

**Congress of the United States**  
**Washington, DC 20515**

July 25, 2013

The Honorable Jacob J. Lew  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, D.C. 20220

Dear Mr. Secretary:

For the past several months, the Committee on Ways and Means and the Committee on Oversight and Government Reform have been conducting oversight of the Administration's decision to expand several taxes and subsidies created by the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup> to individuals in states that have opted not to create state health insurance exchanges. In particular, the Committees have sought information relating to the joint Treasury Department and Internal Revenue Service proposed rule<sup>2</sup> and final rule<sup>3</sup> regarding the health insurance premium tax credits contained in PPACA. We write to request your assistance with the Committees' oversight efforts.

Legal experts at the Congressional Research Service raised questions about the legal basis for the Administration's decision, finding that "[t]he plain language of Section 36B (the section of the Internal Revenue Code, added by PPACA, that authorizes premium tax credits) suggests that premium tax credits are available only where a taxpayer is enrolled in an 'Exchange **established by the State** [emphasis added]'".<sup>4</sup> They stated:

[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

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<sup>1</sup> PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010; PUB. LAW 111-152.

<sup>2</sup> Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 76 Fed. Reg. 50935 (Aug. 17, 2011), available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-17/pdf/2011-20728.pdf> (last accessed May 30, 2013).

<sup>3</sup> Department of the Treasury, Internal Revenue Service, *Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30378 (May 23, 2012), available at: <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf> (last accessed May 30, 2013).

<sup>4</sup> 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*, CONG. RESEARCH SERV. (Jul. 23, 2012). [emphasis added]

congressional intent, receive no *Chevron* deference, and likely be deemed invalid.<sup>5</sup>

Given the fact that IRS's rule is contrary to the plain text of the law passed by Congress and signed by President Obama, the Committees have sought information related to IRS and Treasury's rationale for the rule. To date, Committee staff have conducted two *in camera* reviews of four internal Treasury documents related to the rule.<sup>6</sup> IRS and Treasury Department staff also provided three briefings -- on November 3, 2012, April 4, 2013, and June 13, 2013 -- regarding the decision to extend PPACA's premium tax credits, which amount to several hundreds of billions of dollars in new and unauthorized federal spending, to individuals enrolled in exchanges created by the federal government.<sup>7</sup> The Administration's decision also extends the employer mandate penalty and individual mandate penalty to individuals in states that have chosen not to create an exchange.

Although IRS's rule has significant implications for individuals and the nation's finances, IRS and Treasury have not been able to provide the Committees with detailed information about the factors considered by IRS and Treasury that expanded the availability of PPACA's tax credits to federal exchanges. Treasury officials previously informed Congress that, with the exception of approximately 50 e-mails, all relevant documents and communications have been produced to the Committee.<sup>8</sup> We request that you produce these e-mails as soon as possible, but by no later than 5:00 p.m. on July 30, 2013. In addition, please produce the following information by August 13, 2013.

1. All documents and communications created between March 23, 2010, and May 23, 2012, referring or relating to the position of IRS or Treasury that there is not a discernible pattern as to how PPACA references exchanges.
2. All documents and communications created prior to the issuance of the proposed rule on August 17, 2011, referring or relating to additional factors IRS or Treasury considered in extending PPACA's tax credits to federal exchanges other than the "such Exchange" language.

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<sup>5</sup> *Id.*

<sup>6</sup> Briefing paper prepared by IRS Chief Counsel for a meeting between IRS Chief Counsel and Office of Tax Policy staff; "Pre-Proposed Legal Analysis" (Mar. 2011); "Proposed Regulatory Clearance Package" (Aug. 2011); "Pre-Final Legal Analysis" (Feb. 2012); "Final Regulatory Clearance Package" (May 2012).

<sup>7</sup> According to the Kaiser Family Foundation, as of May 2013, 17 states (including the District of Columbia) have received conditional approval to operate a state-based Exchange. According to the CBO's estimates, the premium tax credits and cost-sharing subsidies will exceed one trillion dollars in federal spending over the next ten years. Given only a few states have created state-based 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 hundreds of billions of dollars over the next decade.

<sup>8</sup> Phone call between U.S. Dep't of the Treasury staff and staff for the Ways and Means Committee and the Committee on Oversight and Government Reform (March 20, 2013).

3. All documents and communications referring or relating to IRS or Treasury's review or consideration of PPACA's legislative history.
4. All documents and communications referring or relating to IRS or Treasury's review or consideration of the purpose of PPACA with respect to whether tax credits should be available in federal Exchanges.
5. All documents and communications referring or relating to any activities or analysis of the 36B Working Group, including but not limited to the e-mail invitations to Working Group members sent by Donna Crisalli (referenced in the June 13, 2013, briefing between Treasury and IRS employees and Committee staff).
6. All documents and communications produced for, or as a result of, the large group meeting between IRS and Treasury employees held at or near the end of March 2011 (and referenced by IRS employees at the June 13, 2013 briefing) in which the availability of tax credits in federal exchanges was discussed.

The Committee on Ways and Means has jurisdiction over federal revenue measures, including tax credits, as well as the Medicare program. 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 Committees' request.

When producing documents, please deliver production sets to the Committee on Ways and Means in Room 1102 of the Longworth House Office Building, and to the Committee on Oversight and Government Reform Majority Staff in Room 2157 of the Rayburn House Office Building, and to the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committees prefer to receive documents in electronic format.

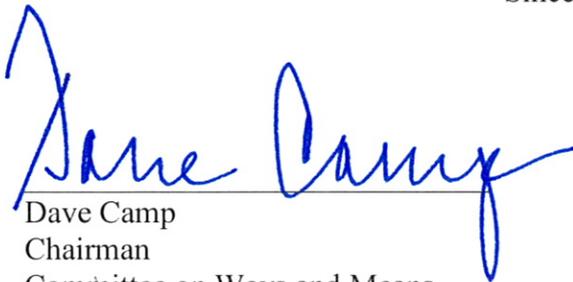
Please contact Chris Armstrong of the Committee on Ways and Means at (202) 225-5522 or Brian Blase of the Committee on Oversight and Government Reform at (202) 225-5074 if you have any questions about this request. Thank you for your prompt attention to this matter.

The Honorable Jacob J. Lew

July 25, 2013

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Sincerely,



Dave Camp  
Chairman  
Committee on Ways and Means



Darrell Issa  
Chairman  
Committee on Oversight  
and Government Reform



James Lankford  
Chairman  
Committee on Oversight and  
Government Reform  
Subcommittee on Energy Policy, Health  
Care & Entitlements



Charles W. Boustany, Jr., M.D.  
Chairman  
Committee on Ways and Means  
Subcommittee on Oversight

Enclosure

cc: The Honorable Sander Levin, Ranking Minority Member  
Committee on Ways and Means

The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

The Honorable Jackie Speier, Ranking Minority Member  
Committee on Oversight and Government Reform Subcommittee on Energy  
Policy, Health Care & Entitlements

ONE HUNDRED THIRTEENTH 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  
Minority (202) 275-5051

### 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,  
SENTPAGE, 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.