

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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May 18, 2016

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

Dear Secretary Burwell:

On February 17, 2016, the Committee issued a subpoena to you for records related to Consumer Operated and Oriented Plans (CO-OPs) established under the Patient Protection and Affordable Care Act (PPACA). The subpoena was issued after the Department of Health and Human Services failed to provide documents and information voluntarily in response to letters dated November 20, 2015, and December 23, 2015.

With respect to the subpoena, you have neither produced all responsive materials, nor invoked a valid legal justification for withholding them. One category of responsive documents—which you and your staff have described as “market sensitive”—have only been made available for *in camera* review. The Committee attempted to accommodate the Department’s interests in this case and agreed to review those documents *in camera* as an initial step, as a genuine sign of good faith. Committee staff have conducted four *in camera* reviews. Each time, the Department failed to make materials available that the Committee specifically requested to review. Of the materials that were made available *in camera*, many records were duplicates, and many others were identical to those that had been reviewed in prior sessions. After reviewing the records *in camera*, the Committee identified specific records that will assist our investigation, yet the Department refuses to provide those records on a permanent basis. This undermines the purpose of the *in camera* review process and demonstrates an unwillingness to work with the Committee in good faith.

The Department’s most recent document production was comprised almost entirely of publicly available materials, and it occurred only after the Committee made clear its intent to enforce the subpoena if the Department continues to withhold responsive documents. It is clear, however, the Department is continuing to withhold responsive documents. To date, the Department has not produced a large volume of documents it provided and/or identified to other investigators and auditors—including the Government Accountability Office (GAO). Documents described in GAO reports have simply been withheld without explanation. Moreover, HHS has refused to discuss its efforts to identify responsive materials, nor provided adequate assurances responsive materials are being preserved.

The Department's failure to comply with the subpoena that was issued to you three months ago has delayed and obstructed the Committee's investigation. The records covered by the subpoena are necessary so the Committee can complete its investigative work on the financial, operational, and management challenges many CO-OPs are currently facing.

I. Persistent Problems at CO-OPs and Exchanges Have Cost Taxpayers Billions and Disrupted Health Insurance for Hundreds of Thousands

CO-OPs are a type of private nonprofit health insurer established under PPACA.¹ CMS awarded over \$2.4 billion in start-up and solvency loans to help create 23 CO-OPs (and nearly \$5 billion in total federal grants to the states for costs related to the Exchanges).² To date, twelve CO-OPs have failed and closed—federal loans to the twelve failed CO-OPs totaled more than \$1.2 billion.³ It is unclear whether any taxpayer dollars will be recouped from failed CO-OPs.

Furthermore, the failed CO-OPs disrupted insurance coverage for approximately 740,000 individuals and small-business employees in Arizona, Colorado, Iowa, Nebraska, Kentucky, West Virginia, Louisiana, New York, Nevada, Tennessee, Oregon, South Carolina, Utah, and Michigan.⁴ Vermont's CO-OP was also closed before it opened for enrollment because it failed to meet the state's insurance standards.⁵

The Exchanges have also been plagued by systemic problems, including call center glitches, website failures, software problems, lower than expected enrollment numbers, and deficient processes for determining eligibility.⁶ Large insurers have publicly discussed withdrawing from the Exchanges.⁷ The nation's largest health insurer, UnitedHealth, recently announced a mass withdrawal from the Exchanges for 2017.⁸

In light of these pervasive problems, it is critical Congress has all the documents and information it needs to assess the agency's efforts to protect consumers and safeguard billions in taxpayer dollars. To this end, the Committee requested information from the Centers for Medicare and Medicaid Services (CMS), and, after CMS failed to produce the records we requested, a subpoena was issued to compel the production of high-priority records. Inexplicably, HHS has refused to cooperate and produce responsive documents and

¹ CMS website, "Grants," available at <https://www.cms.gov/CCIIO/Resources/Grants/new-loan-program.html>; Pub. L. No. 111-148, §§ 1322 (codified at 42 U.S.C. § 18042).

² CMS website, "Grants," available at <https://www.cms.gov/CCIIO/Resources/Grants/new-loan-program.html>. This total excludes the Vermont CO-OP, which closed before enrollment.

