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Congress of the United States

House of Representatives

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September 23, 2014

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

Dear Secretary Lew:

The Committee on Oversight and Government Reform continues to conduct oversight of the Administration's implementation of ObamaCare. This effort includes oversight of the Internal Revenue Service 36B regulation that authorized ObamaCare's premium tax credits and associated tax penalties in states that chose not to establish their own exchanges. Since the Committee's previous letters on this matter, significant developments necessitate that the Treasury Department permanently produce all documents related to the development of the 36B regulation. Despite numerous requests, the Treasury Department has repeatedly demonstrated an unwillingness to voluntarily provide these documents. As a result, I am forced to issue the enclosed subpoena to compel the Department to turn them over.

On July 22, 2014, the D.C. Circuit Court of Appeals ruled that the IRS regulation was illegal, concluding that a "federal Exchange is not an 'Exchange established by the State,' and section 36B does not authorize the IRS to provide tax credits for insurance purchased on federal Exchanges."¹ According to the court's ruling, premium tax credits should not have been authorized in states that opted to use the federal Exchange.²

According to the non-partisan Congressional Research Service, "[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.'"³ [emphasis added]. Despite this clear statutory language, the Department of the Treasury and IRS ignored the

¹ *Halbig v. Burwell*, No. 14-5018, 2014 WL3579745, at *7 (D.C.Cir. 2014).

² *Id.* at *17.

³ Jennifer Staman & Todd Garvey, CONG. RESEARCH SERV., *Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act* (2012).

plain text of the law and issued a rule on May 23, 2012, providing tax credits through an exchange established by the federal government.⁴

On August 20, 2012, I, along with Representatives Trey Gowdy and Scott DesJarlais, first wrote Treasury requesting “all legal analysis, internal or external, conducted by the IRS which authorizes IRS to grant premium-assistance tax credits in federal Exchanges.”⁵ Treasury delivered only a limited set of documents to the Committee on October 12, 2012, consisting primarily of publicly available documents. Committee staff also conducted an *in camera* review of a limited set of heavily redacted documents at Treasury.

On January 29, 2013, Chairman Camp and I sent a letter to Treasury on the failure of Treasury officials to provide documents responsive to the Committees’ oversight of the 36B rule.⁶ It was only after this letter, and the threat of a subpoena, that Treasury allowed Committee staff to review the unredacted documents *in camera*. This *in camera* review showed several problems with IRS’s and Treasury’s legal analysis. For example, the Committees found that:

- In March 2011, the IRS Chief Counsel’s office drafted the only written explanation by IRS or Treasury prior to the publication of the proposed rule regarding their decision to extend PPACA’s premium subsidies in federal exchanges. The written explanation contained a single paragraph with a single reason. This single reason apparently served as the Administration’s entire legal basis for providing subsidies in federal exchanges prior to the proposed rule.⁷
- Prior to the promulgation of the proposed rule, IRS downplayed the significance that the lack of statutory authority for providing subsidies in federal exchanges presented. David Gamage, a counsel in Treasury’s Office of Tax Policy, who wrote the policy memo that accompanied the proposed rule for clearance, included a section in the titled “Significant Issues and Considerations,” with four areas highlighted. Notably absent in this section was any reference to whether tax credits would be available on the federal exchange.⁸

⁴ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf>.

⁵ Letter from Darrell Issa, Chairman H. Comm. on Oversight & Gov’t Reform, Trey Gowdy, Chairman H. Subcomm. Health Care, D.C., and Census and the National Archives, & Scott DesJarlais, Member of Congress, to Douglas H. Shulman, Comm’r, Internal Revenue Ser. (Aug. 20, 2012) (on file with H. Comm. on Oversight & Gov’t Reform).

⁶ Letter from Dave Camp, Chairman H. Comm. on Ways & Means, & Darrell Issa, Chairman H. Comm. on Oversight & Gov’t Reform, to Neal Wolin, Acting Sec’y, Dep’t of the Treasury, and Steve Miller, Acting Comm’r, Internal Revenue Serv. (Jan. 29, 2013) (on file with H. Comm. on Oversight & Gov’t Reform).

⁷ STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM AND H. COMM. ON WAYS AND MEANS, ADMINISTRATION CONDUCTED INADEQUATE REVIEW OF KEY ISSUES PRIOR TO EXPANDING HEALTH LAW’S TAXES AND SUBSIDIES (Feb. 5, 2014) [hereinafter *Staff Report*].

