

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

DAN BURTON, INDIANA
JOHN L. MICA, FLORIDA
TODD RUSSELL PLATTS, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
PATRICK McHENRY, NORTH CAROLINA
JIM JORDAN, OHIO
JASON CHAFFETZ, UTAH
CONNIE MACK, FLORIDA
TIM WALBERG, MICHIGAN
JAMES LANKFORD, OKLAHOMA
JUSTIN AMASH, MICHIGAN
ANN MARIE BUERKLE, NEW YORK
PAUL A. GOSAR, D.D.S., ARIZONA
RAUL A. LABRADOR, IDAHO
PATRICK MEEHAN, PENNSYLVANIA
SCOTT DesJARLAIS, M.D., TENNESSEE
JOE WALSH, ILLINOIS
TREY GOWDY, SOUTH CAROLINA
DENNIS A. ROSS, FLORIDA
BLAKE FARENTHOLD, TEXAS
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051

<http://oversight.house.gov>

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

EDOLPHUS TOWNS, NEW YORK
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
DENNIS J. KUCINICH, OHIO
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
STEPHEN F. LYNCH, MASSACHUSETTS
JIM COOPER, TENNESSEE
GERALD E. CONNOLLY, VIRGINIA
MIKE QUIGLEY, ILLINOIS
DANNY K. DAVIS, ILLINOIS
BRUCE L. BRALEY, IOWA
PETER WELCH, VERMONT
JOHN A. YARMUTH, KENTUCKY
CHRISTOPHER S. MURPHY, CONNECTICUT
JACKIE SPEIER, CALIFORNIA

October 17, 2012

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue
Washington D.C. 20515

Dear Madam Secretary:

We are writing to you about the department's failure to provide information that the Committee on Oversight and Government Reform requested two and a half months ago. Our request pertains to the Committee's oversight of the Department of Health and Human Services' (HHS) Medicare Advantage Quality Bonus Payment Demonstration (Demonstration).¹ On July 25, 2012, the Committee held a hearing on the Demonstration where the Committee heard experts from the Government Accountability Office (GAO) discuss the Demonstration's many flaws and recommend its cancellation.² Moreover, GAO's legal experts concluded you exceeded your legal authority by authorizing this Demonstration.³

After the Committee's hearing, we sent you a letter on August 1, 2012, asking for detailed information about the Demonstration and your decision to waive long-standing rules governing demonstration projects to conduct this particular one.⁴ Since you had also failed to provide documents in response to the Committee's first letter from May 23, 2012, regarding the flawed Demonstration,⁵ we incorporated our request from our May letter into the August letter. We requested a response by August 13, 2012.⁶ You failed to produce any information by August 17, 2012, so Committee staff sent an email to two separate HHS staff members that same day,

¹ 75 Fed. Reg. 71190, 71220 (Nov. 22, 2010).

² *GAO Report: The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project*: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012).

³ *Id.*

⁴ Letter from Darrell Issa, Chairman of the Committee on Oversight and Government Reform, and James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform to Kathleen Sebelius, HHS Secretary (August 1, 2012).

⁵ Letter from Darrell Issa, Chairman of the Committee on Oversight and Government Reform to Kathleen Sebelius, HHS Secretary (May 23, 2012). (on file with Committee).

⁶ Letter from Darrell Issa, Chairman of the Committee on Oversight and Government Reform, and James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform to Kathleen Sebelius, HHS Secretary (August 1, 2012) (on file with Committee).

asking for an update.⁷ HHS staff did not respond to Committee staff for several additional weeks.

Seven weeks after we sent our letter to you, Committee staff requested that HHS staff provide the Committee with an update of HHS's response and the requested document production.⁸ HHS's Deputy Director for Oversight and Investigation responded, "I'm checking on the status and will get back to you."⁹ Yet, once again, HHS staff failed to provide Committee staff with an update. Because of HHS's failure to provide the Committee with the requested information or respond to the inquiries of Committee staff, we sent you a follow-up letter on September 27, 2012, which asked for all the requested documents and information by October 5, 2012.¹⁰

In response to the Committee's letter, HHS staff emailed Committee staff on September 27, 2012, with the following message: "Folks here and at CMS have been working hard to pull documents together that are responsive to your boss's request and we plan to get you what we can asap."¹¹

On October 3, 2012, Committee staff asked HHS staff if the Committee would receive the requested information by the October 5, 2012, deadline.¹² HHS staff replied later in the day, "Actually we're aiming for tomorrow. The copying machines are working overtime."¹³ At the

⁷ Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (August 17, 2012) (on file with Committee); Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kevin Barstow, Staff Member, Department of Health and Human Services (August 17, 2012) (on file with Committee).

