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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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May 13, 2015

The Honorable Sylvia Mathews Burwell
Secretary
Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

Dear Secretary Burwell:

The Affordable Care Act (ACA) enables qualified consumers of health insurance to obtain government subsidies, primarily in the form of advance premium tax credits. Approximately \$15 billion in ACA premium subsidies were disbursed last year, and the Congressional Budget Office forecasts that subsidy payments will reach \$849 billion over the next decade.¹ To ensure those benefits reach qualified individuals and prevent waste, federal law requires the Department of Health and Human Services (HHS) to make certain that the federal and state health insurance exchanges are equipped to verify an applicant's eligibility to receive subsidies. Because the IRS is responsible for collecting overpayments, a reliable verification process is the only way to protect health insurance consumers from unfair surprises during tax time and to avoid significant waste due to unrecovered overpayments.

With these concerns in mind, I have repeatedly raised questions regarding efforts by the Department of Health and Human Services to prevent improper payments through the exchanges. My three past inquiries on this issue have been inadequately answered, even as independent reports by the Government Accountability Office, the HHS Inspector General, and other independent parties have raised alarms about reported breakdowns in the state and federal exchanges' processes for verifying eligibility for ACA premium subsidies. Accordingly, to ensure proper oversight, the U.S. Senate Permanent Subcommittee on Investigations is initiating an independent review of the Department's efforts to assess eligibility and prevent improper payments through the health insurance exchanges established pursuant to the ACA.

Eligibility verification is a complicated multi-step process that turns on a number of criteria, including income, family size, legal residency, and access to employer-sponsored coverage. According to the Department, applicant-provided information is first checked against Internal Revenue Service and Social Security Administration databases. If there is a mismatch, according to Department-established standards, the information is checked against a third-party database. If there is still a mismatch, the applicant is asked to provide supporting documentation. The Department permits the applicant to obtain coverage and subsidies for an initial 90-day

¹ Letter from Sylvia M. Burwell, Sec'y Dep't Health & Human Servs., to Sen. Orrin Hatch, Feb. 3, 2015; Congressional Budget Office, Updated Budget Projections 2015-2025, App. 19, Mar. 2015.

period—based on unverified information, including unverified income information—while it awaits and reviews these additional documents. The Department may permit applicants to receive coverage and subsidies until the Department completes its review, even if that review takes more than 90 days. If, for any reason, the subsidy an applicant receives is too large, the IRS attempts to collect the overpayment through a reconciliation process, subject to statutory caps on recovery of overpayments. Failure or unnecessary delay at any of these stages could result in confusion for consumers who purchased insurance through the exchanges and waste of taxpayer resources.

In 2013, Congress was sufficiently concerned about preventing overpayments through the exchanges that it passed a law, signed by President Obama, requiring the HHS Secretary to certify that the exchanges were capable of verifying applicants' subsidy eligibility before any funds could be disbursed.² The Department evidently shared those concerns, noting in a December 2013 internal document that “financial harm to the government” would result if controls were not in place to prevent “erroneous payments” by “mid-March 2014.”³ One expert has estimated that the government could stand to lose approximately \$152 billion in overpayments over 10 years.⁴ Because tax enforcement is not perfect, we also know that a sizable share of these funds is effectively unrecoverable. Moreover, even if tax enforcement were perfect, billions in overpayments could be lost forever because the ACA caps recovery of overpayments above specified thresholds.⁵

On January 1, 2014, then-Secretary Sebelius certified to Congress that all exchanges “verif[y] application information provided by the consumer when making an eligibility determination.”⁶ Despite the Secretary's categorical certification—and consistent with the Department's own internal December 2013 prediction—it quickly became apparent that the exchanges were not capable of adequately verifying purchaser information. In May 2014, the *Washington Post* reported that the federal exchange alone “may be paying incorrect subsidies” to up to 1.5 million Americans and that the government had been “unable . . . to fix the errors” because the part of the exchange that would address the issue had “yet to be built.”⁷ Additionally, in an undercover investigation, GAO tried to obtain subsidies through the federal exchange using 12 different false identities and succeeded 11 times.⁸ Further, according to the HHS Inspector General, as of summer 2014, the federal exchange lacked the capability to resolve most income and other eligibility problems, including verifying basic information used to

² Continuing Appropriations Act, 2014, Pub. L. No. 1130-46.

³ Centers for Medicare and Medicaid Services, Office of Information Systems, *Justification for Other Than Full and Open Competition*, available at <https://www.politicopro.com/f/?f=23135&inb>.

