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House of Representatives

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November 30, 2012

The Honorable Douglas Elmendorf
Director
Congressional Budget Office
Ford House Office Building, 4th Floor
Second and D Streets, SW
Washington, D.C. 20515-6925

Dear Mr. Elmendorf:

The Committee on Oversight and Government Reform is conducting oversight of the implementation of the Patient Protection and Affordable Care Act (PPACA).¹ In May of 2012, the Internal Revenue Service (IRS) and the Treasury Department issued a final rule (rule) that will extend PPACA's premium-assistance tax credits to individuals who purchase insurance in exchanges established by the federal government.² Outside experts believe the rule violates the law.³ A review by legal experts at the Congressional Research Service found that "[t]he plain language of Section 36B suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange established by the State.'"⁴ CRS's experts noted:

[A] strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid.⁵

¹ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111-152 § 1401, 124 Stat. 119, 213.

² Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012).

³ Jonathan Adler and Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, Case Research Paper Series in Legal Studies Working Paper 2012-27 (July 2012).

⁴ Jennifer Staman and Todd Garvey, CONG. RESEARCH SERV., Memorandum, LEGAL ANALYSIS OF AVAILABILITY OF PREMIUM TAX CREDITS IN STATE AND FEDERALLY CREATED EXCHANGES PURSUANT TO THE AFFORDABLE CARE ACT, (July 23, 2012).

⁵ *Id.*

Treasury officials are using Congressional Budget Office (CBO) assumptions as a defense of the rule. In a letter to the Committee on October 12, 2012, the Assistant Secretary at Treasury for Tax Policy, Mark Mazur, wrote, "Our interpretation is consistent with the explanation of the ACA released by the non-partisan Congressional Joint Committee on Taxation and with the assumptions made by the Congressional Budget Office in estimating the effects of the ACA."⁶ Moreover, at a Congressional briefing on November 2, 2012, Committee staff asked Treasury officials the relevant components of the legislative history that supported IRS's rule. The only response given by Treasury officials to the question was the CBO and JCT estimates of the bill.

CBO employees, who were involved with estimating the budgetary impact of PPACA, however, informed Committee staff that CBO never prepared a separate legal analysis or assessment of whether PPACA's tax credits would be available in states that failed to create their own health insurance exchanges.⁷ Moreover, CBO staff informed Committee staff that CBO used the same assumption about the availability of the premium tax credits for residents in every state for all the earlier House and Senate bills that preceded PPACA.⁸ Staff for the Joint Committee on Taxation (JCT) informed Committee staff that its experts also never prepared a legal opinion of whether PPACA's tax credits would be available in states that failed to create their own health insurance exchanges.⁹

In order to assist the Committee's continued oversight of the rule, I respectfully request a description and explanation of CBO's assumption that the premium assistance tax credits would be available in every state in the cost estimate of H.R. 4872 released on March 19, 2010.

Please contact Brian Blase with the Committee on Oversight and Government Reform staff at 202-225-5074 if you have questions about this request. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

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

⁶ Letter from Mark Mazur, Assistant Secretary (Tax Policy) of Treasury of the Department of Treasury, to Darrell Issa, Chairman of the Committee on Oversight and Government Reform, October 12, 2012.

⁷ Email exchange between staff of the Committee on Oversight and Government Reform and staff of the Congressional Budget Office, September 26, 2012.

⁸ Phone conversation between staff of the Committee on Oversight and Government Reform and staff of the Congressional Budget Office, November 13, 2012.

⁹ Phone conversation between staff of the Committee on Oversight and Government Reform and staff of the Joint Committee on Taxation, September 28, 2012.