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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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August 3, 2011

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20515

Dear Secretary Sebelius:

On February 10, 2011, and March 8, 2011,[1] we wrote to you regarding our concerns about the process used by the U.S. Department of Health and Human Services (HHS) to waive statutory coverage requirements mandated by Section 1001 of the Patient Protection and Affordable Care Act (PPACA)[2] for certain organizations. The Committee is concerned with the agency's arbitrary creation of minimum allowable annual limits for health plans, the absence of clear guidelines for waiver approvals, and the concentration of waivers among union plans and in certain geographic areas of the country.

We requested you provide documents and information to assist the Committee in its oversight of the waiver process.[3] We requested that you provide a copy of every application for a waiver, including any supplemental and/or supporting memos and documents.[4] We also requested that you provide documents and communications prepared in the evaluation of each waiver application.[5] You have yet to provide the Committee with much of this information.

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[1] Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, February 10, 2011; Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, March 8, 2011.
[2] Public Law 111-148; which was immediately amended by the Health Care and Education Reconciliation Act (HCERA), Public Law 111-152.
[3] Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, February 10, 2011; Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, March 8, 2011
[4] *Id.*
[5] *Id.*

HHS failed to provide a copy of every application for a waiver, including supporting memos and documents.[6] You also did not provide the documents, including intra-agency email communications, which were produced in the agency's evaluation of each application. You only provided the applications that were denied as of March 10, 2011, the date of the Committee's hearing.[7]

Your continued failure to cooperate in full with the Committee's oversight effort is unacceptable. Furthermore, your agency's claim that it did not want to submit copies of the documents because of the expense of photocopying is not justified. These documents were requested and should be available in electronic format.[8]

In addition to our document request, we also requested that you identify which procedure, methodology, and/or criteria that each business denied a waiver failed to meet, and your agency has yet to satisfy this request. Rather than respond to this specific request, you produced the standard agency letter sent to each organization that received a denial. This standard agency letter indicated that a waiver was denied because the "application has not demonstrated that the requirement of the restricted annual limit would result in a significant decrease in access to benefits…or a significant increase in premiums…."[9] Your March 10, 2011, letter indicated that the agency lacks fixed rules for determining whether a waiver application is approved or denied.[10] Therefore, it is imperative that we know the specific procedure, methodology, and/or criteria that caused each organization to receive a denial.

Because of the deficiency of your initial response, we are writing to reiterate our request for the following information:

1. State the specific procedure, methodology, and/or criteria that each organization that was denied a waiver failed to meet;

2. Provide a copy of every application for a waiver, including any supplemental and/or supporting memos and documentation;

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[6] Letter to Chairman Issa and Chairman Gowdy from HHS, March 10, 2011.
[7] *Id.*
[8] Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, February 10, 2011; Letter to Secretary Sebelius from Chairman Issa and Chairman Gowdy, March 8, 2011
[9] The standard language is stated on HHS's website. U.S. Department of Health and Human Services Centers for Medicare and Medicaid, the Center for Consumer Information and Insurance, *Annual Limits Waiver Applicants Receiving Denial Letters*, viewed July 14, 2011, available at http://cciio.cms.gov/resources/files/denials_06172011_g.pdf.
[10] Letter to Chairman Issa and Chairman Gowdy from HHS, March 10, 2011.

3. Provide all documents and communications prepared in the evaluation of each application for a waiver.

The Committee's staff remains willing to meet with Department officials to help identify priority documents and to agree on search terms that would expedite the document production. If, however, the Department continues to demonstrate an unwillingness to cooperate with the Committee's investigation, we will be forced to consider compulsory process.

Since our last letter, additional information has come to light that raises more questions about the waiver process. We now know more than 20 percent of the 204 waivers granted in April went to organizations in Minority Leader Nancy Pelosi's congressional district.[11] The disproportionate number of waivers granted to Ms. Pelosi's district is troubling and suggests a broken process. It is nearly impossible that Ms. Pelosi's district would receive such a disproportionate share of waivers by mere chance. Rather, it appears that businesses in her district were, at a minimum, more aware of the waiver process. The result is that businesses in Ms. Pelosi's district disproportionately benefited from being able to escape from the annual limit regulations.

Additionally, without prior notice or public comment, HHS decided to eliminate the entire waiver process effective September 22, 2011.[12] The *New York Times* quoted Steve Larsen, Deputy Administrator and Director of the Center for Consumer Information and Insurance Oversight, as stating, "By the time we reach September, people that felt they needed a waiver would have had the opportunity to apply."[13]

However, it is far from clear that organizations whose workers would benefit from a waiver have thus far applied or that these organizations are even aware of the waiver process. For example, we are not aware of any outreach made by the Administration to small businesses regarding the availability of waivers.

We are skeptical that organizations that would benefit from a waiver will have had the opportunity and foresight to apply by September 22, 2011. The 2011 minimum allowable annual limit ($750,000) for health insurance plans will increase to $1.2 million

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[11] Boyle, Matthew, "Nearly 20 percent of new Obamacare waivers are gourmet restaurants, nightclubs, fancy hotels in Nancy Pelosi's district," THE DAILY CALLER, May 17, 2011.
[12] Pear, Robert, "Program Offering Waivers for Health Law is Ending," THE NEW YORK TIMES, June 17, 2011.
[13] *Id.*

in 2012 and to $2 million in 2013.[14] The cost of complying with the law will increase when the minimum allowable annual limit increases. This means that at least as many organizations will likely seek waivers from the minimum allowable annual limit requirements over the next two years than have thus far. Our concern is that many workers will suffer lower wages or a loss of health insurance if businesses can no longer get waivers from the annual limit requirements.

Mr. Larsen also stated that "[eliminating the waiver process] was the course that we mapped out a year ago."[15] The evidence, however, does not suggest that HHS has been considering ending the waiver process for over a year. For example, a September 3, 2010, memorandum from Steve Larsen makes no mention of plans to eliminate the waiver process, but instead states the exact opposite: "A group health plan or health insurance issuer must reapply for any subsequent plan or policy year prior to January 1, 2014 when this waiver expires in accordance with future guidance from HHS."[16]

In light of the information that has come to light since our initial request, we ask that you provide the following information no later than August 17, 2011.

1. An explanation as to why HHS is shutting down the waiver process.

2. All documents and communications referring or relating to the decision to shut down the waiver process.

3. Has HHS surveyed small businesses about their knowledge of the waiver process? If so, please provide a copy of the survey.

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. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on August 17, 2011. When producing documents to

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[14] U.S. Department of Health and Human Services, "Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections" *Interim Final Rule*, 75 Federal Register 37188, June 28, 2010.

[15] Julian Pecquet and Sam Baker, "Obama administration to end monthly healthcare law waiver approvals," THE HILL, June 17, 2011.

[16] Centers for Medicare and Medicaid Office of Consumer Information and Insurance Office, Memorandum from Steve Larsen, "OCIIO Sub-Regulatory Guidance (OCIIO 2010 – 1): Process for Obtaining Waivers of the Annual Limits Requirements of PHS Act Section 2711," September 3, 2010.

the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Sery Kim or Brian Blase of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Darrell Issa
Chairman

Trey Gowdy
Chairman, Subcommittee on Health Care, District of Columbia, Census and the National Archives

Enclosure

cc: The Honorable Elijah Cummings, Ranking Minority Member, Committee on Oversight and Government Reform

The Honorable Danny Davis, Ranking Member, Subcommittee on Health Care, District of Columbia, Census and the National Archives

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Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.

8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157of the Rayburn House Office Building and the Minority Staff in Room 2471of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.