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Congress of the United States

House of Representatives

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May 14, 2014

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Madam Secretary:

The Committee on Oversight and Government Reform is conducting oversight of the implementation of ObamaCare. As part of this effort, the Committee is examining the numerous problems with the design, implementation, testing, and rollout of ObamaCare's health insurance exchanges, including the federal health insurance exchange website, HealthCare.gov. The decision to launch the exchanges on October 1, 2013, without adequate performance or security testing, caused millions of Americans unnecessary frustrations and delays when they attempted to sign up for health insurance. It also exposed these individuals to a serious risk of identity theft, data modification, and malicious attacks on their personal computers.

Senator Lamar Alexander and I first wrote to you on October 10, 2013, with a number of questions about the reported problems with ObamaCare's health insurance exchanges.¹ In the October 10, 2013, letter Senator Alexander and I requested documents that would help us better understand the testing of the exchange and the federal data hub.² To accommodate our mutual interest in an efficient and expeditious document production process, Committee staff answered numerous questions from Health and Human Services staff and prioritized certain categories of documents for immediate production. Despite these extraordinary accommodations, the Department did not produce any of the requested documents, or answer in writing any of the questions, before the October 24, 2013, deadline.³

¹ Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (OGR), & Hon. Lamar Alexander, Ranking Member, S. Comm. on Health, Education, Labor and Pensions (HELP), to Hon. Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (HHS) (Oct. 10, 2013).

² *Id.*

³ Letter from Hon. Darrell Issa, Chairman, OGR, & Hon. Lamar Alexander, Ranking Member, HELP, to Hon. Kathleen Sebelius, Sec'y, HHS (Oct. 24, 2013).

HHS's refusal to provide documents and other information forced the Committee to issue a subpoena.

The Department's failure to provide any of the requested information forced Senator Alexander and me to write to you again on October 24, 2013.⁴ The Department finally responded to these letters on October 25, 2013, but gave no indication of when it would begin to produce documents or answer any questions. Left with no other alternative to obtain these documents, I issued a subpoena to you on October 30, 2013, to compel production of the documents that the Committee requires. The subpoena required you to produce, in unredacted form, the following:

1. Documents referring or relating to the number of people who successfully enrolled for insurance through the federal exchanges through the HealthCare.gov website as of October 29, 2013, at midnight.
2. Documents referring or relating to the number of people who attempted to submit applications for insurance through the federal exchanges through the HealthCare.gov website as of October 29, 2013, at midnight.
3. Documents and communications referring or relating to any technical problems associated with HealthCare.gov, including, but not limited to, any technical problems with the underlying software, hardware, and/or design.
4. Documents and communications referring or relating to the user capacity of HealthCare.gov.
5. Documents and communications referring or relating to the testing of HealthCare.gov.
6. Documents and communications referring or relating to the testing of exchanges and the federal data hub, including, but not limited to, contracts, reports, or other data submitted by contractors or insurers.
7. Documents and communications referring or relating to any design, software, and/or capacity problems with the exchanges.⁵

Although the subpoena required full compliance by November 13, 2013,⁶ the Department did not fully comply by that date. In fact, more than six months later, the Department still has not fully complied with the subpoena. To date, the Department has produced roughly 111,000 pages of

⁴ *Id.*

⁵ H. Comm. on Oversight & Gov't Reform, Subpoena to Hon. Kathleen Sebelius, Sec'y, HHS (Nov. 13, 2013).

⁶ *Id.*

documents; it produced over 75,000 of these pages after February 25, 2014.⁷ Many of these documents contain heavy redactions, and some have been redacted completely. Further, the Department has deliberately withheld key documents responsive to the subpoena from the Committee altogether. Over the past four months, the Department has produced documents from only five custodians, former CMS Chief Information Officer (CIO) Tony Trenkle, CMS Chief Information Security Officer (CISO) Teresa Fryer, CMS Chief Technology Officer George Linares, HHS CIO Frank Baitman, and HHS CISO Kevin Charest. Even the production for these five custodians is not complete. The Department has indicated that the complete search for those custodians will take several more weeks or even months. The Department will not produce documents from other key custodians identified by the Committee until all the documents from Mr. Trenkle, Ms. Fryer, Mr. Linares, Mr. Baitman, and Mr. Charest have been produced.

The Department's substantial delay in production, combined with its improper redactions, has obstructed the Committee's investigation. The Department's failure to comply fully hinders the Committee's constitutional obligation to conduct oversight of the Executive Branch. The Department has even taken steps to impede the Committee's investigation by instructing HHS contractors not to comply with document requests from the Committee.⁸ In light of these facts, I am concerned the Department is willfully failing to comply with the Committee's subpoena.

The White House is blocking production of subpoenaed documents to the Committee.

