



National **Retail** Federation  
*The Voice of Retail Worldwide*

**\*\*\*TESTIMONY IS EMBARGOED UNTIL 2:30 PM  
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National Retail Federation Testimony

Hearing on

**“Implementation of Health Insurance Exchanges and Related Provisions”**

Committee on Ways and Means

Subcommittee on Health

United States House of Representatives

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Mr. Chairman, Ranking Member Stark and honored members of the Committee, I thank you for the opportunity to appear before you today and to share our views regarding implementation of the Affordable Care Act (ACA). My name is Neil Trautwein and I am a vice president and Employee Benefits Policy Counsel with the National Retail Federation (NRF).

As the world's largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans. Contributing \$2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's **Retail Means Jobs** campaign emphasizes the economic importance of retail and encourages policymakers to support a **Jobs, Innovation and Consumer Value Agenda** aimed at boosting economic growth and job creation. [www.nrf.com](http://www.nrf.com)

NRF supports effective implementation of the Affordable Care Act, despite our continued opposition to the law itself. We are greatly concerned by delays in issuing regulations, agency reliance on temporary guidance rather than formal regulations, and the fast-approaching deadlines for key issues affecting coverage in every market. Our nation cannot afford for the ACA to stumble out of the starting gate, especially as to health insurance exchanges, a key ACA element important to both employers and individuals. We fear that as time diminishes between now and January 2014, a cascade of last minute regulations will create confusion and thus could encourage more employers to back out of coverage.

We credit the regulatory agencies<sup>1</sup> for working hard and fairly cooperatively to implement the ACA, a difficult task given the law's unorthodox provenance and structure. The Administration has rightly been solicitous of the greater retail industry, both because of our industry's important role in the economy as well as the nature of retail employment. Many retail and restaurant employees do not fit neatly into full and part-time categories. Much of the regulatory guidance released to date will help somewhat to accommodate our workforce concerns.

The concerns I bring to you today are prompted by the Administration's primary reliance on bulletins, guidance, and frequently-asked-question documents rather than more typical notice-and-comment regulatory procedures. Such guidance has been helpful and the opportunity to comment and suggest changes has been welcome. But, much of this process has taken place outside of the strictures of the Administrative Procedure Act<sup>2</sup> and lacks the notice and comment finality employers must rely upon to plan for the future. The consistent attention and cooperation of the Administration – though welcome and helpful – does not make up for the lack of good and fair regulations.

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<sup>1</sup> Departments of Health and Human Services, Labor and Treasury.

<sup>2</sup> APA, the Administrative Procedure Act (5 U.S.C. Subchapter II)

Timing is becoming critical for benefits that are to be available in January 2014. Our members tell us that they commonly need six to nine months to prepare for an ordinary benefit year. The key year (2014) will be far from ordinary and will instead entail massive change for many employer-sponsored plans. Without final regulations in the first quarter of 2013, the number of employer-sponsored plans may well suffer significant attrition.

## **NRF, Allied Coalitions and the Affordable Care Act**

NRF has actively encouraged the fair and effective implementation of the ACA, despite our continued opposition to the law itself. We see no inconsistency between the two positions; we owe it to our members to help make the law as workable as possible so long as it remains the law of this land. Commentators as diverse as former President Bill Clinton<sup>3</sup> have said that the ACA is unsustainable as written. We stand ready to assist any effort toward genuine reform.

We are engaged in a number of allied coalition efforts on the new health insurance exchanges and related issues. For example, NRF chairs the Essential Health Benefits Coalition<sup>4</sup> (EHBC) and participates in the leadership of the Coalition for Choice and Competition<sup>5</sup> (CCC) and Employers for Flexibility in Health Care (EFHC). Coalitions addressing aspects of ACA implementation have grown so numerous as to require a degree of coordination between them. NRF established and chairs the Employers' Health Care Clearinghouse, which meets on a monthly basis to do just that.

These coalitions are deeply substantive and deal with specific ACA implementation concerns. They also have served a useful role in developing and coordinating views and comments among allied employer interests.

## **NRF and ACA Implementation**

NRF has been closely engaged in the regulatory process ever since the ACA was signed into law. We have submitted written comments on key concerns and have assisted in submitting joint comments for the coalitions listed above. We have not been litigants against the ACA and also did not submit amicus comments in the ACA case before the Supreme Court.

In marked contrast to past years, more and more of our time is now devoted to regulatory matters. Given the complexity of the law and the uncertain transition, we believe that is an appropriate investment on our members' behalf. We have created a number of targeted resources<sup>6</sup> – based on current guidance – to help our members better understand their responsibilities under the new law. Special webinar

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<sup>3</sup> January 2012, before NRF's Annual Convention in New York.

<sup>4</sup> [www.ehbcoalition.org](http://www.ehbcoalition.org)

<sup>5</sup> [www.choiceandcompetitioncoalition.org](http://www.choiceandcompetitioncoalition.org)

<sup>6</sup> [www.retailmeansjobs.com/healthcare](http://www.retailmeansjobs.com/healthcare). No password is required.

presentations compliment our monthly conference call with members of NRF's Health and Employee Benefits Committee. We are trying to help prevent what threatens to become a regulatory train wreck in early January 2014.

