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# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

September 21, 2015

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

Dear Secretary Lew:

I write today to request the documents and information that the Department of the Treasury refused to supply prior to the recent U.S. Supreme Court decision in *King v. Burwell*.<sup>1</sup>

For some time since the passage of the Patient Protection and Affordable Care Act (PPACA), Congress has sought information regarding the Administration's drafting and implementation of the healthcare insurance exchange subsidies final rule.<sup>2</sup> Despite the significance of this rule and congressional interest in its origins, this Administration has steadfastly refused to honor congressional requests for relevant information for several years. The subject is of more than academic interest to the American people and Congress, given the impact that the final rule has had, and will continue to have, on the costs of PPACA.<sup>3</sup>

During our recent effort to have an open discussion in the public domain about the Department's work on the rule, three of your employees – Assistant Secretary for Tax Policy Mark Mazur, Deputy Assistant Secretary for Tax Policy Emily McMahon, and Deputy Tax Legislative Counsel for Tax Policy Cameron Arterton – refused to testify, and justified their refusal on the litigation that was then pending before the Court.<sup>4</sup>

<sup>1</sup> 576 U.S. \_\_\_, Slip Op. No. 14-114 (2015).

<sup>2</sup> See generally Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012).

<sup>3</sup> See, e.g., H. Comm. on Oversight and Government Reform and H. Comm. on Ways and Means, Joint Staff Report, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies*, 10 (Feb. 5, 2014) (citing Congressional Budget Office, CBO's May 2013 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage (May 2013) (hereinafter CBO REPORT)) (noting that PPACA's "employer mandate" penalty is anticipated to "cost Americans \$140 billion over the next decade").

<sup>4</sup> See generally Jeff Overley, *Treasury Skips Senate Hearing on ACA Tax Credits*, LAW360.COM (Jun. 4, 2015).

On Thursday, June 25, the Court issued its decision in *King*. The decision, which was poorly decided and (even by the admission of Chief Justice John Roberts, who authored the majority opinion) strains the most basic principles of statutory interpretation,<sup>5</sup> nonetheless authorized the Department to continue to provide premium tax credits to individuals who purchase health insurance on federally established exchanges.

Because the decision in *King* represents the end of the litigation that apparently prevented earlier cooperation, I therefore request that the Department engage in the following preservation efforts, effective immediately:<sup>6</sup>

1. Preserve all paper-based documents, e-mail-based communications, e-mail-based calendar appointments, electronic documents, electronic communications (including voicemails, SMS (i.e., text) messages, and instant messages), and all other electronic data regardless of format, created since March 23, 2010, that:
  - a. Relate to the drafting, development, and/or implementation of the above-mentioned premium tax credit proposed final rule and final rule;
  - b. Are records of Mazur, McMahon, Arterton, and all other members of the 36B working group;
  - c. Are official or personal e-mail communications received from former Special Assistant to the President Elizabeth “Liz” Fowler between March 23, 2010, and December 31, 2012; and
  - d. Otherwise include the phrases or terms “Chevron deference,”<sup>7</sup> “federal exchange,” “premium tax credit,” the words or acronyms “Chevron,” “36B,” “LF,” “LF4,” or any related phrases, terms, words, or acronyms.

For the purposes of this request, “preserve” means taking any and all reasonable steps to prevent the partial or full destruction, alteration, overwriting, formatting, deletion, shredding, incineration, wiping, relocation, migration, theft, revision, or mutation of such electronic or non-electronic records, as well as negligent or intentional handling that would make such records incomplete or inaccessible.

2. Exercise any and all reasonable efforts to identify and notify former Department employees, contractors, subcontractors, grantees, subgrantees, and consultants who may have access to such electronic or non-electronic records that these records are also to be preserved.

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<sup>5</sup> See *King*, Slip Op. No. 14-114 at 20 (Roberts, C.J.) (stating that “[p]etitioners’ arguments about the plain meaning of Section 36B are *strong*,” but that “the context and structure of [PPACA] compel us to depart from what would otherwise be the *most natural reading* of the pertinent statutory phrase”) (emphasis added).

<sup>6</sup> I would remind you, the Department, and its officials, personnel, contractors, grantees, and consultants that violation of this preservation order is a violation of federal criminal law. See *generally* 18 U.S.C. § 1505.

<sup>7</sup> This would include the word Chevron in non-italicized and italicized form.

3. If it is a practice of the Department, any Department component, any federal employee, any contract employee, any grantee or subgrantee, or any consultant to destroy or otherwise alter such electronic or non-electronic records, either halt such practices immediately, or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production.

Please also provide the following unredacted documents and information for the time period from March 23, 2010, to the present (unless a different time period is specified below):<sup>8</sup>

1. All documents and information that were shown to congressional staff *in camera* on the following dates:
  - a. September 24, 2013; and
  - b. Any other dates on which documents and information were shown to congressional staff *in camera*.
2. All draft versions of the proposed final rule, Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,931 (Aug. 17, 2011), and the final rule, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012), including relevant date of production or editing information (where not apparent on the face of the document).
3. A complete list of all Department and (if applicable) non-Department employees who participated at any point and for any length of time in the Department's 36B working group, including former federal employees.
4. The identities of all Department and (if applicable) non-Department employees who edited or contributed to the drafting of the above-mentioned proposed final rule or final rule, including the identity of "LF4."
5. All e-mail communications that contain the phrase the word "Chevron" or otherwise discuss the Court's 1984 decision of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, or its citation, 467 U.S. 837.
6. All e-mail communications sent to or from Liz Fowler, regardless of subject matter.
7. The following documents and information involved in the production of Mazur's October 12, 2012, letter responding to former House Oversight and Government Reform Chairman Darrell E. Issa:

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<sup>8</sup> It is important to note that this is a request for a document production *to* the Committee, and is not a request for further *in camera* review of documents in the Department's possession. The requested documents are to be *physically* transferred in *unredacted* form to the Committee. Similarly, this is also not a request for the provision of previously released versions of similar or redacted information that may have been made available via Freedom of Information Act requests, since congressional document requests are not restricted by either the Freedom of Information Act or the Privacy Act.

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- a. All draft versions **and** the final version of the letter, including any edits or comments included in draft versions and the identities of any individuals who edited or contributed to any draft version; and
- b. All e-mail communications discussing or forwarding a draft or final version of the letter.

I would also request that you provide us with any additional materials that fall into the above categories on a continuing basis but are created, written, or otherwise produced after the Department's initial receipt of this request.

Please provide the requested documents and information as soon as possible, but **no later than 9:00 a.m. on Tuesday, September 29, 2015**. When producing documents to the Committee, please deliver separate production sets to both the Majority Staff in Room 224 of the Dirksen Senate Office Building and the Minority Staff in Room 152 of the Dirksen Senate Office Building.

I appreciate your cooperation in this very important matter and look forward to receipt of the requested material at the stated date and time. Please contact Committee staff at (202) 224-5225 if you have any additional questions about how to comply with the terms of this production request.

Sincerely,



Ted Cruz  
Chairman  
Subcommittee on Oversight, Agency Action,  
Federal Rights and Federal Courts

Cc: The Honorable Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary

The Honorable Patrick J. Leahy  
Ranking Member  
Senate Committee on the Judiciary

The Honorable Christopher A. Coons  
Ranking Member  
Subcommittee on Oversight, Agency Action,  
Federal Rights and Federal Courts

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The Honorable John Koskinen  
Commissioner  
Internal Revenue Service  
U.S. Department of the Treasury

The Honorable J. Russell George  
Inspector General  
Treasury Inspector General for Tax Administration  
U.S. Department of the Treasury