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# 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>

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STAFF DIRECTOR

June 12, 2013

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 continues its oversight of the implementation of the Patient Protection and Affordable Care Act, or ObamaCare.<sup>1</sup> The Committee wrote to you on April 19, 2013<sup>2</sup>, and May 6, 2013<sup>3</sup>, expressing concerns about the implementation of ObamaCare, specifically the funding of exchanges and the establishment and operation of the Navigator and in-person assister (Assister) programs. You have failed to respond to either of these letters and have not provided a single responsive document to date. On May 21, 2013, two Oversight and Government Reform Subcommittees held a joint hearing on the implementation of ObamaCare that focused on Navigators and Assisters.<sup>4</sup> During this hearing, Gary Cohen, the director of the Center for Consumer Information and Insurance Oversight (CCIIO), promised to work with the Committee to supply the documents and information we need to continue our oversight. We write to emphasize the need for the Department of Health and Human Services to honor this commitment and also to request transcribed interviews from two Department officials to clarify contradictory information they provided the Committee about ObamaCare outreach efforts.

In our April 19, 2013, letter we asked whether you have the legal authority to transfer funds from sources other than the Health Insurance Reform Implementation Fund (HIRIF) to finance the establishment and operation of Federally Facilitated Health Care Exchanges (FFE).<sup>5</sup> In our May 6, 2013, letter we expressed serious concerns about information Committee staff

<sup>1</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT, P. L. 111-148.

<sup>2</sup> See Letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform to Kathleen Sebelius, Secretary, Department of Health and Human Services (April 19, 2013).

<sup>3</sup> See Letter from Darrell Issa, Chairman, Committee on Oversight and Government Reform to Kathleen Sebelius, Secretary, Department of Health and Human Services (May 6, 2013).

<sup>4</sup> Subcommittee on Energy Policy, Health Care and Entitlements and Subcommittee on Economic Growth, Job Creation and Regulatory Affairs hearing entitled *Examining the Concerns About ObamaCare Outreach Campaign: Hearing before the H. Comm. on Oversight & Govt. Reform, Subcomm. on Energy Policy, Health Care and Entitlements and Subcomm. on Economic Growth, Job Creation and Regulatory Affairs*, 113th Cong. (2013).

<sup>5</sup> See Letter from Hon. Darrell Issa, Chairman, Committee on Oversight and Government Reform to Kathleen Sebelius, Secretary, Department of Health and Human Services (April 19, 2013).

learned during a briefing from HHS officials on the Navigators and Assisters programs, and the proposed rule for those programs issued by HHS.<sup>6</sup> During the hearing on May 21, 2013, the Committee questioned Mr. Cohen about the funding sources of and training and qualifications for Navigators and Assisters.<sup>7</sup> Several additional concerns also came to light during the course of the hearing:

- Mr. Cohen testified that the Navigator and Assister training modules are currently still being formulated and designed, and there is no anticipated completion date even though grants for both programs will be awarded in two months.<sup>8</sup>
- When asked about the plan to oversee Navigator organizations and individuals, Mr. Cohen admitted that he was “not certain whether there is a specific oversight plan for this program written down” and said that he would “have to look” to determine if a specific oversight plan even exists.<sup>9</sup>
- Mr. Cohen was unsure about the grading rubric used to evaluate grant applications despite the fact that the grant applications were due June 7, 2013.<sup>10</sup>
- When asked how Navigators and Assisters would respond if an individual reported that they were paid under the table, Mr. Cohen said that he “will have to think about it and talk to folks.”<sup>11</sup>
- Mr. Cohen made what appeared to be conflicting statements regarding the ability of Navigators and Assisters to give tax advice. He first told Chairman Lankford that “the Navigator is not going to be giving [individuals] tax advice,”<sup>12</sup> but then later told Mr. Cartwright that Navigators would “help small business owners understand their eligibility for the tax credit and also help them in selecting a plan that is good for their employees and for their business.”<sup>13</sup>
- It is unclear what information Navigators and Assisters will automatically provide to individuals and what they will only provide if explicitly asked. For example, Mr. Cohen did not know if Navigators would affirmatively inform individuals about the \$95 tax penalty for failing to purchase insurance coverage. He stated that Navigators will be required to answer truthfully if an individual asks them about tax penalties.<sup>14</sup>

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<sup>6</sup> See Letter from Darrell Issa, Chairman, Committee on Oversight and Government Reform to Kathleen Sebelius, Secretary, Department of Health and Human Services (May 6, 2013).