⁴ *Hearing on Subsidy Verification in the ACA: Complexity Creating Taxpayer Risk*, Hr'g before the H. Comm. on Ways & Means Subcomm. on Oversight, June 10, 2014 (testimony of Douglas Holtz-Eakin, President, American Action Forum).

⁵ 26 U.S.C. § 36B(f)(2)(B).

⁶ Letter from Kathleen Sebelius, Sec'y Dep't Health & Human Servs., to Joe Biden, President of the Senate, Jan. 1, 2014, available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf>.

⁷ Amy Goldstein and Sandhya Somashekhar, *Federal Health-Care Subsidies May be Too High or Too Low for more than 1 Million Americans*, *Wash. Post.*, May 16, 2014.

⁸ *Hearing on the Integrity of the Affordable Care Act's Premium Tax Credit*, Hr'g before the H. Comm. on Ways & Means Subcomm. on Oversight, July 23, 2014 (testimony of Seto J. Bagdoyan, Acting Dir. of Forensic Audits and Investigative Services, GAO).

identify purchasers.⁹ The Inspector General also noted that the exchange was unable to resolve 89 percent of known inconsistencies on submitted applications, including inconsistencies as to a purchaser's income.¹⁰

The state-based exchanges have struggled with eligibility verification as well. According to media reports, the Department has not enforced the requirement that states verify income eligibility.¹¹ And the Inspector General has concluded that the state-based exchanges in California and Connecticut are having difficulty verifying Social Security numbers and citizenship and performing identity-proofing of phone applicants.¹² Indeed, California informed HHS that its online verification procedures would not even be in place until November 2014—well after the end of the 2014 open enrollment period.¹³ Other states acknowledge “shift[ing] resources to processing . . . applications rather than attempting to resolve inconsistencies.”¹⁴

Congress and the public must have confidence in the exchanges' verification systems and the Department's responsiveness in addressing problems with those systems. Recent independent reports and the Department's failure to adequately respond to congressional oversight inquiries, however, have undermined that confidence. Therefore, the Subcommittee requests that the Department answer the following questions, several of which I have posed in earlier correspondence:

1. Does the Department stand behind its January 1, 2014 certification to Congress that the state and federal exchanges were, at that time, verifying that applicants for advance payments of premium tax credits and cost-sharing reductions were eligible for such credits and reductions, consistent with the requirements of the ACA and its implementing regulations? Please provide a yes or no answer, along with an explanation of the basis for that certification.
2. One eligibility criterion is lack of access to employer-sponsored coverage that meets minimum essential coverage standards. Due to the delay in employer and insurer reporting in connection with the employer mandate, the Treasury Inspector General for Tax Administration reported in March 2015 that “the IRS has not developed processes and procedures to verify compliance with [minimum essential coverage] requirements for the 2015 [Tax] Filing Season.” In light of

⁹ HHS Office of the Inspector General, *Marketplaces Faced Early Challenges Resolving Inconsistencies with Applicant Data*, No. OEI-01-14-00180, June 2014, at 10, available at <http://oig.hhs.gov/oei/reports/oei-01-14-00180.pdf>

¹⁰ *Id.*

¹¹ Sarah Kliff and Sandhya Somashekhar, *Health Insurance Marketplaces Will Not Be Required to Verify Consumer Claims*, Wash. Post, July 5, 2013.

¹² HHS Office of the Inspector General, *Not All Internal Controls Implemented by the Federal, California, and Connecticut Marketplaces Were Effective in Ensuring That Individuals Were Enrolled in Qualified Health Plans According to Federal Requirements*, No. A-09-14-01000, June 2014, at viii, available at <http://oig.hhs.gov/oas/reports/region9/91401000.pdf>.

¹³ *Id.*

¹⁴ HHS Office of the Inspector General, *Marketplaces Faced Early Challenges Resolving Inconsistencies with Applicant Data*, No. OEI-01-14-00180, June 2014, at 12, available at <http://oig.hhs.gov/oei/reports/oei-01-14-00180.pdf>.

this report, how is HHS verifying whether enrollees on the exchange have access to employer-sponsored coverage?