In recent months, it has come to light that the White House has been involved in the Department's productions pursuant to the subpoena. In a cover letter accompanying the Department's February 4, 2014, production to the Committee, the Department wrote:

Enclosed is an additional document that needed further review, **because a portion of it raised important Executive Branch institutional concerns that extend beyond HHS and CMS** and that have been recognized across

⁷ See Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Nov. 13, 2013) ("In response to your October 30 subpoena, we are enclosing approximately five thousand pages of documents."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Dec. 2, 2013) ("Enclosed with this letter are approximately 4,300 additional pages of documents as part of our ongoing production."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Dec. 20, 2013) ("The transmittal of the enclosed approximately 5,400 pages of documents follows up on the Committee's October 10, 2013 and October 24, 2013 letters, and the Committee's October 30, 2013 subpoena regarding the website."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Jan. 28, 2014) ("Enclosed with the letter are approximately 9,200 additional pages of documents as part of our ongoing production."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Feb. 4, 2014) ("Enclosed is an additional document that needed further review[.]"); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Feb. 25, 2014) ("Enclosed with this letter are approximately 78,000 additional pages of documents as part of our ongoing production."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Mar. 14, 2014) ("Enclosed with this letter are approximately 3,181 additional pages of documents as part of our ongoing production."); Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Apr. 7, 2014) ("Enclosed with this letter are approximately 5000 additional pages of documents as part of our ongoing production.").

⁸ See Letter from Hon. Darrell Issa, Chairman, OGR, to Hon. Kathleen Sebelius, Sec'y, HHS (Dec. 11, 2013).

various administrations. We are producing the document with limited redaction in an effort to provide the Committee with information that is responsive to its stated oversight interests in the security of the health insurance marketplace, while making a modest accommodation to the longstanding Executive Branch institutional interest at issue.⁹

Three weeks later, in a cover letter accompanying the Department's February 25, 2014, production to the Committee, the Department stated, "During the course of our review of potentially responsive records, **we discovered a number of documents that raised executive branch institutional interests that are not HHS's alone.**"¹⁰ The Department also informed the Committee that it redacted other documents for "security purposes."¹¹ The Department, however, did not identify the number of redacted or withheld documents that raised "executive branch institutional interests" or "security interests," nor did it provide any details about the "executive branch institutional interests" and "security interests" that the documents purportedly raised.

On February 25, 2014, Committee staff met with representatives of the Office of Counsel to the President to discuss the White House's role in the Department's response to the Committee's subpoena.¹² During that meeting, Counsel's Office staff communicated that the White House does in fact have equities in certain documents covered by the subpoena, and that the White House was withholding those documents for further White House review.¹³ The apparent purpose of this equity review is to give the White House the opportunity to apply redactions, or to instruct HHS to withhold documents that are responsive to the Committee's subpoena in full or in part.

On March 14, 2014, and April 7, 2014, the Department made document productions to the Committee. The Department produced 3,181 pages to the Committee on March 14, 2014, and 4,996 pages on April 7, 2014. According to the Department, these productions contained documents with "limited redactions" that raised unspecified "Executive Branch institutional interests," as well as documents redacted for purported "security purposes."¹⁴ The Department provided no further details about the specific redactions, which appear to be unnecessarily overbroad, with entire e-mails redacted in some cases.¹⁵

⁹ Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Feb. 4, 2014) (emphasis added).

¹⁰ Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Feb. 25, 2014) at 2 (emphasis added).

¹¹ *Id.*

¹² Meeting between Committee Staff & Office of Counsel to the President Staff (Feb. 25, 2014) [hereinafter Feb. 25 WHCO Meeting].

¹³ *Id.*

¹⁴ Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Mar. 14, 2014) at 1; Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Apr. 7, 2014) at 1.

¹⁵ *See, e.g.*, e-mail from Brad Ellison, HHS, to Kevin Charest, HHS (Oct. 23, 2013, 4:03 p.m.) [HHS-0107159-60].

The high level of White House involvement in the launch of HealthCare.gov and the Department's response to the Committee's subpoena is surprising.

Since the Department launched HealthCare.gov on October 1, 2013, the President has been adamant that he and other senior Administration officials did not have a significant role in the rollout of HealthCare.gov. Indeed, the President has often directed criticism related to the rollout toward HHS technical staff and contractors. For example, in an interview with *NBC News* on November 7, 2013, the President stated, "Kathleen Sebelius doesn't write code, she wasn't our IT person."¹⁶ Similarly, during a November 14, 2013, press conference, the President stated, "On the website, I was not informed directly that the website would not be working the way it was supposed to."¹⁷ If these statements are true, the Department's delay in responding to the Committee's subpoena to allow the White House to review certain documents seems unnecessary.