³ Tom Howell, Jr., *More than half of Obamacare co-ops fail*, WASH. TIMES, Nov. 3, 2015.

⁴ Amy Goldstein, *More than half of ACA co-ops now out of insurance marketplaces*, WASH. POST, Nov. 3, 2015.

⁵ Brian J. Tumulty, *Health Republic is latest health care co-op to go under*, USA TODAY, Nov. 29, 2015.

⁶ Lena H. Sun and Niraj Chokshi, *Almost half of Obamacare exchanges face financial struggles in the future*, WASH. POST, May 1, 2015; Ricardo Alonso-Zaldivar, *State health insurance markets struggle with cost challenges*, ASSOC. PRESS, July 26, 2015; Stephanie Armour, *Audit Finds Deficiencies in New York State's Health-Insurance Exchange*, WALL ST. J., Sept. 23, 2015.

⁷ Anna Wilde Mathews and Stephanie Armour, *Biggest Insurer Threatens to Abandon Health Law*, WALL ST. J., Dec. 1, 2015.

⁸ Carolyn Y. Johnson, *UnitedHealth Group to exit Obamacare exchanges in all but a 'handful' of states*, WASH. POST, Apr. 19, 2016.

communications, including items identified by Committee staff for priority production both before and after the subpoena was served.

II. Background on the Committee's Investigation

For almost six months, the Committee has made a methodical good faith effort to obtain documents from the Department. Despite extraordinary accommodations by the Committee every step of the way, you and your staff have delayed and obstructed the Committee's work.

A. November 20, 2015, Document Request

On November 20, 2015, the Committee requested information about Exchanges and CO-OPs from the Department, specifically, materials relating to:

- Sustainability and financial viability of CO-OPs and Exchanges;
- CO-OPs placed on enhanced oversight plans (EOPs) and/or corrective action plans (CAPs);
- Analysis relating to current and future operational status of CO-OPs and Exchanges;
- Total taxpayer dollars provided to each CO-OP and Exchange; and
- Recoupment of federal funds provided to failed CO-OPs and Exchanges.⁹

In response, the Department made cursory document productions on an intermittent rolling basis, and provided a briefing for Committee staff on December 16, 2015. No documents were produced at the briefing. Two days later, Department staff advised they would not produce information regarding CO-OPs operating under corrective action plans (CAPs) and/or enhanced oversight plans (EOPs).¹⁰ Currently, eight of the eleven remaining CO-OPs are under CAPs and/or EOPs.¹¹ According to the Department, consumers may be reluctant to enroll in plans at any of those eight CO-OPs if they knew about the imminent risk of failure.

As yet another meaningful accommodation, on December 23, 2015, the Committee identified a narrow, targeted subset of the documents requested on November 20. The Committee specifically identified documents and communications relating to the CO-OPs on EOPs/CAPs as the first priority. The Department refused to provide this narrow subset of documents, and instead insisted they would only be available for *in camera* review at the Department because of "market sensitivities."¹²

⁹ Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, *et al.*, to CMS Acting Administrator Andy Slavitt (Nov. 20, 2015).

¹⁰ Phone call between Investigations Staff, H. Comm. on Oversight and Gov't Reform and Office of Legislation Staff, CMS (Dec. 18, 2015).

¹¹ Materials provided by HHS for *in camera* review on Jan. 28, 2016 and Feb. 23, 2016.

¹² Letter from Megan O'Reilly, Director, Office of Legislation, CMS, to Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform (Jan. 15, 2016) ("...CMS commits to make available to you and your staff the CMS EOP or CAP letters sent to currently operating CO-OPs through an in-camera review. As CMS has relayed to the Committee, information about the CO-OPs currently operating under EOPs or CAPS, including the names and the number of such CO-OPs as well as the content of the EOP or CAP letters, is market sensitive and the disclosure of this information would place policyholders and federal taxpayer dollars at unnecessary risk.").

