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ADDENDUM TO JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM

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II. Executive Summary

In February 2015, the House Committee on Energy and Commerce and the House Committee on Ways and Means launched a joint investigation to understand the rationale behind the Administration's decision to fund the Cost Sharing Reduction (CSR) program through a permanent appropriation, found at 31 U.S.C. § 1324, instead of through the annual appropriations process. To date, the Administration has spent an estimated \$13 billion on CSR payments without a lawful congressional appropriation. Understanding the rationale—learning who made these decisions, when, and why—was and remains critical to Congress's appropriations and oversight authorities. Under the powers set forth in the Constitution, Congress has an obligation to understand the facts of the Obama Administration's decisions here and must ensure that any future administration spends taxpayer dollars prudently and in accordance with the law.

In July 2016, the Committee on Energy and Commerce and the Committee on Ways and Means held two hearings and issued a joint staff report detailing the committees' investigation into the source of funding for the cost sharing reduction program to date. At a hearing before the Subcommittee on Oversight of the Committee on Ways and Means, a senior Treasury official testified, "If Congress doesn't want the moneys appropriated, they could pass a law that specifically said, do not appropriate moneys from that account."¹

Spurred by this testimony that Congress should appropriate in the negative—a statement that directly contradicts the Constitution²—and the number of questions still unanswered, the committees continued the investigation. Since July, the committees continued to press the Administration to produce documents responsive to the multiple subpoenas issued over the course of the investigation, and the Administration finally caved and made documents available. Staff have reviewed thousands of pages of documents to date about the source of funding for the CSR program. This update to the July 2016 CSR report begins to answer the outstanding questions.

As detailed in the July 2016 CSR report, the Administration requested funding for the CSR program in the President's Fiscal Year 2014 budget. The committees have now learned that HHS also included a request for an advance appropriation to cover one month of payments for the CSR program in its FY 2013 budget submission to OMB. This new information—that HHS requested an annual appropriation for the CSR program not once, but twice, further indicates that HHS believed it required an annual appropriation to fund the program.

Numerous communications occurred between the Administration and the Senate Finance Committee between the issuance of the President's FY 2014 budget in April 2014 and the Senate Finance Committee's rejection of funding for the CSR program in July 2014. Ellen Murray,

¹ *Defying the Constitution: The Administration's Unlawful Funding of the Cost Sharing Reduction Program: Hearing Before the Subcomm. on Oversight, H. Comm. on Ways & Means, 114th Cong. 69-70 (2016) (unofficial transcript on file with Committee).*

² U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriation made by law[.]").

HHS Assistant Secretary for Financial Resources, testified that she recalled one telephone conversation with Erik Fatemi, the Staff Director for the Senate Appropriations Committee, in which she informally withdrew the Administration's request for funding for the CSR program. However, email exchanges between Ms. Murray and Mr. Fatemi over just a one-week period from late June to early July 2013 demonstrate much back and forth over the CSR program, and also indicate multiple in-person or phone conversations between the two. Emails also indicate that the Administration continued to internally discuss the budget request for CSR funding months after it was included in the President's budget.

Just weeks after Ms. Murray informally withdrew the request for funding and the Senate Appropriations Committee subsequently denied the request for CSR program funding, senior officials at HHS, Treasury, OMB, and the White House discussed via email funding the CSR program from the permanent appropriation for tax credits and refunds—the ultimate source of funding for the program. Moreover, indicating the role that sequestration may have played in the funding decision, these officials discussed the permanent appropriation as a source of funds for the CSR program in the context of the potential impact of sequestration on the program.

More than four months later, in mid-December 2013, IRS officials who were ultimately responsible for making the CSR payments to issuers finally learned of the source of funding for the payments—31 U.S.C. § 1324. Senior IRS officials raised concerns not just to the IRS's legal department—as discussed in the July 2016 CSR report—but also to the Office of the General Counsel at Treasury and other senior Treasury officials. After learning of the decision on the source of funding, IRS officials worried about the potential impact of sequestration on their readiness to make the payments. They did not learn that the CSR program would not be subject to sequestration until a week before the first payments were to be made and months after HHS officials appear to have been aware of the decision. IRS officials rushed to draft and finalize a Memorandum of Understanding (MOU) with CMS governing the CSR payments. Emails about the MOU further document the IRS's concern over the source of funding decision. And, given their concerns over the legality of the source of funding, IRS officials insisted on having Secretary Lew's January 2014 Action Memorandum in hand before proceeding beyond organizational discussions with CMS.