<sup>7</sup> *Examining the Concerns About ObamaCare Outreach Campaign: Hearing before the H. Comm. on Oversight & Govt. Reform, Subcomm. on Energy Policy, Health Care and Entitlements and Subcomm. on Economic Growth, Job Creation and Regulatory Affairs*, 113th Cong. (2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

- Mr. Cohen was unable to guarantee that convicted felons would be prohibited from being a Navigator or Assister.<sup>15</sup> He was also unable to guarantee that HHS will hold Navigators and Assistors to the same standard as other federal employees, who are required to receive background checks and fingerprinting before they are able to access applicants' social security numbers and other sensitive financial information.<sup>16</sup>
- Even though Mr. Cohen served as the Chief Counsel to the California Health Exchange Board, he was unaware that the California law establishing the state exchange allows the exchange to conceal federal spending on state exchange grants indefinitely. Mr. Cohen said that HHS would have access to California's records to perform oversight functions, but did not know if HHS would make those records available to taxpayers.<sup>17</sup>
- When asked to provide the statutory authority for the Assistors program, Mr. Cohen explained that "the statutory authority [for Assistors] is the requirement in the Affordable Care Act that State-based exchanges and all exchanges provide outreach and education and enrollment assistance to people."<sup>18</sup> This categorization is inaccurate because, outside of the requirement to establish Navigators, there is no such requirement in the ObamaCare statute.<sup>19</sup>

During his testimony, Mr. Cohen also contradicted information provided to the Committee from Vicki Gottlich, Director of the Consumer Support Group within CCIIO. Mr. Cohen asserted that HHS has statutory authority to fund the Assistors program with section 1311 funds,<sup>20</sup> while Ms. Gottlich told Committee staff one month earlier that there was no statutory authority for the Assistors program.<sup>21</sup> Since Section 1311(i)(6) explicitly prohibits Establishment grants from being used to fund Navigators<sup>22</sup> and Mr. Cohen and Ms. Gottlich agree that the functions of the Navigators and Assistors programs are "essentially the same,"<sup>23</sup> it seems that Ms. Gottlich was correct and that your Department intentionally circumvented an explicit federal funding ban in the interest of convenience and political expediency.

In light of our concerns about the funding and implementation of ObamaCare, your Department needs to prioritize and expedite its responses to our April 19, 2013, and May 6, 2013, letters, copies of which are attached for your reference. Failure to produce these documents by June 26, 2013, will force us to consider the use of compulsory processes.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See note 7, *supra*.

<sup>19</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT, PUB. LAW 111-148 §1311.

<sup>20</sup> *Id.*

<sup>21</sup> Oversight & Government Reform Briefing by HHS Officials on Navigators and Assistors Programs (April 18, 2013).

<sup>22</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT, PUB. LAW 111-148 §1311.

<sup>23</sup> See note 19, *supra*.

In addition, Gary Cohen and Vicki Gottlich have given the Committee contradictory information relating to the Navigator and Assister programs. We therefore request that you make both Gary Cohen and Vicki Gottlich available to the Committee for transcribed interviews to clarify their contradictions and to answer additional questions related to these programs. Please contact Committee staff by **June 26, 2013**, to schedule these transcribed interviews.

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.

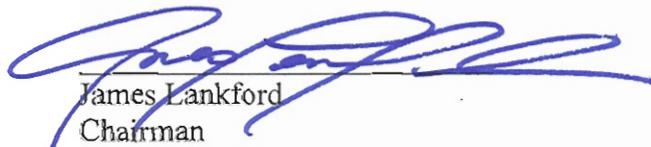
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

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

Sincerely,



Darrell Issa  
Chairman



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



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

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 Matthew A. Cartwright, Ranking Minority Member  
Subcommittee on Economic Growth, Job Creation and 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.