

The Volokh Conspiracy

House Hearing to Consider Illegal IRS Rule Implementing Health Care Reform

Jonathan H. Adler • August 2, 2012 1:37 am

Today the House Committee on Oversight and Government Reform is holding a [hearing](#) on the Internal Revenue Service's role in "Enforcing ObamaCare's New Rules and Taxes." Among the subjects of the hearing is a recent IRS rule authorizing tax credits and subsidies for the purchase of qualifying health insurance plans in federally-run exchanges. Although the plain text of the PPACA only authorizes tax credits in state-run exchanges, the IRS promulgated this rule to ensure the credits (and associated subsidies) are available nationwide. This rule will affect quite a few states because somewhere between 15 and 30 states (if not more) will fail to create exchanges by 2014. The rule is also illegal.

I have co-authored [testimony](#) for the hearing with Michael Cannon of the Cato Institute arguing that the IRS rule is not authorized by the PPACA. The testimony is largely based on our [forthcoming article Cannon in *Health Matrix*](#). As we explain in the article, the rule is not authorized by the plain text of the PPACA, nor can it be justified by resort to the statute's legislative history or congressional intent.

The most prominent critic of our position is Professor Tim Jost of Washington & Lee, who will also be testifying at the hearing. He [criticized our position](#) on the Health Affairs blog. Wednesday, [Health Affairs posted our response](#). As we note, Jost has moderated and modified his position since he [first critiqued](#) our claim. More importantly, Jost fails to identify any statutory language or evidence from the legislative history that contradicts the plain text of the statute. Nor, for that matter, has the IRS. We'll see if they have any more evidence in support of their position at the hearing.

The heart of Jost's claim is that the PPACA's supporters would have wanted tax credits to be available in every state. Perhaps so, but that's not the bill that was enacted. They also believed every state would create their own exchanges (which explains why the CBO, among others, scored the bill as if every state would have an exchange). Had states acted as the PPACA's supporters hoped and anticipated, there would be no issue. But the failure of states to fall in line hardly justifies the IRS' effort to rewrite the statute after the fact.

For more on this issue, see my prior blog posts on the subject [here](#), [here](#), and [here](#). See also some of the coverage our forthcoming paper has received, such as [here](#) and [here](#).