



January 19, 2016

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Upton:

We write in response to the oversight requests you have made to our agencies regarding cost-sharing reduction payments under the Affordable Care Act. As you know, the House of Representatives has filed a lawsuit against the Department of the Treasury and the Department of Health and Human Services asking a federal court to end cost-sharing reduction payments and to declare that the agencies' actions in providing the payments are unconstitutional. In light of that ongoing litigation brought by the House, we are concerned with our agencies responding to your request for information and interviews at this time. To do so may compromise the ongoing litigation.

Your oversight requests on this matter have been expressly premised on the legal position that "Congress has never appropriated any funds to permit the administration to make any Section 1402 Offset Program Payments to insurance companies."¹¹ And you have further indicated that your interest in oversight is your "concern[] that the administration is unlawfully and unconstitutionally misappropriating funds to make Section 1402 Offset Program payments to insurance companies."¹² As we explained in our July 21, 2015 letter and again in our December 18, 2015 letter, our agencies disagree with your legal position and believe we have faithfully implemented the provisions of the Affordable Care Act.

¹¹ See Letter to The Honorable Sylvia Burwell, Secretary, U.S. Department of Health & Human Services, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Paul Ryan, Chairman, House Committee on Ways and Means (Feb. 3, 2015); Letter to The Honorable Jacob Lew, Secretary, U.S. Department of the Treasury, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Paul Ryan, Chairman, House Committee on Ways and Means (Feb. 3, 2015).

¹² Letter to The Honorable Sylvia Burwell, Secretary, U.S. Department of Health & Human Services, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Paul Ryan, Chairman, House Committee on Ways and Means (July 7, 2015); Letter to The Honorable Jacob Lew, Secretary, U.S. Department of the Treasury, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Paul Ryan, Chairman, House Committee on Ways and Means (July 7, 2015).

Rather than seeking to address these differences in the typical manner through the oversight or legislative process, the House of Representatives instead filed an action in federal court asking the judiciary to determine whether the House or the Executive Branch has adopted the correct legal interpretation of the applicable statutes and constitutional provisions. We continue to believe, as we have argued in that litigation, that the courts are not the appropriate forum for the resolution of this inter-branch dispute. Nonetheless, it is the forum that the House has chosen and, at this time, it is the forum in which this matter is proceeding. In that forum, the House has represented that “[t]here are no facts in dispute; there is no ambiguity or uncertainty in the record; no discovery is required to enable the case to proceed to briefing on, and resolution of, the merits.”¹³ Furthermore, the House and our agencies have addressed at length the precise legal question that you have stated is the predicate for your oversight requests in briefs filed on December 4, 2015, and January 15, 2016, with final briefs due on February 5. And the Court has made clear that the case will be “decided in a matter of months.”¹⁴

The resolution of this litigation will naturally have an impact on the oversight being conducted by this Committee. If, as we suspect, our agencies ultimately prevail, that would eliminate the legal issue that is your stated predicate for the oversight. We recognize that the ongoing litigation does not, as you state, “deprive the Committees of their respective oversight authorities and obligations.”¹⁵ However, while the committees retain oversight *authority*, the pending resolution by an Article III court—the forum chosen by the House to resolve this dispute—of the legal question that you have stated as the underlying predicate for that oversight indicates that there is no legitimate *need* for the oversight to proceed at this time.

In addition, conducting interviews of our employees during the pendency of litigation in which they are representatives of adverse parties appears to be an attempt to elicit information outside of the bounds of traditional district court discovery that the House would seek to use in later briefings. Your request for interviews “to understand the facts that led to the administration’s initial request for an annual appropriation to fund the CSR program payments to insurers, and the administration’s subsequent actions . . . to nevertheless pay insurers with funds from the permanent appropriation for tax refunds and credits,”¹⁶ was sent the same day the House filed a summary judgment motion in the ongoing litigation. In that motion, the House expressly cites and relies on some of the same actions you seek to investigate—the administration’s initial request for an annual appropriation—as evidence purportedly supporting its legal contention,¹⁷ notwithstanding that, as the defendants have explained, those matters cannot answer the question

¹³ *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 49, at 9 (D.D.C. Oct. 5, 2015).

¹⁴ *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 51, at 3 (D.D.C. Oct. 19, 2015).

¹⁵ Letter to The Honorable Sylvia Burwell, Secretary, U.S. Department of Health & Human Services, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Kevin Brady, Chairman, House Committee on Ways and Means (Dec. 2, 2015); Letter to The Honorable Jacob Lew, Secretary, U.S. Department of the Treasury, from Fred Upton, Chairman, House Committee on Energy and Commerce, and Kevin Brady, Chairman, House Committee on Ways and Means (Dec. 2, 2015) (collectively “December 2 letters”).

¹⁶ December 2 letters.

¹⁷ *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 53, at 22-25 (D.D.C. Dec. 2, 2015); *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 66, at 38-41 (D.D.C. Jan. 15, 2016).

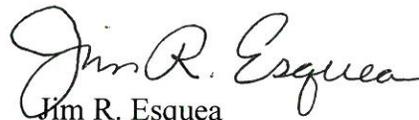
of statutory interpretation at issue.¹⁸ The House will have the opportunity to file an additional responsive brief on this issue in February. Conducting the interviews you request on these topics could compromise the integrity of the judicial proceedings by circumventing the established rules of discovery and procedure, including judicial determination of the applicability of privileges designed to protect litigants in civil litigation. Indeed, as noted above, the House has expressly acknowledged that discovery is not required in this case,¹⁹ a point with which we and the district court agree.²⁰ Two House committees requesting interviews about agency actions on the same day that the House has relied on those actions in litigation against those same agencies raises the appearance of utilizing oversight to accomplish inappropriate litigation objectives.

Although we continue to believe the appropriate course is to defer at this time to the practices and procedures governing the judicial proceeding brought by the House rather than engage in extra-judicial process, we are making the accommodation of providing you with a briefing by an individual with whom you have asked to speak, Ellen Murray, the Assistant Secretary for Financial Resources at the Department of Health and Human Services. Ms. Murray is a Senate-confirmed appointee, and her responsibilities include overseeing the Office of Budget. Given the litigation you are pursuing in federal court, this offer represents a significant accommodation and effort to cooperate with you. We will work with your staff to schedule this meeting.

Sincerely,



Anne Wall
Assistant Secretary
for Legislative Affairs



Jim R. Esquea
Assistant Secretary
for Legislation

Identical letter sent to:
The Honorable Kevin Brady

¹⁸ *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 55-1, at 26-32 (D.D.C. Dec. 2, 2015).

¹⁹ *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 47, at 4 (D.D.C. Sept. 23, 2015) (“[T]here is no reason to delay briefing on the merits where, as here, the action involves discrete issues of law and requires no discovery.”); *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 49, at 2 (D.D.C. Oct. 5, 2015) (“[T]here are no facts in dispute here and no discovery is required.”).

²⁰ See *United States House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, Dkt. No. 51, at 2-3 (D.D.C. Oct. 19, 2015) (“Unlike typical civil litigation, where the denial of a motion to dismiss would be followed by months or even years of discovery, this case is presently suited for summary disposition: the facts are not in dispute.”).