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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Members, Subcommittee on Health and Technology
From: Committee Staff
Date: September 18, 2014
Re: Hearing: "An Update on the Small Business Health Option Program (SHOPs): Are They Working for Small Businesses?"

On Thursday, September 18, 2014 at 1:00 p.m., the Small Business Subcommittee on Health and Technology will meet in Room 2360 of the Rayburn House Office Building for the purpose of receiving testimony on the Small Business Health Option Programs (SHOPs) and whether they are working for small businesses.

I. Introduction

For years, small businesses have said that one of their biggest obstacles is the cost of health insurance. In fact, according to the National Federation of Independent Business (NFIB), the cost of health insurance was the number one problem cited by small business owners in its 2012 problems and priorities survey.

The Affordable Care Act[1] requires "large" employers to offer full-time equivalent employees the opportunity to enroll in an employer-sponsored health care plan or pay a penalty.[2] The law also requires individuals to enroll in health insurance, either on their own or through plans offered by an employer, or pay a penalty.[3] These requirements are colloquially referred to as the "employer mandate" and the "individual mandate."

The SHOPs are exchanges intended to assist small businesses in identifying, comparing and enrolling in health insurance. Some states chose to establish and operate SHOP exchanges. For those that did not, the federal government is responsible for operating the SHOPs.[4]

II. Employer-Sponsored Health Insurance and Small Businesses

The rate at which businesses sponsor health benefits appears largely dependent on the size of the business. According to a Kaiser Family Foundation survey, about 98% of firms with 200 or more

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[1] Pub. L. No. 111-148, 124 STAT. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-121, 124 STAT. 1029 (2010), codified in scattered sections of 20, 25, 26, 29 and 42 U.S.C. [hereinafter "the Affordable Care Act" or "the health care law"]. For ease of reference, this memorandum will cite to the United States Code rather than public law.

[2] 26 U.S.C. 4980(H)(a). The type of coverage that must be offered to employees is specified in 26 U.S.C. § 5000(A)(f)(2). Technically, the employer penalty only occurs if an employee enrolls in a plan for which the employee obtains a tax credit or when a cost-sharing reduction is allowed or paid. 26 U.S.C. § 4980(H)(a)(2).

[3] *Id.* at § 5000A.

[4] 42 U.S.C. § 18041.

employees offered health insurance to at least some of their employees, compared to 54% of firms with fewer than 200 employees.[5] Of these smaller companies, only 44% with three to nine employees offer health insurance, while approximately 83% of small businesses with between 25 to 49 workers offer coverage.[6]

In addition to differences in sponsorship rates, the survey revealed discrepancies in employer and employee cost for health benefits. While the survey found that the average family premiums for many types of coverage was slightly lower at smaller firms compared to the average family premium covered by large firms,[7] part of this discrepancy could result from higher cost sharing at smaller firms,[8] as well as plans offering less generous benefits.[9]

The decision by employers to offer health insurance as an employee benefit is based on a number of factors. However, the primary factor influencing this decision appears to be whether providing health benefits is a cost-effective means of finding and retaining quality employees.[10] Therefore, a policy intended to expand availability of employer-sponsored health insurance should seek to reduce the cost of that insurance as an incentive for more firms to offer that benefit. As a result, any policy changes must be examined in the context of reducing consumer costs if the policy goal is to increase coverage.

III. The Goals of the Affordable Care Act

The Obama Administration has publicly stated a number of goals it hopes to achieve through the health care law. Among these are slowing the rate of growth in health care spending to reduce the rising cost of health care to individuals, businesses, the federal budget, and the economy; reducing the cost of health care for individuals, families and small businesses; extending health insurance benefits to millions of uninsured individuals; enhancing the quality and generosity of health insurance available to the insured; eliminating pre-existing conditions as a reason for denying health insurance; and prohibiting insurers from charging higher rates based on an individual's or, in the case of small businesses, a group's health status.

