

JOHN L. MICA, FLORIDA
MICHAEL R. TURNER, OHIO
JOHN J. DUNCAN, JR., TENNESSEE
PATRICK T. MCHEMRY, NORTH CAROLINA
JIM JORDAN, OHIO
JASON CHAFFETZ, UTAH
TIM WALBERG, MICHIGAN
JAMES LANKFORD, OKLAHOMA
JUSTIN AMASH, MICHIGAN
PAUL A. GOSAR, ARIZONA
PATRICK MEEHAN, PENNSYLVANIA
SCOTT DESJARLAIS, TENNESSEE
TREY GOWDY, SOUTH CAROLINA
BLAKE FARENTHOLD, TEXAS
DOC HASTINGS, WASHINGTON
CYNTHIA M. LUMMIS, WYOMING
ROB WOODALL, GEORGIA
THOMAS MASSIE, KENTUCKY
DOUG COLLINS, GEORGIA
MARK MEADOWS, NORTH CAROLINA
KERRY L. BENTIVOLIO, MICHIGAN
RON DESANTIS, FLORIDA

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) 225-6051

<http://oversight.house.gov>

CAROLYN B. MALONEY, NEW YORK
ELEANOR HOLMES NORTON,
DISTRICT OF COLUMBIA
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
STEPHEN F. LYNCH, MASSACHUSETTS
JIM COOPER, TENNESSEE
GERALD E. CONNOLLY, VIRGINIA
JACKIE SPEIER, CALIFORNIA
MATTHEW A. CARTWRIGHT, PENNSYLVANIA
MARK POCAN, WISCONSIN
L. TAMMY DUCKWORTH, ILLINOIS
ROBIN L. KELLY, ILLINOIS
DANNY K. DAVIS, ILLINOIS
PETER WELCH, VERMONT
TONY CARDENAS, CALIFORNIA
STEVEN A. HORSFORD, NEVADA
MICHELLE LUJAN GRISHAM, NEW MEXICO

LAWRENCE J. BRADY
STAFF DIRECTOR

August 15, 2013

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

Dear Mr. Secretary:

On July 25, 2013, we wrote you for the second time to request information related to the joint Internal Revenue Service and Treasury Department proposed rule¹ and final rule² regarding the health insurance premium tax credits contained in ObamaCare.³ For nearly a year, the Committee on Oversight and Government Reform and the Committee on Ways and Means have sought information related to IRS and Treasury's controversial decision to extend tax credits and subsidies to individuals who will purchase insurance in new federal exchanges. Treasury's decision is inconsistent with the plain statutory language that restricted the availability of tax credits to exchanges established by States.⁴ To date, the Treasury Department has provided very little information to support the Administration's assertion that it "carefully considered the language of the statute and the legislative history" in coming to its decision to expand ObamaCare.⁵ We write to clarify the information provided by Treasury and to request that you provide all remaining relevant documents and communications.

On October 12, 2012, the Committee received 386 pages of documents, almost all of which are publicly available documents or documents that are not relevant to the Committee's request. For example, 154 pages of the document production consisted of the proposed rule (which contains one sentence on the issue of tax credit availability in

¹ 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).

² 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).

³ PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010; PUB. LAW 111-152.

⁴ *Id.*

⁵ Final Regs Clearance Package.

federal exchanges)⁶; 70 pages were a draft of Michael Cannon and Jonathan Adler's law review article⁷; 45 pages were from the public hearings on the 36B regulation (the section of the Internal Revenue Code, added by ObamaCare, that authorizes premium tax credits) where the availability of tax credits in federal exchanges merited less than a half page discussion⁸; and 59 pages of a Supreme Court opinion and a Tenth Circuit Court of Appeals decision found after a senior Treasury official requested information about Chevron's⁹ applicability to Treasury's decision.¹⁰

In total, Treasury only produced 17 pages of material relevant to the Committees' oversight. Most of these pages consisted of e-mails from Treasury staff forwarding or commenting on various news articles or blog posts. **Treasury's production does not include a single document or communication created prior to the publication of the proposed rule on August 17, 2011.** On November 19, 2012, Committee staff conducted an *in-camera* of four memoranda related to the availability of tax credits in federal exchanges. One of the documents reviewed was your Department's only written analysis of its decision to extend tax credits to federal exchanges prior to the issuance of the proposed rule. This analysis, drafted in March 2011 by IRS Chief Counsel staff, consisted of a single paragraph with a single reason listed to justify Treasury's decision.

