Congress of the United States
Washington, DC 20515

June 14, 2016

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

Dear Secretary Lew:

For more than a year, the Committees on Ways and Means and Energy and Commerce have been investigating the Administration's implementation of the cost-sharing reduction (CSR) program established by the Patient Protection and Affordable Care Act (ACA). Throughout the course of the Committees' investigation, the Department of the Treasury has refused to cooperate. Your Department has failed to provide responsive documents—even pursuant to subpoena. Your Department not only improperly redacted the final memorandum you initialed authorizing the Department to make CSR payments, but does not appear to have even collected records responsive to our subpoenas. Your Department has not allowed witnesses to answer the Committees' questions, citing a regulation promulgated by the Department that improperly limits the rights of Treasury employees to petition Congress. Further, the Department has not cited any legal privilege, let alone a valid one, to withhold this information from Congress. Your Department's obstructive tactics reinforce the necessity of meaningful, diligent, and continuous congressional oversight.

I. The Committees first requested that the Department voluntarily produce documents.

On February 3, 2015, then-Ways and Means Committee Chairman Paul Ryan and Energy and Commerce Committee Chairman Fred Upton wrote you and Department of Health and Human Services (HHS) Secretary Burwell explaining concerns with the source of funding for the CSR program. Specifically, there was concern that the Administration was making (and continues to make) these payments from funds appropriated for the premium tax credit program. At the time, the Committees believed—and continue to believe—that the payments are in violation of the Constitution, which expressly prohibits the expenditure of public funds without an appropriation made by law.[1] A federal judge recently ruled exactly that.[2]

[1] U.S. CONST. art I, § 9, cl. 7 (stating, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

PRINTED ON RECYCLED PAPER

In February 2015, we asked that you provide documents related to the Administration's decision regarding the source of CSR funding by February 17, 2015. Specifically, we requested documents relating to:

1. The administration's decision to make Section 1402 Offset Program payments to insurers, despite a lack of appropriation to do so; and

2. The administration's abrupt reversal in course from its FY 2014 budget submission to Congress, in which it requested an "annual" appropriation to fund the Section 1402 Offset Program payments, to its FY 2015 budget submission, which did not include an annual appropriation request.[3]

More than a week past the deadline, on February 25, 2015, the Committees received a three-paragraph response from both departments referring Chairmen Ryan and Upton to the Department of Justice (DOJ), stating that, in your opinion, the requested information related to "matters that are the subject of the House lawsuit."[4] Your Department's response did not answer our questions or include any documents.

Nearly six months later, your Department still had not produced any documents to the Committees. Accordingly, on July 7, 2015, we wrote again to reiterate our request. At this time, we informed you that, if the Department failed to produce the requested documents and information voluntarily, we would have no choice but to consider the use of compulsory process to obtain the documents.[5] Citing the *House v. Burwell* litigation, your Department explicitly refused to produce any documents.[6]

Given your refusal to produce documents responsive to our request, on December 2, 2015, Chairman Upton and new Ways and Means Committee Chairman Brady requested

---

[2] *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967, Opinion at 1 (D.D.C. May 12, 2016) ("The question is whether Section 1402 can nonetheless be funded through the same, permanent appropriation. It cannot.").

[3] Letter from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (Feb. 3, 2015).

[4] Letters from Randal DeValk, Acting Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Feb. 25, 2015) (referring to *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967 (D.D.C. filed Nov. 21, 2014)).

[5] Letter from Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (July 7, 2015).

[6] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Paul Ryan, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (July 21, 2015).

that Treasury make four officials available for transcribed interviews by December 16, 2015.[7] At this time, we explained that "[t]he ongoing litigation is not a valid basis for refusing to respond to legitimate congressional oversight requests and does not in any way deprive the Committees of their respective oversight authorities and obligations."[8] We also, again, explained the basis for our request:

> The Committees seek to fully 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, after Congress had rejected the appropriation request, to nevertheless pay insurers with funds from the permanent appropriation for tax refunds and credits.[9]

On December 18, 2015, two days after the deadline, Treasury responded jointly with HHS, reiterating alleged concerns regarding the ongoing litigation and failing to mention our requests for interviews.[10] Your Department's response—which focused entirely on the legal arguments at issue in the *House v. Burwell* litigation—in no way addressed the factual issues central to our separate and independent oversight inquiry. As had been articulated repeatedly in our letters and staff conversations, the Committees have an oversight interest in the implementation of the law and regulations passed by Congress, and specifically, how and by whom important factual decisions were made. To be sure, the Committees' oversight interests are broader than the scope of the House's lawsuit. You also failed, again, to explain why the *House v. Burwell* litigation prevented the Committees from exercising their constitutional oversight responsibilities.