The OMB memorandum on the source of funding for the CSR program was an integral part of the Administration's justification that the permanent appropriation for tax refunds and credits could be used to fund the program. OMB initially refused to produce this document to the committees—even pursuant to subpoena—but the committees received testimony describing the contents of the memorandum as discussed in the July 2016 CSR report. The committees have since reviewed the memorandum and found that it does not provide a cognizable legal basis for using the permanent appropriation to fund the CSR program.

While this update to the July 2016 CSR report answers many of the questions left outstanding, it does not answer all of them. Most notably, the committees have not determined why the Administration requested funding for the program in the FY 2014 budget, and why the Administration subsequently and surreptitiously withdrew that request. The committees plan to pursue this matter until these and other questions are answered.

III. Background

A. The Administration Surreptitiously Raided a Permanent Appropriation to Pay for the CSR Program

In January 2014, the Administration began making payments for the CSR program established by the Patient Protection and Affordable Care Act (ACA) without a lawful congressional appropriation, and has continued to do so ever since. Found under Section 1402 of the ACA, the CSR program requires health insurance companies that offer qualified health plans to reduce co-payments, deductibles, and other out-of-pocket expenses for eligible beneficiaries.³ Section 1412(c)(3) authorizes the federal government to make direct payments to insurance companies to offset estimated costs incurred by providing CSRs to eligible beneficiaries.⁴ While the ACA authorized the CSR program, it did not provide an appropriation or otherwise specify a source of funding for making CSR payments.⁵ Therefore, the Administration needed an appropriation from Congress to make these payments.

The Administration, however, has been making CSR payments to insurance companies through a permanent appropriation, found at 31 U.S.C. § 1324. To date, the Administration has made an estimated \$13 billion in CSR payments from the permanent appropriation.⁶ The appropriation's statutory language limits payments from the appropriation to only tax refunds and specific credit provisions within the Internal Revenue Code.⁷ Congress must amend this appropriation to include other programs. Congress did just that for one part of the ACA—the premium tax credit.⁸ Congress did not do so, however, for the CSR program.

After passage of the ACA, the Administration took steps indicating that it understood that it needed an annual appropriation to fund the CSR program. Most notably, on April 10, 2013, the Administration requested an annual appropriation for the program in its FY 2014 budget request to Congress.⁹ This budget requested nearly \$4 billion to make CSR payments.¹⁰ On July 11, 2013, the Senate Committee on Appropriations denied the President's request to fund the CSR program.¹¹

During the course of the investigation, however, the committees learned that HHS Assistant Secretary for Financial Resources Ellen Murray engaged in several key conversations about the source of funding for the CSR program between April 10 and July 11, including: (1) a

³ See 42 U.S.C. § 18071(b)(1).

⁴ 42 U.S.C. § 18082(c)(3).

⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Sec. 1402, 124 Stat. 119 (2010).

⁶ Office of Mgmt. and Budget, Budget of the U.S. Government, Fiscal Year 2017, Appendix 1061 (Feb. 9, 2016); Office of Mgmt. and Budget, Budget of the U.S. Government, Fiscal Year 2016, Appendix 1048 (Feb. 2, 2015).

⁷ 31 U.S.C. § 1324.

⁸ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amending 31 U.S.C. § 1324 by adding “36B” to the list of tax credits available to be paid from the permanent appropriation).

⁹ Office of Mgmt. & Budget, Budget of the U.S. Government Fiscal Year 2014, Appendix 448 (Apr. 10, 2013).

¹⁰ *Id.*

¹¹ S. Comm. on Appropriations, *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Bill, 2014*, 113th Cong. (S. Rept. 113-71).

telephone conversation with someone in the Executive Office of the President, the name of whom the Administration refuses to disclose; (2) a conversation with HHS General Counsel William Schultz; and (3) a telephone conversation with the then-Staff Director of the Senate Appropriations Committee.¹² Ms. Murray told the committees that she informally withdrew the Administration's request for funding for the CSR program during her conversation with the former Staff Director of the Senate Appropriations Committee.¹³ Ms. Murray testified, "I told [Erik Fatemi] that there was already any appropriation for the program, and we did not need the bill to include one."¹⁴

