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# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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WASHINGTON, DC 20515-6143

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April 19, 2013

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LAWRENCE J. BRADY  
STAFF DIRECTOR

The Honorable Kathleen Sebelius  
Secretary  
Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Dear Madam Secretary:

The Committee on Oversight and Government Reform is conducting oversight of the implementation of the Patient Protection and Affordable Care Act, also known as Obamacare. We write to you today for information about the funding sources your agency plans to use for establishing and operating the federally facilitated health insurance exchanges (FFEs). According to *Politico*, you and public affairs officials from the Department of Health and Human Services told reporters that the Administration will fund FFE implementation efforts with the approximately \$235 million left in the \$1 billion Health Insurance Reform Implementation Fund (HIRIF) established by Obamacare in addition to money transferred from other sources.<sup>1</sup> The Committee has questions about how HIRIF money has been spent, whether \$235 million remains in the HIRIF, and whether you have the legal authority to transfer funds from other sources for the purpose of establishing and operating the FFEs. We write to seek your cooperation with the Committee's oversight of your Department's efforts to implement FFEs.

Last spring, the Committee requested that the Congressional Research Service (CRS) provide analysis of Obamacare's implementation funding. On June 25, 2012, the Committee received a memorandum from CRS with the requested information.<sup>2</sup> Citing statements that you made before the House Energy and Commerce Subcommittee on Health on March 1, 2012, and information presented in the President's Fiscal Year 2013 budget request, CRS concluded that HHS "expects to have obligated all the HIRIF funds by the end of FY 2012."<sup>3</sup> CRS also noted that a large portion of the HIRIF money has been transferred to the IRS to finance its significant role in enforcing Obamacare's provisions.<sup>4</sup>

<sup>1</sup> Jason Millman and Brett Norman, *HHS seeks Obamacare funds – but is ready to scramble*, POLITICO, April 10, 2013. Available at: <http://www.politico.com/story/2013/04/hhs-seeks-obamacare-funds-budget-2014-89915.html>.

<sup>2</sup> Congressional Research Service Memorandum to House Committee on Oversight and Government Reform, *Patient Protection and Affordable Care Act: Implementation Funding and Obligations*, June 25, 2012.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

According to last week's *CQ Roll Call* article, HHS expects to spend a total of \$1.5 billion in FY2013 on administering FFEs.<sup>5</sup> Last week, HHS Assistant Secretary Murray said that \$235 million is coming from HIRIF, \$450 million from the non-recurring expense fund, and \$116 million from the Secretary's authority to transfer funds.<sup>6</sup> According to Murray, an additional undisclosed amount is coming this fiscal year from the Prevention and Public Health Fund.<sup>7</sup>

At the April 17 hearing before the Senate Finance Committee, you were asked about your authority to transfer funds for the purposes of administering and operating federal exchanges. You replied that you "have, for 2013, used [your] transfer authority, which is statutorily in our budget, as well as the non-reoccurring expense fund for one time IT costs and a portion of funding for the Prevention Fund to use for outreach and education."<sup>8</sup> According to CRS, "[o]nce all the HIRIF funds have been obligated, ACA administrative costs will have to be funded through annual discretionary appropriations."<sup>9</sup> Thus, it appears that your plans to use funds outside of the HIRIF to finance implementation of the FFEs are inconsistent with the law.

In the past, government watchdogs have criticized you for spending money without the legal authority to do so. For example, last year, legal experts from the Government Accountability Office concluded that you lacked the legal authority to spend over \$8 billion through the Medicare Advantage Quality Bonus Demonstration.<sup>10</sup> Despite GAO's legal opinion and the view of experts at GAO and the Medicare Payment and Access Commission that the Demonstration was an inappropriate use of public dollars, you proceeded with the Demonstration unaltered.<sup>11</sup> Similar to your actions regarding the Demonstration, the Committee is concerned that you appear to lack the legal authority to spend funds designated for specific purposes on the establishment and operation of FFEs.

In order for the Committee to understand the various funding streams for the Administration's implementation of the FFEs and your legal authority to spend funds on the establishment and operation of FFEs, we respectfully request that you produce the following information as soon as possible, but no later than 5:00 p.m. on May 2, 2013:

1. Documents, including copies of contracts, showing all expenditures in excess of \$100,000 from the HIRIF;

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<sup>5</sup> John Reichard, *HHS Using Several Sources to Fund Federal Health Insurance Exchange*, *CQ Roll Call*, April 10, 2013.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *The President's Budget for Fiscal Year 2014: Hearing Before the Senate Finance Committee*, 113<sup>th</sup> Cong. (April 17, 2013) (testimony of Kathleen Sebelius, Secretary of Health and Human Services).

<sup>9</sup> Congressional Research Service Memorandum to House Committee on Oversight and Government Reform, *Patient Protection and Affordable Care Act: Implementation Funding and Obligations*, June 25, 2012.

<sup>10</sup> Letter from Lynn H. Gibson, Gen. Counsel, Gov't Accountability Office, to Honorable Kathleen Sebelius, Sec'y of Health & Human Servs. (July 11, 2012)

<sup>11</sup> Gov't Accountability Office, *Medicare Advantage: Quality Bonus Payment Demonstration Undermined by High Estimated Costs and Design Shortcomings*, GAO-12-409R (Mar. 21, 2012); Letter from MedPac to Donald Berwick, CMS Administrator, January 6, 2011.

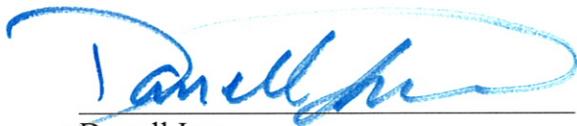
2. All documents referring or relating to the purpose of the non-recurring expense fund, and the source of money in this fund, as well as any documents which show what remains in this fund;
3. All documents and communications referring or relating to your authority to spend money from the non-recurring expense fund on the implementation of the FFEs;
4. Documents referring or relating to the current amount left in the Prevention and Public Health Fund and an itemized list, along with copies of contracts, showing all expenditures in excess of \$100,000 from the Prevention and Public Health Fund; and
5. All documents and communications referring or relating to your authority to spend money from the Prevention and Public Health Fund on the implementation of the FFEs.

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.

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. An attachment to this letter provides additional information about responding to the Committee's request.

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

Sincerely,



Darrell Issa  
Chairman  
Committee on Oversight and Government  
Reform



James Lankford  
Chairman  
Subcommittee on Energy Policy, Health Care  
and Entitlements



Jim Jordan  
Chairman  
Subcommittee on Economic Growth, Job Creation  
and Regulatory Affairs

The Honorable Kathleen Sebelius  
April 19, 2013  
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Enclosure

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

The Honorable Jackie Speier, Ranking Minority Member  
Subcommittee on Energy Policy, Health Care and Entitlements

The Honorable Matt Cartwright, Ranking Minority Member  
Subcommittee on Economic Growth, Job Creation & Regulatory Affairs

ONE HUNDRED THIRTEENTH CONGRESS  
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**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.