REASON

[*Another IRS Attempt to Rewrite Another Unworkable Part of ObamaCare?*]

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What do you do when you wrote, passed, and defended to the death in a Supreme Court steel-cage match a law that doesn't quite work — and you no longer have the votes to make any new changes? You cross your fingers, let the Internal Revenue Service rewrite it through the rulemaking process, and hope that the words "IRS rulemaking process" cause eyes to glaze over before too many people start to care.

That's what happened with the rule the IRS wrote governing subsidies for federally run exchanges. The plain language of the law states that the subsidies and tax credits for private insurance shall be available only in state run exchanges. In the only discussion of that provision in the Congressional record, Democratic Senator Max Baucus noted clearly that the subsidy conditions were designed to encourage states to set up their own exchanges. But despite the clear language of the law, and despite the only clear indication of the intention behind the provision, the IRS wrote a rule allowing subsidies in federally run exchanges anyway.

Michael Cannon of the Cato Institute and Jonathan Adler of Case Western Reserve University have argued that this makes the IRS rule illegal. I suspect they are right. Cannon and Adler have jointly authored a long and quite convincing rebuttal to defenders of the IRS rule over at the journal *Health Affairs*. If they are right, it could be a fatal blow to the law. It now looks as if about half of U.S. states will not set up their own exchanges, leaving the federal government to step in. As *The New York Times* noted over the weekend, those preparations are being undertaken largely in secret, perhaps because of the many administrative hurdles to creating the federal exchanges, including the problem that the law provides no substantial funding to do so. If the IRS rule is judged illegal, that will further complicate the federal exchange implementation process, perhaps to the point of permanent delay. As Rep. Scott DesJarlais (R-Tennessee) noted at a Congressional hearing on the IRS provision last week, the debate over the legality of the rule is "about whether ObamaCare can continue to exist."

Nor is this the only instance in which it appears that the IRS has stepped in to attempt to rewrite a potentially unworkable part of ObamaCare. As Robert Book of The Heritage Foundation explains at Forbes, the IRS has also attempted to adjust a provision in the law surrounding the employer mandate:

The most well-known part of the employer mandate requires employers to provide "qualified coverage" or pay a penalty of $2,000 per full-time employee (after the first 30, if they have at least 50). Less widely known is a special penalty that applies only to companies that *do* offer coverage: a $3,000 penalty for each employee who qualifies for, and accepts, a federal premium subsidy for coverage purchased through the state-based exchanges. An employee is eligible for such a subsidy, and can thus trigger the penalty, if the employee's share of the health insurance premium is "unaffordable" – which is defined as more than 9.5% of the employee's *family*income, if the employee's family income is also between 138% and 400% of the federal poverty level (FPL). The intent appears to be to discourage employers from "dumping" their lower-income employees onto the taxpayers by setting high employee premium share – although it might just as well discourage employers from hiring people from low-income families.

When informed of this provision, employers naturally ask, "How are we supposed to know our employee's *family* income?" Employers know what they pay, but they normally don't know the employee's income from other sources, or the income of the employee's other family members. The answer based on the legislative language is basically, "You aren't supposed to know – the IRS will tell you when they figure out your penalty." (The law sets up a complex system of reporting and information sharing between employers, insurers, state exchanges, the Department of Health and Human Services, and the IRS, that will allow the IRS to determine which employers owe this penalty for which employees.)

Of course, without that information at the time they set premiums, it is difficult for employers to do what the law apparently wants them to do, which is to set premiums low enough to keep employees ineligible for subsidies.

The IRS responded to this eminently reasonable concern by proposing an “affordability safe harbor” that employers can use to avoid the penalty based on information they actually know. Employers would not be assessed the penalty if they offer coverage to their employers and dependents, and if, in the language of the Federal Register, “the employee portion of the self-only premium … does not exceed 9.5 percent of the employee’s current W–2 wages from the employer,” which the employer knows.

This certainly sounds like a much more practical requirement. Unfortunately, it’s not what the law says, and executive branch agencies like the IRS aren’t supposed to issue regulations that contradict laws passed by Congress.

Democrats passed the bill so that we could all find out what was in it. Now it appears that Democrats don't quite like what was in the bill, and are hoping the IRS can save them from their own unworkable legislation.