Around the same time that the Administration informally withdrew its CSR funding request, the Office of Management and Budget (OMB) began to develop a memorandum justifying another source of funding for the CSR program. The memorandum provided OMB's final legal analysis and justification for making CSR payments using the premium tax credit account—the account funded through the 31 U.S.C. § 1324 permanent appropriation.¹⁵ OMB shared this memorandum with top Administration officials at Treasury and HHS.¹⁶ In addition, then-OMB General Counsel Geovette Washington briefed then-Attorney General Eric Holder on the issue, who approved the legal analysis in the memorandum.¹⁷

Toward the end of 2013, several high-level IRS officials learned that the CSR payments would be made from the permanent appropriation for tax credits and refunds, and they began raising concerns about this source of funding.¹⁸ After the IRS raised these concerns to OMB, OMB permitted the IRS officials to review its memorandum at the Old Executive Office Building on January 13, 2014.¹⁹ OMB officials instructed the IRS officials not to take notes and did not permit them to take a copy of the memorandum with them. The OMB memorandum did not alleviate all of the IRS officials' concerns that the Administration's course of action violated appropriations law.²⁰

A few days later, senior IRS officials met with IRS Commissioner John Koskinen. The IRS officials who attended the OMB meeting were given an opportunity to raise their concerns directly to the Commissioner. Although Commissioner Koskinen listened to those concerns, the Administration had already decided to move forward with its plan to make the CSR payments through the premium tax credit account.²¹ By the time of this meeting, Secretary Lew had already signed an Action Memorandum that authorized the IRS to administer the CSR payments through the § 1324 appropriation in the same way it administered the Advance Premium Tax

¹² STAFF OF H. COMM. ON ENERGY & COMM. AND H. COMM. ON WAYS & MEANS, 114TH CONG., JOINT CONGRESSIONAL INVESTIGATIVE REPORT INTO THE SOURCE OF FUNDING FOR THE ACA'S COST SHARING REDUCTION PROGRAM 45-51 (July 2016) [hereinafter JULY 2016 CSR REPORT].

¹³ *Id.* at 45-48.

¹⁴ H. Comm. on Energy & Comm., Transcribed Interview of Ellen Murray, at 37 (Mar. 4, 2016) [hereinafter Murray Tr.]

¹⁵ JULY 2016 CSR REPORT, *supra* note 12, at 55-57.

¹⁶ *Id.* at 57-58.

¹⁷ *Id.* at 59-60.

¹⁸ *Id.* at 62-67.

¹⁹ *Id.* at 67-74.

²⁰ *Id.* at 74-76.

²¹ *Id.* at 82-84.

Credit (APTC) payments.²² This Action Memorandum, coupled with the OMB memorandum, paved the way for the Administration to begin making CSR payments from the permanent appropriation for tax refunds and credits.

B. The Administration Relentlessly Obstructed This Investigation, Refusing to Provide Documents and Testimony

As detailed in the July 2016 report, the committees faced a level of obstruction by the Administration previously unprecedented at both the Committee on Energy and Commerce and the Committee on Ways and Means. The committees first requested documents from Treasury and HHS about the source of funding for the CSR program on February 3, 2015. Between February 2015 and January 2016, the departments did not produce a single document. The committees also requested that OMB provide a copy of the legal memorandum justifying the source of funding for the CSR program on April 25, 2016, after learning of the memorandum through interviews. OMB refused to produce the document. Both committees ultimately issued subpoenas for documents to the Department of the Treasury, the Department of Health and Human Services, and the Office of Management and Budget.²³

The Administration refused to comply with document subpoenas issued by the United States Congress.²⁴ The Department of the Treasury refused to confirm to the Committee on Ways and Means whether it ever delivered deposition subpoenas to witnesses.²⁵ During transcribed interviews, the Department of the Treasury limited its employees' and former employees' testimony to Congress by issuing testimony authorizations to witnesses based on over-broad *Touhy* regulations inconsistent with federal law.²⁶ The Department of Health and Human Services and the Office of Management and Budget also severely restricted the scope of testimony provided by current and former employees.²⁷ Administration lawyers further instructed witnesses not to answer purely factual questions—including questions seeking the names of individuals involved in decisions about the source of funding for the CSR program, or confirmation of the occurrence of meetings about the CSR program.²⁸ Finally, lawyers for the Administration pressured at least one witness into following the restrictions set forth in his testimony authorization issued by the IRS after the witness questioned the Administration's ability to limit his testimony.²⁹

When asked to justify the testimonial restrictions imposed on witnesses appearing before the committees, Administration lawyers explained that the Executive branch has “confidentiality interests” and “heightened sensitivities” that allow it to withhold this information from Congress. When asked to explain the basis of those “interests” and “sensitivities,” Administration lawyers

²² *Id.* at 76-82.

