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Tax vs. Penalty, Round Two: Interpreting the ACA's Assessable Payment as a Tax for Federal Award Cost Allowances

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TAX VS. PENALTY, ROUND TWO: INTERPRETING THE ACA'S ASSESSABLE PAYMENT AS A TAX FOR FEDERAL AWARD COST ALLOWANCES

Abstract: The Patient Protection and Affordable Care Act (ACA)—a significant health care reform enacted in 2010—imposes an "assessable payment" on certain employers that fail to offer affordable health insurance to their employees. Unfortunately, this assessable payment label presents a problem for nonprofits and other nonfederal entities receiving federal awards. Per uniform guidance from the Office of Management and Budget, federal awards may be used to pay taxes, but not fines or penalties. This Note argues that the ACA's assessable payment should be interpreted as a tax. This conclusion is based on both: (1) the U.S. Supreme Court's analysis in its 2012 decision in *National Federation of Independent Business v. Sebelius* in which it held that the ACA's individual mandate's "shared responsibility payment" could, for constitutional purposes, be interpreted as a tax; and (2) an analysis of an assessable payment's characteristics and likely effect on employer behavior. Interpreting the assessable payment as a tax recognizes its inherent functionality as such and ensures that Congress does not escape political accountability for imposing taxes by using ambiguous terminology to describe an exaction.

INTRODUCTION

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (ACA).[1] Representing a massive overhaul of the U.S. health care market, the ACA seeks to lower skyrocketing national

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Because President Obama made the health care reform accomplished by the ACA a major part of his political agenda, both critics and supporters of the ACA sometimes refer to it as "ObamaCare." *See, e.g.*, Editorial, *Embracing His Inner 'Obamacare,'* N.Y. TIMES, Oct. 8, 2011, at A18, *available at* http://www.nytimes.com/2011/10/08/opinion/the-president-embraces-obamacare.html, *archived at* http://perma.cc/J9XG-8BRV (discussing the Republican Party's "sneering dismissal" of the ACA); Julian Pecquet, *President Embraces ObamaCare Label*, HEALTHWATCH: THE HILL'S HEALTHCARE BLOG (Oct. 06, 2011, 5:00 AM), http://www.thehill.com/blogs/healthwatch/health-reform-implementation/185877-president-embraces-obamacare-label, *archived at* http://perma.cc/9WNH-QUZD (stating that President Obama embraced the term "ObamaCare" to turn the tables on critics who use the term derogatorily).

health care spending and, relatedly, to facilitate near-universal health insurance coverage.[2] The primary way that the ACA seeks to achieve universal health coverage is by mandating that individuals either purchase health insurance or pay a penalty—called a "shared responsibility payment"—to the Internal Revenue Service.[3] Another important provision of the ACA, codified at Section 4980H of the Internal Revenue Code (I.R.C.), regulates the employer-provided health insurance market—the primary financing source of health insurance in the United States.[4] Section 4980H requires employers with an "average of at least 50 full-time employees" to offer affordable health insurance to their employees or, instead, make an "assessable payment" to the IRS.[5]

Congress's decision to label the exaction in I.R.C. § 4980H an assessable payment poses a problem for certain nonprofit employers that use federal grant awards to fund their operations because of specific restrictions attached to these awards by the Office of Management and Budget (OMB).[6] This is because the OMB allows nonprofit organizations and other nonfederal entities to use federal awards for taxes, but not for fines or penalties.[7] Because of the am-

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[2] *See* 42 U.S.C. § 18091(2) (Supp. IV 2010) (discussing Congress's economic motivation for enacting the ACA); Nicholas Drew, Note, *Two Federally Subsidized Health Insurance Programs Are One Too Many: Reconsidering the Federal Income Tax Exclusion for Employer-Provided Health Insurance in Light of the Patient Protection and Affordable Care Act*, 54 B.C. L. REV. 2047, 2061–62 (2013) (stating that one of the ACA's primary goals is to "facilitat[e] and ensur[e] universal health insurance coverage").

[3] I.R.C. § 5000A (2012) (discussing the ACA's requirement that individuals maintain health insurance that meets a minimum standard and the ACA's imposition of a penalty for an individual's failure to meet this requirement); *see* 42 U.S.C. § 18091(1), (2)(A). Congress believed that the individual mandate, together with other ACA provisions, would significantly increase the number of people in the health insurance market, which would in turn increase "economies of scale" and lower health insurance costs. *See* 42 U.S.C § 18091(2)(J) (discussing Congress's finding that increasing the size of health insurance purchasing pools should result in lower health insurance premiums).

[4] *See* I.R.C. § 4980H (2012); 42 U.S.C. § 18091(D); Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 886–87 (2011) (noting that the U.S. health care industry is principally financed through employer-provided health insurance and that the ACA both builds on, and strengthens, the employer-provided health insurance system).

[5] *See* I.R.C. § 4980H. Section 4980H provides some exemptions for employers that do not meet the fifty full-time employee requirement for more than 120 days in a calendar year. *Id.* § 4980H(c)(2)(B).

[6] *See* Riley Lovendale & Eleanor Evans, *After Health Care Reform Upheld, What's Next for CAAs?*, CAPLAWUPDATE, Fall 2012, at 6, 8–9, *available at* http://www.caplaw.org/resources/PublicationDocuments/updatenewsletter/2012/CAPLAW_HealthCareReform_Fall2012.pdf, *archived at* http://perma.cc/7TRF-EMRU (explaining that it is unclear whether an assessable payment would be interpreted as a tax or a penalty and that this ambiguity affects organizations receiving certain federal awards because OMB funding restrictions allow the use of federal awards for taxes, but not for penalties).

[7] *See* 2 C.F.R. § 200.441 (2014) (stating that organizations may not use federal awards to pay penalties or fines resulting from a violation of, or failure to comply with, the law); *id.* § 200.470 (al-

biguity inherent in the I.R.C. § 4980H term "assessable payment," it is unclear whether the exaction for failing to offer affordable health care would be considered a tax or a penalty.[8]

This Note argues that an assessable payment imposed by I.R.C. § 4980H should be considered a tax for federal award cost allowances.[9] This conclusion is partly based on the U.S. Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius* (*NFIB*), in which the Court wrestled with a similar tax versus penalty issue and held that the ACA's individual mandate exaction could reasonably be interpreted as a tax despite Congress referring to it as a penalty.[10] Using the *NFIB* Court's analysis, an assessable payment in I.R.C. § 4980H should be considered a tax because: (1) the exaction effectively functions as a tax; and (2) the exaction's particular characteristics are more consistent with those of a tax than a penalty.[11] Though the *NFIB* Court was dealing with a constitutional—and not purely interpretive—question, its analysis of the effects of the ACA's individual mandate exaction—an exaction similar to the one imposed by I.R.C. § 4980H—and subsequent scholarship support this Note's conclusion that such an assessable payment should be interpreted as a tax under OMB federal award cost principles.[12]

Part I examines the enactment, objectives, and some intricacies of the ACA, focusing on I.R.C. § 4980H and its effect on the employer-provided health insurance market.[13] Part II analyzes the OMB's restrictions on the use of federal awards by nonprofit organizations and other nonfederal entities.[14] Then, Part III analyzes methods for distinguishing taxes from penalties, including the test articulated by the *NFIB* Court.[15] Finally, Part IV applies this analysis to I.R.C. § 4980H's assessable payment and concludes that it should be interpreted as a tax.[16]

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lowing organizations to use federal funding to pay taxes); Lovendale & Evans, *supra* note 6, at 8–9. These OMB restrictions on the use of federal awards are often referred to as "cost principles." 2 C.F.R. § 200.400.

[8] *See* I.R.C. § 4980H; 2 C.F.R. §§ 200.441, 200.470; Lovendale & Evans, *supra* note 6, at 8–9.

[9] *See infra* notes 133–171 and accompanying text.

[10] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2593–94, 2601 (2012) (stating that the ACA's individual mandate is "constitutional, because it can reasonably be read as a tax"); *see also* U.S. CONST. art. I, § 8, cl. 1 (providing that "Congress shall have Power To lay and collect Taxes").

[11] *See NFIB*, 132 S. Ct. at 2593–98; *infra* notes 148–171 and accompanying text.

[12] *See NFIB*, 132 S. Ct. at 2593–98, 2601; 2 C.F.R. § 200.470; *infra* notes 148–171 and accompanying text.

[13] *See infra* notes 17–52 and accompanying text.

[14] *See infra* notes 53–61 and accompanying text.

[15] *See infra* notes 62–132 and accompanying text.

[16] *See infra* notes 133–171 and accompanying text.

I. THE ACA: A SINGLE, COMPREHENSIVE SOLUTION TO REFORM THE HEALTH CARE MARKET

The ACA is the most extensive reform of the American health care system in decades and aims to achieve nearly-universal health care coverage in the United States, while lowering the amount of spending in the health care industry.[17] To accomplish these lofty objectives, Congress included provisions in the ACA that impose new requirements on insurers, states, individuals (through the so-called "individual mandate"), and employers (through the so-called "employer mandate").[18] Collectively, these provisions aim to reduce the number of uninsured individuals, which in turn would allow health care providers to pass on the savings to health insurers, which could then translate into savings for families purchasing insurance.[19]

Section 5000A, which creates the ACA's individual mandate, is the legislation's most publicized and controversial provision and seeks to reduce the number of uninsured Americans by requiring that most individuals maintain health insurance that meets certain minimum requirements or, instead, pay a penalty.[20] It attempts to prevent individuals from waiting to purchase health insurance until they need it, a phenomenon referred to as "adverse selection."[21] To further re-

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[17] *See* 42 U.S.C. § 18091 (Supp. IV 2010); Dustin D. Berger, *The Management of Health Care Costs: Independent Medical Review After "ObamaCare,"* 42 U. MEM. L. REV. 255, 256–58 (2011) (discussing the long-term "dramatic trend of increasing health care costs"); Moore, *supra* note 4, at 886 (stating the "[ACA] fundamentally reforms the American health care system"); Drew, *supra* note 2, at 2061 & n.105 (stating that the ACA is one of the most expansive legislative overhauls of the U.S. health insurance market in decades).

[18] *See* I.R.C. § 4980H (2012) (imposing an exaction on most large employers that do not offer insurance to their employees that meets certain requirements); *id.* § 5000A (2012) (imposing an exaction on most individuals who do not carry health insurance); 42 U.S.C. § 18031 (Supp. IV 2010) (requiring states to facilitate a marketplace for health insurance plans to promote free market competition among insurance providers); Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1580–93 (2011) (discussing how the ACA reforms four major components of the health care industry: Medicare, Medicaid, the individual and small-group market, and the large-group market); Drew, *supra* note 2, at 2061–65 (stating that the extensive reforms set forth by the ACA have dramatically altered the health care landscape in the United States); Frederick Thide, Comment, *In Search of Limiting Principles: The Eleventh Circuit Invalidates the Individual Mandate in* Florida v. U.S. Department of Health and Human Services, 53 B.C. L. REV. 359, 362–63 (2012) (discussing the ACA's individual mandate, which Congress concluded was "essential" to its plan to expand health coverage and reduce health care costs).

[19] *See* 42 U.S.C. §§ 18091(2)(C), (F), (I)–(J) (providing Congress's prediction that the ACA would simultaneously increase the number of people purchasing health insurance and decrease health insurance costs).

[20] *See* I.R.C. § 5000A; 42 U.S.C. § 18091(2)(I); Berger, *supra* note 17, at 257.

[21] 42 U.S.C. § 18091(2)(I); *see* I.R.C. § 5000A. Adverse selection occurs when low-risk individuals decide not to purchase health insurance priced to reflect an average risk because it seems like a bad deal to them. *See* Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*,

duce adverse selection in the health insurance market, the ACA also forbids certain insurance industry practices, such as denying individuals health insurance for various reasons, including the existence of preexisting health conditions.[22]

In addition to these measures, Congress also included two components in the ACA that address employer-provided health insurance.[23] First, the ACA provides a "small employer health insurance credit" to small employers that contribute to their employees' health insurance premiums during the taxable year.[24] Second, the ACA's employer mandate provision in I.R.C. § 4980H requires certain employers to provide affordable (as defined by the ACA) health insurance to their employees or, instead, pay an assessable payment.[25]

Section A of this Part examines I.R.C. § 4980H and discusses the assessable payment that employers must make to the IRS if they fail to offer affordable health insurance to their employees.[26] Section B then analyzes the employers' choice between making such assessable payments to the IRS or providing qualifying health insurance to their employees.[27]

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113 YALE L.J. 1223, 1223 (2004). When this occurs, health insurance providers then charge the rate for average risk to an insurance pool that contains only high-risk individuals and end up losing money. *See id.* at 1224.