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[5] THE HENRY J. KAISER FAMILY FOUNDATION, EMPLOYER HEALTH BENEFITS 2014 ANNUAL SURVEY 35 (2013) [hereinafter "Kaiser Small Business Survey"], *available at* http://kaiserfamilyfoundation.files.wordpress.com/2014/09/8625-employer-health-benefits-2014-annual-survey4.pdf. The survey found that sponsorship rates for part-time workers were likewise dependent on employer size, although the survey does not define the number hours an employee must work to be considered full-time versus part-time. The health care law defines full-time employee as one who works an average of 30 hours per week. 26 U.S.C. § 4980H(c)(4)(A). This matter was examined at an October 7, 2013 hearing before the Subcommittee on Health and Technology of the Committee on Small Business titled, "The Effects of the Health Law's Full-Time Employee Definition on Small Businesses."

[6] Kaiser Small Business Survey, *supra* note 5, at 36. It should be noted that the percentages of small firms offering coverage has declined compared to the 2013 survey. http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20132.pdf.

[7] *Id.* at 18.

[8] *Id* at 125.

[9] http://kff.org/private-insurance/issue-brief/snapshots-a-comparison-of-the-availability-and-cost-of-coverage-for-workers-in-small-firms-and-large-firms/. A different study found that small businesses pay on average 18% more in health insurance premiums for the same benefits compared to employees at larger businesses. Jon Gabel, Roland McDevitt, Laura Gandolfo, Jeremy Pickreign, Samantha Hawkins & Cheryl Fahlman, *Generosity and Adjusted Premiums in Job-Based Insurance*, 25 HEALTH AFF. 832, 840 (2006).

[10] EMPLOYEE BENEFIT RESEARCH INSTITUTE, SMALL EMPLOYERS AND HEALTH BENEFITS: FINDINGS FROM THE 2002 SMALL EMPLOYER HEALTH BENEFITS SURVEY 7 (January 2003), *available at* http://www.ebri.org/pdf/surveys/sehbs/sehbsqst.pdf.

However, requirements that increase the generosity of health benefits may involve tradeoffs relative to the cost of those benefits. While the ACA attempts to reduce these potential financial impacts on small businesses, such as requiring all firms and workers to maintain insurance, and through the offering tax credits for certain firms to offer coverage, there is little evidence thus far that the law has achieved its cost reduction goals.[11]

IV. SHOPs for Small Businesses

The SHOPs are marketplaces where small businesses can shop for and purchase health insurance for their employees. They are available to small businesses with 50 or fewer full-time or equivalent employees,[12] increasing to businesses with 100 or fewer full-time or equivalent employees by 2016.[13] According to the Obama Administration, the purpose of the SHOPs is to expand coverage options available to small businesses, increase their purchasing power to lower costs in the small group health insurance market, and simplify the administrative burden of sponsoring health coverage.[14]

The SHOPs[15] permit small businesses to select for their employees specific health insurance plans approved for sale in an exchange,[16] and also select the tier of coverage they will make available.[17] Some SHOPs currently allow employers to permit their employees to choose for themselves from the multiple plans that may be offered in a SHOP exchange.[18]

In addition to facilitating comparison shopping and enrollment, small businesses with fewer than 25 full-time equivalent employees that want to claim the small employer health tax credit must apply for and receive an official SHOP eligibility determination.[19] The SHOPs also provide consumer assistance, such as information to compare plans and help with enrollment.

V. SHOP and Health Care Law Outcomes

The SHOPs were expected to be operational on October 1, 2013. While many of the state-based SHOPs are fully functioning and accepting enrollment, the federal SHOPS were not.[20]

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[11] Press Release, National Federation of Independent Business, Small-Business Healthcare Survey Reveals Reality of Painful Premium Increases (October 13, 2013), *available at* http://www.nfib.com/article/small-business-healthcare-survey-reveals-reality-of-painful-premium-increases-64127/ [hereinafter "NFIB Health Insurance Cost Survey"].

[12] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PATIENT PROTECTION AND AFFORDABLE CARE ACT, STATUS OF FEDERAL AND STATE EFFORTS TO ESTABLISH HEALTH INSURANCE EXCHANGES FOR SMALL BUSINESSES 1 (2013) (GAO-13-614), *available at* http://www.gao.gov/products/gao-13-614.

