

ONE HUNDRED SIXTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

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October 16, 2019

The Honorable Alex M. Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue SW  
Washington, DC 20201

The Honorable Seema Verma  
Administrator  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

Dear Secretary Azar and Administrator Verma:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committee on Energy and Commerce (Committee) is examining the Trump Administration's implementation of the Affordable Care Act. I write to request your immediate attention regarding the Department of Health and Human Services' (HHS) wholly inadequate response to my letter of June 13, 2019, regarding certain policies under consideration by the Trump Administration that would increase health care costs and take away coverage from American families and patients. To date, HHS has refused to provide any of the requested documents and information. Obstruction of the Committee's legitimate exercise of its oversight responsibilities is unacceptable and, if continued, may necessitate the use of additional measures, including compulsory process.

Previously, Democratic health leaders called upon the Administration not to finalize HHS's proposed policies.<sup>1</sup> In fact, the Administration's own analysis found that these policies would increase health care costs and result in 1.1 million individuals losing health insurance coverage. According to an August 2018 internal memorandum from Administrator Verma to Secretary Azar (August 2018 Memorandum), the Administration itself admitted that the policies under consideration for the 2020 Notice of Benefit and Payment Parameters would cause "coverage losses, further premium increases, and market disruption." On June 13, 2019, I, along with Chairman Neal and Chairman Scott, sent the attached letter requesting documents and analyses conducted by HHS and the Centers for Medicare & Medicare Services (CMS) regarding

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<sup>1</sup>Letter from House and Senate Democratic Health Leaders to Secretary Azar and Verma (Feb. 19, 2019).

the policies under consideration.<sup>2</sup> We also requested that HHS provide the analyses by the CMS Office of the Actuary (OACT) discussed in the August 2018 Memorandum no later than June 27, 2019. To date, HHS has provided no substantive response to our inquiry, and has refused to provide any OACT analyses.

On July 19, 2019, HHS responded to the Committee asserting that:

It is the position of HHS that the OACT analysis referred to in Chairman Pallone's June 13, 2019 letter is protected by the deliberative process privilege. The analysis was (1) pre-decisional (i.e. prepared before the adoption of an agency policy or governmental decision); (2) prepared to assist agency decision-makers in arriving at a decision and reflects the give-and-take of the consultative process; and (3) disclosure would cause injury to the decision-making process. HHS understands that Congress has historically taken the view that the deliberative process privilege does not apply to Congressional oversight requests. However, a D.C. court recently clarified that agencies may invoke the deliberative process privilege in response to Congressional demands. *See House Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

As an initial matter, Congress's authority to oversee Executive Branch agencies and officials is constitutionally-based and "inherent in the legislative process."<sup>3</sup> By contrast, the deliberative process privilege is a common law evidentiary privilege<sup>4</sup> that does not pertain to, and is inconsistent with, Congress's constitutional duty to conduct oversight of the Executive Branch. Accordingly, the Committee does not recognize claims of common law deliberative process privilege when it engages in oversight of the Executive Branch.

HHS's reliance on *Lynch* is misplaced. This non-binding, district court decision resulted in a settlement agreement in which both the House of Representatives and the Department of Justice agreed that the district court's holdings would not control future disputes.<sup>5</sup> Even if

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<sup>2</sup> Letter from Chairman Pallone, Chairman Scott, and Chairman Neal to Secretary Azar and Administrator Verma (June 13, 2019).

<sup>3</sup> *See Watkins v. United States*, 354 U.S. 178, 187 (1957).

<sup>4</sup> *See, e.g., Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) ("deliberative process . . . [is a] qualified, common law executive privilege"); *In re Sealed Case (Espy)*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("[T]he deliberative process is primarily a common law privilege."); *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) ("The common law discovery privilege at issue is the executive or deliberative process privilege.").

<sup>5</sup> Settlement Agreement, No. 16-5078 ("[T]he Parties agree that because subsequent developments have obviated the need to resolve those issues in an appeal in this case, the District Court's holdings should not in any way control the resolution of the same or similar issues should they arise in other litigation between the Committee and the Executive Branch, and hereby waive any right to argue that the judgment of the District Court or any of the District

applicable, the deliberative process privilege is a qualified privilege that can be overcome by a showing of need<sup>6</sup> and can be rendered inapplicable under a variety of different circumstances.<sup>7</sup> Indeed, in *Lynch*, the district court subsequently ordered the disclosure of certain deliberative information requested by Congress.<sup>8</sup> Among other reasons, the district court noted that the materials responsive to the subpoena to the Department of Justice had already been described in a detailed report that had been made public by the Inspector General.<sup>9</sup> Similarly here, HHS has waived its ability to claim deliberative process privilege by voluntarily providing the Committee with the unredacted August 2018 Memorandum. The August 2018 Memorandum includes a substantive discussion of the results of the OACT analyses, including the impact of the proposed policies on coverage losses and premiums. On June 13, 2019, the Committee informed HHS that the Democratic health leaders would be sending a letter on the subject of the August 2018 Memorandum, and that the August 2018 Memorandum would be made publicly available along with the letter. HHS raised no objections.

Congress has a constitutional duty to conduct oversight of the Executive Branch, and a longstanding interest in ensuring that the Executive Branch operates in a transparent manner. I am very concerned that despite the analyses by OACT, the Administration appears to be continuing to contemplate destructive policies that could harm families' access to affordable, comprehensive health insurance coverage. Please provide the underlying OACT analyses and the documents responsive to my June 13, 2019, letter no later than October 30, 2019, or the Committee will be forced to consider additional measures to compel production of the requested documents.

Sincerely,



Frank Pallone, Jr.  
Chairman

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*Court's orders or opinions in this case have any preclusive effect in any other litigation.*") (emphasis added).

<sup>6</sup> See *Espy*, 121 F.3d at 737-38.

<sup>7</sup> See, e.g., *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 142 F.3d 1422, 1424 (D.C. Cir. 1998).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*