[22] *See* 42 U.S.C. § 300gg-1(a) (Supp. IV 2010) (requiring health insurance providers to "accept every employer and individual in the [s]tate that applies for such coverage"); *see id.* § 300gg-3 (Supp. IV 2010) (stating that group health plans and health insurance providers "may not impose any preexisting condition exclusion[s]"). Congress defined a "preexisting condition exclusion" as a "limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the date of enrollment for such coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before such date." *Id.* § 300gg-3(1)(A).

[23] *See* I.R.C. § 45R (2012) (establishing a health insurance credit for small employers); *id.* § 4980H (imposing an assessable payment on certain large employers that do not offer affordable health insurance to their employees). These two components are especially important as the majority of health care in the United States is financed primarily through an individual's employer. *See* 42 U.S.C. § 18091(2)(D) (Supp. IV 2010) (stating that the ACA builds upon and strengthens the "private employer-based health insurance system, which covers [176 million] Americans nationwide"); Moore, *supra* note 4, at 886 & nn.1–2 (stating that roughly 59% of the U.S. population was covered by employer-provided health insurance in 2009); *id.* at 887–90 (discussing the exponential growth of employer-provided health insurance from approximately 3% in 1930 due to factors including World War II wage caps that led to insurance being offered as a fringe benefit to employees and the favorable tax treatment given to payments of employee health insurance premiums made by employers).

[24] I.R.C. § 45R(a); *see* Moore, *supra* note 4, at 912–17 (discussing the ACA's small employer tax credit and its likely effect on the business decisions of companies that qualify for it); *see also* I.R.C. § 45R(f) (outlining health insurance tax credits for small employers described under I.R.C. § 501(c), which are tax-exempt under I.R.C. § 501(a)).

[25] I.R.C. § 4980H (2012) (imposing an exaction on employers that fail to provide affordable health insurance to their employees); *see* I.R.C. § 36B(c)(2)(C) (2012) (outlining coverage affordability rules for the ACA).

[26] *See infra* notes 28–42 and accompanying text.

[27] *See infra* notes 43–52 and accompanying text.

A. Section 4980H: The ACA's Employer Mandate Provision

The ACA's employer mandate provision, I.R.C. § 4980H, requires an exaction from some employers that fail to offer their employees health insurance meeting certain statutory requirements.[28] Though the spirit of I.R.C. § 4980H is the same now as it was in prior proposed versions of the provision, the terminology used by Congress to describe the exaction is much different.[29] Notably, in multiple prior versions of I.R.C. § 4980H, Congress used the term "tax" to refer to the exaction imposed on employers that fail to offer affordable health insurance to their employees.[30] As enacted, however, I.R.C. § 4980H imposes an exaction called an "assessable payment" on employers that fail to offer affordable health insurance to their employees.[31] Congress's politically motivated name change of I.R.C. § 4980H's exaction from a "tax" now affects nonprofits and other nonfederal entities governed by OMB federal award cost principles, which do not contain explicit instructions as to whether an assessable payment would be treated as a tax or a penalty.[32]

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[28] *See* I.R.C. § 4980H; Harvey D. Cotton & Leslie F. Arnould, *Health Care Reform Yesterday & Tomorrow: The Impact of State and Federal Law on Employers*, 7 J. HEALTH & BIOMEDICAL L. 91, 99 (2011). The Obama administration sought to distance itself from the term "employer mandate" in a 2010 publication. *See* THE WHITE HOUSE, THE AFFORDABLE CARE ACT INCREASES CHOICE AND SAVING MONEY FOR SMALL BUSINESSES 1 (2010), *available at* http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf, *archived at* http://perma.cc/R98G-Y949 ("The Affordable Care Act does not include an employer mandate."). Rather than use the term employer mandate, the publication states that, "as a matter of fairness," the ACA requires large employers to make an assessable payment "only if they don't provide affordable coverage." *See id.*

[29] *Compare* I.R.C. § 4980H (imposing an "assessable payment" on large employers that fail to offer affordable health insurance to their employees), *with* America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 1306 (2009) (imposing a "tax" on employers that fail to satisfy certain health coverage participation requirements), *and* Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 511 (as passed by the House, Nov. 7, 2009) (same).

[30] *See* S. 1796 § 1306; H.R. 3962 § 511.

[31] I.R.C. § 4980H (2012).

[32] *See id.*; *NFIB*, 132 S. Ct. at 2593–94, 2655 (Scalia, J., dissenting) (stating that "[t]axes have never been popular . . . [and] must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election" and concluding that "[w]e have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty"); 2 C.F.R. § 200.441 (2014) (stating that organizations may not use federal awards to pay penalties or fines); *id.* § 200.470 (allowing organizations to use federal awards to pay taxes); David Orentlicher, Response, *Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law*, 160 U. PA. L. REV. PENNUMBRA 19, 29 (2011), http://www.pennumbra.com/responses/09-2011/Orentlicher.pdf, *archived at* http://perma.cc/F7WV-A4KR(positing that "Congress and President Barack Obama characterized [the ACA shared responsibility payment] as a penalty rather than a tax because they knew that taxes are unpopular"); Jacqueline Klingebiel, *Obama: Mandate Is Not a Tax*, ABC NEWS BLOG (Sep. 20, 2009, 9:00 AM), http://www.abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/, *archived at* http://perma.cc/G4T9-FJAX (detailing an interview in which President Obama discusses the ACA's

Beginning in either 2015 or 2016 (depending on its number of employees),[33] an "applicable large employer" will be required to make assessable payments if it fails to satisfy its I.R.C. § 4980H requirement of offering affordable health insurance to its employees.[34] An employer may fail to meet its obligations under I.R.C. § 4980H in one of two ways: (1) by failing to offer its full-time employees (and their dependents) the opportunity to enroll in "minimum essential coverage"[35] under an employer-provided health insurance plan, and having at least one full-time employee who is certified to claim an "appli-

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individual mandate and states that the "responsibility to get health insurance is absolutely not a tax increase").

[33] *See* I.R.C. § 4980H (stating that the original effective date of the ACA's employer mandate was January 1, 2014); Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, and 301) (providing extended transition relief through 2015 for employers that meet certain eligibility requirements, including the requirement that the average number of full-time employees they employ in 2014 is between fifty and ninety-nine); I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (providing "transition relief," which effectively postpones I.R.C. § 4980H's implementation for all employers through 2014); MARY ANN CHIRBA ET AL., HEALTH CARE REFORM: LAW AND PRACTICE § 2.02[1] & n.4 (2013) (discussing the Obama administration's unilateral delays of the implementation of I.R.C. § 4980H, which have been called illegal by some critics). These delays in the implementation of I.R.C. § 4980H are motivated in large part by the complexity of the numerous requirements that the ACA imposes on employers, especially for those that did not previously offer health insurance to their employees. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8574.

[34] I.R.C. § 4980H; *see* CHIRBA ET AL., *supra* note 33, § 2.02[2] (outlining the structure of I.R.C. § 4980H and the incentives that Congress provided therein to ensure that employers offer their employees affordable health insurance). Congress defined an "applicable large employer" as "an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year." *Id.* § 4980H(c)(2)(A). Elaborating further, Congress defined "full-time employee" as one that, with respect to any given month, is employed for an average of "at least 30 hours of service per week." *Id.* § 4980H(c)(4)(A). The ACA, however, also provides that, only for the purpose of determining if an employer is an "applicable large employer," an employer must (in addition to its calculated number of full-time employees) divide the total number of hours worked by non-full-time employees by 120. *Id.* § 4980H(c)(2)(E). This number of "[f]ull-time equivalents" must then be added to the regular full-time employee count. *Id.* In 2012, the IRS published a notice describing this process of determining the number of full-time employees. *See* I.R.S. Notice 2012-58, 2012-41 I.R.B. 436. Additionally, the ACA provides that an employer will not be considered to employ more than fifty full-time employees if either: (1) its workforce only exceeds fifty full-time employees for 120 or fewer days during the calendar year; or (2) the employees in excess of fifty employed during that 120-day period were "seasonal workers." *See* I.R.C. § 4980H(c)(2)(B) (defining "seasonal worker[s]" in either the same way as the Secretary of Labor does or as "retail workers" employed during the holiday season).

[35] I.R.C. § 5000A(f) (2012). Section 5000A(f) defines "minimum essential coverage" as including, among a variety of other options, an "eligible employer-sponsored plan" and health plans offered in a state's individual market. *Id.* "Eligible employer-sponsored plan[s]" are group health insurance plans that employers offer to their employees which are either government plans or plans offered in the small or large group markets within a given state. *Id.* § 5000A(f)(2).

cable premium tax credit or cost-sharing reduction;"[36] or (2) by *offering* its full-time employees (and their dependents) an opportunity to enroll in minimum essential coverage, and *still* having at least one full-time employee who is certified to claim the applicable premium tax credit or cost-sharing reduction.[37] Thus, an employer must make an assessable payment under I.R.C.

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[36] *See id.* § 4980H(a); *see also id.* § 4980H(c)(3) (defining "applicable premium tax credit and cost-sharing reduction"). Requiring that at least one full-time employee be certified for a premium tax credit or cost-sharing reduction is in accordance with the ACA's commitment to making health insurance more affordable for individuals. *See* 42 U.S.C. § 18091(2)(F) (Supp. IV 2010). Generally, an employee will be eligible for a premium tax credit or cost-sharing reduction for health coverage, specifically for "qualified health plans," purchased through an exchange if several conditions are met. *See id.* § 18031(d) (Supp. V 2011) (defining a "qualified health plan" as a health insurance plan made available to qualified individuals and employers on a state-run exchange); 42 U.S.C. § 18081 (Supp. IV 2010) (laying out procedures for determining eligibility for premium tax credits and reduced cost-sharing); Moore, *supra* note 4, at 905 (same). First, the employee's annual household income must be between 100% and 400% of the federal poverty line. *See* I.R.C. § 36B(b)(3)(A) (2012); *see also id.* § 36B(d)(3) (providing for future changes to the federal poverty line by specifying the use of the "most recently published poverty line" as of the first day of a health insurance plan's regular enrollment period begins). Second, either: (1) the employee must be ineligible to participate in an employer-provided health insurance plan; or (2) the employer-provided health insurance plan must be unaffordable. *See id.* § 36B(c)(2)(C). An employer-provided health insurance plan is unaffordable when either: (1) the employee's premium under the plan exceeds 9.5% of the employee's annual household income; or (2) the "plan's share of the total allowed costs of benefits provided under the plan is less than 60 percent of such costs." *See id.* "Household income" is defined as an amount determined by adding the "modified adjusted gross income of the taxpayer" to the total "modified adjusted gross incomes" of every other person who: (1) was "taken into account in determining the taxpayer's family size;" and (2) was also required to file an income tax return. *See id.* § 36B(d)(2). Because the affordability of insurance (defined as premiums costing no more than 9.5% of household income) is determined by referencing the income of a taxpayer's spouse and dependents, employers may have difficulty determining the affordability of the health insurance that they offer to their employees. *See id.* § 36B(c)(2)(C)(i)(II); I.R.S. Notice 2011-73, 2011-40 I.R.B. 474 at 2–3. To remedy this issue, the Department of the Treasury and the IRS created an "affordability safe harbor" that would allow employers to determine insurance affordability by referencing their employees' wages reported on their Form W-2 tax documentation. *See* Treas. Reg. § 54.4980H–5(e) (2014); Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8564; I.R.S. Notice 2012-17, 2012-9 I.R.B. 430; I.R.S. Notice 2011-73, 2011-40 I.R.B. 474. As long as an employee's required contribution for a calendar year does not exceed 9.5% of "that employee's Form W–2 wages from the employer," the insurance will be considered affordable. Treas. Reg. § 54.4980H–5(e)(ii). The idea is that if employer-provided health insurance was affordable based just on the employee's Form W-2 wages, it would also be affordable in light of that employee's household income because the premium would then be an even smaller percentage of that total household income. *See* I.R.S. Notice 2011-73, 2011-40 I.R.B. 474. It was unclear whether this approach would be approved, however, because it creates a loophole where employers must simply limit each of their employee's premiums to just below 9.5% of the employee's pay to ensure they do not have to make an assessable payment. *See* Robert Book, *The IRS Employer Mandate Loophole*, FORBES (Aug. 6, 2012, 1:58 AM), http://www.forbes.com/sites/aroy/2012/08/06/the-irs-employer-mandate-loophole/, *archived at* http://perma.cc/7UPU-8DPE.