On January 19, your Department, along with HHS, again wrote to the Committees expressing concerns that "responding to your request for information and interviews at this time…may compromise the ongoing litigation."[11] Once again, you failed to explain how our separate oversight interests could "compromise" the litigation. Further, in accusing our Committees of "utilizing oversight to accomplish inappropriate litigation objectives," including by conducting interviews "in an attempt to elicit information outside of the bounds of traditional district court discovery," you failed to explain how

---

[7] Letter from Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (Dec. 2, 2015).
[8] *Id.*
[9] *Id.*
[10] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Dec. 18, 2015) ("It would therefore be premature for our agencies to address your document requests[.]").
[11] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury and Jim R. Esquea, Assistant Sec'y for Legis., U.S. Dep't of Health & Human Servs., to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Jan. 19, 2016).

the facts gathered in our investigation could be used in the lawsuit. Because the *House v. Burwell* litigation focused solely on the legality of the payments, it involved no discovery.

In conflating our factually based oversight inquiry with the legal issues in the *House v. Burwell* litigation, your Department wrote, "If, as we suspect, our agencies ultimately prevail, that would eliminate the legal issue that is the stated predicate for the oversight."[12] In fact, the Administration did not prevail. But, as we have explained to your staff, even if your Department had prevailed our questions would remain.

II. After the Department refused to produce any documents for nearly a year, the Committees issued subpoenas. The Department still did not comply.

The Committees hoped that your Department would comply voluntarily with our requests to understand how the Administration is administering a $136 billion program and how the Administration reached its decision to fund the CSR program from the premium tax credit account—issues separate and apart from the legality of the payments themselves at issue in the *House v. Burwell* litigation.

Nearly a year after we began this inquiry, however, your Department had not produced a single document to the Committees, nor had you made the requested Treasury officials available for transcribed interviews. Accordingly, on January 20, 2016, we each issued you a subpoena for documents relating to the CSR program. Specifically, each subpoena required you to produce:

> All documents and communications referring or relating to budget requests and the source of funding for cost-sharing reduction payments made by the Administration to health insurance issuers under Section 1402 of the Patient Protection and Affordable Care Act.[13]

The subpoenas created a legal obligation for the Department to produce unredacted documents to the Ways and Means and Energy and Commerce committees by February 3—exactly one year to the day since the Committees first wrote to you about this program.

Instead of producing the documents, on February 3, your Department wrote to each Committee stating that, because the House was involved in litigation regarding this same program, it was "unclear why you are insisting on factual development through the

---

[12] *Id.*

[13] Subpoena to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, from the H. Comm. on Ways & Means (Jan. 20, 2016); Subpoena to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, from the H. Comm. on Energy & Commerce (Jan. 20, 2016).

oversight process." The letter continued, "[i]t is unclear what questions remain for the Committee's purposes other than the legal questions that will soon be decided in court," and "while your Committee retains authority to conduct oversight, the pending resolution of the legal status of cost-sharing reduction payments by a coordinate branch removes any legitimate need for such oversight."[14]

Let us be clear: the Committees of the United States House of Representatives, not the Department of the Treasury, and certainly not an Assistant Secretary, have sole authority to determine the type of information necessary to conduct effective oversight.

Your Department did not produce a single document responsive to our subpoenas before the production deadline. In fact, to date, Treasury has produced only 31 pages of documents. Most of these documents were produced just before the first interview of a Treasury employee. One of these documents—a **final** "Action Memorandum" signed by Secretary Lew authorizing the CSR payments to be made from the permanent appropriation for tax refunds and credits—was not produced until a witness mentioned it during his transcribed interview. Only then did your Department produce this document. Further, your Department unilaterally redacted portions of the document and still has not provided any basis, let alone a valid legal basis, to do so. It is unacceptable that your Department would redact portions of a final authorizing document and refuse to provide the unredacted version to the United States Congress.

The Department has not asserted any valid legal privilege—presuming there is the basis for such privilege—on which the Department may withhold information from Congress. The Committees do not believe there are any valid legal privileges in this instance. Your Department has further failed to provide a log identifying the documents or portions of documents withheld from the Committees, as required by the instructions accompanying the subpoena. Subpoena instruction 11 requires, in part:

> In the event that a document or part of any document is withheld on any basis, provide the following information concerning each and every such document or part of any such document withheld from production: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of author and addressee to each other.[15]

---

[14] Letters from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means, and Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce (Feb. 3, 2016).

[15] Subpoena issued to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, from the H. Comm. on Energy & Commerce (Jan. 20, 2016).

