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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States
## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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MAJORITY (202) 225–5074
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August 20, 2012

The Honorable Douglas H. Shulman
Commissioner
11 Constitution Avenue N.W., Room 3000
Washington, D.C. 20224

Dear Commissioner Shulman:

The Patient Protection and Affordable Care Act (PPACA)[1] created premium-assistance tax credits for individuals enrolled in "an Exchange established by [a] State."[2] IRS issued a final rule (rule) on May 18, 2012, which extends PPACA's premium-assistance tax credits to individuals purchasing insurance in Exchanges established by the federal government (federal Exchanges).[3] While PPACA requires the Secretary of Health and Human Services to "establish and operate" an Exchange within any state that fails to create one on its own,[4] PPACA does not contain any language that contradicts or overrides the explicit language limiting premium-assistance tax credits to Exchanges established by states only.[5] Since most states, to date, have opted not to create Exchanges, IRS's extension of the tax credits beyond what the statute authorizes likely increases PPACA's cost in excess of $500 billion over the next decade.[6] Moreover, since employers are only subject to PPACA's employer mandate tax penalties if their workers receive PPACA's premium-assistance tax credits,[7] IRS's rule subjects employers in every state to the employer mandate tax penalty. The Committee is conducting oversight on this IRS rule, and we are writing to request more information about the rule's rationale, authority, and development.

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[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.
[2] PPACA, Section 1401, 124 Stat. 119, 213.
[3] Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012), *available at*: http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf.
[4] PPACA, Sec. 1321, 124 Stat. 119, 173 (2010).
[5] Section 1402 of the PPACA authorizes cost-sharing subsidies for certain individuals who receiving premium tax credits.
[6] According to the Kaiser Family Foundation, as of June 2012, only 14 states have taken affirmative steps to create a PPACA-compliant State Exchange. According to CBO's estimates, the cost of the premium tax credits and cost sharing subsidies will exceed $1 trillion over the next decade. Given only a few states have created exchanges, expanding the tax credits and cost sharing subsidies to individuals in states that fail to operate their own exchanges will certainly cost at least a few hundred billions of dollars over the next decade.
[7] Internal Revenue Code. Chapter 43. Sec. 4980H.

At the Committee's hearing on August 2, 2012, you testified that your "main job is to implement the law that was written."[8] You also testified that you thought "Section 36B [the Section of the Internal Revenue Code added by PPACA] had some contradictory language in it."[9] On July 23, 2012, the American Law Division, an arm of the Congressional Research Service (CRS) and who the Congress relies upon for guidance, produced a legal analysis of the IRS rule.[10] CRS's analysis raises serious doubt that IRS "implement[ed] the law that was written" when it issued its rule or that Section 36B contained "contradictory language" with respect to whether PPACA authorizes tax credits in federal Exchanges. According to CRS:

> The 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." As noted previously, 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.[11]

According to CRS, a court reviewing the legality of the rule might not "limit itself to a consideration of only the plain text of the provision"[12] and might also look at "legislative history, legislative purpose, and context."[13] Jonathan Adler, a law professor at the Case Western Reserve University School of Law, and Michael Cannon, director of health policy studies at the CATO Institute, argue that "[n]either the structure, history, nor other indicia of congressional intent support the IRS position."[14] According to Adler and Cannon, Congress purposefully limited the law's premium tax credits to Exchanges "established by the State"[15] and the IRS rule that extends the tax credits to federal Exchanges is thus illegal:[16]

> PPACA's authors strongly preferred state-run Exchanges over federal Exchanges. The statute repeatedly uses financial incentives to encourage

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[8] Douglas Shulman. Testimony to the House Committee on Oversight and Government Reform. *IRS: Enforcing Obamacare's New Rules and Taxes*, Hearing, August 2, 2012.
[9] *Id.*
[10] Jennifer Staman and Todd Garvey, Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act, Congressional Research Service Memorandum, July 23, 2012.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] 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).
[15] *Id.*
[16] *Id.*

> states and others to comply with the Act's regulatory scheme. Both of PPACA's antecedent bills contained the same feature of withholding credits from residents of uncooperative states. During congressional consideration, PPACA's lead author said that a state must establish an Exchange in order for tax credits to become available.[17]

In issuing the final rule allowing tax credits in federal Exchanges, IRS argued that "the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."[18] For IRS to issue a rule that contradicts "a strictly textual analysis of the plain meaning of the provision,"[19] the legislative history should clearly support the IRS's interpretation of the rule. However, IRS failed to cite any legislative history that showed Congress intended for individuals in federal Exchanges to receive PPACA's tax credits. According to Michael Cannon's testimony at the Committee's August 2, 2012, hearing, the relevant legislative history is limited, but the limited legislative history suggests that Congress intended for the tax credits to be confined to state Exchanges:

