

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

July 6, 2015

To: Subcommittee on Oversight and Investigations Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “The ACA’s Cost Sharing Reduction Program: Ramifications of the Administration’s Decision on the Source of Funding for the CSR Program”

On Friday, July 8, 2016, at 9:15 a.m. in room 2322 of the Rayburn House Office Building, the subcommittee will hold a hearing on the cost-sharing reduction (CSR) program under the Affordable Care Act (ACA). The hearing will explore the Administration’s legal basis for making CSR payments to insurers and the source of funding for the CSR program.

I. BACKGROUND

At the close of the ACA’s third open enrollment season, 12.7 million consumers had selected health care plans or were automatically re-enrolled in affordable, quality health insurance through the state and federal exchanges.¹ As of March 31, 2016, 11.1 million consumers had effectuated health insurance coverage through the state and federal exchanges.² Of these 11.1 million consumers, about 85 percent, or 9.4 million individuals, were receiving an advance premium tax credit (APTC) to make premiums more affordable.³ The average APTC for those enrollees who qualified for financial assistance was \$291 per month.⁴

¹ Centers for Medicare & Medicaid Services, *Health Insurance Marketplace Open Enrollment Snapshot—Week 13* (Feb. 4, 2016).

² Centers for Medicare & Medicaid Services, *March 31, 2016 Effectuated Enrollment Snapshot* (June 30, 2016).

³ *Id.*

⁴ *Id.*

Overall, the coverage provisions of the ACA have resulted in gains in health insurance coverage for an estimated 20 million uninsured adults through early 2016.⁵ In addition, the uninsured rate has fallen to a historic low of 9.1 percent.⁶

II. THE ROLE OF COST-SHARING REDUCTIONS

In addition to APTCs, which are available to individuals and families with incomes between 100 percent and 400 percent of the federal poverty level (FPL), the ACA mandates that insurance companies provide cost-sharing reductions (CSRs) for individuals and families who qualify for the APTC, who purchase “silver” level coverage through the exchanges, and who have incomes between 100 and 250 percent of the FPL (\$11,770 to \$29,425 for an individual; \$24,250 to \$60,625 for a family of four).⁷ These discounts lower the amount a consumer must pay out-of-pocket for deductibles, coinsurance, and copayments.⁸ The Department of the Treasury then reimburses insurance companies for making these cost-sharing reductions.

Of the approximately 11.1 million consumers who had effectuated enrollments at the end of March 2016, 57 percent or nearly 6.4 million individuals were benefiting from CSRs to make their coverage more affordable.⁹

CSRs play a critical role in making access to health care affordable. Studies have shown that CSRs significantly lower plan deductibles for low- and moderate-income individuals.¹⁰ CSRs also lower out-of-pocket spending limits, copayments, and coinsurance payments. The degree to which CSRs lower out-of-pocket costs varies by an individual’s healthcare usage and his or her health plan. One study estimates that the annual value of the CSRs per eligible individual in 2016 is \$479. This ranges from an average of \$693 for those with incomes below 150 percent of FPL to \$217 for those with incomes between 200 percent and 250 percent of FPL.¹¹

⁵ Department of Health and Human Services, *Health Insurance Coverage and the Affordable Care Act, 2010-2016* (Mar. 3, 2016).

⁶ Centers for Disease Control and Prevention, *Health Insurance Coverage: Early Release of Estimates From the National Health Interview Survey, 2015* (May 2016).

⁷ The Commonwealth Fund, *How Will the Affordable Care Act's Cost-Sharing Reductions Affect Consumers' Out-of-Pocket Costs in 2016?* (Mar. 2016).

⁸ Healthcare.gov, *Cost Sharing Reduction* (accessed June 30, 2016).

⁹ Centers for Medicare & Medicaid Services, *March 31, 2016 Effectuated Enrollment Snapshot* (June 30, 2016).

¹⁰ The Commonwealth Fund, *How Will the Affordable Care Act's Cost-Sharing Reductions Affect Consumers' Out-of-Pocket Costs in 2016?* (Mar. 2016).

¹¹ Urban Institute, *Characteristics of Those Eligible for Cost-Sharing Reductions and Premium Tax Credits Under the Affordable Care Act* (Feb. 2015) (online at www.urban.org/sites/default/files/alfresco/publication-pdfs/2000101-Characteristics-of-Those-Eligible-for-Cost-Sharing-Reductions.pdf).

