



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

July 31, 2013

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Issa:

I write in response to your July 25, 2013 letter to Secretary Lew concerning the process by which the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) developed and finalized the regulations for section 36B under the Internal Revenue Code. For the past nine months, Treasury has been cooperating with the Committee to address its questions about the rationale behind the regulations while also protecting the legitimate confidentiality interests of the Executive Branch in the deliberative stages of the rulemaking process.

You have asked for the factors Treasury and the IRS considered in determining that premium tax credits are available to all eligible individuals who purchase health insurance through federally facilitated exchanges. In response, Treasury has written three letters, made available more than 500 pages of documents, and participated in three separate briefings with Committee staff regarding the details of our determinations.

You also have asked for information about the discussions between Treasury and IRS personnel during the 36B rulemaking process. We are committed to working with the Committee to provide the information that you need. At the same time, we need Treasury and IRS personnel to be able to engage in free, full, and unfettered discussions about policy and legal matters. Public disclosure of such discussions could have a significant chilling effect on their deliberations and could inhibit the ability of agency staff to fulfill their statutory responsibilities. In addition, Treasury is facing active litigation in federal court regarding these very regulations.

As part of our ongoing dialogue with the Committee, below we summarize the information provided thus far related to the 36B rulemaking process. We also address the Committee's request for additional information.

## **I. Correspondence, Documents, and Briefings Describe our Rationale**

In three previous letters, dated October 12, 2012, October 25, 2012, and February 5, 2013, we described the standard process by which Treasury and the IRS develop tax regulations. We also described how we followed that process for drafting and approving the regulations implementing section 36B. In addition, the letters described the legal basis for our interpretation that the Affordable Care Act (ACA) did not limit the tax credit solely to state exchanges.

Beyond these letters, we have made available more than 500 pages of materials responsive to the Committee's requests. Included were the internal Treasury memoranda that accompanied the clearance packages for both the proposed and final regulations. The memoranda outline considerations raised and issues resolved during the drafting process. They discuss comments Treasury received in response to the proposed regulations and how those comments were addressed in the final regulations. They describe the legal analysis supporting the conclusion that Congress did not intend section 36B to provide a tax credit to taxpayers enrolled through a state exchange while denying a tax credit to taxpayers enrolled through a federal exchange.

In addition to the letters and documents, we have provided three separate briefings for Committee staff on the legal analysis and the drafting process behind the 36B regulations. At the staff's request in those briefings, Treasury and IRS personnel reviewed the text of section 36B, the text of other provisions of the ACA, and the legislative history to explain our legal conclusions about the federally facilitated exchanges and why those conclusions were consistent with the statute.

The November 2, 2012 briefing involved three Treasury personnel and lasted over one hour. The April 4, 2013 briefing involved four Treasury personnel (two from November), lasted almost 3.5 hours, and included 24 pages of questions. The June 13, 2013 briefing involved three personnel (one from Treasury and two from the IRS), lasted more than three hours, and included largely the same questions as those asked in April. All told, eight different personnel from Treasury's Office of Tax Policy, Office of General Counsel, and Office of the Executive Secretary, as well as from the IRS's Office of Income Tax and Accounting and Office of Health Care Counsel, have briefed Committee staff for approximately eight hours regarding the rulemaking process and legal conclusions underlying the 36B regulations.

It is important to note that our responses are not the only sources of information regarding our approach to the 36B rulemaking. For example, your letter cites a July 2012 Congressional Research Service report about our regulations. We respectfully take issue with your characterization of that report, as the authors do not reach any conclusions about the merits of our determinations. Moreover, in discussing the language of section 36B, the authors indicate that the definition of "exchange" in the ACA "arguably links a federally created exchange to one established by a state pursuant to the requirements of § 1311."<sup>3</sup>

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<sup>3</sup> Jennifer Staman and Todd Garvey, *Legal Analysis of the Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act*, CONG. RESEARCH SERV. (Jul. 23, 2012).

Additionally, the non-partisan Congressional Budget Office (CBO) has released a letter regarding its assumptions in estimating the effects of the ACA. According to Director Elmendorf, “to the best of our recollection, the possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when the legislation was being considered. Nor was the issue raised during consideration of earlier versions of the legislation in 2009 and 2010, when CBO had anticipated, in its analyses, that the credits would be available in every state.”<sup>4</sup>

## **II. Additional Documents Implicate Confidentiality and Litigation Interests**

Your letter also requests information concerning the deliberative process behind the 36B regulations. In addition, you describe a telephone conversation with Treasury staff from March 2013 regarding such information. We disagree with your description of that conversation.

Treasury conducted a search for responsive materials after receiving the initial request. We identified a number of relevant documents. We have made over 500 pages of those documents available to the Committee during the past nine months. There also is a subset of documents that we have not made available.

The subset includes deliberations from the 36B rulemaking process. Your request for these documents implicates well-established Executive Branch confidentiality interests. The public release of agency rulemaking deliberations could have a significant chilling effect on the Executive Branch’s ability to fulfill its statutory obligations. Agency staff and counsel must be able to engage in free, full, and unfettered discussions about policy and legal matters. This is a longstanding principle of Administrations from both parties. Our confidentiality interests are particularly acute here because of Treasury’s involvement in ongoing litigation on these regulations.

Committee staff have requested a narrative description of the materials that implicate our confidentiality and active-litigation interests. The documents at issue range from December 2010 through July 2012. They reflect the information Treasury and IRS personnel described during the course of the three briefings.

The documents prior to August 2011 reflect the deliberations of Executive Branch personnel as they participated in the rulemaking process for developing the 36B regulations. They show that Treasury and IRS personnel formed a working group that identified and addressed various legal issues that arose in the rulemaking process; engaged in interagency deliberations regarding ACA implementation; considered the availability of the premium tax credit for federally facilitated exchanges prior to the publication of the proposed regulations; and performed legal analysis of that issue. They reflect that the analysis led Treasury and the IRS to conclude that the tax credit

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<sup>4</sup> Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, (Dec. 6, 2012).

was intended to be available for eligible taxpayers who purchased insurance through federally facilitated exchanges.

The documents after August 2011 show additional analysis and interagency coordination related to Treasury and the IRS's promulgation of the final rule, issues identified in comments to the proposed regulations, and how such issues were addressed. The final regulations include Treasury and the IRS's conclusions that the tax credits should be available for eligible taxpayers who purchased insurance through federally facilitated exchanges, which is consistent with the proposed regulations. The documents also show internal discussion about issues raised in response to publication of the final regulations.

### **III. Conclusion**

Treasury remains committed to cooperating fully with the Committee. Emily McMahon, Deputy Assistant Secretary for Tax Policy, is testifying at the upcoming hearing before the House Oversight and Government Reform Subcommittee. Ms. McMahon was the Acting Assistant Secretary when both the proposed and final regulations were published. She also participated in the April briefing with Committee staff, where she described the decision-making process and legal analysis behind the 36B regulations. She can address Members' questions concerning the regulations, subject to the legitimate confidentiality and active-litigation interests already described.

Thank you for your letter. We look forward to continuing to work with you and your staff on important matters related to implementation of the ACA.

Sincerely,



Alastair M. Fitzpayne  
Assistant Secretary for Legislative Affairs

Identical letter sent to:

The Honorable Dave Camp  
The Honorable James Lankford  
The Honorable Charles W. Boustany, Jr.

cc: The Honorable Sander Levin  
The Honorable Elijah Cummings  
The Honorable Jackie Speier