> [M]y staff and I did a pretty extensive search of the Congressional Record, including markups and Committee action, on this statute. We found only two mentions in the Congressional Record of what would happen if States did not create a health insurance Exchange on their own. The first was the chairman of the Senate Finance Committee said that tax credits are conditioned upon States establishing their own Exchanges. . . . The only other mention was in the House during House consideration of the Patient Protection and Affordable Care Act by Congressman Michael Burgess. He said, "What happens if the States don't create an Exchange? Well, a federal Exchange will impose a public option." It made no mention of tax credits. Those are the only two [examples] we have found.[20]

Although the Congressional debate was limited on the question of whether tax credits would apply to federal Exchanges, Senate Finance Chairman Max Baucus's comments offer support to the interpretation that the tax credits are only available in Exchanges established by states.[21] Moreover, neither of PPACA's antecedent bills,

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[17] *Id.*

[18] Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012), *available at*: http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf

[19] Jennifer Staman and Todd Garvey, Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act, Congressional Research Service Memorandum, July 23, 2012.

[20] Michael Cannon. Testimony to the House Committee on Oversight and Government Reform. *IRS: Enforcing Obamacare's New Rules and Taxes*, Hearing, August 2, 2012.

[21] *Executive Committee Meeting to Consider an Original Bill Providing for Health Care Reform: Before the S. Comm. on Finance*, 111th Cong. 326 (2009),

> **Senator Ensign:** Is this bill, the underlying premise in this bill that...we are making states change their laws, their coverage laws? Aren't we doing that? And so why would not most of the coverage rules in this bill, underlying bill, be...only in the jurisdiction of the HELP Committee and not in the jurisdiction of this committee?...On certain minimum plans, exchanges. All those coverage things are state laws...How do we have jurisdiction over changing state laws on coverage?...

which were reported by the Senate Finance Committee and the Senate Health Education Labor and Pension Committee, supports IRS's rule.[22] According to Adler and Cannon, "Each of those bills withheld credits from taxpayers whose state governments failed to establish an Exchange or otherwise failed to implement the law in accord with federal dictates."[23] Since there is nothing in the legislative history to support IRS's rule and IRS ignored the legislative history that suggests the plain text of the statute represented Congressional intent about limiting the tax credits to state Exchanges, IRS's defense of its rule using "the relevant legislative history" is flawed and misleading.

In order to assist the Committee in understanding how IRS arrived at the rule to extend PPACA's premium-assistance tax credits to individuals purchasing insurance in federal Exchanges, please provide the following information to the Committee by September 4, 2012.

1. Please provide all legal analysis, internal or external, conducted by the IRS which authorizes IRS to grant premium-assistance tax credits in federal Exchanges.

2. Please provide all documents and communications between IRS employees and employees of the White House Executive Office of the President or any other federal agency or department referring or relating to the proposed IRS rule[24] or final IRS rule[25] between March 23, 2010, and August 17, 2012.

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 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 the Committee's request.

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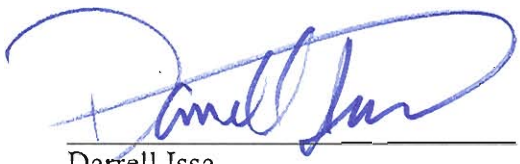
**The Chairman:** There are conditions to participate in the Exchange.
**Senator Ensign:** That is right.
**The Chairman:** For setting up an Exchange.
**Senator Ensign:** These would be conditions to participate—
**The Chairman:** And states—an Exchange is, essentially is tax credits. Taxes are in the jurisdiction of this Committee.

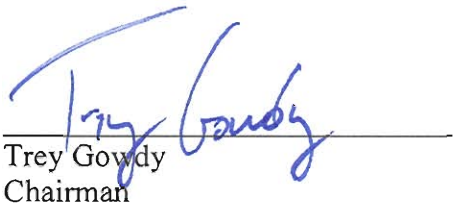
[22] Jonathan Adler and Michael Cannon, "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA," Case Research Paper Series in Legal Studies Working Paper 2012-27. (July 2012).
[23] *Id.*
[24] Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 FEDERAL REGISTER 50935 (August 17, 2011), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf.
[25] Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 FEDERAL REGISTER 30378 (May 23, 2012), *available at*: http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf.

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

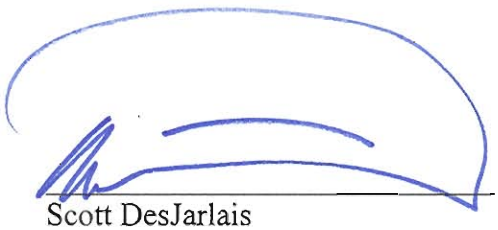
Sincerely,



Darrell Issa
Chairman



Trey Gowdy
Chairman
Subcommittee on Health Care,
District of Columbia, Census and the
National Archives



Scott DesJarlais
Member of Congress

Enclosure

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

The Honorable Danny Davis, Ranking Minority Member, Subcommittee on Health Care, District of Columbia, Census and the National Archives

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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.