Although not required to, but as a meaningful sign of good faith, the Committee agreed to accommodate the Department's interests in this case and examine those documents *in camera*. This was a nod to the Department's stated interest in retaining control of documents it believes the public should not see. On January 28, 2016, bipartisan Committee staff conducted the first of four *in camera* reviews. The Department made only a few documents available: seven letters, one to each of the CO-OPs currently operating under EOPs/CAPs. These letters referenced other correspondence between CMS and the CO-OPs, as well as various reports the CO-OPs are required to file with CMS as part of the EOP/CAPs. These materials were not made available to Committee staff during the *in camera* reviews, despite Committee staff's specific request to review those documents.

On February 8, 2016, the Department briefed Committee staff, but provided no documents. After the meeting, Committee staff identified items from the *in camera* review for priority production, including correspondence between CO-OPs and CMS from specific dates, corrective action plans, enhanced oversight plans, warning letters of specific dates issued by CMS to CO-OPs and CO-OP responses, and reports from CMS' site visits to CO-OPs, including a July 8, 2015, site visit to Wisconsin and a July 27-28, 2015, site visit to Maryland.¹³ More than three months later, none of these materials have been produced to the Committee.

B. February 17, 2016, Subpoena

Because the Department was unwilling to produce documents and communications voluntarily, despite the Committee's efforts to accommodate the Department's concerns about market sensitivities and the scope of the request, the Committee issued a subpoena to you on February 17, 2016. The Department's posture towards cooperating with the Committee's investigation, however, remained unaccommodating.

The Department continued to withhold documents specifically identified as top priorities, such as the periodic reports CO-OPs file, and other responsive documents referenced in the materials available *in camera*.

Furthermore, at a hearing before the Committee on February 25, 2016, a Department witness agreed to provide a number of responsive records, including:

- a list of CO-OPs at which CMS has conducted site visits;
- enrollment projections for each CO-OP;
- whether enrollment projections are being met; and
- a list of CO-OPs that are profitable.¹⁴

To date, HHS has provided only a list of CO-OPs site visits. The remaining materials are still being withheld.

¹³ Email from H. Comm. on Oversight & Gov't Reform staff to CMS Office of Legislation Staff (Feb. 8, 2016).

¹⁴ *Review of Consumer Operated and Oriented Plans: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Feb. 25, 2016).

C. April 19, 2016, Committee Hearing

At the Committee's April 19, 2016, hearing, titled "Document Production Status Update, Part II," the Department continued to articulate concerns about producing the records it deemed market sensitive.¹⁵ The Department's witness would not agree to produce any of the documents made available *in camera*, or other responsive materials, other than to note the ongoing effort to obtain a list of CO-OPs for which CMS has conducted site visits. A follow-up meeting with staff two days later was equally unproductive, and the Department did not produce a single document in conjunction with the hearing.

III. Documents Covered by the Subpoena are Being Withheld

The Committee's February 17, 2016, subpoena covers four categories of documents relating to CO-OPs. You have failed to produce these, and the Department is currently withholding responsive documents identified by the Committee.

Subpoena Paragraph 1 covers "All documents and communications referring or relating to any criteria or processes by which the Centers for Medicare and Medicaid Services and/or the Department of Health and Human Services assess the sustainability and financial viability of CO-OPs."

The Department has, and is currently withholding, a number of documents responsive to Paragraph 1, including periodic reports CO-OPs are required to file with CMS under the terms of the CAPs/EOPs. Those periodic reports contain monthly claims and loss ratio updates, monthly reporting on claim backlogs, monthly reports on consumer complaints, monthly/cumulative profit/loss statements, monthly financial statements that include true administrative cost ratio and medical loss ratio, monthly cash flow projections, currently monthly burn rate, accounts receivable and accounts payable aging reports, termination of enrollment due to non-payment, administrative spending versus budget, status on hiring key CO-OP personnel such as chief executive officer and chief medical officer, status/inventory of provider contracting, and bi-weekly updates provided by CO-OPs to CMS' CO-OP Division Account Managers.

The Department has refused to produce this information on the basis it is "market sensitive." This is not a valid legal reason for withholding documents covered by a subpoena.