[13] 45 C.F.R. 155.705.

[14] THE WHITE HOUSE, THE AFFORDABLE CARE ACT INCREASES CHOICE AND SAVING MONEY FOR SMALL BUSINESSES 1, *available at* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

[15] Most states have opted not to establish a SHOP exchange. Currently, 17 states have established state-based exchanges, 7 states have entered into partnerships with federally-facilitated exchanges and 27 states have federally-facilitated exchanges. http://kff.org/health-reform/state-indicator/health-insurance-exchanges/.

[16] 45 C.F.R. § 155.705.

[17] *Id.* at § 155.705(b)(2).

[18] This is colloquially known as "employee choice." Choice is an option for state-based exchanges in 2014, but all SHOPs were to be required to offer this option in 2015. Patient Protection and Affordable Care Act: Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 33,233, 33,235 (June 4, 2013). However, subsequent rulemaking now permits states operating their own state-run SHOPs the option of not providing employee choice in 2015. 79 Fed. Reg. 30,243.

[19] 26 U.S.C. § 45R. This credit may be claimed only through plan(s) accessed through the SHOP exchange.

[20] For example, Maryland's SHOP was delayed from November 2013 until April 2014. Washington's SHOP is only available to two rural counties with only one insurer participating. Mississippi hopes to establish a SHOP and open it

The SHOP program has been beset by a series of delays. On March 11, 2013, the Department of Health and Human Services (HHS) issued a proposed rule stating that federally-facilitated SHOPs would not be required to offer employers a choice of health insurance plans within a single level of coverage until 2015.[21] In June 2013, GAO released a report[22] on SHOP implementation requested by Chairman Graves which found that CMS had missed many deadlines of critical SHOP functions and still had many challenges to accomplish in a short time period of time.

On September 26, 2013, HHS announced that SHOP online enrollment would be delayed from its planned opening on October 1, 2013 until November of 2013.[23] At a hearing before the House Committee on Ways and Means on October 29, 2013, Marilyn Tavenner, Administrator of the Centers for Medicare and Medicaid Services, stated that the SHOPs would be operating fully by the end of November 2013.[24] On November 27, 2013, the Administration announced that small businesses would not be able to enroll online until November 2014.[25]

These operational delays of the SHOP program undermine the health care law's goal of simplifying the purchase of employer-sponsored health insurance and expanding employee choice. As a result, small businesses that used a SHOP to purchase coverage had to spend additional time and effort to complete paperwork that the online portals were meant to eliminate. In addition, employers at small businesses in states with federally-facilitated SHOPs will not be permitted to choose their own health plan until 2015 at the earliest, thus negating the goal of providing those workers with a choice of plans.[26]

The intent of the SHOPs was to reduce the cost of health insurance for individuals and small employers. However, a number of small firms in several states have reported that the cost of providing insurance is increasing significantly as a result of the law.[27] While this outcome is not necessarily attributable to the SHOP delays, it is indicative of the tradeoff inherent in the inability of the law to reconcile some goals, such as requiring plans to offer more generous benefits, with other goals, namely,

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by June 2014. Oregon's SHOP is on hold with no set date to open. Even where the state SHOP exchange rollouts have gone smoothly, small business interest appears to be low (by January, Kentucky signed up only 14 small firms; Colorado and Connecticut 100 each). Some states have prioritized their individual exchanges over their SHOP.

[21] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 15,553, 15,554 (March 11, 2013).

[22] PATIENT PROTECTION AND AFFORDABLE CARE ACT: STATUS OF FEDERAL AND STATE EFFORTS TO ESTABLISH HEALTH INSURANCE EXCHANGES FOR SMALL BUSINESSES (GAO-13-614), *available at* http://www.gao.gov/assets/660/655285.pdf.

[23] That same day, White House Press Secretary Jay Carney stated that small businesses would be able to enroll online on November 1, 2013. http://www.whitehouse.gov/the-press-office/2013/09/26/press-briefing-press-secretary-jay-carney-9262013.