## **Health Insurance Exchanges**

The fate of health insurance exchanges will be a significant indicator for the success or failure of the ACA itself. Unanswered questions and the lack of APA notice and comment procedures have slowed not only the development of exchange plans in many states but also employer planning for 2014 and beyond. NRF and other members of the Coalition on Choice and Competition<sup>7</sup> have worked hard to encourage both the states and the implementing agencies to move forward. I have participated in two separate CCC briefings in the Hall of States building to do just that.

Health insurance exchanges have perhaps the most bipartisan antecedents. From former Congressman Harris Fawell's<sup>8</sup> association health plans to Senator Dick Durbin's<sup>9</sup> SHOP plans, group purchasing has been a common bipartisan reform element. We firmly hope that this bipartisan support for group purchasing will translate to congressional support in its oversight capacity to encourage the Administration to move faster on health insurance exchanges according to APA procedures.

Definitive regulatory guidance is lagging on health insurance exchanges. For example, very little information has emerged on the federally facilitated exchanges that will serve as a full or partial substitute in states that cannot or will not establish their own exchange.

States also lack myriad other key details required to establish health insurance exchanges. For example, the question of whether an eligible employer purchasing coverage through a small business (SHOP) exchange will select one plan for his or her eligible employees or provide them with a defined contribution that can be used to select among plans and levels of personal responsibility is not fully defined. How information from employers and employees and federal databases will be coordinated has yet to be determined. Other integrated issues such as the composition of essential health benefits benchmarks also have yet to be determined. Yet, all of these factors will be important to determining compliance cost or penalty exposure for employers.

Confusion among applicable employers, employees and individuals will not help the launch of health insurance exchanges in 2014. Indeed, initial enrollment in health insurance exchanges is scheduled to take place in the fall of 2013, almost exactly one year from now. These deadlines could cause great confusion if regulatory guidance is released without enough time for compliance. But, with helpful oversight urging from Congress, perhaps these deadlines will serve as an impetus to help encourage the

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<sup>7</sup> CCC, [www.choiceandcompetitioncoalition.org](http://www.choiceandcompetitioncoalition.org)

<sup>8</sup> Rep. Harris Fawell (R-IL-13), 1985-1998

<sup>9</sup> Sen. Richard Durbin (D-IL)

regulatory agencies to move towards more appropriate notice and comment procedures.

## **Essential Health Benefits**

The basic level of coverage in health insurance exchanges and the surrounding small group marketplace has yet to be determined. Under ACA, the Secretary of Health and Human Services (HHS) will determine what comprises the essential health benefits (EHB) package. ACA prescribes ten required categories of coverage<sup>10</sup>; yet coverage is to resemble a “typical employer plan.” Tension between the cost and extent of coverage is a crucial ACA issue.

In December 2011, HHS issued guidance in the form of a bulletin which instructed the states to select a benchmark EHB plan from several options.<sup>11</sup> States are to select their benchmark plan and submit them to the Secretary for approval next month. States that elect not to choose a benchmark will face a federal default option.<sup>12</sup> The Secretary may enhance the state benchmark plans to add additional ACA-required categories of coverage. The result will be published for comment and presumably finalized in early 2013.

As noted previously, employers will be hard pressed to make intelligent choices regarding their options in 2014 without key details like the EHB as early as possible in 2013. We would have much preferred to have this detail finalized in 2012.

NRF and a diverse group of allies established the Essential Health Benefits Coalition<sup>13</sup> in 2011. The EHBC is resolutely focused on the affordability of the EHB package. Whether or not an employer or individual will purchase coverage in the health insurance exchange or surrounding market will in large part be determined by the price of that coverage relative to employer or family budgets.

## **Employers, Employees and Exchanges**

NRF and employer allies have also worked closely with the implementing agencies on questions of accommodating workforce realities to ACA requirements. We participate on the steering committee of the Employers for Flexibility in Health Care Coalition, a group that has been particularly active on these issues.

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<sup>10</sup> Ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitation and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; pediatric services, including oral and vision care.

<sup>11</sup> The largest (by enrollment) small group plan offered in the state; any of the three largest state employee health benefit plan options; any of the three largest national federal employee health benefit plan options; or, the largest insured commercial Health Maintenance Organization offered in the state.

<sup>12</sup> The largest (by enrollment) small group plan offered in the state.

<sup>13</sup> EHBC, [www.ehbcoalition.org](http://www.ehbcoalition.org); NRF chairs.

For example, the ACA defines a full-time employee as working 30 hours per week on average and does not require coverage for part-time employees. No waiting period for coverage can exceed 90 days. Yet, hours can often vary and part-time employees can be promoted to full-time status or potentially graduate to that status over time.

The Department of Treasury and its Internal Revenue Service (IRS) have worked out a potentially reasonable accommodation trading a “look-back” means of averaging hours over time in exchange for an equal period of prospective coverage regardless of status. Still – and despite assurances in the last notice that employers could rely on this guidance through 2014 – employers want to see this principle as a rule, rather than a notice for future years.

## **Conclusion**

Again, NRF greatly appreciates the opportunity to appear before you today. In sum, we urge this Committee and Congress to encourage the implementing agencies and the Administration to follow the normal notice and comment procedures under the APA between now and the end of the year. Fair and final regulations will help individuals, employers, health plans and exchanges prepare for the difficult transition ahead in January 2014. The best chance health insurance exchanges have to succeed is to launch smoothly and as glitch-free as possible. NRF stands ready to help the Administration and Congress make the ACA more workable, so long as it remains the law of this land.