⁸ Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (September 24, 2012) (on file with Committee).

⁹ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (September 24, 2012) (on file with Committee).

¹⁰ Letter from Darrell Issa, Chairman of the Committee on Oversight and Government Reform, and James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform to Kathleen Sebelius, HHS Secretary (September 26, 2012) (on file with Committee).

¹¹ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (September 27, 2012) (on file with Committee).

¹² Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (October 3, 2012) (on file with Committee).

¹³ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (October 3, 2012) (on file with Committee).

end of the day on October 4, 2012, in response to another inquiry from Committee staff,¹⁴ HHS staff replied, “[J]ust checked. Unfortunately, it looks like tomorrow they’ll get it you.”¹⁵

HHS did not meet the October 5, 2012, deadline, however, and Committee staff called HHS staff on October 9, 2012, inquiring about your failure to produce the requested documents.¹⁶ Late in the day on October 9, 2012, HHS staff emailed the Committee, “The day got away from me once I got in but I realize I owe you an update from our call this morning. It looks like we’ve made some progress but I should know more in a day or two.”¹⁷

On October 10, 2012, Committee staff emailed HHS staff reminding HHS how long this process had been dragged out: “Just a reminder that the Committee’s original request for this information was August 1st, over ten weeks ago. Yesterday, you indicated the Committee would receive the requested information early this week. Do you now think it will be later in the week?”¹⁸ Once again, HHS staff promised the information would be forthcoming within a few days, emailing the Committee, “We’re still working on this and I do think [the] end of the week is doable. Could we touch base tomorrow?”¹⁹

On October 12, 2012, the Committee asked whether the production would arrive by the end of the day and HHS staff replied, “I’ve got my fingers and toes crossed.”²⁰ HHS did not produce the information by the end of the day, so Committee staff called HHS staff on October 15, 2012, to ask for an explanation for the hold-up.²¹ In reply, HHS staff said that the Committee had a right to these materials and the issues raised by the Committee were important, but she would no longer specify a timetable for when the Committee would receive the documents.²²

¹⁴ Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (October 4, 2012) (on file with Committee).

¹⁵ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (October 4, 2012) (on file with Committee).

¹⁶ Phone call between Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform and Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (October 9, 2012).

¹⁷ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (October 9, 2012) (on file with Committee).

¹⁸ Email from Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform, to Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (October 10, 2012) (on file with Committee).

¹⁹ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (October 10, 2012) (on file with Committee).

²⁰ Email from Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services to Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform (October 12, 2012) (on file with Committee).

²¹ Phone call between Brian Blase, Professional Staff Member for Committee on Oversight and Government Reform and Kristine Blackwood, Deputy Director for Oversight and Investigations, Department of Health and Human Services (October 15, 2012).

²² *Id.*

Your staff has run out of excuses and the long delay in providing these documents is inexcusable. The American people deserve a federal government that is transparent and forthcoming. Your reluctance to provide the Committee with these documents suggests that the documents and communications do not justify the Administration's assertion that there is no limit to what the Secretary of HHS can spend on demonstrations, the Administration's decision to exempt this Demonstration from long-established budget neutrality rules, or the Administration's decision to waive the requirement for an evaluation by a statistical expert for this Demonstration, among other unsupported assertions. Since GAO experts testified the Demonstration's design makes it impossible for the project to "demonstrate anything,"²³ we are concerned that the only plausible explanation for the Demonstration is that you decided to utilize a loophole in the Social Security Act to temporarily cover up Obamacare's large cuts to the 13 million seniors enrolled in Medicare Advantage until after this year's election.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. If the Committee does not receive all the information and documents requested in our August 1, 2012, letter, reiterated in our September 27, 2012, letter, and listed below by 5:00 p.m., October 18, 2012, the Committee will move ahead with the use of compulsory process.