²³ *Id.* at 90-98.

²⁴ *Id.* at 99-109.

²⁵ *Id.* at 109-112.

²⁶ *Id.* at 113-121.

²⁷ *Id.* at 122-125.

²⁸ *Id.* at 125-145.

²⁹ *Id.* at 145-154.

refused to do so.³⁰ The position of the Administration—that it could unilaterally block from disclosure to Congress the answer to any question that sought internal or interagency information, or implicated an undefined “confidentiality interest,” or simply sought a fact it did not want Congress to know—effectively would exempt the entire Executive branch from Congressional oversight.

The Administration also argued that the ongoing *House v. Burwell*³¹ litigation effectively preempted any oversight by the committees of the CSR program. The litigation and this investigation, however, have always been distinct from each other. The lawsuit involved no factual discovery. The parties stipulated to the facts. The question before the court was purely a question of law. The committees’ separate and independent oversight inquiry focused on the underlying facts surrounding the Administration’s decision to fund the CSR program through the permanent appropriation instead of through the annual appropriations process. Understanding the rationale—learning who made these decisions, when, and why—was and remains critical to Congress’s appropriations and oversight authorities. Under the powers set forth in the Constitution, Congress has an obligation to understand the facts of the Administration’s decisions here. The committees have an oversight interest in the laws and regulations passed by Congress, and must ensure that the Administration spends taxpayer dollars prudently and in accordance with the law. Nevertheless, the Administration attempted to use the lawsuit to excuse it from cooperating with the committees’ oversight efforts.

C. Since July 2016, the Committees Have Continued Their Investigation, Obtaining Significantly More Information About Decisions Related to the Source of Funding for the CSR Program

While the July 2016 staff report answered many questions about the Administration’s decision to fund the CSR program through the permanent appropriation for tax credits and refunds, many more questions remained outstanding.

The committees first sought answers to these questions through two hearings. On July 7, 2016, the Subcommittee on Oversight of the Committee on Ways and Means held a hearing entitled, “Defying the Constitution: The Administration’s Unlawful Funding of the Cost Sharing Reduction Program.”³² Witnesses from each department involved in the committees’ investigation testified, including the Treasury Department’s Assistant Secretary for Tax Policy Mark Mazur. The witnesses were questioned about the facts surrounding the Administration’s

³⁰ *Id.* at 134-137.

³¹ The *House v. Burwell* litigation is currently before the U.S. Court of Appeals for the District of Columbia Circuit. On November 21, 2016, the U.S. House of Representatives filed a motion requesting to hold the briefing for the appeal in abeyance to allow the incoming administration of the President-elect to discuss potential options for resolution of the matter. Appellee’s motion to hold briefing in abeyance or, in the alternative, to extend the briefing schedule, *U.S. House of Reps. v. Burwell*, No. 16-5202 (D.C. Cir. Nov. 21, 2016). On December 5, 2016, the court ordered that the case be held in abeyance pending further order of the court, and directed the parties to file motions to govern further proceedings by February 21, 2017. Per Curiam Order, *U.S. House of Reps. v. Burwell*, No. 16-5202 (D.C. Cir. Dec. 5, 2016).

³² *Defying the Constitution: The Administration’s Unlawful Funding of the Cost Sharing Reduction Program: Hearing Before the Subcomm. on Oversight, H. Comm. on Ways & Means*, 114th Cong. (2016).

decision to fund the CSR program through the permanent appropriation for tax refunds and credits and the Administration's obstructive tactics in response to the committees' investigation.

At the hearing, Mr. Mazur testified that if Congress did not want the Executive branch to make CSR payments through the permanent appropriation, it could pass a law making that clear. Mr. Mazur testified:

Mr. Mazur. Congresswoman Black, I mean, I think you can look at this in a somewhat different way. **If Congress doesn't want the moneys appropriated, they could pass a law that specifically said, do not appropriate the moneys from that account.**

Mrs. Black. That is not my understanding, sir. And you are an expert in this area. So what you are saying is, if it is left without direction, that it can just be made a mandatory? Is that what you are telling me?

