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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

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December 1, 2011

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:

As the Ranking Republican on the United States Senate's Committee on Finance, I am closely overseeing the implementation of the Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111-148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152). The Treasury Department and the Internal Revenue Service have promulgated proposed regulations regarding the new premium credits established in Section 1311 of PPACA. It appears that these regulations, implementing Section 36B of the Internal Revenue Code, are inconsistent with the relevant statutory language. I am concerned that if finalized, these rules would exceed your regulatory authority, violating the Constitution's separation of powers.

Internal Revenue Code section 36B provides for a refundable credit for coverage under a qualified health plan. The amount of the credit equals the "premium assistance credit amount,"¹ which in turn equals the annual sum of the monthly "premium assistant amounts."² The Premium Assistance Amount equals the lesser of ... (A) "the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent ... and which were enrolled in through *an Exchange established by the State under 1311* of the Patient Protection and Affordable Care Act" or (B) an amount calculated with reference to the "applicable second lowest cost silver plan."³ An applicable second lowest cost silver plan must be a plan offered "through the same Exchange through which the qualified health plans taken into account under" the immediately-
aforementioned subparagraph (A)⁴ – that is, through "an Exchange established by the State under [section] 1311" of PPACA.

So, to the extent there is not "an Exchange established by the State under [section] 1311" of PPACA, there are no premium assistance amounts and thus the section 36B Health Insurance Premium Tax Credit would be zero.

¹ IRC § 36B(a).

² See IRC § 36B(b)(1).

³ IRC § 36B(b)(2) (emphasis added).

⁴ IRC § 36B(b)(3)(B)(i).

However, your proposed regulations provide that a section 36B Health Insurance Premium Tax Credit would be available if, among other conditions, the taxpayer or a member of the taxpayer's family is enrolled in a "qualified health plan through an Exchange established under section 1311 *or* 1321 of the Affordable Care Act."⁵ Section 1321(c) provides that if a State does not establish an Exchange, then the Federal government can establish a "Federally-facilitated Exchange."⁶ A section 1321(c) Federally-facilitated Exchange is not "an Exchange established by the State" and thus cannot satisfy the language of Code section 36B(b)(2)(A).

Even the relevant recent HHS proposed regulations recognize that a "Federally-facilitated Exchange" is different from an Exchange established by the State under section 1311: "Section 1321(c)(1) requires the Secretary [of Health & Human Services] to establish and operate such Exchange within States that ... [d]o not elect to establish an Exchange."⁷ That is, these HHS proposed regulations confirm that States may elect to not establish an exchange, and that the HHS Secretary is required to establish an Exchange if the State does not do so.

Simply put, under current statutory law, there is no premium assistance amount, hence no section 36B Health Insurance Premium Tax Credit, to the extent that an Exchange is a Federally-facilitated Exchange. But contrary to the clear wording of the statute, your proposed regulations suggest otherwise, extending the availability of premium credits to those participating in federal exchanges.

It is worth noting that even the grant of regulatory authority in section 1401 of PPACA does not authorize your extension of premium credits to the federal exchange.⁸ That section provides that "[t]he Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section." However, as discussed earlier, providing Health Insurance Premium Tax Credits based on Federally-facilitated Exchanges is not a "provision of this section."

I appreciate that some in your agencies and in the Administration might have found the language creating the premium credits, as passed by both the House and the Senate and signed by the President, problematic, since it precludes the application of premium credits to any federal exchanges. I would suggest that the failure to draft this language differently was the result of the highly partisan nature by which PPACA was pushed through Congress. Whatever the case, if the wording and effect of section 36B should somehow be different, then legislation is the appropriate means of changing section 36B. The legislative function, under the Constitution, is exclusively granted to Congress.

This excessive use of regulatory authority is only the continuation of a trend by the Treasury Department and the IRS of violating the constitutional principle of separation of powers by usurping Congress' exclusive role in law-making. Other examples include IRS

⁵ Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931, 50,934 (Aug. 17, 2011) (emphasis added).

⁶ 42 USC sec. 18041(c); Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866 (Jul. 15, 2011).

⁷ Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, 41,867 (Jul. 15, 2011).

⁸ PPACA Section 1401; Internal Revenue Code Section 36B(g).

Notice 2008-83.⁹ I also have real concerns about the Treasury Department not getting the required OMB Office of Information and Regulatory Affairs (OIRA) review for all final rules as required by the Congressional Review Act, 5 USC secs. 801-808. Over the last 15 years, literally thousands of IRS rules have not received the required OMB OIRA review, calling into question whether such rules have taken effect.

Given these concerns, I respectfully request:

- 1) That any final regulations regarding Code section 36B clarify that the section 36B Health Insurance Premium Tax Credit will not be available based upon enrollment in a Federally-facilitated Exchange;
- 2) That before any final regulations regarding Code section 36B become effective, they receive the review of the Administrator of OMB's OIRA, as referred to by 5 USC sec. 804(2); and
- 3) That you provide my office with any correspondence (including emails, memoranda, written notes, and electronic documents) addressing your agencies' legal authority to issue a regulation that expands the section 36B Health Insurance Premium Tax Credit so as to be available for participation in Federally-facilitated Exchanges.

I appreciate your expeditious consideration of this matter, and ask that you respond to this request by December 31, 2011. Should you have any questions regarding this letter, please contact Tony Coughlan or Brendan Dunn of the Committee staff at 202-224-4515.

Sincerely,



Orrin G. Hatch
Ranking Member

⁹ Congress eventually overturned Notice 2008-83. See section 1261(a) of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.