The Department is also withholding a range of reports and tools CMS uses to monitor CO-OP performance, including:¹⁶

- Quarterly "direct analysis" that CMS uses "to analyze various aspects of performance, including enrollment, net income, premium revenues, claims and administrative expenses, and financial information related to risk mitigation programs and reserves."

¹⁵ *Document Production Status Update, Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Apr. 19, 2016).

¹⁶ Gov't Accountability Office, *Private Health Insurance: Federal Oversight, Premiums, and Enrollment for Consumer Operated and Oriented Plans in 2015* (Mar. 2016) (GAO-16-326) at 15-24.

- Quarterly “risk assessment,” which CMS uses to assess risk across long-term sustainability, working capital, profitability, compliance with state requirements, compliance with CO-OP program requirements, CO-OP management, and CO-OP infrastructure issues.
- Termination letters, i.e., letters that CMS sends to CO-OPs to terminate loan agreements of CO-OPs determined to be unable to satisfactorily address problems identified in CAPs, EOPs, and site visits. According to GAO, nine of twelve CO-OPs that have ceased operations received a termination letter as of January 2016.
- Independent auditor reviews completed in 2013, 2014, and 2015, with additional audits expected to be completed by mid-2016 for the currently operational CO-OPs.
- Materials related to a committee formed by CMS to identify and make recommendations related to risks to, and concerns about, the CO-OP program as a whole.

Subpoena Paragraph 2 covers “All documents and communications referring or relating to CO-OPs that have been placed on enhanced oversight or corrective action plans, including, but not limited to, the enhanced oversight or corrective action plans for such CO-OPs and any amendments, addendums, or changes.”

The Department has, and is currently withholding, documents responsive to Paragraph 2, including CAPs/EOPs and related materials for currently operational CO-OPs, such as their periodic reporting. Further, HHS has failed to produce additional CO-OP materials identified by GAO, such as CMS communications with state insurance regulators, or issue assessments and scoring of the CO-OPs conducted by CMS account managers.¹⁷

Subpoena Paragraph 3 covers “All documents and communications referring or relating to the status of each CO-OP, including, but not limited to, current and future operational statuses, performance analyses, financial or technological sustainability and solvency, and future financial viability.”

The Department has, and is currently withholding, documents responsive to Paragraph 3, including CAPs/EOPs and related materials for currently operational CO-OPs. HHS has also failed to produce the reports from site visits conducted by CMS at the CO-OPs. HHS has only offered to make the site visit reports for currently operational CO-OPs available for *in camera* review, once again citing “market sensitivities.”¹⁸

Subpoena Paragraph 4 covers “All documents and communications referring or relating to requests, actions and/or plans to recoup federal funds provided to failed CO-OPs,

¹⁷ *Id.*

¹⁸ Email from HHS Office of Leg. Affairs staff to H. Comm. on Oversight and Gov’t Reform staff (Apr. 27, 2016) (“Consistent with our past practices and responsibility to protect market sensitive information, we will provide final reports from these visits available to you by *in camera* review for open CO-OPs. Reports from these visits to closed CO-OPs have not been finalized.”).

including, but not limited to, documents and communications referring or relating to how any funding recouped in a judicial proceeding or settlement will be allocated.”

The Department has, and is currently withholding, documents responsive to Paragraph 4, including materials relating to actual efforts to recoup loans from failed CO-OPs (or any decisions not to recoup loan funds). Additional responsive materials could include termination letters (referenced above under Subpoena Request No. 1) and HHS documents and communications relating to the decision to allow CO-OPs to apply to reclassify certain loans as surplus.¹⁹ In fact, your staff advised the Committee to obtain these documents from the Department of Justice instead.²⁰

IV. Conclusion

The Committee has repeatedly requested that certain materials be made available *in camera*. The Department has failed to provide these documents for review.²¹ The Committee has repeatedly requested that HHS permanently produce certain materials made available *in camera*.²² Citing market sensitivities, the Department has refused to turn those over.²³ The Committee asked the Department to identify the universe of responsive materials being withheld.²⁴ The Department has not. The Committee has asked the Department to describe its

¹⁹ Memorandum from CMS to CO-OP Project Officers from Kelly O’Brien, Director, CO-OP Division, re: “Amending CO-OP Loans Agreement to Apply Surplus Notes to Start-up Loans” (July 9, 2015), *available at* <http://cagw.org/sites/default/files/users/user98/Converting%20Start-up%20Loans%20to%20Surplus%20Notes%20Guidance%207-9-15%20final.pdf>

²⁰ *Document Production Status Update, Part II: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 114th Cong. (Apr. 19, 2016) (testimony of Jim Esquea, Asst. Sec’y for Legislation, HHS).