Mr. Mazur. I am saying that the Affordable Care Act -- and I think the legal piece that we referred to goes to this. The Affordable Care Act directs the executive branch to make these cost-sharing reduction payments. And these payments are of a piece with the same payments that are made to the insurance companies under the premium tax credit. And that is the justification for using the same account.

Mrs. Black. So the justification comes because the administration then decides that that is the way they want to do it, even though it is not stipulated in the law.

Mr. Mazur. **And, frankly, if you would like to make the law clearer, you could pass an appropriation law that said, do not make them.**³³

When given the opportunity to correct this answer in response to the Committee's Questions for the Record, the Department of the Treasury doubled down on Mr. Mazur's assessment, stating, "Congress has never sought to prevent the Executive Branch's use of the permanent appropriation or to otherwise prohibit the use of federal funds to make the cost-sharing reduction payments mandated by the ACA."³⁴ Mr. Mazur's claim—that Congress should appropriate in the negative—is not a principle of appropriations law. In fact, it is in direct contradiction to the Constitution, which requires that the Executive only spend monies appropriated by Congress.³⁵

³³ *Id.* at 69-70 (2016) (emphasis added) (unofficial transcript on file with Committee).

³⁴ *Id.* (Questions for the Record responses on file with Committee).

³⁵ U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriation made by law[.]").

The Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce held a hearing on July 8, 2016 entitled “The ACA’s Cost Sharing Reduction Program: Ramifications of the Administration’s Decision on the Source of Funding for the CSR Program.”³⁶ Witnesses at this hearing discussed the ramifications of the Administration’s decision on the source of funding on appropriations law, health care law, and congressional prerogatives. One witness specifically discussed Mr. Mazur’s testimony before the Ways and Means Committee. Tom Miller of the American Enterprise Institute testified:

Mr. Murphy. Is that how appropriations laws are supposed to work that Congress has to pass a law specifying how the executive branch cannot spend a specific account or appropriations? You may have heard me reference the idea that which is not permitted is allowed.

Mr. Miller. Your question implies the answer, Chairman Murphy. **That's exactly the opposite as to what happens. It's trying to say we can spend whatever we want until you stop us as opposed to it is the role of Congress under the Constitution to first authorize and then appropriate the funding.** Failing to say you can't spend is not the same thing as saying it was originally approved for spending.³⁷

The committees also continued to seek documents and information from the Administration about the source of funding for the CSR program after issuing the July 2016 staff report. Given the Administration’s refusal to produce documents in response to subpoenas issued by both committees, the Committee on Ways and Means issued deposition subpoenas to a number of relevant officials involved in decisions about the source of funding for the CSR program. After much negotiation, Ways and Means offered a substantial accommodation to the various departments whereby the departments produced documents, largely *in camera*, for review by staff of both committees so as to obviate the need to speak with Administration officials.

Since July, staff of the committees have reviewed thousands of pages of documents responsive to the subpoenas, including the OMB legal memorandum. This addendum provides an update to the July 2016 CSR report based on the significant additional information the committees have learned.

³⁶ *The ACA’s Cost Sharing Reduction Program: Ramifications of the Administration’s Decision on the Source of Funding for the CSR Program: Hearing Before the Subcomm. on Oversight, H. Comm. on Energy & Commerce*, 114th Cong. (2016).

³⁷ *Id.* at 44 (emphasis added) (unofficial transcript on file with Committee).

IV. Documents Reviewed by the Committees Confirm the Findings in the Committees' Report and Answer Questions Raised by the Report*

A. As Early as Summer 2010, the Administration Discussed the CSR Program and Understood It Was Not a Tax Credit, and Was Separate from Tax Programs

Through their transcribed interviews, the committees learned that the Administration began to have discussions about the source of funding for the CSR program soon after the passage of the ACA in 2010. According to IRS Associate Chief Counsel Linda Horowitz, top IRS officials discussed the source of funding both internally and with OMB.³⁸ The committees have more recently learned that IRS officials also questioned the involvement of the IRS in the CSR program in communications with HHS officials in 2010.

