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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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March 18, 2014

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

Dear Mr. Secretary:

The Committee on Oversight and Government Reform is continuing its oversight of the Administration's implementation of the Patient Protection and Affordable Care Act, also known as "ObamaCare." The Committee is concerned that, as part of its role in the law's implementation, the Department of Treasury is intentionally disregarding core statutory requirements of the law. These concerns are compounded by serious questions about the constitutionality of the Department's actions. While we believe that ObamaCare, including its penalties on employers, is bad policy and should be repealed, it is clear that by law the Administration cannot act unilaterally to delay unpopular aspects of ObamaCare until after the next November election. We write to request your assistance in the Committee's oversight of this important issue.

The Department of the Treasury and the Internal Revenue Service published a final rule implementing Section 36B of the Internal Revenue Code on May 23, 2012.¹ Contrary to the plain and unambiguous language of the statute, the final regulation extends the health insurance premium tax credits to individuals who purchase health insurance through federally-facilitated exchanges.² This Committee and the Committee on Ways and Means conducted a joint investigation of the rulemaking, with specific attention to the Department's consideration of its legal authority to extend eligibility for the tax credit in contravention of the statute.³ The investigation included multiple interviews with senior Department and IRS officials and three *in camera* reviews of documents related to the Department's legal analysis.⁴ The Committees' investigation found no evidence that either the Department or IRS conducted a thorough legal

¹ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377 (May 23, 2012); I.R.C. § 36B (2012).

² Treas. Reg. § 1.36B-1(k) (stating that "Exchange has the same meaning as in 45 CFR 155.20").

³ Letter from Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, David Camp, Chairman, H. Comm. on Ways and Means, et al., to Jacob J. Lew, Sec'y, U.S. Dep't of the Treasury, July 25, 2013.

⁴ H. COMM. ON OVERSIGHT AND GOV'T REFORM AND H. COMM. ON WAYS AND MEANS, JOINT STAFF REPORT: ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW'S TAXES AND SUBSIDIES (FEB. 5, 2014).

analysis of the statute or legislative history prior to deciding that the premium tax credits would be available in exchanges established by the federal government.⁵

Unfortunately, it appears the Department has taken a similar approach with respect to the implementation of ObamaCare's employer mandate.⁶ The mandate penalties are assessed on employers who fail to provide government-approved health insurance coverage to their workers. According to the statute, employers with more than 50 full-time employees that do not offer health insurance coverage that meets certain criteria will be assessed a penalty.⁷ The plain language of the law is clear: the employer mandate provisions "shall apply" after December 31, 2013.⁸ Nonetheless, on July 2, 2013, the Department published a blog post announcing a one year delay in the implementation of this provision, as well as the related reporting requirements.⁹ The subsequent formal IRS Notice characterized the action as "transition relief," but failed to identify or articulate any legal basis or authority for the delay.¹⁰

Many legal experts have criticized the move as blatantly illegal and potentially unconstitutional.¹¹ Michael McConnell, a former judge on the U.S. Court of Appeals for the Tenth Circuit and a professor of law of Stanford University, has offered the following observation:

The employer mandate in the Affordable Care Act contains no provision allowing the president to suspend, delay or repeal it. Section 1513(d) states in no uncertain terms that "The amendments made by this section shall apply to months beginning after December 31, 2013."

Republican opponents of ObamaCare might say the suspension of the employer mandate is such good policy that there's no need to worry about the constitutionality. But if the president can dispense with laws, or parts of laws, when he disagrees with them, the implications for constitutional government are dire.¹²

In the wake of this criticism, Treasury officials began to assert they had relied on an unrelated provision of the Internal Revenue Code as the legal basis for the delay.¹³ However,

⁵ *Id.*

⁶ Patient Protection and Affordable Care Act, I.R.C. §§ 6055-6056, 4980H (2012).

⁷ *See* I.R.C. § 4980H (2012).

⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 6056(d).

⁹ Posting of Mark J. Mazur, Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury, to Treasury Notes, <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx> (July 2, 2013); Patient Protection and Affordable Care Act 26 U.S.C. §§ 6055-6056, 4980H (2012).

¹⁰ I.R.S. Notice 2013-45 (July 29, 2013).

¹¹ *See, e.g.*, Terry Baynes, Healthcare mandate delay may be illegal, but challenges unlikely – experts, REUTERS, Feb. 11, 2014.

¹² Michael McConnell, Opinion, *Obama Suspends the Law*, WALL ST. J., Jul 8, 2013.

¹³ I.R.C. § 7805. For assertions of this authority, *see Patient Protection and Affordable Care Act: Implementation in the Wake of Administrative Delay: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 113th Cong. (2013) (written testimony of J. Mark Iwry, Senior Advisor to the Sec'y and

there is evidence that calls into question the truthfulness of this assertion. On January 16, 2014, Committee staff conducted a transcribed interview of Mark J. Mazur, the Department's Assistant Secretary for Tax Policy. Mr. Mazur is the top official responsible for "developing, analyzing, and coordinating Treasury's and the Administration's agenda, policies, and guidance on tax issues," and authored the initial blog post announcing the delay.¹⁴ During the interview, Mr. Mazur answered a number of questions concerning the Department's consideration of its legal authority to delay implementation of the reporting requirements and employer penalties:

Q Did anyone in the Executive Office of the President inquire into the legal authority for the delay?

