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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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October 18, 2012

The Honorable Timothy F. Geithner
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
10th St. & Pennsylvania Avenue, NW
Washington, DC 20004

Dear Secretary Geithner and Commissioner Shulman:

On August 20, 2012, we sent Commissioner Shulman a letter asking for information related to IRS's rule that extended Obamacare's premium-assistance tax credits to individuals purchasing insurance in federal exchanges.¹ We wrote out of concern that IRS's rule was inconsistent with the language Obamacare added to the Internal Revenue Code, which explicitly states that only individuals in state exchanges would be eligible for the tax credits.² Since you have failed to provide documents and information that we requested, we are writing to reiterate our earlier request.

Michael Cannon, director of health policy studies at the CATO Institute, and Jonathan Adler, law professor at Case-Western University, stated in their article "Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the Patient Protection and Affordable Care Act," that IRS's rule not only violates the statute, but the rule also represents a massive tax increase on individuals and businesses.³ A review by legal experts at the Congressional Research Service found 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.'"⁴ CRS's experts noted:

[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

¹ Letter from Rep. Darrell Issa, Rep. Trey Gowdy, and Rep. Scott DesJarlais to Douglas Shulman, Commissioner of the IRS (August 20, 2012) (on file with Committee) [hereinafter Letter].

² PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111-148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111-152 § 1401, 124 Stat. 119, 213.

³ 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).

⁴ Jennifer Staman and Todd Garvey, CONG. RESEARCH SERV., Memorandum, LEGAL ANALYSIS OF AVAILABILITY OF PREMIUM TAX CREDITS IN STATE AND FEDERALLY CREATED EXCHANGES PURSUANT TO THE AFFORDABLE CARE ACT, (July 23, 2012).

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.⁵

As we wrote in our August 20, 2012, letter, since most states have opted not to create exchanges, the IRS's extension of the tax credits beyond what the statute authorizes likely increases Obamacare's cost in excess of \$500 billion over the next decade.⁶ Moreover, since employers are only subject to Obamacare's employer mandate tax penalties if their workers receive a premium-assistance tax credit,⁷ IRS's rule will subject employers in every state to the employer mandate tax penalty. Our August 20, 2012, letter⁸ asked for all legal analysis produced by the IRS which authorizes the extension of the premium-assistance tax credits for individuals purchasing insurance in federal exchanges and for all documents and communications referring or relating to both the proposed rule⁹ and the final rule.¹⁰

On October 12, 2012, Treasury responded to the Committee's letter on behalf of IRS.¹¹ According to the response, the regulations implementing section 36B, the section of the Internal Revenue Code added by Obamacare and which authorizes the tax credits, were developed "in accordance with our standard process for drafting, approving, and publishing tax regulations."¹² Treasury's response then listed the steps that make up the "standard process", including an initial review of the statute by IRS lawyers, a subsequent review of IRS's legal analysis by Treasury lawyers, a conferral between the two sets of lawyers before a consensus is reached and the proposed rule is published in the Federal Register.¹³

Treasury's response failed to include a single document or communication created before the publication of the proposed rule on August 17, 2011, and thus no evidence to support the bald assertion that the IRS developed this rule "in accordance with our standard process."¹⁴

⁵ *Id.*

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 26 U.S.C. § 4980H.

⁸ See Letter, *supra* note 1.

⁹ 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>.

¹⁰ 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>.

¹¹ Letter from Mark Mazur, Treasury Department Assistant Secretary for Tax Policy to Rep. Darrell Issa (October 12, 2012) (on file with Committee).

¹² *Id.*

¹³ *Id.*

¹⁴ 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>.

The Honorable Timothy Geithner
The Honorable Douglas Shulman
October 18, 2012
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Thus, we are left to conclude that you are either willfully misleading the Committee or that you are purposefully withholding information that is essential to the Committee's oversight effort.

If you do not provide all of the requested information by Thursday, October 25, 2012, the Committee will consider the 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. 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, if possible, to receive all documents in electronic format.

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 Cummings, Ranking Minority Member

The Honorable Danny Davis, Ranking 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.