[37] *See* I.R.C. § 4980H(b) (2012).

§ 4980H either if it fails to offer health insurance to its employees *or* if it offers *unaffordable* health insurance to its employees.[38]

The amount of an assessable payment imposed on an employer depends on whether the employer fails to offer health insurance at all or simply fails to provide affordable health insurance.[39] If an employer fails to offer *any* health insurance to its full-time employees, its monthly assessable payment will be $167 for each of its full-time employees, not including the first thirty employees.[40] If an employer fails to provide *affordable* health insurance to its full-time employees, its monthly assessable payment will be $250 for each full-time employee who opts out of the employer-provided plan and receives a premium tax credit or cost-sharing reduction after enrolling in a qualified health plan elsewhere.[41] Additionally, Congress provided for future inflation adjustments of I.R.C. § 4980H's assessable payment amounts.[42]

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[38] *See id.* § 4980H(a)–(b); *supra* notes 35–37 and accompanying text.

[39] *See* I.R.C. § 4980H(a)–(b); *see also* Treas. Reg. §§ 54.4980H–4(d), 54.4980H–5(d) (2014) (stating that "[f]or a calendar month, an applicable large employer member may be liable for an assessable payment under section 4980H(a) or under section 4980H(b), but will not be liable for an assessable payment under both").

[40] *See* I.R.C. § 4980H(a), (c)(1). More specifically, § 4980H(a) requires that for employers not offering health insurance to their employees, their assessable payment is determined by the "product of the applicable payment amount" and the number of full-time employees employed that month. *See id.* § 4980H(a). Congress later defined "applicable payment amount" as $167. *Id.* § 4980H(c)(1). Congress provided employers with a break in their full-time employee calculation by requiring the total number of full-time employees to be reduced by thirty "for purposes of calculating" their assessable payment liability under I.R.C. § 4980H(a). *See id.* § 4980H(c)(2)(D).

[41] *See id.* § 4980H(b); Moore, *supra* note 4, at 905–06. Section 4980H(b)(1)(B) states that if an employer offers unaffordable health insurance to its employees, its assessable payment is "equal to the product of the number of full-time employees" that obtain the premium tax credit or cost-sharing reduction and "an amount equal to [one-twelfth] of $3,000," or $250. I.R.C. § 4980H(b)(1)(B). Thus, an employer's assessable payment for offering unaffordable health insurance is based on the number of employees who decide not to purchase the employer-provided health insurance instead of its total number of full-time employees. *See id.* One scholar offers the following illustration of the practical difference this distinction between I.R.C. § 4980H(a) and I.R.C. § 4980H(b) provides:

> [S]uppose that an applicable large employer has seventy-five full-time employees and does not offer its full-time employees and their dependents coverage under an eligible employer-sponsored group health plan for a month. Two full-time employees are certified to claim a premium assistance tax credit or cost sharing reduction. The employer will be subject to a penalty equal to $7500 for that month. In contrast, if the same employer offered coverage and the same two employees opted out, the employer would only be subject to a penalty equal to $500.

Moore, *supra* note 4, at 906.

[42] *See* I.R.C. § 4980H(c)(5). For each calendar year after 2014, the current assessable payment annual caps of either $2000 or $3000 per employee will be multiplied by a "premium adjustment percentage." *Id.* Currently, the "premium adjustment percentage" is calculated by the percentage by which the "average per capita premium for health insurance" for the prior calendar year exceeds the "average per capita premium for 2013." 42 U.S.C. § 18022(c)(4) (Supp. IV 2010).

B. Section 4980H's Effect on Employer-Provided Health Insurance

Because I.R.C. § 4980H does not take effect until 2015 at the earliest, employers are now in planning and preparation mode as they analyze the effect of the ACA's employer mandate on their business.[43] Though Congress intended I.R.C. § 4980H to motivate employers to provide affordable health insurance to their employers, some suggest that it remains unclear whether the provision will actually have this effect.[44] Even though I.R.C. § 4980H has not taken effect, one recent study shows that the percentage of the nonelderly population receiving employer-provided health insurance is already slowly—but steadily—dropping, while the percentage of the same population receiving government-provided health insurance is increasing.[45]

Most employers can save money by simply paying the assessable payment required by I.R.C. § 4980H instead of offering affordable health insurance to their employees.[46] This is the case because an employer's maximum

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[43] *See* TOWERS WATSON, HEALTH CARE REFORM: LOOMING FEARS MASK UNPRECEDENTED EMPLOYER OPPORTUNITIES TO MITIGATE COSTS, RISKS AND RESET TOTAL REWARDS 3 (2010), *available at* http://www.towerswatson.com/~/media/Pdf/Insights/IC-Types/Survey-Research-Results/2010/05/Post-HCR_Flash_survey_bulletin_5_25_101.pdf, *archived at* http://perma.cc/R7BB-MA23 (stating that the employer-respondents' "most pressing short-term actions focus on . . . modeling the financial impact of health care reform on their organization"); *supra* note 33 and accompanying text (discussing the delayed implementation of I.R.C. § 4980H).

[44] *Compare* David A. Hyman, *Employment-Based Health Insurance: Is Health Reform a 'Game Changer?'* 13–14 (Univ. Ill. Law & Econ. Research, Paper No. LE10-010, 2010; Ill. Pub. Law Research, Paper No. 10-17, 2010), *available at* http://www.ssrn.com/abstract=1624311, *archived at* http://perma.cc/Q8ZY-2PHH (stating the likely result of the of the ACA's employer mandate will be that "some employers will make all-or-nothing coverage decisions for all employees in favor of 'nothing'"), *and* Grace-Marie Turner, *No, You Can't Keep Your Health Insurance*, WALL ST. J. (June 8, 2011, 1:38 PM), http://online.wsj.com/article/SB10001424052702304432304576371252181401600.html, *archived at* http://perma.cc/M9JY-5T92 (predicting that "ObamaCare will lead to a dramatic decline in employer-provided health insurance" requiring up to 78 million Americans to find health insurance from other sources), *with* Moore, *supra* note 4, at 909–10 (discussing the results of two surveys: in one survey, 88% of surveyed employers answered that they would continue to—or likely would continue to—provide health insurance to their employees; in a second survey, 87% of respondents said that they would continue to offer health insurance because it is important for employee recruiting and retention purposes), *and id.* at 921 (concluding that the ACA's three main incentives regarding employer-provided health insurance benefits are "unlikely to change significantly the number of employers that elect to offer" employer-provided health insurance).

[45] *See* Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2012 Current Population Survey*, EBRI ISSUE BRIEFS, Sept. 2012, at 4, 5, *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2012_No376_Sources.pdf, *archived at* http://perma.cc/529Z-G4H9 (presenting data showing the percentage of the nonelderly population with employer-provided health insurance dropped from 63.5% in 2007 to 58.4% in 2011, while the percentage of the same population receiving insurance from public sources rose from 18.3% in 2007 to 22.5% in 2011).

[46] Moore, *supra* note 4, at 906 ("The penalty [the ACA] imposes on employers who fail to offer employees affordable health care coverage is relatively low compared with prevailing health insurance costs."); Shubham Singhal et al., *How US Health Care Reform Will Affect Employee Benefits*, MCKIN-

annual assessable payment per employee is either $2000 or $3000, whereas an employer's average annual cost for an employee's health insurance premium is roughly $4000 for an individual and $11,000 for a family.[47]

Comparing the costs of an assessable payment with providing affordable health insurance is not the only consideration for employers deciding whether to provide, or continue to provide, affordable health insurance to their employees.[48] One additional consideration for employers is the different tax implications that result from paying I.R.C. § 4980H's assessable payments as opposed to paying for a portion of an employee's health insurance premium.[49] Section 4980H explicitly forbids an employer from deducting assessable payments on its tax return, whereas an employer may currently deduct its contributions to its employees' health plans as business expenses.[50] Another consideration for em-

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SEY & CO. (June 2011), http://www.mckinsey.com/insights/health_systems_and_services/how_us_health_care_reform_will_affect_employee_benefits, *archived at* http://perma.cc/ZKR2-55PY (stating that "[a]t least 30 percent of employers would gain economically from dropping coverage even if they completely compensated employees for the change"); Shawn Tully, *Documents Reveal AT&T, Verizon, Others, Thought About Dropping Employer-Sponsored Benefits*, CNN MONEY (May 6, 2010, 11:52 AM), http://www.money.cnn.com/2010/05/05/news/companies/dropping_benefits.fortune/, *archived at* http://perma.cc/9SP-MZU3 ("AT&T revealed that it spends $2.4 billion a year on coverage for its almost 300,000 active employees, a number that would fall to $600 million if AT&T stopped providing health care coverage and paid the [assessable payment] instead.").

[47] *See* I.R.C. § 4980H (2012); JAMES M. BRANSCOME, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, STATISTICAL BRIEF #375: STATE DIFFERENCES IN THE COST OF JOB-RELATED HEALTH INSURANCE, 2011 at 2, 5 (2010), *available at* http://www.meps.ahrq.gov/data_files/publications/st375/stat375.pdf, *archived at* http://perma.cc/4TUB-U2PX. This study reports that, in 2011, the average nationwide health insurance premiums were $5222 for individual coverage and $15,022 for family coverage. BRANSCOME, *supra*, at 2. One study concluded that the average 2011 annual contributions by employees toward their own health insurance premiums was $1090 for individual coverage and $3962 for family coverage. *Id.* at 3. Subtracting the employees' contributions from their total premiums leaves an annual average cost to employers of $4132 for individual plans and $11,060 for family plans. *See id.* at 1, 3.

[48] *See* Moore, *supra* note 4, at 908–09 (discussing additional factors for employer consideration including, tax deductions, employees' demands for higher wages, and its effect on recruiting and retention).

[49] *See* I.R.C. § 4980H(c)(7); Moore, *supra* note 4, at 908.

[50] *Compare* I.R.C. § 4980H(c)(7) (denying employers a "deduction for the tax imposed" by § 4980H), *with id.* § 105(b) (2012) (excluding from an employee's gross income the amounts paid to them by their employers for medical care expenses incurred by the taxpayer for themselves, their spouses, and their dependents), *id.* § 106(a) (2012) (excluding, in most cases, from an employee's gross income the amounts of employer-provided health or accident insurance plans), *id.* § 162 (2012) (allowing employers a deduction for "ordinary and necessary" business expenses paid during the taxable year), *and* Treas. Reg. § 1.162–10(a) (2014) (specifying "medical expense[s]" paid during the taxable year as deductible business expenses). The advantage of these provisions in the I.R.C. is that the amounts spent or received in relation to employer-provided health insurance are excluded from an employee's pre-tax income; if employees purchase health insurance on their own, they must pay for it with after-tax dollars. *Compare* I.R.C. § 106(a) (excluding the amount of employer-provided health insurance from an employee's gross income without a requirement that an employee contribute a

ployers is the possible demand of higher wages from their employees if health insurance benefits are no longer included as part of their compensation package.[51] Other factors that scholars have identified for an employer's consideration include recruiting, retention, and ensuring continued employee productivity.[52]

II. TAX-EXEMPT ORGANIZATIONS AND COST GUIDANCE FOR ALLOWABLE USES OF FEDERAL AWARDS

One type of large employer that will be affected by the ACA's employer mandate is a tax-exempt organization (a "nonprofit") under I.R.C. § 501.[53] Nonprofits employ roughly ten percent of the U.S. workforce and the nonprofits that employ over fifty full-time employees will be subject to the require-

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certain amount), *with id.* § 213(a) (2012) (providing that individuals' medical care expenses are only deductible "to the extent that such expenses exceed 10 percent of adjusted gross income"). The ACA provides individuals with some additional tax relief for health insurance expenses through the premium tax credit or cost-sharing reduction discussed previously. *See supra* note 36 and accompanying text.

[51] *See* MERCER, HEALTH CARE REFORM: IMPACT ON EMPLOYER-SPONSORED PLANS BEGINS TO EMERGE 4 (2010), *available at* http://www.mercer.com/attachment.dyn?idContent=1296645&filePath=/attachments/English/Mercer_HCR_Perspective_June2010.pdf, *archived at* http://perma.cc/JN82-39UK ("The 'savings' to an employer are not simply the difference between current cost and the penalty. Employees will expect some compensation adjustment to help them buy coverage in the individual market . . . ."); Moore, *supra* note 4, at 908–09 ("[H]ealth care coverage is a form of nontaxable compensation to employees, and employees may demand higher wages if employers elect to eliminate coverage.").

