December 18, 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 December 2, 2015 letters to Secretaries Burwell and Lew regarding the implementation of the Affordable Care Act (ACA). Congress enacted the ACA to improve access to affordable health care. To achieve that goal, the ACA provides for an integrated system of federal subsidies for eligible individuals. That system consists of premium tax credits that subsidize monthly health insurance premiums and cost-sharing reduction payments that reimburse plans required to reduce out-of-pocket costs, such as co-payments, coinsurance, and deductibles. Together, these subsidies have helped make health care more affordable for over 16 million Americans.[1]

In our letters of February 25 and July 21, 2015, we provided the Committee with substantial information about the Executive Branch's payments of premium tax credits and cost-sharing reductions. As we explained, "the ACA obligates the Executive Branch to make these . . . payments, and eligible individuals (as well as those who receive the payments on behalf of these individuals) have a legal entitlement to them."[2] Our July 21 letter also described the Executive Branch's determination that the permanent appropriation in 31 U.S.C. § 1324, as amended by the ACA, is available to fund all components of the Act's integrated system of subsidies for the purchase of health insurance, including both the premium tax credit and cost-sharing portions of the payments required by the Act.

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[1] *See* U.S. Department of Health & Human Services, *The Affordable Care Act is Working* (June 24, 2015), *available at* http://www.hhs.gov/healthcare/facts-and-features/fact-sheets/aca-is-working/index.html.

[2] Letter to Fred Upton, Chairman, House Committee on Energy and Commerce, and Paul Ryan, Chairman, House Committee on Ways and Means, from Anne Wall, Assistant Secretary for Legislative Affairs, U.S. Department of the Treasury, and Jim R. Esquea, Assistant Secretary for Legislation, U.S. Department of Health & Human Services (July 21, 2015).

Your recent letters seek further information concerning the source of funding for the cost-sharing reduction payments. As you know, on November 21, 2014, the House of Representatives filed a lawsuit against the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) asserting the same position as your Committees—that Congress provided no appropriation for those payments. We continue to believe 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. The Court has ordered briefing on the merits of the House's claim, which is a question of statutory interpretation.

With respect to that legal question, the Executive Branch's most recent litigation brief (which was filed on December 2, the day of your letters) provides the House with further information regarding the basis for the conclusion that Congress intended for cost-sharing reduction payments to be funded through a permanent appropriation. As the Executive Branch's brief explains, the ACA's text, structure, design, and history demonstrate that Congress provided a permanent appropriation under 31 U.S.C. § 1324 for both components of the integrated subsidy program, including the cost-sharing reduction payments.

Under the ACA, the premium tax credits, which the House acknowledges are properly appropriated by 31 U.S.C. § 1324, and the cost-sharing reduction payments are legally linked, including by the requirement that both subsidies must be provided through an integrated subsidy program by the same payer (Treasury), to the same recipient (the insurer), on behalf of the same person (the eligible insured), and for the same purpose: defraying the cost of an eligible insured's health coverage.

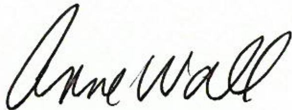
Congress's decision to unify the payments for both subsidies makes good sense because premiums and cost-sharing expenses are economically intertwined: as cost sharing decreases, premiums must increase to make up the difference in health care costs, and vice versa. Without cost-sharing reduction payments, premiums for plans required to reduce cost-sharing would inevitably rise. This in turn would increase premium tax credits, the amount of which is tied to premiums of the same plans (so called "silver" plans) that are subject to cost-sharing reductions. Moreover, there is ample evidence that Congress itself shared the Administration's common-sense reading of the ACA's provisions. For instance, the ACA imposes a permanent funding restriction, modeled on the "Hyde Amendment" included in annual appropriations bills, that explicitly bars the use of funding attributable to cost-sharing reduction payments to pay for certain abortion services. That provision is predicated on the understanding that cost-sharing reductions are permanently appropriated in the Act itself, and therefore not subject to annual appropriations, which are already subject to the Hyde Amendment restriction.

Your letters specifically express interest in budgetary activity that postdated the enactment of the ACA. In the ongoing litigation, the Executive Branch has discussed that activity in several filings, including in its most recently filed brief, and the House has cited and relied on that activity to support its legal contentions. In the coming weeks, both parties will have the opportunity to file two additional responsive briefs. Moreover, the House has expressly acknowledged that further development of the factual record is not required, a point with which we and the district court agree. As the House has told the Court: "There are no facts in dispute;

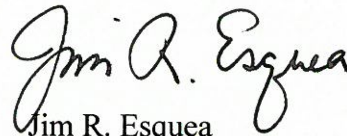
there is no ambiguity or uncertainty in the record; no discovery is required to enable the case to proceed to briefing on, and resolution of, the merits."[3] The final round of briefs in the district court are expected to be filed in early February 2016, and the House has recognized that the "case is primed to be resolved on its merits very promptly."[4]

HHS and Treasury recognize the critical oversight role played by Congress and are committed to working with your Committee. If the Committee has any oversight interests that are not being addressed through the litigation, we would be happy to meet with you or your staff to discuss how we might work to accommodate those interests.

Sincerely,



Anne Wall
Assistant Secretary
for Legislative Affairs
Department of the Treasury



Jim R. Esquea
Assistant Secretary
for Legislation
Department of Health and
Human Services

Identical letter sent to:
The Honorable Kevin Brady

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