[24] J.D. Harrison, *Delayed Again: Critical Function of the Health Care Law's Small Business Exchange Pushed Back*, THE WASH. POST, October 30, 2013, *available at* http://www.washingtonpost.com/business/on-small-business/delayed-again-critical-function-of-health-care-laws-small-business-exchange-pushed-back/2013/10/30/c8a3f414-416e-11e3-a624-41d661b0bb78_story.html.

[25] http://www.hhs.gov/healthcare/facts/blog/2013/11/direct-new-path-to-shop-marketplace.html. GAO raised important questions about the readiness of the federally-facilitated SHOPs to meet important deadlines. GAO SHOP report, *supra* note 12 at 1. It should be noted that the Administration recently announced an initiative for small businesses in five states that will grant them early access to the federal SHOPs web-based portals beginning sometime in late October. Rhett Buttle, *SHOP Early Access in Five States Benefits Small Employers Nationwide*, United States Dept. of Health and Human Services (September 5, 2014), *available at* http://www.hhs.gov/healthcare/facts/blog/2014/09/shop-early-access-five-states.html.

[26] Again, recent rulemaking permits state-run SHOPs the option of not offering employee choice in 2015. *Id.*

[27] NFIB Health Insurance Survey, *supra* note 11.

reducing the cost of health insurance to small businesses. Many of the health care law's mandates reduce the ability of insurers to vary the number and scope of benefits covered by their product offerings as a cost-containment mechanism. This often diminishes or eliminates the cost savings that arise through increased competition. A February 2014 report released by the Centers for Medicare and Medicaid Services (CMS) found that under the health care law's rules, costs will increase for two-thirds of small businesses that provide health insurance to their employees.[28]

The narrow criteria and complexity of the small employer health care tax credit has led to far fewer small businesses claiming it than originally estimated. In a report requested by Chairman Graves, GAO found that in tax year 2010, only 170,300 employers claimed even a partial credit.[29] Government agencies and small businesses groups had estimated that between 1.4 and 4 million small firms would be eligible.[30] In addition, the credit expires in 2016. As businesses make critical financial decisions, such as undertaking an expansion, hiring new employees, or sponsoring an employee benefit plan, a temporary tax credit is unlikely to provide an adequate incentive for firms to make decisions which are amortized over a longer period of time.

Finally, the Administration's failure to maintain and provide adequate SHOP enrollment data, including the number of small businesses and employees enrolled in the SHOP exchange; the number of paid premiums by SHOP enrollees; the number of SHOP policies sold by each insurer; and the number of SHOP enrollees who were previously uninsured; means that it is impossible to assess the success of the program.[31]

VI. Conclusion

A well-functioning SHOP website could provide small businesses with a more convenient means of comparing insurance options and facilitating enrollment of their employees. However, the technical problems affecting federally-facilitated SHOPs, the decisions by the Administration to postpone online enrollment until late 2014 and the delay in implementing employee choice options appear to have significantly decreased the SHOP as a useful tool for small firms.

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[28] OFFICE OF THE ACTUARY, CENTERS FOR MEDICARE AND MEDICAID SERVICES, REPORT TO CONGRESS ON THE IMPACT ON PREMIUMS FOR INDIVIDUALS AND FAMILIES WITH EMPLOYER-SPONSORED HEALTH INSURANCE FROM THE GUARANTEED-ISSUE, GUARANTEED RENEWAL, AND FAIR HEALTH INSURANCE PROVISIONS OF THE AFFORDABLE CARE ACT, February 21, 2014, *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/ACA-Employer-Premium-Impact.pdf.

[29] *Id.* at 9.

[30] *Id.*

[31] In January, 2014, Chairman Graves requested SHOP enrollment data from Secretary Sebelius. Letter from Representative Sam Graves, Chairman, Committee on Small Business, to Kathleen Sebelius, Secretary, United States Department of Health and Human Services, January 30, 2014 (on file with the Committee). The Secretary's response indicated that the Department could not provide the data. Letter from Kathleen Sebelius, Secretary, United States Department of Health and Human Services, March 12, 2014 (on file with the Committee).