[52] *See* Moore, *supra* note 4, at 909; Singhal et al., *supra* note 46, at 7.

[53] *See* I.R.C. § 501 (2012); *id.* § 4980H (2012). Tax-exempt organizations are also commonly referred to as "nonprofits," but the terms are not identical; to qualify as tax-exempt, an organization must file appropriate paperwork with the IRS. *See* Treas. Reg. § 1.501(a)–1(a)(2) (2014) ("An organization . . . is not exempt from tax merely because it is not organized and operated for profit."); BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS pt. 14 ¶ 100.1.1 (rev. 3d ed. Supp. 2006) (discussing the exemption of charitable organizations from taxation extending back to the "English Statute of Charitable Uses of 1601" as well as early state constitutions); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301 (1976) (same). Several policy rationales historically justified federal income tax exemptions for these organizations: (1) a disconnect between the concept of income and the organization's objectives; (2) small potential for tax revenues; (3) administrative difficulties arising from these organizations' heavy reliance on volunteers; and (4) the benefits of these organizations' activities on society. *See, e.g.*, Green v. Connally, 330 F. Supp. 1150, 1157–61 (D.D.C. 1971) (emphasizing the "public benefits arising" from nonprofit organizations (internal quotations omitted)), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); BITTKER & LOKKEN, *supra*, ¶ 100.1.3. The most important, and probably best-known, tax-exempt organizations are classified as charitable organizations under I.R.C. § 501(c)(3), which requires the organization to be "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" to qualify for an I.R.C. § 501(a) tax exemption. *See* I.R.C. § 501(a), (c)(3); Treas. Reg. § 1.501(c)(3)–1(a) (2014).

ments of I.R.C. § 4980H.[54] In order to cover their operating costs, many nonprofits utilize federal grant awards—in addition to private donations—as a significant source of funding.[55] To ensure that nonprofits, and other nonfederal entities, use federal awards judiciously and for the purposes for which they were intended, the OMB has issued official cost guidance for them.[56]

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[54] *See* I.R.C. § 4980H; MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RESEARCH SERV., R40919, AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR 4 (2009), *available at* http://www.councilofnonprofits.org/files/crs-overview-nonprofit-charitable-sector.pdf, *archived at* http://perma.cc/5JFF-HF2J.

[55] *See* AMY BLACKWOOD ET AL., URBAN INST., THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING AND VOLUNTEERING, 2012, at 1–3 (2012), *available at* http://www.urban.org/UploadedPDF/412674-The-Nonprofit-Sector-in-Brief.pdf, *archived at* http://perma.cc/TK65-R68X (reporting that, in 2010, government grants composed 8.3% of the $1.51 trillion in revenues for public charities and that the total amount donated by individuals as private charitable contributions was over $298 billion in 2011). A 2009 report by the U.S. Government Accountability Office (GAO) stated that in the 2006 fiscal year nonprofits received a significant amount of assistance through federal funds. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-193, NONPROFIT SECTOR: SIGNIFICANT FEDERAL FUNDS REACH THE SECTOR THROUGH VARIOUS MECHANISMS, BUT MORE COMPLETE AND RELIABLE FUNDING DATA ARE NEEDED 4 (2009), *available at* http://www.gao.gov/new.items/d09193.pdf, *archived at* http://perma.cc/T5W7-5JZS. The GAO reported that in 2009 nonprofits received approximately $25 billion in "direct grants," $55 billion in grant funds that first flow through a state, and $10 billion in federal contracts. *See id.*

[56] *See* 2 C.F.R. §§ 200.400–475 (2014) (outlining federal award cost principles for nonfederal entities); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-122 (COST PRINCIPLES FOR NON-PROFIT ORGANIZATIONS) (2004) (codified in 2 C.F.R. pt. 230 (2013)); *see also* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-21 (COST PRINCIPLES FOR EDUCATIONAL INSTITUTIONS) (2004) (codified in 2 C.F.R. pt. 220 (2013)) (performing the same function for educational institutions as OMB Circular A-122 performed for nonprofits); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-87 (COST PRINCIPLES FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS) (2004) (codified in 2 C.F.R. pt. 225 (2013)) (performing the same function for government entities as OMB Circular A-122 performed for nonprofits). On July 8, 1980, the OMB issued Circular A-122 to provide nonprofit organizations with cost principles to be used for determining whether certain costs could be paid with federal awards. *See* Circular A-122, "Cost Principles for Nonprofit Organizations," 45 Fed. Reg. 46022 (July 8, 1980). On December 26, 2013, the OMB, together with the Council on Financial Assistance Reform, streamlined the cost guidance and other requirements for nonprofits receiving federal awards formerly contained in OMB Circular A-122 (as well as similar guidance and requirements for hospitals, institutions of higher education, state and local governments, and Indian tribes formerly contained in other OMB circulars) by enacting uniform guidance which supersedes and combines the various OMB circulars. *See* 2 C.F.R. § 200.100 ("This Part establishes uniform administrative requirements, cost principles, and audit requirements for Federal awards to non-Federal entities . . . ."); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590 (Dec. 26, 2013) (codified at 2 C.F.R. pts. 200, 215, 220, 225, and 230). The effective date of these reforms will be one year from the publication of the OMB's uniform guidance, December 26, 2014. 2 C.F.R. § 200.110. This massive overhaul of previous cost and administrative guidance for these organizations was prompted by two objectives: (1) to condense guidance for federal awards to reduce the administrative burden on nonfederal entities; and (2) strengthen oversight over federal awards to reduce risks of "waste, fraud, and abuse." Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. at 78590. The OMB has

As it now stands, the OMB's cost guidance does not let nonprofits, or other nonfederal entities, subject to I.R.C. § 4980H's employer mandate know whether an assessable payment would be an allowable use of federal award funds.[57] Under 2 C.F.R. § 200.470, taxes are generally "allowable" costs.[58] Under 2 C.F.R. § 200.441, however, the costs of fines and penalties resulting from the violation of laws or regulations are "unallowable."[59] This distinction matters because if a nonprofit[60] uses a federal award for unallowable costs, the

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also extended these cost principles to "subawards," recognizing that, because of the way certain grants are structured, an organization may receive its federal funding after it has passed through a state government or other entity first. *See id.* § 200.92 (defining "subaward"); *id.* § 200.332 (allowing pass-through entities to provide subawards if they meet certain other requirements in the OMB's uniform guidance).

[57] *See* 2 C.F.R. §§ 200.441, 200.470; Lovendale & Evans, *supra* note 6, at 8–9. Though this Note focuses on how the ambiguity in the labeling of I.R.C. § 4980H's "assessable payment" affects nonprofits receiving federal awards, the same ambiguity also affects other nonfederal entities receiving federal awards, including state and local governments, Indian tribes, and institutions of higher education. *See* 2 C.F.R. § 200.69 (defining the term "[n]on-Federal entity"); *id.* § 200.100 (stating that the OMB uniform guidance for federal awards applies to nonfederal entities); *id.* § 200.441 (stating that fines and penalties are unallowable costs); *id.* § 200.470 (stating that taxes are usually allowable costs). The OMB's uniform guidance provides that a cost is "allowable" under a federal award if seven criteria are met. *See id.* § 200.403. First, the cost must "[b]e necessary and reasonable for the performance of the Federal award and be allocable thereto." *Id.* § 200.403(a). Second, the cost must conform to the conditions or limitations of the OMB cost principles or the federal award itself with respect to types or amounts of costs. *See id.* § 200.403(b). Third, the cost must be consistent with "policies and procedures" uniformly applied to the organization's activities, whether carried out with federal awards or not. *See id.* § 200.403(c). Fourth, the cost must "[b]e accorded consistent treatment." *See id.* § 200.403(d). Fifth, the cost must be tracked with "generally accepted accounting principles (GAAP)." *See id.* § 200.403(e). Sixth, the cost cannot be used to meet "cost sharing or matching requirements of any other federally-financed program." *See id.* § 200.403(f). Seventh, the cost must "[b]e adequately documented." *See id.* § 200.403(g). Notably, the OMB's uniform guidance provides that whether a certain cost is an allowable use of a federal award may also be governed by that award's terms, and this definition trumps the OMB's specific cost guidance. *Id.* § 200.420.

[58] *See id.* § 200.470(b) ("In general, taxes which the non-Federal entity is required to pay and which are paid or accrued in accordance with GAAP . . . are allowable . . . ."). This provision, however, contains exceptions for three types of taxes which are unallowable costs for a nonprofit: (1) taxes from which exemptions are available to the organization directly or available from the federal government; (2) special land assessments; and (3) "Federal income taxes." *Id.*

[59] *See id.* § 200.441 ("Costs resulting from non-Federal entity violations of, alleged violations of, or failure to comply with, Federal, state, tribal, local, or foreign laws and regulations are unallowable . . . ."). The only exceptions are when these costs are incurred as a result of complying with: (1) the specific award terms; or (2) written instructions from the "Federal awarding agency." *Id.*

[60] *Id.* § 200.70 (defining "[n]onprofit organization" for OMB uniform guidance purposes). Importantly, the OMB also explicitly excluded some types of nonprofits from its cost principles for federal awards. *See id.* § 200.401(c) ("Some nonprofit organizations, because of their size and nature of operations, can be considered to be similar to for-profit entities for purpose of applicability of cost principles."); *id.* pt. 200, App. VIII (listing specific nonprofits that are not subject to OMB cost principles, including various research institutes, nonprofit insurance providers "such as Blue Cross and Blue Shield Organizations," and "[o]ther [nonprofits] as negotiated with Federal awarding agencies").

awarding agency may require the funds be returned or may even terminate the entire federal award.[61]

III. Tax or Penalty? Competing Interpretations of the Assessable Payment Imposed by Section 4980H

Because Congress used the term "assessable payment" to describe the exaction in I.R.C. § 4980H, it is unclear whether this exaction would be considered a tax or a penalty under the OMB's cost principles.[62] The language Congress used in I.R.C. § 4980H makes it unclear whether the exaction should be considered a tax or a penalty because I.R.C. § 4980H uses *both* terms when referring to the assessable payment.[63]

The Supreme Court, in *National Federation of Independent Business v. Sebelius* (*NFIB*), grappled with this type of interpretive dilemma in 2012 when it examined the constitutionality of the ACA's individual mandate in light of Congress's Taxing Power.[64] The Court concluded that the ACA's individual mandate exaction could reasonably be interpreted as a tax despite Congress labeling it a "shared responsibility payment."[65] To reach this conclusion, the Court analyzed how the shared responsibility payment functioned, as opposed to focusing on its congressional label.[66] Although *NFIB* dealt with a constitutional—and not a purely interpretive—question, the Court's analysis can be used to determine whether an assessable payment under I.R.C. § 4980H is a tax or a penalty by evaluating (1) how the exaction functions, and (2) its material characteristics.[67] When evaluating an assessable payment's material characteristics, one should consider the language Congress used to describe the

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[61] *See* 45 C.F.R. pt. 16, app. A , para. C (2013). If a nonprofit wishes to challenge the determination that its use of a federal award was unallowable, it may do so at an administrative hearing; should it choose to appeal the result of that hearing, the Department of Health and Human Services has granted the Departmental Appeals Board authority to handle appeals of these grant disputes. *See id.*; *Appellate Division*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/dab/divisions/appellate/index.html, *archived at* http://perma.cc/4K3D-KFCE (last visited Apr. 16, 2014) (stating that the Appellate Division of the Departmental Appeals Board "provides *de novo* review" of final decisions, including those for grant "disallowances, terminations and denials of refunding").

[62] *See* I.R.C. § 4980H (2012); 2 C.F.R. §§ 200.441, 200.470 (2014); Lovendale & Evans, *supra* note 6, at 8–9.

[63] *See* I.R.C. § 4980H; *infra* notes 72–80 and accompanying text.

[64] *See* U.S. CONST. art. I, § 8, cl. 1; Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2593–94 (2012).

[65] *NFIB*, 132 S. Ct. at 2601; *see* I.R.C. § 5000A (2012); *infra* notes 93–108 and accompanying text.

[66] *See NFIB*, 132 S. Ct. at 2593–98.