⁸ *Id.*

In addition to these *in camera* reviews, the Committees conducted three briefings on November 2, 2012, April 4, 2013, and June 13, 2013, with IRS and Treasury personnel and held a hearing with Emily McMahon, Deputy Assistant Secretary for Tax Policy, on July 31, 2013.⁹ This Committee also conducted a transcribed interview of Mark Mazur, Treasury's Assistant Secretary for Tax Policy, on January 16, 2014.¹⁰

Unfortunately, IRS and Treasury personnel were unable or unwilling to provide many key answers to the Committees' questions about the factors Treasury considered during the development of the rule. The information provided by these officials at briefings, interviews, and hearings, indicate that IRS and Treasury never seriously attempted to reconcile the plain text of the statute and ObamaCare's legislative history with their interpretation. For example, the Committees uncovered several additional problems with IRS and Treasury's legal analysis, such as:

- Mark Mazur, who defended IRS and Treasury's interpretation, testified that he never saw any analysis of the decision to authorize tax credits in federal exchanges that was produced prior to May 2012, when the 36B final rule was published. Mr. Mazur also could not recall the basis for key statements he made within a previous letter he sent about Treasury's interpretation.¹¹
- Treasury officials did not consider that ObamaCare also conditioned other provisions on state cooperation, such as the law's Medicaid expansion, in deciding whether the absence of authorization for premium subsidies in federal exchanges was intentional.¹²
- Treasury's review of the legislative history did not consider evidence that the Senate had a clear preference for state exchanges.¹³ Treasury's review of the legislative history did not consider evidence that PPACA's antecedent bills in the Senate conditioned premium subsidies on state compliance.¹⁴
- Treasury's review of the relevant legislative history considered statements made by Members of the House of Representatives prior to the Senate passage of PPACA on December 24, 2009, despite the fact that such statements do not represent the relevant legislative history because they addressed different bills

⁹ Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Nov. 2, 2012); Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Apr. 4, 2013); Briefing from Internal Revenue Serv. & Dep't of the Treasury Officials to H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (June 13, 2013).

¹⁰ Transcribed Interview with Mark Mazur, Assistant Sec'y for Tax Policy, U.S. Dep't of the Treasury, in Washington, D.C. (Jan. 16, 2014).

¹¹ See *Staff Report*, *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

with different approaches to exchanges and premium subsidies that could not pass both chambers of Congress.¹⁵

On August 15, 2013, one year after I first wrote IRS concerning this issue, I, along with Subcommittee Chairman James Lankford, wrote to you requesting approximately 50 emails and other documents that Treasury had withheld from this Committee's investigation.¹⁶ Your staff had previously indicated that these were the only documents Treasury had identified as responsive beyond the limited materials already produced to the Committees.¹⁷ Finally, on September 24, 2013, again after we were forced to consider a subpoena to obtain the documents, Committee staff conducted an *in camera* review of these documents. During this review, Committee staff viewed documents that showed serious concerns with the 36B regulation, such as:

- Early drafts of the proposed premium subsidy regulation contained the statutory language restricting tax credits to Exchanges "established by the State." This language was removed from those drafts in early March 2011.¹⁸
- In March 2011, IRS and Treasury officials expressed concern that there was no direct statutory authority to interpret federal exchanges as an "Exchange established by the State." IRS personnel emailed many senior HHS personnel seeking clarification of the issue in HHS's rulemaking.¹⁹

You have a responsibility to be open and transparent with the American people about the regulatory process, especially for regulations that greatly expand government reach by imposing new taxes and generate spending far beyond the plain reading of the statute.

On several occasions in 2012, Jonathan Gruber, a paid consultant to the Administration who is considered by many to be an architect of the law, confirmed that these tax credits would only be available in state exchanges.²⁰ For example, speaking in San Francisco on January 10, 2012, Mr. Gruber stated:

Now, I guess I'm enough of a believer in democracy to think that when the voters in states see that by not setting up an exchange the politicians of a state are costing state residents hundreds and millions and billions of dollars, that they'll eventually throw the

¹⁵ *Id.*

¹⁶ Letter from Darrell Issa, Chairman H. Comm. on Oversight & Gov't Reform and James Lankford, Chairman H. Subcomm. On Energy Policy, Health Care and Entitlements, to Jacob Lew, Secretary, Department of the Treasury (Aug. 15, 2013) (on file with H. Comm. on Oversight & Gov't Reform).

¹⁷ Phone call between Staff of the U.S. Dep't of the Treasury and H. Comm. on Oversight & Gov't Reform and H. Comm. on Ways & Means Staff (Mar. 20, 2013).

¹⁸ See *Staff Report*, *supra* note 7.

¹⁹ *Id.*

²⁰ Michael James, *On Jonathan Gruber and Disclosure*, ABC NEWS (Jan. 9, 2010), <http://abcnews.go.com/blags/politics/2010/01/on-jonathan-gruber-and-disclosure/>.

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guys out. But I don't know that for sure. *And that is really the ultimate threat, is, will people understand that, gee, if your governor doesn't set up an exchange, you're losing hundreds of millions of dollars of tax credits to be delivered to your citizens.* [emphasis added]²¹

In order to have a complete and accurate public record, and to correct any misinformation, I am issuing the enclosed subpoena to compel the Treasury Department to produce the documents that will answer the Committee's outstanding questions. The subpoena requires Treasury and the IRS provide four categories of documents that have—other than a series of limited *in camera reviews*—been withheld from the Committee.

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 the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman

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

Enclosure

²¹ Megan McArdle, *Obamacare's Smoking Gun Fires Again*, BLOOMBERG VIEW (July 25, 2014), <http://www.bloombergview.com/articles/2014-07-25/obamacare-s-smoking-gun-fires-again>.