On March 23, 2010, President Obama signed the ACA into law.³⁹ Less than three months later, on June 23, 2010, Chiquita Brooks-LaSure of the HHS Office of Coverage Policy emailed IRS Deputy Division Counsel⁴⁰ Catherine Livingston and others, asking them to review a document before it was sent to the White House for comment.⁴¹ Ms. Livingston replied, questioning the IRS' involvement in the cost-sharing subsidy. She wrote, "It is a straight subsidy, not a tax benefit, so we are not clear on the connection."⁴² Brooks-LaSure responded, "its [sic] more that it would be one regulation and we think of the tax credit/cost sharing policies as linked, but we can delete if you prefer."⁴³

In 2010, the Obama Administration understood that the cost sharing reduction was a subsidy—not a tax benefit. This understanding has not been challenged by any documents or testimony the committees have received. The question remains, however, how the Administration decided that a subsidy that was neither a tax credit nor a tax refund could be funded from the permanent appropriation for tax credits and tax refunds.

* Many of the documents cited by the committees herein were reviewed by staff *in camera* as an accommodation to the Department of the Treasury, the Department of Health and Human Services, and the Office of Management and Budget. Documents in the possession of the committees are indicated as such throughout. Otherwise, all quotes and explanations of the documents are from staff notes, and have been cross-referenced among the notes of multiple staffers across the committees.

³⁸ JULY 2016 CSR REPORT, *supra* note 12, at 21–22.

³⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

⁴⁰ In October 2010, Ms. Livingston became the IRS Health Care Counsel.

⁴¹ Email from Chiquita Brooks-LaSure, Dir. of Coverage Policy, U.S. Dep't of Health & Human Servs., to Catherine Livingston, Deputy Division Counsel, I.R.S., et al. (June 23, 2010) [01202016.WM.UST-001952].

⁴² Email from Catherine Livingston, Deputy Division Counsel, I.R.S., to Chiquita Brooks-LaSure, Dir. of Coverage Policy, U.S. Dep't of Health & Human Servs., et al. (June 23, 2010) [01202016.WM.UST-001952].

⁴³ Email from Chiquita Brooks-LaSure, Dir. of Coverage Policy, U.S. Dep't of Health & Human Servs., to Catherine Livingston, Deputy Division Counsel, I.R.S., et al. (June 23, 2010) [01202016.WM.UST-001952].

B. HHS Included a Request for Funding for the CSR Program in its FY 2013 Annual Appropriations Request to OMB

While the committees have been aware of the Administration's request for an annual appropriation for the CSR program since the FY 2014 budget was first made public, the committees recently learned that HHS also included a request for an advance appropriation for the CSR program in its FY 2013 budget submission to OMB. This provides even more evidence that the Administration knew that it needed an annual appropriation for the CSR program.

As described in the July 2016 CSR Report, in a typical HHS budget process, HHS begins to meet with operating divisions the summer before the President's final budget request is submitted to Congress.⁴⁴ The summer meetings include ones with the Secretary's Budget Council, which includes the Deputy Secretary, the Office of the Secretary, the Office of the Assistant Secretary for Financial Resources, and other senior officials. The meetings culminate with HHS Secretary making "tough choices between different requests to come up with [the] final proposal to OMB."⁴⁵ HHS typically submits its initial budget request to OMB around Labor Day.⁴⁶

In the summer of 2011, HHS was preparing its FY 2013 budget request. On July 27, 2011, HHS Assistant Secretary for Financial Resources Ellen Murray met with HHS Secretary Kathleen Sebelius to review the recommendations from the Secretary's Budget Council for FY 2013 mandatory spending.⁴⁷ Ms. Murray prepared a memorandum for Secretary Sebelius in advance of the briefing and included with the memorandum a document entitled "Significant FY 2013 Mandatory Legislative Proposals with no Budget Impact." This document discussed submitting a request in the FY 2013 budget to fund the cost sharing reduction program.⁴⁸

Appropriation for Cost Sharing Reductions: Submits language in the FY 2013 budget for an advance appropriation to fund the entitlement to reduced cost-sharing for certain individuals enrolled in qualified health plans through the Exchange.

On August 18, 2011, Ms. Murray emailed the members of the Secretary's Budget Council requesting final review of the CMS and ACF mandatory proposals for the Secretary's request to OMB.⁴⁹ Ms. Murray made clear that the final decision on any ACA-related proposals would rest with OMB. She wrote:⁵⁰

⁴⁴ JULY 2016 CSR REPORT, *supra* note 12, at 30-32.

⁴⁵ Murray Tr., *supra* note 14, at 17.

⁴⁶ JULY 2016 CSR REPORT, *supra* note 12, at 32-33.