Treasury's one-paragraph analysis did not contain a substantive discussion of the many sections of the law relevant to the issue of whether the statute authorized tax credits in federal exchanges. Treasury's analysis compares poorly to a much more thorough analysis conducted by the Congressional Research Service of this issue.¹¹ As you know, legal experts at the Congressional Research Service raised significant questions about the legal basis for the Administration's decision, finding that "[t]he 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** [emphasis added].'"¹²

As stated in your letter, in addition to the one document production and *in-camera* review of the four additional memoranda, IRS and Treasury employees have provided Committee staff with three briefings related to the decision to extend tax credits in federal

⁶ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377 (proposed May 23, 2012) (to be codified at 26 C.F.R. pt. 1).

⁷ Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX: J. OF LAW-MEDICINE, Spring 2013 at 119.

⁸ INTERNAL REVENUE SERVICE, U.S. DEPT. OF THE TREASURY, PUBLIC HEARING ON PROPOSED REGULATIONS 26 CFR PART 1 "HEALTH INSURANCE TAX CREDIT" (2011)

⁹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁰ *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007); *Herrera-Castillo v. Holder* 573 F.3d 1004 (10th Cir. 2009).

¹¹ 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).

¹² *Id.*

exchanges.¹³ However, these briefings have consisted of IRS and Treasury employees' inability to remember key factors they considered, a lack of familiarity among IRS and Treasury employees with how particular parts of the statute related to the rule, and a failure of IRS and Treasury employees to provide supporting evidence to this potentially illegal decision. At the Committee's hearing on July 31, 2013, Emily McMahon, Deputy Assistant Secretary for Tax Policy, was also unable to answer many Members' important questions about IRS and Treasury's decision to extend tax credits in federal exchanges.¹⁴

Treasury employees, including your Chief of Staff, Chris Weideman, have told the Committees that the only outstanding information related to IRS and Treasury's decision to extend tax credits in federal exchanges is approximately 50 e-mails.¹⁵ Treasury has withheld this material from the Committees. In addition to this material, we believe, based on briefings with IRS and Treasury employees, there are additional documents, including e-mails, which may exist that have not yet been provided to the Committee. We requested this additional material in our July 25, 2013, letter.

You have claimed executive branch confidentiality interests in refusing to provide information to the Committee. Given Congress' constitutional responsibility to conduct oversight of the executive branch, the significant budgetary impact of Treasury's decision to extend the tax credits in federal exchanges (estimated to be upwards of \$600 billion over the next decade), and the failure of Treasury and IRS employees to remember details about the rule-making process, we ask you to provide the Committee with the approximately 50 e-mails already compiled by IRS or Treasury staff as well as any of the following documents or communications by August 29, 2013, if they exist:

1. All documents and communications referring or relating to IRS or Treasury's review or consideration of PPACA's legislative history;
2. 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;
3. 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); and

¹³ Letter from Mark Mazur, Assistant Secretary Tax Policy, Dept. of the Treasury, to the Honorable Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform (Oct. 12, 2012) (on file with author).

¹⁴ *Oversight of IRS's Legal Basis for Expanding ObamaCare's Taxes and Subsidies: Hearing Before the Subcomm. on Energy Policy, Health Care, and Entitlements of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) available at <http://oversight.house.gov/hearing/oversight-of-irss-legal-basis-for-expanding-ObamaCares-taxes-and-subsidies/> (questioning of Ms. Emily S. McMahon, Deputy Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury).

¹⁵ 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).

The Honorable Jacob J. Lew
August 15, 2013
Page 4

4. 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.

If you do not comply with the Committee's request by Thursday, August 29, 2013, the Committee will be forced to consider use of compulsory process.

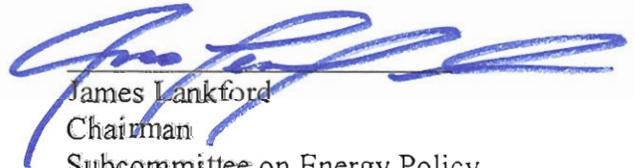
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committees' request.

Please contact 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.

Sincerely,



Darrell Issa
Chairman



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

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

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) 225-5051

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,
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.