Yet the Committee is now aware of substantial White House involvement in developing and launching HealthCare.gov.¹⁸ Additionally, the Committee has learned that the White House applied redactions to documents that are responsive to the Department's subpoena for HealthCare.gov documents.

For example, on February 4, 2014, the Department produced a September 3, 2013, e-mail from Frank Baitman, HHS's Chief Information Officer, to HHS Deputy Secretary Bill Corr, related to talking points drafted by Department officials regarding the information security of the federal exchange.¹⁹ Though the Department initially withheld the e-mail from the Committee because it "raised important Executive Branch institutional concerns that extend beyond HHS and CMS,"²⁰ the Department eventually partially produced the document in redacted form after the White House applied redactions to the e-mail.²¹ The White House was unwilling to provide any further details about the redactions.

On March 14, 2014, the Department produced additional parts of the September 3, 2013, Baitman e-mail.²² This e-mail exchange shows the significant involvement of White House officials with issues relating to the security of HealthCare.gov. In particular, it appears that White House officials asked CMS officials and HHS officials how to validate the security of the

¹⁶ *Exclusive: Obama Personally Apologizes For Americans Losing Health Coverage*, NBC NEWS, Nov. 7, 2013, <http://www.nbcnews.com/news/us-news/exclusive-obama-personally-apologizes-americans-losing-health-coverage-v21352724>.

¹⁷ The White House, Office of the Press Sec'y, Stmt. by the President on the Affordable Care Act (Nov. 14, 2013), <http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act>.

¹⁸ See Letter from Hon. Darrell Issa, Chairman, OGR, to Hon. Kathryn Ruemmler, Counsel to the President (Apr. 17, 2014).

¹⁹ E-mail from Frank Baitman, Chief Information Officer, HHS, to Bill Corr, Deputy Sec'y, HHS (Sep. 3, 2013).

²⁰ Letter from Jim R. Esquea, Assistant Sec'y for Legis., HHS, to Hon. Darrell Issa, Chairman, OGR (Feb. 4, 2014), at 1.

²¹ Feb. 25, 2014 WHCO Meeting.

²² See e-mail from Todd Park, U.S. Chief Tech. Officer, White House, to Christopher Jennings, Deputy Ass't to the President for Health Policy & Coordinator for Health Reform, White House, et al. (Sep. 2, 2013) [HHS-0106215-222]; [HHS-0103206-210].

online marketplace. The e-mail exchange—which involved several high-ranking officials, including Tara McGuinness, White House Senior Communications Advisor; Jeanne Lambrew, Deputy Director of the White House Office of Health Reform; Chris Jennings, Deputy Assistant to the President for Health Policy and Coordinator of Health Reform; Ed Siskel, Deputy Counsel to the President; and Todd Park, Chief Technology Officer of the United States—contains redactions that are far more extensive than the “limited redactions” the Department described in its March 14, 2014, letter. The subpoena requires the Department to produce responsive documents in unredacted form, absent a valid assertion of an applicable constitutional privilege.

The Department must produce all documents in unredacted form unless the President invokes executive privilege.

In light of the fact that the White House was highly involved in designing and launching HealthCare.gov, there may indeed be legitimate Executive Branch interests in withholding certain documents from the Committee. Neither the Department nor the White House has specified the “important Executive Branch institutional concerns” that require withholding documents responsive to the subpoena. Further, neither the Department nor the White House has provided the number of documents, in full or in part, from the Committee. While the Committee is mindful of the need to balance the interests of two co-equal branches of government, only a valid assertion of executive privilege allows the Department to withhold documents from the Committee.

If the President or other senior White House officials considered information about HealthCare.gov prior to its launch that affected the President’s decision-making, there may be a proper invocation of executive privilege that would allow the Department to withhold documents from the Committee. Absent such an assertion, the Department is required to produce all responsive documents to the Committee in unredacted form.

In addition to producing these documents, please provide the following information to the Committee as soon as possible, but by no later than May 28, 2014:

1. The total number of documents reviewed by the Department as of May 8, 2014.
2. The total number of documents the Department sent to the White House for review as of May 8, 2014.
3. The total number of documents withheld from the Committee, in whole or in part.
4. The reasons why each document or portion of a document has been withheld, including a description of any redactions applied to the document, and whether the Department, the White House, or another federal agency applied the redactions.
5. The date by which the Department’s production of unredacted, responsive documents to the Committee will be complete.

The Honorable Kathleen Sebelius

May 14, 2014

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Should the Department continue to refuse to produce all documents in unredacted form as required by the instructions in the subpoena issued on October 30, 2013, I will have no alternative but to consider the full range of options to enforce the subpoena.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", with a large, sweeping flourish extending to the right.

Darrell Issa
Chairman

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