A I don't have any recollection of that.

Q Did anyone in the Department of the Treasury inquire into the legal authority for the delays?

A I don't recall anything along those lines, no.

Q Did anyone in the Office of the Chief Counsel of the Internal Revenue Service inquire into the legal authority for the delays?

A Not to my recollection.

Q Did anyone in the Department of the Treasury suggest or argue that the Department lacked a legal authority for the delays?

A Not to my recollection.

Q Did anyone in the Executive Office of the President suggest or argue that the Department lacked the authority for the delays?

A Not to my recollection.

Q Did anyone in the Office of the Chief Counsel of the Internal Revenue Service suggest or argue that the Department lacked the authority for the delays?

A Not to my recollection.¹⁵

These admissions are stunning: there are more than two thousand attorneys in the Department of Treasury, and the official responsible for tax policy cannot recall a single one

Deputy Assistant Sec'y for Retirement and Health Policy); Letter from Mark J. Mazur, Assistant Sec'y for Tax Policy, to Fred Upton, Chairman, H. Comm. on Energy and Commerce (July 9, 2013).

¹⁴ About the Assistant Secretary for Tax Policy, U.S. Dep't of the Treasury, <http://www.treasury.gov/about/organizational-structure/Pages/Mark%20Mazur.aspx>; see also *supra* note 9.

¹⁵ Transcribed Interview with Mark Mazur, Assistant Secretary for Tax Policy, Department of the Treasury in Wash. D.C. (Jan. 16, 2014).

inquiring into the legal authority for the employer mandate delay.¹⁶ Furthermore, Mr. Mazur's responses are inconsistent with the Department's claim that it relied upon an asserted authority under § 7805 of the Internal Revenue Code.¹⁷ In fact, Mr. Mazur's account of the legal review for the employer mandate delay is wholly consistent with the conclusions of the Committee's investigation of the legal review for the health insurance premium tax credit rule: namely, *that there was no serious legal review.*

Information obtained by the Committee suggests that last year's decision to delay the employer mandate was made by the White House and not the Treasury Department. According to Aryana Khalid, Chief of Staff for the Centers for Medicare and Medicaid Services, Health and Human Services Secretary Kathleen Sebelius learned about the employer mandate delay a few days prior to the July 2, 2013, announcement from White House Deputy Chief of Staff Mark Childress.¹⁸ We were surprised to learn that the White House Chief of Staff knew about the employer mandate delay prior to the head of the department implementing the program. This finding raises serious questions about whether the White House directed the delay of the employer mandate for political reasons.

To enable the Committee to better understand the process by which the Department concluded it was entitled to ignore explicit statutory mandate, please provide the following information:

1. All documents and communications since March 23, 2010, between employees of the Department of the Treasury and employees of the Executive Office of the President referring or relating to implementation of §§ 6055, 6056, and 4980H of the Internal Revenue Code.
2. All documents and communications since March 23, 2010, between employees of the Department of the Treasury and employees of the Department of the Health and Human Services referring or relating to implementation of §§ 6055, 6056, and 4980H of the Internal Revenue Code.

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 Committee's request.

¹⁶ See U.S. Dep't of the Treasury, About the Office of the General Counsel, *available at* <http://www.treasury.gov/about/organizational-structure/offices/Pages/General-Counsel.aspx> (stating "The General Counsel also is the head of the Treasury Legal Division, a separate bureau within the Department that is composed of approximately 2,000 attorneys and 1,500 support staff...").

¹⁷ I.R.C. § 7805. For assertions of this authority, see *Patient Protection and Affordable Care Act: Implementation in the Wake of Administrative Delay: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 113th Cong. (2013) (written testimony of J. Mark Iwry, Senior Advisor to the Sec'y and Deputy Assistant Sec'y for Retirement and Health Policy); Letter from Mark J. Mazur, Assistant Sec'y for Tax Policy, to Fred Upton, Chairman, H. Comm. on Energy and Commerce (July 9, 2013).

¹⁸ Transcribed Interview with Aryana Khalid, Chief of Staff, Centers for Medicare and Medicaid Services, in Wash. D.C. (Feb. 28, 2014).

The Honorable Jacob J. Lew
March 18, 2014
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Please provide all responsive material as soon as possible, but no later than 5:00 p.m. on April 1, 2014. 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 to receive all documents **in electronic format**.

If you have any questions about this request, please contact Brian Blase or Brian Daner of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

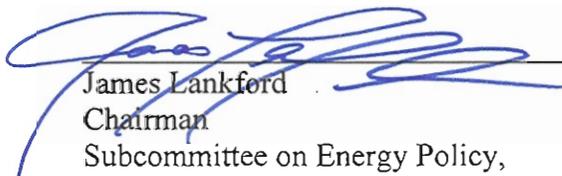
Sincerely,



Darrell Issa
Chairman



Jim Jordan
Chairman
Subcommittee on Economic Growth,
Job Creation, and Regulatory Affairs



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

Enclosure

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

The Honorable Matthew A. Cartwright, Ranking Minority Member
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

The Honorable Jackie Speier, Ranking Minority Member
Subcommittee on Energy Policy, Health Care and Entitlements

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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.