[67] *See id.*; Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1222–23 (2012) (discussing how the material characteristics of taxes differ from those of penalties).

exaction, the conduct Congress sought to regulate, and the magnitude and conditions of the exaction.[68]

Section A analyzes the conflicting tax versus penalty terminology Congress used to describe the assessable payment in I.R.C. § 4980H.[69] Section B then discusses the reasoning that the *NFIB* Court used to interpret the ACA's shared responsibility payment as a tax.[70] Finally, Section C examines additional characteristics of exactions like I.R.C. § 4980H's assessable payment.[71]

A. Conflicting Tax and Penalty Terminology in I.R.C. § 4980H

It is unclear whether an assessable payment imposed on employers by the ACA would be interpreted as a tax or penalty because Congress refers to the exaction using both terms in I.R.C. § 4980H.[72] In some instances, I.R.C. § 4980H characterizes an assessable payment as a "penalty."[73] For example, the heading for one provision in I.R.C. § 4980H refers specifically to "assessable penalties."[74] Congress also specified that assessable payments shall be calculated and paid in the same way "as an assessable penalty" under another chapter of the I.R.C.[75] Finally, proposed regulations to provide guidance under I.R.C. § 4980H reference a "penalty" imposed by the section a total of three times.[76]

Conversely, another provision, I.R.C. § 4980H(c)(7), refers to the assessable payment as a "tax."[77] Section 4980H(c)(7) explicitly denies large employers a tax deduction for the "tax imposed" by I.R.C. § 4980H.[78] Additionally, the background section of proposed regulations for I.R.C. § 4980H states that the document contains "proposed Pension Excise Tax Regulations under section 4980H."[79] Despite the fact that Congress originally used the term "tax" to

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[68] *See* Cooter & Siegel, *supra* note 67, at 1222–23.

[69] *See infra* notes 72–80 and accompanying text.

[70] *See infra* notes 81–108 and accompanying text.

[71] *See infra* notes 109–132 and accompanying text.

[72] *See* I.R.C. § 4980H (2012); Lovendale & Evans, *supra* note 6, at 8–9.

[73] *See* I.R.C. § 4980H(c)(2)(D) (using the term "assessable penalties" in the section heading); *id.* § 4980H(d)(1).

[74] *See id.* § 4980H(c)(2)(D). Congress used the term "assessable payment" in this provision everywhere except the heading. *See id.*

[75] *See id.* § 4980H(d)(1) (referring to the manner of assessment and collection under "subchapter B of chapter 68" of the I.R.C.).

[76] *See* Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 218 (proposed Jan. 2, 2013) (codified at 26 C.F.R. pts. 1, 54, and 301).

[77] *See* I.R.C. § 4980H(c)(7).

[78] *See* I.R.C. § 4980H(c)(7) (2012); *see also* Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 235 ("Pursuant to section 275(a)(6) regarding the nondeductibility of certain excise taxes . . . an assessable payment imposed under section 4980H is not deductible.").

[79] *See* Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 218.

refer to this exaction in prior versions of the ACA, the "assessable payment" label Congress used in I.R.C. § 4980H as enacted, combined with scattered usage of both "tax" and "penalty" terminology, makes it unclear what the exaction would be considered under the OMB cost principles.[80]

B. Tax vs. Penalty, Round One: The ACA's Individual Mandate Exaction in National Federation of Independent Business v. Sebelius

One way to address the tax versus penalty issue in I.R.C. § 4980H—instead of focusing on the label used by Congress—is to examine the function and characteristics of an assessable payment.[81] In June 2012, the Supreme Court engaged in this type of analysis when it upheld the constitutionality of the ACA's individual mandate provision, I.R.C. § 5000A, in its landmark *NFIB* decision.[82] Though the Court did not address the employer mandate of the ACA in its opinion, it discussed whether the individual mandate's "shared responsibility payment" was a penalty or a tax in its analysis of the ACA's con-

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[80] *See* I.R.C. § 4980H; Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 511 (as passed by the House, Nov. 7, 2009) (imposing a "tax" on employers in a prior version of I.R.C. § 4980H); America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 1306 (Oct. 19, 2009) (same); 2 C.F.R. §§ 200.441, 200.470 (2014).

[81] *See NFIB*, 132 S. Ct. at 2593–95 (outlining the Court's "functional approach" to determine whether an exaction "falls within Congress's taxing power").

[82] *See id.* at 2593–95, 2601. *See generally* L. Darnell Weeden, *The Supreme Court's Treatment of the Patient Protection and Affordable Care Act*, 12 APPALACHIAN J.L. 49 (2012) (analyzing the ACA and the *NFIB* opinion). In upholding the constitutionality of the individual mandate, the Supreme Court surprised many by rejecting the government's argument that the mandate is a valid exercise of the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3; *NFIB*, 132 S. Ct. at 2600–01; Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, SLATE (June 28, 2012, 11:59 AM), http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html, *archived at* http://perma.cc/4ZJW-EFRZ (discussing the various challenges to the constitutionality of the ACA and concluding that Chief Justice John G. Roberts, Jr. effectively limited Congress's future power to regulate under the Commerce Clause). Indicative of the surprising nature of the Court's ruling, some journalists erroneously reported that the Court had struck down the ACA as unconstitutional under the Commerce Clause before reading that the Court upheld it under Congress's Taxing Power. *See* Dylan Byers, *Jeff Toobin Explains How CNN Got It Wrong*, POLITICO (June 28, 2012, 11:28 AM), http://www.politico.com/blogs/media/2012/06/jeff-toobin-explains-how-cnn-got-it-wrong-127564.html, *archived at* http://perma.cc/3R8A-BQN6 ("It was an extraordinary turn of events because five minutes into [C]hief [J]ustice Roberts's opinion, [if] you would have asked anyone in that room whether this law was going to be held unconstitutional, I think we all would have said yes."); Erik Wemple, *CNN and Fox Get It Wrong on Health-care Ruling*, WASH. POST (June 28, 2012, 10:46 AM), http://www.washingtonpost.com/blogs/erik-wemple/post/cnn-correction-on-health-care-ruling-insane/2012/06/28/gJQAg6w78V_blog.html, *archived at* http://perma.cc/V3RH-PZSR (discussing how CNN initially reported that the individual mandate was struck down by the Court after their correspondent learned of the Court's rejection of the government's main Commerce Clause claim).

stitutionality.[83] The *NFIB* Court's discussion of whether I.R.C. § 5000A's shared responsibility payment is a penalty or a tax is helpful in analyzing how I.R.C. § 4980H's assessable payment should be interpreted in light of the OMB's cost principles.[84] Subsection 1 discusses the *NFIB* Court's analysis of whether the I.R.C. § 5000A shared responsibility payment was a penalty and whether the Anti-Injunction Act barred the suit challenging the constitutionality of the ACA.[85] Subsection 2 discusses the Court's interpretation of I.R.C. § 5000A's shared responsibility payment as a tax in light of Congress's Taxing Power, despite the penalty label Congress applied to it within the ACA.[86]

1. The ACA's Individual Mandate's "Penalty" Label Is Not Dispositive for the *NFIB* Court's Anti-Injunction Act Analysis

Although the ACA frequently refers to the individual mandate's shared responsibility payment as a penalty, the *NFIB* Court concluded that, for purposes of the Anti-Injunction Act, this label was not dispositive.[87] The Anti-Injunction Act, enacted in 1954, denies standing to any suit that seeks to prevent the collection of *taxes*, but not penalties.[88] In holding that, for the purposes of the Anti-Injunction Act, the ACA's individual mandate was a penalty, the Court gave great weight to the specific textual label Congress used to describe the exaction in the ACA.[89] The Court noted that Congress chose to describe the

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[83] *See NFIB*, 132 S. Ct. at 2580–83.

[84] *See id.* at 2593–98. *Compare* I.R.C. § 5000A (2012) (imposing an exaction on most individuals who fail to obtain health insurance), *with id.* § 4980H (2012) (imposing an exaction on most employers that fail to provide their employees with affordable health insurance).

[85] *See infra* notes 87–92 and accompanying text.

[86] *See infra* notes 93–108 and accompanying text.

[87] *See NFIB*, 132 S. Ct. at 2582–84 ("Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti-Injunction Act.").

[88] *See* I.R.C. § 7421 (2012). The practical effect of the Anti-Injunction Act is to allow taxes to be challenged only after they are paid and the party sues for a refund. *See NFIB*, 132 S. Ct. at 2582; Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7–8 (1962). Congress passed the Anti-Injunction Act to protect the government's constant stream of tax revenue by preventing litigation aimed at obstructing tax collection. *See NFIB*, 132 S. Ct. at 2582; *Enochs*, 370 U.S. at 7 ("The manifest purpose of [the Anti-Injunction Act] is to permit the United States to assess and collect taxes alleged to be due without judicial intervention . . . ."). Because the ACA's individual mandate did not become enforceable until 2014, the Anti-Injunction Act would have prevented the Court from analyzing the constitutionality of the individual mandate until at least then if the Court treated the mandate as a tax in this section of its analysis. *See* I.R.C. § 5000A; *NFIB*, 132 S. Ct. at 2582–83 (stating that "[b]ecause of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund").

[89] *See NFIB*, 132 S. Ct. at 2582–83 ("The text of the pertinent statutes suggests otherwise. . . . Congress's decision to label this exaction a 'penalty' rather than a 'tax' is significant because the [ACA] describes many other exactions it creates as 'taxes.'").

shared responsibility payment as a penalty and not as a tax.[90] The Court then reasoned that Congress's decision to label the shared responsibility payment a penalty was intentional and significant because Congress used the term "tax" to describe many other exactions in the ACA.[91] Thus, the Court concluded that the ACA does not require the shared responsibility payment to be treated as a tax under the Anti-Injunction Act.[92]

2. Interpreting a Penalty as a Tax: The *NFIB* Court's Analysis of the ACA's Individual Mandate's Constitutionality Under Congress's Taxing Power

In contrast, for purposes of Congress's Taxing Power, the *NFIB* Court held that the shared responsibility payment can reasonably be interpreted as a tax despite its "penalty" label.[93] To reach this conclusion, the Court empha-

[90] *See id.* at 2583. Congress actually changed the label from "tax" to "penalty" in the final version of the ACA. *See* Liberty Univ. v. Geithner, 671 F.3d 391, 424 (4th Cir. 2011) (Davis, J., dissenting) ("Congress considered earlier versions of the individual mandate that clearly characterized the exaction as a tax and referred to it as such more than a dozen times. . . . Congress deliberately deleted all of these references to a tax in the final version of the Act and instead designated the exaction a penalty." (citations omitted) (internal quotation marks omitted)), *vacated by* 133 S. Ct. 679 (2012); Cooter & Siegel, *supra* note 67, at 1240 ("Congress . . . [labeled] the exaction a 'tax' in earlier versions of the bill.").

[91] *See NFIB*, 132 S. Ct. at 2583. In 2011, in *Thomas More Law Center v. Obama*, the U.S. Court of Appeals for the Sixth Circuit noted that "[w]ords matter, and it is fair to assume that Congress knows the difference between a tax and a penalty." *See* 651 F.3d 529, 551 (6th Cir. 2011), *abrogated by NFIB*, 132 S. Ct. 2566 (2012). The Sixth Circuit also noted Congress's political motives for labeling the individual mandate as a "penalty" instead of a "tax." *See id.* ("That is all the more true in an era when elected officials are not known for casually discussing, much less casually increasing, taxes. When was the last time a candidate for elective office promised not to raise penalties?" (internal quotation marks omitted)). By one count, Congress used the term "penalty" at least seventeen times in the ACA's individual mandate provision, and roughly 180 more times in the rest of the ACA. *See id.* Congress also used the term "tax" approximately 620 times throughout the ACA. *See id.*

[92] *See NFIB*, 132 S. Ct. at 2584 (citing I.R.C. § 5000A(b) (2012)).

[93] *Id.* at 2593–94, 2601 (stating that Congress's choice to label the shared responsibility payment as a penalty meant Congress did not want the Anti-Injunction Act to apply to the ACA, but also stating that Congress's choice to do so did not control the Court's analysis as to "whether an exaction is within Congress's constitutional power to tax"); *see* U.S. CONST. art. I, § 8, cl. 1. Before analyzing the ACA's constitutionality under the Taxing Power, the Court first analyzed its constitutionality under both the Commerce Clause and the Necessary and Proper Clause. *NFIB*, 132 S. Ct. at 2584–93 (discussing the Supreme Court's Commerce Clause and Necessary and Proper Clause precedent and concluding that the ACA's individual mandate is not authorized by either enumerated power); *see* U.S. CONST. art. I, § 8, cl. 3 (describing Congress's power "[t]o regulate Commerce"); *id.* art. I, § 8, cl. 18 (describing Congress's power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers). The government then argued that, by failing to purchase health insurance, an individual "triggers a tax" and is required to make an additional payment to the IRS. *See NFIB*, 132 S. Ct. at 2593–94 (stating that the argument for the individual mandate's constitutionality was the government's second, or alternative, argument). Taking special care to grant the ACA deference as a duly-passed act of Congress, the Court accepted the government's alternative

sized that Congress's choice to label the shared responsibility payment as a penalty was not determinative in its analysis of whether the individual mandate was a tax or a penalty for constitutional purposes.[94] Rather, to determine whether the shared responsibility payment was a tax for constitutional purposes, the Court noted that it must analyze the exaction's "substance and application."[95] The Court described this process of disregarding the label of an exaction and analyzing its characteristics as its "functional approach."[96]

To reach this conclusion, the Court began by analyzing the ways that the shared responsibility payment functions as a tax.[97] First, the Court noted that

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argument and held that the individual mandate can reasonably be interpreted as a tax despite Congress labeling it a "penalty." *See id.* at 2593–94, 2601 ("The Federal Government does have the power to impose a tax on those without health insurance.") In its discussion of the deference a court owes a statute passed through the legislative process, the Court stated that "if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." *See id.* at 2593 ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution." (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830))).