III. *HOUSE V. BURWELL* LAWSUIT

In November 2014, the Republican-led House of Representatives filed a lawsuit against the Department of Health and Human Services (HHS), the Department of the Treasury, and their respective secretaries. The House alleged that in reimbursing insurers for their CSR payments, the Executive Branch unlawfully made an expenditure of public funds absent an explicit appropriation from Congress.¹²

According to the House of Representatives, section 1401(a) of the ACA, which establishes the APTC program, includes a permanent appropriation to pay for the refundable tax credits. In contrast, they argue, section 1402 of the ACA, which establishes the CSR program, does not provide a permanent appropriation of funds to make CSR payments to insurers; therefore, the CSR program requires an annual appropriation. Congress has not appropriated funds for the program in FY2014, FY2015, or FY2016. According to the suit filed by the House of Representatives, the Administration's ongoing CSR payments to insurers violates the Appropriations Clause of the Constitution, which states that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹³

The Administration has argued that it acted fully within the limits of the Appropriations Clause in following the ACA's mandate and making CSR payments.¹⁴ According to the Administration, the text, structure, design, and history of the ACA demonstrate that Congress permanently appropriated funds for both the APTC and CSR programs.¹⁵ The ACA makes clear that CSRs and APTC are components of a single program in which eligibility for one is predicated on eligibility for the other, and advance payments attributable to both subsidies are made by the same agency to the same entities for the same purpose. Therefore, the Administration's authority to make CSR payments draws from the permanent appropriation for the APTC.¹⁶

In May 2016, the District Court for the District of Columbia ruled in favor of the House of Representatives, holding that there was no appropriation for reimbursement to insurers for CSR payments, and therefore the Executive Branch acted unlawfully in expending those funds.¹⁷ Additionally, earlier, in September 2015, the court rejected the Administration's argument that

¹² Plaintiff United State House of Representatives' Motion for Summary Judgment, *United States House of Representatives v. Burwell*, No. 14-cv-01967 (D.D.C. Dec. 2, 2015).

¹³ *Id.*

¹⁴ Defendant's Memorandum in Support of Their Motion for Summary Judgment, *United States House of Representatives v. Burwell*, No. 14-cv-01967 (D.D.C. Dec. 2, 2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *United States House of Representatives v. Burwell*, No. 14-cv-01967, Memorandum Opinion (D.D.C. May 12, 2016).

the House of Representatives did not have standing to sue the administration.¹⁸ The Administration is appealing the case to the U.S. Court of Appeals for the District of Columbia.

IV. JOINT INVESTIGATION BY THE HOUSE COMMITTEE ON ENERGY AND COMMERCE AND HOUSE COMMITTEE ON WAYS AND MEANS

Republicans on the House Committee on Energy and Commerce, in conjunction with Republicans on the House Committee on Ways and Means, have been conducting an investigation into the CSR program that closely tracks the issues in dispute in the *House of Representatives v. Burwell* lawsuit. On February 3, 2015, Chairman Upton and then-Chairman Ryan jointly sent letters to the Department of the Treasury and HHS requesting documents and information on the agencies' administration of the CSR program. The Committee chairmen adopted the same position as in the lawsuit, writing, "Congress has never appropriated any funds to permit the administration to make any Section 1402 Offset Program [CSR] payments to insurance companies," and "Article I of the U.S. Constitution expressly prohibits the expenditure of public funds without an appropriation made by law." The chairmen wrote, "Accordingly, it appears the Department of Health and Human Services ("HHS") has directed the Treasury Department to make payments to insurers for the Section 1402 Offset Payments [CSRs], and that the Treasury Department has made and continues to make these payments, even though no funds are lawfully available to do so."¹⁹

The Administration has raised concerns regarding the Committee's investigation during the pendency of the lawsuit, and the impact that the parallel congressional investigation will have on the integrity of the judicial proceedings:

Rather than seeking to address these differences in the typical manner through the oversight or legislative process, the House of Representatives instead filed an action in federal court asking the judiciary to determine whether the House or the Executive Branch has adopted the correct legal interpretation of the applicable statutes and constitutional provisions. We continue to believe, as we have argued in that litigation, 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. In that forum, the House has represented that "[t]here 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." Furthermore, the House and our agencies have addressed at length the precise legal question that you have stated is the predicate for your oversight requests in briefs filed on December 4, 2015, and January 15, 2016, with final briefs due on February 5. ...

¹⁸ United States House of Representatives v. Burwell, No. 14-cv-01967, Memorandum Opinion (D.D.C. Sept. 9, 2015).