²¹ E.g., Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, HHS (May. 11, 2016) (“The materials provided by HHS for in camera review are not fully responsive to the subpoena/priority production items we have requested. For example, HHS has yet to provide materials relating to recoupment of loans from failed CO-OPs; CMS internal analyses of the CO-OPs; certain periodic reports that CO-OPs are required to file with CMS, such as weekly/biweekly updates provided by CO-OPs to Division Account Managers. Can you please advise regarding when we can expect to receive these items?”).

²² E.g., Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, CMS (Feb. 8, 2016); Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, HHS (Mar. 3, 2016); *Review of Consumer Operated and Oriented Plans: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (Feb. 25, 2016); *Document Production Status Update, Part II: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (Apr. 19, 2016); Meeting with Office of Leg. Affairs Staff, HHS and Investigations Staff, H. Comm. on Oversight and Gov’t Reform, to discuss CO-OP document production (Apr. 21, 2016); Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, HHS (Apr. 22, 2016).

²³ E.g., *Review of Consumer Operated and Oriented Plans: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (Feb. 25, 2016); *Document Production Status Update, Part II: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. (Apr. 19, 2016); Meeting with Office of Leg. Affairs Staff, HHS and Investigations Staff, H. Comm. on Oversight and Gov’t Reform, to discuss CO-OP document production (Apr. 21, 2016).

²⁴ E.g., Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, CMS (Dec. 16, 2015); Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, CMS (Feb. 8, 2016); Email from Investigations Staff, H. Comm. on Oversight and Gov’t Reform to Office of Leg. Affairs Staff, HHS (Mar. 3, 2016); Meeting with Office of Leg. Affairs Staff, HHS and Investigations Staff, H. Comm. on Oversight and Gov’t Reform, to discuss CO-OP document production (Apr. 21, 2016).

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efforts to identify responsive materials.²⁵ Your staff specifically stated they will not engage in such a discussion.²⁶ The Committee asked the Department to provide assurances that responsive materials are being appropriately preserved.²⁷ Your staff stated a preservation order is not necessary.²⁸

Throughout the investigation, the Committee has made numerous meaningful attempts to accommodate HHS's stated interests. Committee staff have conducted numerous phone calls, emails, and meetings with Department officials to clarify and highlight priorities with respect to the subpoena and related voluntary requests. Committee staff participated in four *in camera* reviews and two briefings, and I have been flexible with production deadlines to assist the Department.

Despite the Committee's flexibility, HHS has refused to produce certain materials to the Committee or even make certain materials available for *in camera* review. The Department has represented on numerous occasions it will not produce materials it views as market sensitive, chiefly, materials relating to currently operational CO-OPs that are under CAPs/EOPs. HHS continues to withhold materials without any assertion of legal privilege, citing only "market sensitivities" as a basis for its refusal to produce responsive materials.

In sum, you and your staff's posture towards congressional oversight of an extremely important Department initiative has required the Committee to go to extraordinary lengths to obtain even a small subset of responsive documents. In light of the foregoing, and with billions of taxpayer dollars at risk, it is imperative you stop obstructing the Committee's investigation and immediately comply with the subpoena. The Committee intends to enforce the subpoena pursuant to 2 U.S.C. §192, if immediate efforts to cooperate and produce all responsive materials are not undertaken forthwith.

If you have any questions, please contact Sean Hayes of the Committee staff at (202) 225-5074.

Sincerely,



Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

²⁵ Meeting with Office of Leg. Affairs Staff, HHS and Investigations Staff, H. Comm. on Oversight and Gov't Reform, to discuss CO-OP document production (Apr. 21, 2016).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*