It is inconceivable that there are no other documents responsive to the Committees' requests and subpoenas. In fact, Treasury officials described other documents that would be responsive to the Committees' subpoenas during their interviews.[16]

Not only has your Department not produced all documents responsive to the subpoenas but it appears that your Department has not even collected documents in response to the subpoenas. Treasury counsel did not permit witnesses to answer questions regarding whether they had collected documents pursuant to our subpoenas or other requests. One witness, however was able to answer the question before Treasury counsel could instruct him not to. Mark Mazur—the author of the Action Memorandum you signed authorizing the IRS to make the CSR payments from the Premium Tax Credit appropriation—said that no one had ever instructed him to collect records relating to the CSR program.[17]

Mr. Mazur clearly possessed important information directly responsive to our subpoenas. Months after we issued subpoenas compelling you, as Secretary, to produce all responsive documents, your Department had not even asked employees to collect records.

III. Chairman Brady issues subpoenas for depositions. After accepting service of the subpoenas, the Department refused to confirm when it provided the subpoenas to the individuals.

After your Department refused to schedule transcribed interviews requested by the Committees, the Ways and Means Committee was left with no choice but to compel their testimony by subpoena. As a courtesy to the Administration and with the agencies' consent, congressional committees customarily allow agencies to accept service on behalf of their employees in lieu of serving the individuals directly with the subpoena.

In this instance, Treasury Deputy Assistant Secretary for Legislative Affairs Sandra Salstrom accepted service of three subpoenas, which noticed depositions on February 23, February 24, and March 1, 2016, on behalf of the employees. To this day, your Department has refused to even confirm whether Ms. Salstrom ever provided those subpoenas and their attachments to the witnesses, let alone provide to the Committees the date on which the documents were provided to the witnesses.

As an accommodation to the Department and the witnesses, the Committee on Ways and Means agreed to conduct the proceedings as transcribed interviews instead of depositions,

---

[16] *See, e.g.*, H. Comm. on Ways & Means, Transcribed Interview of Gregory Kane at 71 (Mar. 10, 2016) (*hereinafter* Kane Tr.); H. Comm. on Ways & Means, Transcribed Interview of William Wilkins at 34-35, 54-55 (Mar. 17, 2016) (*hereinafter* Wilkins Tr.); H. Comm. on Ways & Means, Transcribed Interview of Kristen Witter at 42 (Apr. 8, 2016); H. Comm. on Ways & Means, Transcribed Interview of Mark Mazur at 40-41 (Apr. 28, 2016) (*hereinafter* Mazur Tr.).

[17] Mazur Tr. at 10.

thus allowing Treasury counsel to attend the proceedings.[18] During those transcribed interviews, Treasury counsel refused to allow the witnesses to answer questions about the subpoenas, including whether, or if, they had received the subpoenas, and when they had received them.[19] One witness, who answered before Treasury counsel instructed him not to, stated that he saw his subpoena in a news article.[20] This is unacceptable.

IV. The Department refused to allow witnesses to answer questions about the CSR program in transcribed interviews.

During the extensive-staff level negotiations that ultimately led to the Ways and Means Committee agreeing to conduct the depositions as voluntary transcribed interviews rather than by subpoena, staff emphasized that the committees would not agree to any limitations on the scope of the interviews. Ways and Means staff further made clear that a key area of interest was the Administration's reasoning for using the money appropriated for the premium tax credit program to fund the CSR payments, as stated in the letters from the Chairmen to the Departments of Treasury and HHS. The Department, however, did not negotiate in good faith, and reneged on the agreed-upon conditions of the transcribed interviews.

The day before the first witness's transcribed interview, your Department sent Chairman Brady a letter stating that the witness "will not be in a position to disclose information about internal IRS deliberations, or deliberations between IRS and Treasury or other Executive Branch agencies or offices."[21] The letter attached a memorandum from Leonard T. Oursler, IRS Director of Legislative Affairs, directed to the witness, titled, "Testimony Authorization." The memorandum purported to limit what the witness could say to Congress, including that he may not "[t]estify regarding legal advice provided, the thought processes of agency personnel" or "[d]isclose information about internal IRS deliberations, or deliberations between IRS and Treasury or other Executive Branch agencies or offices, regarding cost-sharing reduction payments under the Affordable Care Act."[22] Your Department sent similar authorizations limiting the information that witnesses could provide to Congress before all but one other interview.

These authorization memoranda were based on a regulation promulgated by the IRS that not only describes the procedure that current and former employees must follow when

---

[18] *See* 161 Cong. Rec. E21 (daily ed. Jan. 7, 2015) (statement of Rep. Sessions, Procedures for Use of Staff Deposition Authority), *available at* https://www.congress.gov/crec/2015/01/07/CREC-2015-01-07.pdf. The Procedures prohibit counsel for an agency under investigation to attend depositions, but under the practices of the Committee on Ways and Means, agency counsel may attend transcribed interviews.

[19] Kane Tr. at 26; Wilkins Tr. at 18-19. Counsel refused to allow Robin Canady to state whether he had received his subpoena, as well, although that interview was not transcribed.