1. All documents and communications referring or relating to limits on what the Secretary of HHS can spend on demonstration projects under Section 402(a)(1)(A) of the Social Security Act.
2. All documents and communications referring or relating to the decision to exempt this Demonstration from CMS's own budget neutrality rules.
3. All documents and communications referring or relating to Section 402(b)'s requirement that CMS obtain the evaluation of a statistical expert for demonstration projects.
4. All documents and communications referring or relating to the decision to implement this Demonstration as a three-year project that ends the MA [Medicare Advantage] on December 31, 2014.
5. The documents you submitted to the Committee on July 25, 2012, are not fully compliant with the May 23, 2012, written request.²⁴ Since your submission included only two emails from August 2010, there clearly remains substantial communications between CMS, HHS, MedPAC, OMB, and health insurance companies that you and your agency have chosen not to disclose. Therefore, please provide all documents

²³ GAO Report: *The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project*: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012)

²⁴ Letter from Darrell Issa, Chairman of the Committee on Oversight and Government Reform to Kathleen Sebelius, HHS Secretary (May 23, 2012) (on file with Committee).

The Honorable Kathleen Sebelius
October 17, 2012
Page 5

and communications between and among any executive branch employees that refer or relate to the Demonstration from March 23, 2010, to the present.

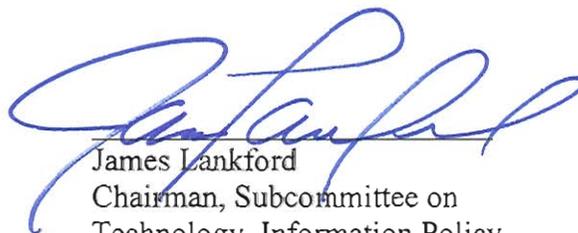
When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Brian Blase with the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



James Lankford
Chairman, Subcommittee on
Technology, Information Policy,
Intergovernmental Relations and
Procurement Reform

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Gerald E. Connolly, Ranking Minority Member
Subcommittee on Technology, Information Policy, Intergovernmental Relations and
Procurement Reform

DAN BURTON, INDIANA
JOHN L. MICA, FLORIDA
TODD RUSSELL PLATT, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
PATRICK McHENRY, NORTH CAROLINA
JIM JORDAN, OHIO
JASON CHAFFETZ, UTAH
CONNIE MACK, FLORIDA
TIM WALBERG, MICHIGAN
JAMES LANKFORD, OKLAHOMA
JUSTIN AMASH, MICHIGAN
ANN MARIE BUERKLE, NEW YORK
PAUL A. GOSAR, D.D.S., ARIZONA
RAUL R. LABRADOR, IDAHO
PATRICK MEEHAN, PENNSYLVANIA
SCOTT DESJARLAIS, M.D., TENNESSEE
JOE WALSH, ILLINOIS
TREY GOWDY, SOUTH CAROLINA
DENNIS A. ROSS, FLORIDA
FRANK C. GUINTA, NEW HAMPSHIRE
BLAKE FARENTHOLD, TEXAS
MIKE KELLY, PENNSYLVANIA

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

FACSIMILE (202) 225-3974

MINORITY (202) 225-5051

<http://oversight.house.gov>

EDOLPHUS TOWNS, NEW YORK
CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
DENNIS J. KUCINICH, OHIO
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
STEPHEN F. LYNCH, MASSACHUSETTS
JIM COOPER, TENNESSEE
GERALD E. CONNOLLY, VIRGINIA
MIKE QUIGLEY, ILLINOIS
DANNY K. DAVIS, ILLINOIS
BRUCE L. BRALEY, IOWA
PETER WELCH, VERMONT
JOHN A. YARMUTH, KENTUCKY
CHRISTOPHER S. MURPHY, CONNECTICUT
JACKIE SPEIER, CALIFORNIA

LAWRENCE J. BRADY
STAFF DIRECTOR

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.