3. In September 2014, a Department official told Congress that some verification mechanisms have “not yet been completed.”¹⁵ To which mechanisms did that statement refer? Have those mechanisms been completed? If so, were they completed in time for the 2015 enrollment period?
4. How many state-based exchanges have implemented functioning systems and processes—other than attestation and reconciliation—to verify applicants’ eligibility to enroll in ACA health care plans or to receive ACA subsidies? When were those systems and processes implemented? How many were implemented by January 1, 2014?
5. How many state-based exchanges have, at any point in their operation, stopped attempting to verify applicants’ eligibility to enroll in ACA health care plans or to receive ACA subsidies? How many state-based exchanges were unable to verify applicants’ subsidy eligibility on the date they opened?
6. California told the Department that it would not be able to conduct income verification for 2014 until November 2014. Was that deadline met? If not, has California begun conducting income verification? If so, when did California begin conducting income verification?
7. One news report stated that, as of April 2014, the federal exchange was using “a spreadsheet and some informed estimates” to track subsidy payments from the federal government to insurance companies.¹⁶ Was this true? If not, please describe the method the federal exchange used to track subsidy payments from the federal government to insurance companies as of April 2014. Please also describe the method currently used.
8. What is the Department’s current best estimate of all overpayments of subsidies—including advance premium tax credits and cost-sharing reductions—made to health insurance companies on behalf of individuals enrolled in healthcare plans through the *federal exchange*?
9. What is the Department’s current best estimate of all overpayments of subsidies—including advance premium tax credits and cost-sharing reductions—made to health insurance companies on behalf of individuals enrolled in healthcare plans through a *state-based exchange*?

¹⁵ *Hearing on Preparing for the Second Year of Open Enrollment*, Hr’g before the H. Comm. on Ways & Means Subcomm. on Health, Sept. 10, 2014 (testimony of Andrew Slavitt, Principal Deputy Adm’r, Ctrs. for Medicare & Medicaid Servs.).

¹⁶ Kyle Cheney, *Behind the Scenes, Much of Healthcare.gov Is Still Under Construction*, Politico, Apr. 25, 2014.

10. The Department's Inspector General has said that, in the first quarter of 2014, there were 2.9 million inconsistencies between data provided by health insurance purchasers and information stored in federal databases and other data sources.¹⁷ According to the IG, of these 2.9 million inconsistencies, the Department was capable of resolving 300,000 cases through the first quarter of 2014.¹⁸ How many of these inconsistencies remain unresolved?
11. How many inconsistencies between applicant-reported data and information stored in federal databases and other data sources were detected during open enrollment for the remainder of the 2014 enrollment period and the 2015 enrollment period? How many inconsistencies has the Department resolved to date?
12. In the weeks and months preceding the launch of the federal exchange, did the Department take steps—or instruct its agents or vendors to take steps—to deprioritize or delay full implementation of verification systems for the exchange or to impair or hinder their operation?¹⁹
13. How many times has an exchange determined that an applicant's attestation regarding a tax filer's family size or income is not "reasonably compatible" with other information provided by the applicant for the family or in the records of the exchange?²⁰ Please provide this information separately for all exchanges.
14. What are the current sources of income data used by the exchanges to verify annual household income? Please provide this information separately for all exchanges.
15. Does the federal exchange use data from the State Wage Information Collection Agency in connection with its income verification processes and procedures? If not, please provide an explanation.

This inquiry is authorized by Senate Resolution 73 (114th Cong.), which empowers the Subcommittee to ensure "the efficiency and economy of operations of all branches of the Government." Please submit responses to the above questions by no later than May 29, 2015.

Thank you for your attention to this matter.

¹⁷ HHS Office of the Inspector General, *Marketplaces Faced Early Challenges Resolving Inconsistencies With Applicant Data*, No. OEI-01-14-00180, June 2014, at 12, available at <http://oig.hhs.gov/oei/reports/oei-01-14-00180.pdf>.

¹⁸ HHS Office of the Inspector General, *Marketplaces Faced Early Challenges Resolving Inconsistencies with Applicant Data*, No. OEI-01-14-00180, June 2014, at 12, available at <http://oig.hhs.gov/oei/reports/oei-01-14-00180.pdf>

¹⁹ See James C. Capretta, *The ACA: Still Falling Short*, Nat'l Rev. Online, Apr. 1, 2014.

²⁰ Letter from Kathleen Sebelius, Sec'y Dep't Health & Human Servs., to Joe Biden, President of the Senate, Jan. 1, 2014, at 9-10, available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/verifications-report-12-31-2013.pdf>.

Sincerely,

A handwritten signature in blue ink that reads "Rob Portman". The signature is fluid and cursive, with the first name "Rob" and last name "Portman" clearly distinguishable.

Rob Portman
Chairman
Permanent Subcommittee on Investigations