[94] *See NFIB*, 132 S. Ct at 2594–95 (contrasting the fact that Congress's penalty label was dispositive in the Court's Anti-Injunction Act analysis). Some judges and legal scholars fear that these congressional word games allow elected representatives to escape political accountability for raising taxes by "call[ing] an exaction one thing in the political arena and something else in court." Cooter & Siegel, *supra* note 67, at 1243 & n.216; *see* Florida *ex rel.* McCollum v. U.S. Dep't of Health and Human Servs., 716 F. Supp. 2d 1120, 1143 (N.D. Fla. 2010) ("[N]ow that [the ACA] has passed into law [pursuant to Congress's] Commerce Clause power . . . [the] government . . . argued that it was a tax after all . . . . [This] could have the consequence of allowing Congress to avoid [the accountability that operates] as a check on Congress's broad taxing power . . . ."); Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 632 (2010) ("The public is acutely aware of tax increases. Rather than incur the political cost of imposing a general tax on the public using its tax powers, economic mandates allow Congress and the President to escape accountability for tax increases by compelling citizens to make payments directly to private companies."). *But see* Cooter & Siegel, *supra* note 67, at 1243–44 (disagreeing with those scholars and saying that political accountability for federal exactions usually "turns on who must pay and how much they must pay, not on the exaction's name").

[95] *See NFIB*, 132 S. Ct. at 2595 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)). The Court relied on its 1935 decision in *United States v. Constantine* for this point, in which it wrestled with the question of whether a $1000 exaction required for trafficking liquor after the repeal of the Eighteenth Amendment was a tax or a penalty. *See* 296 U.S. at 294. As part of its analysis, the Court stated that if the exaction was "in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name." *See id.* (holding that the tax was in fact a penalty and beyond the limits of Congress's Taxing Power to enact); *see also* United States v. Sotelo, 436 U.S. 268, 275 (1978) (stating that the fact "[t]hat the funds due are referred to as a 'penalty' when the Government later seeks to recover them does not alter their essential character as taxes"); License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866) (holding that the grant of certain federal licenses to sell alcohol and lottery tickets "must be regarded as nothing more than a mere form of imposing a tax").

[96] *See NFIB*, 132 S. Ct. at 2595.

[97] *See id.* at 2594.

the payment for failing to purchase health insurance must be paid into the U.S. Treasury by individuals when they file their annual federal income tax returns.[98] Second, the individual mandate does not apply to individuals who do not pay any federal income tax.[99] Third, the Court stated that the amount that uninsured individuals must pay the IRS is affected by their taxable income, number of dependents, and tax filing status.[100] Fourth, on a similar note, the ACA's individual mandate provision is contained within the I.R.C. itself.[101] Fifth, the Court noted that the IRS is responsible for enforcing the shared responsibility payment collection process, which it must do "in the same manner as taxes."[102] Sixth, the Court stated that the collection process for the shared responsibility payments bears the essential characteristic of a tax: producing revenue for the government.[103]

Moreover, the Court emphasized three of the shared responsibility payment's characteristics.[104] First, the Court held that the exaction did not impose an "exceedingly heavy burden" because the cost of the shared responsibility payment will likely be much less than the price of an insurance premium for an

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[98] *Id.*; *see* I.R.C. § 5000A(b)(2) (2012) ("Any *penalty* imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month." (emphasis added)).

[99] *NFIB*, 132 S. Ct. at 2594 (citing I.R.C. § 5000A(e)(2)). Some individuals are not required to pay federal income tax because their total income for the year does not meet the "filing threshold" contained in the I.R.C. *Id.*; *see also* I.R.C. § 6012(a)(1) (2012) (detailing who is required to file a federal income tax return). An individual's filing threshold generally can be calculated by adding the individual's personal exemption amount to the standard deduction applicable to that individual. *See* I.R.C. § 6012(a)(1)(A).

[100] *NFIB*, 132 S. Ct. at 2594 (citing I.R.C. § 5000A(b)(3), (c)(2), (c)(4)).

[101] *Id.*; *see* I.R.C. § 5000A.

[102] *See NFIB*, 132 S. Ct. at 2584, 2594.

[103] *See id.* at 2594 (citing United States v. Kahriger, 345 U.S. 22, 28 & n.4 (1953), *overruled in part by* Marchetti v. United States, 390 U.S. 39 (1968)). The Court also referenced a report by the Congressional Budget Office (CBO) that estimated that the annual revenue raised from shared responsibility payments will total approximately $4 billion by 2017. *See id.* at 2594 (citing CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010) [hereinafter 2010 CBO REPORT], *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/individual_mandate_penalties-04-30.pdf, *archived at* http://perma.cc/7MX8-ULRV). According to a February 2014 estimate by the CBO, revenue from shared responsibility payments between 2015 and 2024 will total $52 billion. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024, at 111 (2014) [hereinafter 2014 CBO REPORT], *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-Outlook2014_Feb.pdf, *archived at* http://perma.cc/R66P-5QDZ.

[104] *See id.* at 2595 (citing Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 36–37 (1922)). The Court relied on its 1922 decision in the *Child Labor Tax Case* for this point, in which it held that a statute imposing a 10% tax on employers utilizing child labor was in fact functioning as a penalty and thus not a valid exercise of Congress's Taxing Power. *Id.* (citing *Child Labor Tax Case*, 259 U.S. at 36–37).

individual.[105] Second, the Court noted that the ACA's individual mandate does not have a "scienter requirement."[106] Third, the IRS enforces and assesses shared responsibility payments through normal methods of federal taxation.[107] Thus, the Court concluded that the shared responsibility payment's "practical characteristics" support its conclusion that the exaction could reasonably be interpreted as a tax despite its congressional label as a penalty.[108]

C. Further Effects-Based Analysis of the Tax vs. Penalty Dichotomy

Because the *NFIB* Court was dealing with a constitutional question and not a purely interpretive one, its functional approach is not dispositive in the determination of whether I.R.C. § 4980H's assessable payment is a tax or a penalty in light of the OMB's federal award cost principles.[109] As such, addi-

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[105] *Id.* at 2595–96 & n.8 (analyzing figures provided in a report to Congress estimating that, in 2016, individuals making $100,000 annually would likely owe about $200 monthly in shared responsibility payments if they choose not to purchase insurance, whereas an insurance premium for a qualifying plan is estimated to be roughly $400 monthly). The Court even stated that, because the amount of the shared responsibility payment was so low when compared to the estimated cost of an individual's insurance premium, failing to purchase insurance and making the requisite shared responsibility payment could be a "reasonable financial decision." *Id.* at 2596.

[106] *Id.* at 2595; *see Child Labor Tax Case*, 259 U.S. at 37 ("[I]t is only where [an employer] knowingly departs from the prescribed course that payment is to be exacted."). Scienter requirements are usually associated with punitive statutes because legislative bodies often only want to punish individuals who choose to break the law. *NFIB*, 132 S. Ct. at 2595; *see Child Labor Tax Case*, 259 U.S. at 37 ("Scienters are associated with penalties, not with taxes.").

[107] *See NFIB*, 132 S. Ct. at 2595. The Court also emphasized that the IRS is prohibited by the ACA from subjecting taxpayers who fail to make their shared responsibility payments on time "to any criminal prosecution or [additional] penalty with respect to such failure." *Id.* at 2596; *see* I.R.C. § 5000A(g)(2) (2012). In the *Child Labor Tax Case*, however, the tax was enforceable by the Department of Labor, which is typically responsible for labor law violations, rather than the IRS, which is responsible for tax revenue collection. *See* 259 U.S. at 37. This fact bolstered the Court's conclusion that the exaction in the *Child Labor Tax Case* was a penalty and not a tax. *See id.* at 37–38.

[108] *See NFIB*, 132 S. Ct. at 2600–01 (stating that the shared responsibility payment "pass[es] muster as a tax under [the Court's] narrowest interpretations of the taxing power").

[109] *See id.* at 2595 (noting that "the shared responsibility payment may *for constitutional purposes* be considered a tax, not a penalty" (emphasis added)); 2 C.F.R. §§ 200.441, 200.470 (2014) (allowing federal awards to be used for taxes, but not for fines and penalties). The three characteristics articulated by the *NFIB* Court are similar to three characteristics articulated by two legal scholars to distinguish taxes from penalties when not confronted with a constitutional challenge. *See* Cooter & Siegel, *supra* note 67, at 1229–30. Under the theory of these scholars, the constitutional test for distinguishing taxes and penalties should focus on the exaction's effect on the conduct of the people governed by the law. *See id.* at 1229 & n.163. In other words, the test is "whether [the exaction] dampens or prevents conduct." *See id.* at 1230 (stating that exactions that dampen conduct raise significant revenues and exactions that prevent conduct do not raise such revenues). Alternatively, these scholars have formulated three useful questions to ask about the "material characteristics of an exaction" in order to determine—when not confronted with constitutional issues—whether a particular exaction is a penalty or a tax. *See id.* First, one must ask: "[i]s the amount of the exaction so high that it exceeds the ex-

tional analysis of the material characteristics of an exaction is prudent to determine whether the assessable payment is a tax or a penalty.[110] These material characteristics include the language used by a legislative body in describing the exaction, the exaction's magnitude, and the exaction's conditions.[111]

One way to distinguish a penalty from a tax is the language that a legislative body uses to describe the exaction and the relevant conduct it seeks to regulate.[112] The specific language that a legislative body uses expresses a value judgment about the conduct it sought to influence.[113] Penalties are exactions imposed as a means of punishment "for an unlawful act or omission."[114] In contrast, the language describing taxed conduct does not forbid or condemn the conduct as the language describing penalized conduct does.[115] Rather, the

pected benefit from engaging in the assessed conduct for almost everyone?" *Id.* This first question closely aligns with the first characteristic analyzed by the *NFIB* Court: whether the tax imposes an "exceedingly heavy burden." *See* 132 S. Ct. at 2595. Second, one must ask: "[d]oes the exaction's amount depend on whether the assessed individual has a certain mental state, especially the intention to perform the assessed conduct?" Cooter & Siegel, *supra* note 67, at 1230. This second question speaks to the same idea as the *NFIB* Court's second characteristic: the scienter requirement. *See* 132 S. Ct. at 2595. Third, one must ask: "[d]oes the amount of the exaction increase with repetition of the assessed conduct?" *See* Cooter & Siegel, *supra* note 67, at 1230. This third inquiry is where the scholars' three criteria differ from the *NFIB* Court's. *Compare NFIB*, 132 S. Ct. at 2595–96 (focusing on who collects the exaction as the third prong of its functional analysis), *with* Cooter & Siegel, *supra* note 67, at 1230 (focusing on whether an exaction's amount increases with repetition of the conduct). Answering "yes" to each of the scholars' three questions means the exaction probably seeks to prevent conduct and is thus a penalty. *See* Cooter & Siegel, *supra* note 67, at 1231. Conversely, answering "no" to each question means the exaction probably just dampens behavior and raises money for the government, so the exaction is a tax. *See id.* The scholars' three criteria correctly predicted the result in *NFIB*, and may also be used to characterize I.R.C. § 4980H's assessable payment as a tax or a penalty. *See id.* at 1231, 1241 (stating that "[t]he alignment of these material characteristics can decide many cases, including the ACA's minimum insurance requirement").

[110] *See NFIB*, 132 S. Ct. at 2596–2601 (further analyzing the tax versus penalty issue with respect to the individual mandate); Cooter & Siegel, *supra* note 67, at 1222–23 (discussing a variety of ways to distinguish taxes from penalties).

