



July 21, 2015

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 your recent letters to Secretaries Burwell and Lew regarding the implementation of the Affordable Care Act (ACA). Congress enacted the ACA to improve the accessibility, affordability, and quality of health care. The ACA is achieving these goals.

The Administration has faithfully implemented the ACA, including the provisions of the Act that impose a mandatory obligation on the Executive Branch to pay subsidies that help to defray the cost of insurance coverage. The Act provides premium tax credits to help eligible individuals purchasing qualified health plans (QHPs) through the Exchanges, 26 U.S.C. § 36B, and also provides for federal payments to help cover cost-sharing expenses (such as co-payments or deductibles) for certain individuals receiving the credits. 42 U.S.C. § 18071(c)(2), (f)(2). The ACA mandates the payment of these subsidies. The premium tax credit “shall be allowed” for eligible individuals. 26 U.S.C. § 36B(a). Likewise, the Act directs that the insurance issuer “shall reduce the cost-sharing under the plan” for such individuals under a statutory formula, 42 U.S.C. § 18071(a)(2), and mandates that the Department of Health and Human Services “shall make periodic and timely payments to the issuer equal to the value of the reductions.” 42 U.S.C. § 18071(c)(3)(A). The Act further directs that the Department of the Treasury “shall” make advance payments of the ACA’s subsidies to the relevant insurers. 42 U.S.C. § 18082(c)(2)(A), (c)(3). Through its repeated use of the word “shall,” the ACA obligates the Executive Branch to make these advance payments, and eligible individuals (as well as those who receive the payments on behalf of these individuals) have a legal entitlement to them.

Congress’s instruction that the Executive Branch must make these payments is coupled with the conspicuous absence of any language “authorizing” future appropriations. This is powerful evidence that Congress understood these payments to have already been fully appropriated. The ACA is replete with dozens of examples of such “authorization of appropriations” provisions. But there is no similar “authorization of appropriations” provision in the ACA with respect to the

Act's integrated system of subsidies for the purchase of insurance – including the advance payments of cost-sharing reductions about which you have inquired. The fact that Congress mandated that these subsidies be paid, coupled with the absence of any provision authorizing the enactment of future, annual appropriations for this purpose, is a strong indication that Congress understood these payments to have already been fully appropriated.

Congress intended in the ACA that all forms of the ACA's insurance subsidies would be paid together under a single program, and were permanently appropriated. The permanent appropriation is provided under 31 U.S.C. § 1324. Advance payments of the premium tax credits and of cost-sharing reductions are made at the same time, by the same entity (Treasury), to the same recipients (issuers of QHPs), for the same purpose (defraying the cost of an eligible insured's health coverage), and pursuant to the same statutory provision (42 U.S.C. § 18082). Congress did not act to alter that understanding at any time after it enacted the ACA.

In the ACA, Congress enacted a provision that was premised on its understanding that cost-sharing reductions did not require yearly appropriations. Some Members of Congress had objected that these permanently-appropriated subsidies would not be subject to the Hyde Amendment, which limits the use of annually-appropriated funds to pay for abortions under certain circumstances. See, e.g., 155 Cong. Rec. S12660 (Dec. 8, 2009) (Sen. Hatch) (“this bill is not subject to appropriations”). In response, Congress applied such funding restrictions to the subsidies that were permanently appropriated in the Act itself, expressly including both cost-sharing reductions and advance payments.

Moreover, Congress has continued to legislate with the same understanding – that funding for these payments was appropriated in the ACA. The Continuing Appropriations Act, 2014, Pub. L. No. 113-46 (2013), conditioned the payment of cost-sharing reductions on a certification by HHS that a program is in place to verify that applicants are in fact eligible for such subsidies. The necessary premise of that legislation was that once the condition had been satisfied—as it promptly was—the Executive Branch would begin making the mandatory payments in January 2014. In sum, the ACA itself, coupled with subsequent legislation, demonstrates Congress's understanding that an annual appropriation would not be needed for the Executive Branch to fulfill the mandatory duty that Congress has imposed on it to make advance payments of the Act's cost-sharing reductions.

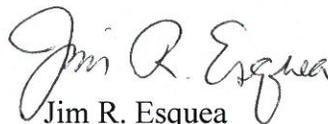
As we wrote in our February 25, 2015 response to you, the House of Representatives has filed a lawsuit against Treasury and HHS asking the court to end cost-sharing reduction payments. Your letters contain document requests that relate to the issues raised by the complaint the House filed in that case. In January of this year, the Department of Justice, which represents both defendants, filed a motion to dismiss the case on the grounds that the suit is not justiciable. However, the court has not yet ruled on that motion, and the case remains pending. It would therefore be premature for our agencies to address your document requests, as they relate to the issues raised in the lawsuit.

We appreciate the Committee's interest in the implementation of the ACA, and, consistent with the principles discussed above, we look forward to working with you and your staff to accommodate your interests and oversight needs. Please do not hesitate to contact us if we may provide further assistance with this or any other matter.

Sincerely,



Anne Wall
Assistant Secretary
for Legislative Affairs



Jim R. Esquea
Assistant Secretary
for Legislation

Identical letter sent to:

The Honorable Paul Ryan
The Honorable Peter J. Roskam
The Honorable Tim Murphy