[20] Kane Tr. at 19.

[21] Letter from Anne Wall, Assistant Sec'y for Legis. Affairs, U.S. Dep't of the Treasury, to Hon. Kevin Brady, Chairman, H. Comm. on Ways & Means (March 9, 2016).

[22] Memorandum from Leonard Oursler, IRS Nat'l Dir. of Legis. Affairs, to Greg Kane (March 8, 2010).

asked to provide information to Congress, but also sets out a series of penalties for providing information to Congress against the Department's wishes. The regulation states, in part:

> (h) Penalties. Any IRS officer or employee who discloses IRS records or information without following the provisions of this section or § 301.9000-3, may be subject to administrative discipline, up to and including dismissal.[23]

Seemingly relying on the authorization memoranda, Treasury counsel present in the interviews repeatedly prevented the witnesses in eight transcribed interview and one non-transcribed telephone interview from answering the Committees' questions.

The Committees take seriously any efforts to limit the rights of Federal employees to petition Congress. We further remind you that Federal law provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress or to a committee or Member thereof, may not be interfered with or denied."[24]

The Testimony Authorization memoranda and the related objections by Treasury's lawyers demonstrate that Treasury limits the scope of the information that its employees provide to Congress and makes determinations as to whether its employees will appear before Congress at all. These practices raise serious questions about whether Treasury is unlawfully interfering with the Committee's investigation by forcing employees who are called to appear as witnesses to obtain approval from the IRS and Treasury. These practices additionally raise serious questions about the legality of the Treasury regulation that your Department relies on in restricting the First Amendment rights of your employees.

V. The Department is obstructing the Committees' investigation.

Over the past 15 months, your Department has:

- Refused to produce documents in response to subpoenas issued by the Committees;
- Improperly redacted a final document it did produce to the Committee;
- Failed to gather all records responsive to our subpoenas;

[23] 26 C.F.R. § 301.9000-4.
[24] 5 U.S.C. § 7211.

- Refused to confirm to the Committee on Ways and Means whether the Department timely delivered deposition subpoenas to witnesses; and

- Prevented witnesses from answering the Committees' questions by relying on a statute that sets out strict penalties, up to and including dismissal, for providing information to Congress without permission.

In light of these and other actions, the Committees have no choice but to conclude that your Department is obstructing our investigation.

As noted above, federal law specifically prohibits hindering federal employees from providing information to Congress.[25] Moreover, taxpayer dollars may not be used to pay the salaries of federal officials who deny or interfere with federal employees' rights to furnish information to Congress in connection with any matter pertaining to their employment.[26] All federal employees, including IRS and Treasury employees, have the right to express their concerns to Congress under the First Amendment.[27]

These laws, among others, reflect the fact that Congress's constitutionally-based right of access to information is critical to the integrity and efficacy of its oversight and investigative activities. The obstreperous manner in which your Department has delayed, frustrated, impeded, and obstructed the Committees' investigation raises serious concerns about your commitment to full and unfettered congressional oversight.

So that the Committees can determine precisely who is directing, coordinating, and/or influencing (whether formally or informally) the Department's response to the Committees' investigation, including, but not limited to, any direction to Department employees not to respond to questions by the Committees, please provide the names and titles of any individuals involved in the Department's response to the Committees'

---

[25] 5 U.S.C. § 7211.

[26] Div. E, § 713 of P.L. 113-235 ("No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee; or, (2) removes, suspends from duty without pay, demotes, reduces in rank, seniority, status, pay, or performance or efficiency rating, denies promotion to, relocates, reassigns, transfers, disciplines or discriminates in regard to any employment right, entitlement, or benefit, or any term or condition of employment of, any other officer or employee of the Federal Government, or attempts or threatens to commit any of the foregoing actions with respect to such other officer or employee, by reason of any communication or contact of such other officer or employee with any Member, committee, or subcommittee of the Congress as described in paragraph (1).").

[27] U.S. CONST. amend. I.

oversight, including but not limited those involved in receiving, drafting, approving and sending the aforementioned Testimony Authorization memoranda. If we do not receive a full and complete response by 5:00 p.m. on June 21, 2016, we will have no choice but to resort to compulsory process.

The Committees take any effort to obstruct its investigations very seriously. It is our expectation that the Department will cease its attempts to interfere with the Committees' investigation.

If you have any questions about this matter, please contact Amanda Neely with the Ways and Means Committee at 202-225-9263 or Jessica Donlon with the Energy and Commerce Committee at 202-225-2927. Thank you for your attention to this matter.

Sincerely,

Kevin Brady
Chairman
Committee on Ways and Means

Fred Upton
Chairman
Committee on Energy and Commerce

cc:

Sander Levin, Ranking Member, Committee on Ways and Means
Frank Pallone, Ranking Member, Committee on Energy and Commerce