[111] *See* Cooter & Siegel, *supra* note 67, at 1222–23 ("Regulations backed by penalties and taxes often have distinct characteristics.").

[112] *Id.*

[113] *See id.*

[114] *See NFIB*, 132 S. Ct. at 2596 (quoting United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)); United States v. La Franca, 282 U.S. 568, 572 (1931) ("A 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."). Some examples of condemning language used in penalties include: "wrong," "penalty," "punishment," or "ought not to." *See* Cooter & Siegel, *supra* note 67, at 1222 (giving criminal fines, regulatory fines, and punitive damages awarded in some civil lawsuits as examples of penalties).

[115] *See* Cooter & Siegel, *supra* note 67, at 1222. Some examples of language used in taxes are "permitted," "allowed," or "neither required nor forbidden." *See id.*

law explicitly permits individuals to engage in the taxed conduct as long as they pay the tax.[116]

In *NFIB*, the Court stated that the ACA's individual mandate provision, I.R.C. § 5000A, did not punish unlawful conduct.[117] In reaching this conclusion, the Court rejected the plaintiffs' argument that the ACA's mandate that individuals "shall" buy health insurance or pay a "penalty" required a finding that I.R.C. § 5000A punished unlawful conduct.[118] Rather, the Court reasoned that I.R.C. § 5000A was enacted for the purpose of inducing uninsured individuals to purchase health insurance.[119] The Court noted that neither the ACA, nor any other statute, attached any negative legal consequences on the failure to purchase health insurance beyond requiring the individual to make a payment to the IRS.[120] Thus, the Court reasoned that the ACA's shared responsibility payment merely imposes a tax that an individual may lawfully decide to pay in lieu of purchasing health insurance.[121]

In addition to the language a legislative body uses in enacting an exaction, the exaction's "magnitude and conditions" may also be used to interpret

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[116] *See id.* For example, the federal income tax provisions of the I.R.C. do not condemn earning income; they simply require payment of a certain percentage to the IRS. *See* I.R.C. § 1 (2012 & Supp. I 2013); Cooter & Siegel, *supra* note 67, at 1222. Other examples of taxes on lawful conduct include "tariffs, excises, head taxes, and property taxes." Cooter & Siegel, *supra* note 67, at 1223 & n.146. Additionally, individuals often infer permission to engage in the conduct described in the statute in the absence of an express prohibition of that conduct. *See id.* at 1222.

[117] *See* 132 S. Ct. at 2597.

[118] *See id.* (citing New York v. United States, 505 U.S. 144, 169 (1992)). The statute that the Court considered in its 1992 decision in *New York v. United States* stated that "[e]ach State shall be responsible for providing . . . for the disposal of . . . low-level radioactive waste." 505 U.S. at 169 (quoting 42 U.S.C. § 2021c(a)(1)(A) (2006)). The Court interpreted the relevant statute to impose a "series of incentives" for each state to take responsibility for its own radioactive waste. *See id.* at 170, 173–74 (discussing the statute's two sets of incentives that Congress granted to the states: (1) conditioning grants on the state's achievement of certain "milestones;" and (2) authorizing cost increases for disposal site use, followed by denial of access to the sites, to states that do not meet the prescribed federal requirements).

[119] *See NFIB*, 132 S. Ct. at 2597.

[120] *See id.* (stating that the government agreed with the Court's conclusion in its brief, noting that if individuals chose to make a shared responsibility payment rather than buy health insurance, "they have fully complied with the law").

[121] *See id.* The *NFIB* Court noted that, in 2010, the CBO estimated that roughly four million individuals would decide to pay the shared responsibility payment instead of buying health insurance. *See id.* (citing 2010 CBO REPORT, *supra* note 103). On September 19, 2012, however, the CBO issued a report which significantly increased its estimate of how many people will pay the penalty in lieu of purchasing health insurance. *See* CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT 1–3 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/09-19-12-Indiv_Mandate_Penalty.pdf, *archived at* http://perma.cc/U8ZN-QF2W. Together with the Joint Committee on Taxation, the CBO estimated that in 2016 just under six million people will choose to pay a penalty because they do not have health insurance, an increase of 50% from the CBO's prior estimate. *See id.* at 1.

whether it is a penalty or a tax.[122] Penalty amounts are usually high in relation to the gain an individual might receive from engaging in the prohibited conduct.[123] As a result, a rational, self-interested individual will typically choose not to engage in the prohibited conduct.[124] Because an individual acting irrationally may continue engaging in the prohibited conduct despite the requisite exaction, a penalty's magnitude sometimes increases for intentional or multiple offenses.[125] Conversely, tax amounts are usually low in relation to the gain an individual derives from engaging in the taxed conduct.[126] Similarly, a tax rate does not progressively increase for an individual who intentionally or repeatedly engages in the taxed conduct.[127]

Viewed in this light, both the magnitude and conditions of I.R.C. § 5000A support the *NFIB* Court's conclusion that the exaction was a tax and not a penalty.[128] The amount of a shared responsibility payment is not overly burdensome on individuals when compared to the cost of their health insurance premiums.[129] Additionally, the amount of an individual's shared responsibility payment does not increase for multiple offenses.[130] Congress even granted individuals an exemption from their shared responsibility payments during short periods of up to three months where they are uninsured.[131] Thus, the expressive

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[122] *See* Cooter & Siegel, *supra* note 67, at 1222.

[123] *See id.*

[124] *See id.* at 1222 & n.145.

[125] *See id.* at 1222 ("Thus an unintentional tort may trigger liability for actual harm, whereas doing the same act intentionally may trigger punitive damages.").

[126] *See id.* at 1223.

[127] *See id.* at 1223 & n.147 ("Earning income intentionally does not affect the income tax rate, and the income tax rate does not change just because someone earns income year after year.")

[128] *See* I.R.C. § 5000A(c) (2012); *NFIB*, 132 S. Ct. at 2601.

[129] *See* I.R.C. § 5000A(c)(3)(A) (stating that the "applicable dollar amount," the total yearly payment for not having health insurance, is $695, which is roughly $58 per month); *supra* note 105 and accompanying text (comparing estimated shared responsibility payments of approximately $200 per month for individuals making over $100,000 annually to an estimated health insurance premium cost of $400 per month in 2016). Congress set the "applicable dollar amount" at $695, but this amount does not apply until 2016. *See* I.R.C. § 5000A(c)(3)(B). Rather, Congress saw fit to ease people into the ACA's individual mandate and thus capped the yearly payment amount to $95 per individual in 2014 and $325 per individual in 2015. *See id.*

[130] *See id.* § 5000A(c); Cooter & Siegel, *supra* note 67, at 1242–43 (noting that the amount of each shared responsibility payment under I.R.C. § 5000A does not progressively increase if an individual does not purchase health insurance year after year). Rather, any increases in shared responsibility payment amounts come from the phase-in provisions of the ACA (effective until 2016) or from cost-of-living adjustments in calendar years after 2016. *See* I.R.C. § 5000A(c)(3)(B), (D) (specifying that the cost-of-living adjustment shall be determined by multiplying $695 by the Consumer Price Index).

[131] *See* I.R.C. § 5000A(e)(4) (stating that if an individual has more than one of these three-month coverage gaps in a given calendar year, the exemption applies only to the months in the first exemption period).

language, magnitude, and conditions of the ACA's shared responsibility payment all support the *NFIB* Court's conclusion that I.R.C. § 5000A can reasonably be interpreted as a tax despite its "penalty" label.[132]

IV. SECTION 4980H'S ASSESSABLE PAYMENT SHOULD BE CONSIDERED A TAX FOR FEDERAL AWARD COST PRINCIPLES

Using the methods for distinguishing taxes from penalties articulated both by the Supreme Court in its 2012 decision in *National Federation of Independent Business v. Sebelius* (*NFIB*) and by legal scholars, the assessable payment imposed by I.R.C. § 4980H should be considered a tax, not a penalty, under the OMB's federal award cost principles.[133] Like the shared responsibility payment that the Court wrestled with in *NFIB*, I.R.C. § 4980H's assessable payment, despite its ambiguous label, bears many similarities to a tax.[134] Under the *NFIB* Court's functional approach for distinguishing taxes from penalties for constitutional purposes, an assessable payment should be considered a tax.[135] Additionally, the material characteristics of an assessable payment support the conclusion that it should be considered a tax.[136]

Section A examines the ways in which an assessable payment looks like a tax.[137] Section B then applies the *NFIB* Court's functional approach to conclude that an assessable payment should be considered a tax.[138] Section C reaches the same conclusion by analyzing an assessable payment's material characteristics.[139]

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[132] *See id.*; *NFIB*, 132 S. Ct. at 2595–97, 2601; Cooter & Siegel, *supra* note 67, at 1247 (concluding that because I.R.C. § 5000A is predicted to "dampen uninsured behavior, not to prevent it, it is a tax equivalent for purposes of Congress's tax power"); *supra* notes 81–131 and accompanying text.

[133] I.R.C. § 4980H (2012); Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2594–97 (2012); 2 C.F.R. § 200.470 (2014); Cooter & Siegel, *supra* note 67, at 1241–43; *infra* notes 134–171 and accompanying text (applying the tests to distinguish taxes from penalties set forth by both the Supreme Court and legal scholars and concluding that the assessable payment should be considered a tax).

[134] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2594; *infra* notes 140–147 and accompanying text.

[135] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2594–96; Cooter & Siegel, *supra* note 67, at 1248–52; *infra* notes 148–160 and accompanying text.

[136] *See* I.R.C. § 4980H; Cooter & Siegel, *supra* note 67, at 1241–47; *infra* notes 161–171 and accompanying text.

[137] *See infra* notes 140–147 and accompanying text.

[138] *See infra* notes 148–160 and accompanying text.

[139] *See infra* notes 161–171 and accompanying text.

A. If It Looks Like a Tax, Swims Like a Tax, and Quacks Like a Tax, Then It Probably Is a Tax

An assessable payment imposed by I.R.C. § 4980H, like the ACA's individual mandate exaction the *NFIB* Court examined, "looks like a tax in many respects."[140] First, large employers that fail to provide affordable health insurance to their employees must pay their assessable payments into the U.S. Treasury just as they pay their other taxes.[141] Second, I.R.C. § 4980H is located in the I.R.C.[142] Third, the IRS performs its assessment and collection of assessable payments "in the same manner as taxes."[143] Fourth, the collection process for assessable payments will produce significant revenue for the government when I.R.C. § 4980H becomes effective.[144]

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[140] *See* I.R.C. § 4980H (2012); *NFIB*, 132 S. Ct. at 2594.

[141] *See* I.R.C. § 4980H(d) (discussing payment "upon notice and demand by the Secretary" and the Secretary's discretion to provide for payment on an "annual, monthly, or other periodic basis"); *NFIB*, 132 S. Ct. at 2594–95 (discussing how individuals pay their shared responsibility payments into the U.S. Treasury "when they file their tax returns").

[142] I.R.C. § 4980H; *see NFIB*, 132 S. Ct. at 2594.

[143] I.R.C. § 6671(a) (2012); *see id.* § 4980H(d)(1) (stating—in almost identical language to I.R.C. § 5000A(g)(1) relating to assessment and collection of the ACA's individual mandate exaction—that an "assessable payment . . . shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," which includes I.R.C. § 6671). The IRS has issued some guidance to employers about the assessable payment collections process. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544, 8566 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, and 301); *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, INTERNAL REVENUE SERV. (last updated Feb. 27, 2014) [hereinafter IRS Q&A], http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act, *archived at* http://perma.cc/4EZG-VFS6. The IRS has stated that it will contact employers to let them know of their "potential liability" and give them an opportunity to respond before officially assessing liability and sending notice and demand for payment. *See* Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. at 8566; IRS Q&A, *supra*. The IRS notice will tell employers how to make their assessable payments, but, unlike an individual making a shared responsibility payment, employers will not include their assessable payments in their tax returns. *Compare* I.R.C. § 5000A(b)(2) (2012) ("Any penalty imposed by this section . . . shall be included with a taxpayer's return . . . for the taxable year . . . ."), *with* IRS Q&A, *supra* ("Employers will not be required to include the [assessable] payment on any tax return that they file.").