¹⁹ Letter from Chairman Fred Upton, House Committee on Energy and Commerce, and Chairman Paul Ryan, House Committee on Ways and Means, to The Honorable Sylvia Burwell, Secretary, Department of Health and Human Services (Feb. 3, 2015).

The resolution of this litigation will naturally have an impact on the oversight being conducted by this Committee. If, as we suspect, our agencies ultimately prevail, that would eliminate the legal issue that is your stated predicate for the oversight. We recognize that the ongoing litigation does not, as you state, “deprive the Committees of their respective oversight authorities and obligations.” However, while the committees retain oversight *authority*, the pending resolution by an Article III court—the forum chosen by the House to resolve this dispute—of the legal question that you have stated as the underlying predicate for that oversight indicates that there is no legitimate *need* for the oversight to proceed at this time.

In addition, conducting interviews of our employees during the pendency of litigation in which they are representatives of adverse parties appears to be an attempt to elicit information outside of the bounds of traditional district court discovery that the House would seek to use in later briefings. ... Conducting the interviews you request on these topics could compromise the integrity of the judicial proceedings by circumventing the established rules of discovery and procedure, including judicial determination of the applicability of privileges designed to protect litigants in civil litigation. Indeed, as noted above, the House has expressly acknowledged that discovery is not required in this case, a point with which we and the district court agree...²⁰

The Committees have conducted interviews of thirteen current and former employees of the Internal Revenue Service, Department of Treasury, Office of Management and Budget, and HHS during the course of their investigation. During these interviews, the administration has declined to provide information about internal agency deliberations, or deliberations between agencies, regarding CSR payments, citing both the Executive Branch confidentiality interests in protecting internal deliberations, as well as the heightened sensitivity of these issues due to the ongoing lawsuit.²¹

V. IMPACT OF AN ADVERSE RULING ON THE CRS PROGRAM

An adverse final ruling from a federal court invalidating CSR payments from the Department of the Treasury to insurers could have a detrimental impact on the stability of the marketplace. If payments for CSRs are stopped in the middle of a plan year, insurers would face significant near-term financial losses and could leave the marketplaces in the middle of a policy year, causing chaos for enrollees.²² Even if changes are delayed until the beginning of a plan

²⁰ Letter from Ann Wall, Assistant Secretary for Legislative Affairs, Department of Treasury, and Jim R. Esquea, Assistant Secretary for Legislation, Department of Health and Human Services, to Chairman Fred Upton, House Committee on Energy and Commerce (Jan. 19, 2016).

²¹ See, e.g., Letter from Tamara L. Fucile, Associate Director of Legislative Affairs, Office of Management and Budget, to Chairman Kevin Brady, House Committee on Ways and Means, and Chairman Fred Upton, House Committee on Energy and Commerce (Apr. 27, 2016).

²² Linda J. Blumberg and Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urban Institute (Jan. 2016).

year, insurers could leave the marketplaces in response to the uncertainty and potential litigation that would ensue from an unfavorable decision.²³

Additionally, such a decision would likely result in an increase in premiums in the marketplace, as well as an increase in federal spending.²⁴ The law explicitly requires insurers to provide CSR payments regardless of whether the federal government reimburses them; consequently, insurers would build the expenses associated with CSRs into their premiums to avoid financial losses.²⁵ According to an estimate by the Urban Institute, silver plan premiums would increase \$1,040 per year on average.²⁶

Such an increase in premiums would also increase federal payments for the APTC, because tax credit amounts are tied to the second-lowest-cost silver plan premium available to enrollees.²⁷ According to the Urban Institute, federal government costs would increase by a net \$3.6 billion per year.²⁸

VI. WITNESSES

Morton Rosenberg
Fellow
The Constitution Project

Tom Miller
Resident Fellow
American Enterprise Institute

Doug Badger
Senior Fellow
Galen Institute

Simon Lazarus
Senior Counsel
Constitutional Accountability Center

²³ *Id.*

²⁴ Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, *Potential Fiscal Consequences of Not Providing CSR Reimbursements* (Dec. 2015); Linda J. Blumberg and Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urban Institute (Jan. 2016).

²⁵ Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, *Potential Fiscal Consequences of Not Providing CSR Reimbursements* (Dec. 2015).

²⁶ Linda J. Blumberg and Matthew Buettgens, *The Implications of a Finding for the Plaintiffs in House v. Burwell*, Urban Institute (Jan. 2016).

²⁷ *Id.*

²⁸ *Id.*