[144] *See NFIB*, 132 S. Ct. at 2594 (analyzing CBO estimates for government revenues from the ACA's individual mandate exaction); 2014 CBO REPORT, *supra* note 103, at 111 (estimating that revenues from employers' assessable payments between 2015 and 2024 will total $151 billion); CONG. BUDGET OFFICE, CBO'S FEBRUARY 2013 ESTIMATE OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON HEALTH INSURANCE COVERAGE 2 (2013) [hereinafter 2013 CBO ESTIMATE], *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2013-02-ACA.pdf, *archived at* http://perma.cc/L9PK-GJQ8 (estimating, as of February 2013, that the projected revenue from employers' assessable payments between 2013 and 2023 will total $150 billion).

Additionally, Congress explicitly labeled the assessable payment a "tax" once in I.R.C. § 4980H.[145] This single usage of the "tax" label in I.R.C. § 4980H is significant when compared to Congress's conscious choice to eliminate *all* references to the ACA's individual mandate exaction as a tax in I.R.C. § 5000A.[146] Congress's use of the "tax" label, combined with its decision to assess and collect assessable payments in the same manner as taxes, supports the conclusion that an assessable payment should be considered a tax under the OMB's federal award cost principles.[147]

B. Section 4980H's Assessable Payment Is a Tax Under the NFIB *Court's Three-Pronged Functional Approach*

The *NFIB* Court utilized its three-pronged functional approach to determine that the ACA's individual mandate exaction may be considered a tax for constitutional purposes.[148] Though not directly analogous, applying the same functional approach to I.R.C. § 4980H's assessable payment compels a similar conclusion that it should be viewed as a tax under the OMB's federal award cost principles.[149] An assessable payment meets the first prong of the *NFIB* test because it does not impose an overly heavy burden on employers that do not offer affordable health insurance to their employees.[150] Pursuant to I.R.C. § 4980H, employers face a maximum annual liability per employee of either $2000 (if they do not offer health insurance) or $3000 (if the health insurance they offer is unaffordable).[151] This maximum annual liability under I.R.C. § 4980H pales in comparison to an employer's current cost of providing health

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[145] *See* I.R.C. § 4980H(c)(7) (discussing the nondeductibility of the "tax imposed" by I.R.C. § 4980H); *NFIB*, 132 S. Ct. at 2583 (emphasizing the significance of Congress's decision not to label the ACA's individual mandate exaction as a "tax" because of other provisions in the ACA, like I.R.C. § 4980H, where Congress used the "tax" label).

[146] *See* I.R.C. § 4980H(c)(7) (2012); *NFIB*, 132 S. Ct. at 2583; Liberty Univ. v. Geithner, 671 F.3d 391, 424 (4th Cir. 2011) (Davis, J., dissenting) (discussing the changing congressional labels of ACA exactions), *vacated by* 133 S. Ct. 679 (2012); *supra* notes 29–32 and accompanying text (discussing prior versions of I.R.C. § 4980H in which Congress explicitly labeled the ACA's employer mandate exaction a "tax").

[147] *See* I.R.C. §§ 4980H, 6671; *NFIB*, 132 S. Ct. at 2594; 2 C.F.R. § 200.470 (2014).

[148] *See* 132 S. Ct. at 2595–96; *supra* notes 104–108 and accompanying text (describing the *NFIB* Court's three-pronged functional approach).

[149] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2595–96.

[150] *See* I.R.C. § 4980H(a), (b), (c)(1); *NFIB*, 132 S. Ct. at 2595 (examining whether an exaction imposes an "exceedingly heavy burden").

[151] *See* I.R.C. § 4980H (indexing to inflation future caps on total annual assessable payment amounts per employee); *supra* notes 46–47 and accompanying text (comparing an employer's maximum annual assessable payment with the average annual cost of its share of employee health insurance premiums).

insurance to its employees.[152] Putting aside considerations of employee morale and recruiting, it is likely a "reasonable financial decision" for employers to make assessable payments instead of providing affordable health insurance to their employees.[153] Thus, an assessable payment's burden on large employers is not exceedingly high and satisfies the first prong of the *NFIB* test.[154]

An assessable payment also meets the second prong of the *NFIB* test because I.R.C. § 4980H does not contain a scienter requirement.[155] Regardless of whether an employer makes a conscious decision to not comply with I.R.C. § 4980H's requirements, or simply neglects to, an assessable payment is "imposed" on them.[156] Because I.R.C. § 4980H's imposition of an assessable payment does not hinge on the intentionality of an employer's choice to not provide affordable health insurance, an assessable payment is more like a tax than a penalty.[157]

Finally, an assessable payment satisfies the third prong of the *NFIB* test because the IRS is responsible for assessing and collecting these exactions.[158] Though employers will not be required to include their assessable payments on their federal tax returns, the IRS nonetheless assesses and collects them.[159] Thus, an assessable payment imposed by I.R.C. § 4980H satisfies the *NFIB* Court's three-pronged, functional approach, and, therefore, can reasonably be considered a tax for federal award cost allowance purposes.[160]

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[152] *See* BRANSCOME, *supra* note 47, at 1, 3 (stating that the average annual, per-employee cost of providing health insurance is roughly $4000 for individual plans and $11,000 for family plans).

[153] *See* I.R.C. § 4980H(a), (b) (2012); *NFIB*, 132 S. Ct. at 2596 (comparing the amount of an individual's shared responsibility payment with the price of health insurance); *see also* Tully, *supra* note 46 (discussing AT&T's disclosure that it spends $2.4 billion per year on health coverage for employees and could reduce that number to $600 million if it simply made assessable payments instead).

[154] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2595–96 (emphasizing that the cost of the ACA's individual mandate exaction is relatively low and can never be more than the price of health insurance).

[155] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2596; Cooter & Siegel, *supra* note 67, at 1242 (emphasizing the lack of a "mens rea requirement" in the ACA's individual mandate and stating it does not matter whether declining to obtain health insurance was innocent or intentional).

[156] *See* I.R.C. § 4980H(a), (b).

[157] *See id.* § 4980H; *NFIB*, 132 S. Ct. at 2596–96 (noting that "scienter requirements are typical of punitive statutes" because Congress often desires to punish only intentional violators of the law).

[158] *See* I.R.C. § 4980H(d)(1); *NFIB*, 132 S. Ct. at 2595–96.

[159] IRS Q&A, *supra* note 143 (stating that, after employees' tax returns have been filed, the IRS will provide notice and demand for payment should the employer owe an assessable payment under I.R.C. § 4980H rather than having employers include assessable payments on their tax returns).

[160] *See* I.R.C. § 4980H (2012) (imposing an assessable payment, collected by the IRS, on employers that do not provide affordable health insurance to their employees regardless of their intent); *NFIB*, 132 S. Ct. at 2596 (emphasizing that an exaction imposed by the ACA may "be viewed as a

C. Section 4980H's Assessable Payment Is a Tax in Light of Additional Effects-Based Analysis

Additionally, the material characteristics of an assessable payment—its language, magnitude, and conditions—support the conclusion that the exaction may reasonably be considered a tax.[161] First, Congress used language in I.R.C. § 4980H that does not impose a punishment on employers that do not offer affordable health insurance to their employees.[162] With the ACA's employer mandate, as with its individual mandate, Congress's main policy objective was to "induce the purchase of health insurance."[163] Similar to the ACA's individual mandate provision, I.R.C. § 4980H states that if a large employer "fails to offer" affordable coverage, then an assessable payment is imposed on it.[164] Section 4980H does not impose any other negative legal consequences on employers that do not offer affordable health insurance to their employees.[165] Additionally, the Congressional Budget Office estimates that the number of people covered by employer-provided health insurance will fall by roughly two million in 2015 and six million in 2016.[166] Because of those figures and the lack of punishment in I.R.C. § 4980H, it is doubtful that Congress enacted I.R.C. § 4980H thinking it was making an employer's business decision to not offer affordable insurance unlawful.[167] Therefore, an employer that makes that

tax" despite not being labeled a tax by Congress); 2 C.F.R. § 200.470 (2014) (allowing federal awards to be used for taxes).

[161] *See* I.R.C. § 4980H; *NFIB*, 132 S. Ct. at 2596–97 (stating that Congress's choice of label for an exaction is not controlling when determining whether that exaction is considered a tax or a penalty); Cooter & Siegel, *supra* note 67, at 1222–23 (discussing the differences in the "material characteristics" of taxes and penalties).

[162] *See* I.R.C. § 4980H(a), (b).

[163] *NFIB*, 132 S. Ct. at 2596–97 (stating that the inducement of individuals to purchase health insurance was a clear aim of the ACA's individual mandate); *see* I.R.C. § 4980H(a), (b) (requiring employees to make assessable payments if they do not provide affordable health insurance to their employees); 42 U.S.C. § 18091(2)(D) (Supp. IV 2010) (stating that Congress sought to achieve its goal of ensuring "near-universal [health] coverage by building upon and strengthening the private employer-based health insurance system").

[164] *Compare* I.R.C. § 4980H(a), (b) (imposing an assessable payment on applicable large employers that "fail to offer" affordable health insurance to their employees), *with* I.R.C. § 5000A(a), (b)(1) (2012) (stating that individuals "shall" purchase health insurance or else there is a "penalty" imposed on them).

[165] *See* I.R.C. § 4980H.

[166] *See* 2014 CBO REPORT, *supra* note 103, at 108; 2013 CBO ESTIMATE, *supra* note 144, at 1.

[167] *See NFIB*, 132 S. Ct. at 2597; Cooter & Siegel, *supra* note 67, at 1222 (stating that a law imposing an exaction should be interpreted as imposing a tax when it "explicitly permits the taxed conduct as long as one pays the tax").

business judgment is still acting within the bounds of the law as long as it makes an assessable payment to the IRS.[168]

Moreover, in addition to not imposing a punishment like a penalty would, I.R.C. § 4980H does not impose an excessive financial burden on employers, and the amount employers owe to the IRS does not increase for their continued failure to provide affordable health insurance.[169] Rather, the only increase in future assessable payment amounts will occur because they are indexed for inflation.[170] Thus, the expressive language, magnitude, and conditions of an assessable payment imposed by I.R.C. § 4980H all support the conclusion that the exaction is a tax that employers may lawfully decide to pay in lieu of offering affordable health insurance to their employees.[171]

Conclusion

Congress enacted I.R.C. § 4980H, the ACA's employer mandate provision, explicitly to strengthen the private employer-provided health insurance market in order to achieve its goal of near-universal health coverage. To accomplish this objective, Congress imposed an exaction on large employers that fail to offer affordable health insurance to their employees. Although Congress's stated objectives for I.R.C. § 4980H may be desirable, the specific terminology it used to describe the exaction leaves much to be desired. By changing the label of I.R.C. § 4980H's exaction from "tax" to "assessable payment" during the ACA's revision process, Congress created an ambiguity that now squarely confronts nonprofits and other nonfederal entities receiving federal awards: is the exaction a tax or a penalty?

Section 4980H's assessable payment should be considered a tax for the purpose of determining federal award cost allowances. Despite Congress's efforts to relabel the exaction, there remains one instance in I.R.C. § 4980H where it still refers to the exaction as a "tax." Moreover, I.R.C. § 4980H meets the test articulated by the Supreme Court in *National Federation of Independent Business v. Sebelius* and functions equivalently to a tax: it is cheaper for an

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[168] *See NFIB*, 132 S. Ct. 2596–97 (discussing the government's position that if an individual chooses not to purchase health insurance and pays the requisite ACA exaction instead, they have complied with the law); Cooter & Siegel, *supra* note 67, at 1247 & n.230 (same).

[169] *See* I.R.C. § 4980H(a), (b), (c)(1) (2012).

[170] *See id.* § 4980H(c)(5) (stating each dollar amount discussed earlier in the provision shall be increased by multiplying that dollar amount by a "premium adjustment percentage" in subsequent years).

[171] *See id.* § 4980H; *NFIB*, 132 S. Ct. 2596–2601; *cf.* Cooter & Siegel, *supra* note 67, at 1222–23, 1253 ("The exaction for noninsurance in the [ACA] has the expressive characteristics of a penalty, the material characteristics of a tax, and almost certainly will have the effect of a tax. . . . In these circumstances, the exaction's name should make no difference . . . .").

employer to make an assessable payment than to provide affordable health insurance, there is no scienter requirement, and the IRS is responsible for its enforcement. Congress did not intend I.R.C. § 4980H to legally punish an employer's failure to offer affordable health coverage, nor did it increase the amount an employer owes for repeated noncompliance. Rather, Congress sought to shape employer conduct by incentivizing them to offer affordable health insurance. Thus, both the functionality and characteristics of assessable payments are consistent with those of taxes—not penalties. Considering an assessable payment imposed by I.R.C. § 4980H to be a tax has an additional benefit: it prevents Congress from playing legislative word games in order to escape political accountability for raising taxes.

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