⁴⁷ Memorandum from Ellen Murray, Assistant Sec'y for Fin. Res., U.S. Dep't of Health & Human Servs., to Hon. Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs., HHS FY 2013 Budget Briefing—Part II (July 27, 2011) (on file with Committee).

⁴⁸ *Id.*

⁴⁹ Email from Ellen Murray, Assistant Sec'y for Fin. Res., U.S. Dep't of Health & Human Servs., to Norris Cochran, Deputy Assistant Sec'y for Budget, U.S. Dep't of Health & Human Servs., et al. (Aug. 18, 2011) (on file with Committee).

⁵⁰ *Id.*

Treatment of ACA-Related Proposals

This strawman package assumes that all ACA-related proposals approved through the legislative team and SBC clearance process will advance to OMB given that the HHS position is that these represent sound policy and good government. The determination on whether to actually include any ACA-related proposals in the Budget will be left to OMB.

HHS submitted its FY 2013 budget submission to OMB by September 12, 2011.⁵¹ The budget submission included a request for an advance appropriation of \$400 million to make CSR payments to issuers of qualified health plans for the first quarter of FY 2014.⁵² The explanation accompanying the request stated that the amount requested was estimated to cover one month of payments to be made in December 2013 for January 2014 coverage, and would avoid the need for an anomaly request in the event of a continuing resolution in FY 2014.⁵³

The final FY 2013 budget, released on February 13, 2012, did not include a request for an advance appropriation for the CSR program. OMB presumably made the decision not to include this request, given Ms. Murray's comment to the Secretary's Budget Council that the final decision on inclusion of ACA-related proposals rested with OMB. HHS' inclusion of this request in its budget submission to OMB is notable, however, because the inclusion of a request for an annual appropriation for the CSR program by HHS not once, but twice—in FY 2013 and FY 2014—further indicates that HHS believed it required a congressional appropriation to fund the program.

C. Extensive Communications Occurred Between HHS and the Senate Appropriations Committee on the FY 2014 Funding Request for the CSR Program

The committees' July 2016 CSR report describes how the Administration initially requested an annual appropriation of nearly \$4 billion for the CSR program in the President's FY 2014 budget request submitted to Congress on April 10, 2013.⁵⁴ On July 11, 2013, however, the Senate Committee on Appropriations issued a report denying the request.⁵⁵

The committees' investigation revealed that, between April 10, 2013 and July 11, 2013, the Administration informally withdrew its appropriation request for an annual appropriation for the CSR program through an undocumented phone call. In her transcribed interview, HHS Assistant Secretary for Financial Resources Ellen Murray testified that she called Senate Appropriations Committee Staff Director Erik Fatemi to tell him that "HHS would not need an appropriation" for the CSR program.⁵⁶

⁵¹ Email from HHS Legis. Affairs Staff to H. Comm. on Energy & Comm. Maj. Staff (Oct. 7, 2016) (on file with Committee).

⁵² U.S. Dep't of Health & Human Servs., *Performance Budget Submission to OMB* (Sept. 12, 2011).

⁵³ *Id.*

⁵⁴ JULY 2016 CSR REPORT, *supra* note 12, at 40–41.

⁵⁵ *Id.* at 45.

⁵⁶ Murray Tr., *supra* note 14, at 36; *see also* JULY 2016 CSR REPORT, *supra* note 12, at 45–46.

Ms. Murray testified that she recalled only one conversation with Mr. Fatemi between April and July 2013. She stated, “[t]he only conversation I specifically remember is calling Erik Fatemi and letting him know that we did not need an appropriation for the Cost Sharing Reduction Program.”⁵⁷ Ms. Murray recalled very few details about the conversation. She testified:

Q. Did you provide an explanation to Mr. Fatemi about why an appropriation was not necessary?

HHS Counsel. Thank you.

Witness. Yes, we did. Yes, I did.

Q. What explanation did you provide to him?

A. I told him that there was already an appropriation for the program, and we did not need the bill to include one.

Q. Did you explain to him why there was already an appropriation for the program?

A. I don’t recall.

Q. Do you recall if he asked you why there was already an appropriation for the program?

A. I don’t recall, but I don’t believe he did.⁵⁸

Ms. Murray was later asked whether she recalled any other details about that conversation. She testified, “I do not.”⁵⁹ Ms. Murray further testified that she did not recall sending or receiving any emails about the decision to withdraw the funding request for the CSR program.⁶⁰

The committees have since learned that Ms. Murray and Mr. Fatemi had many more interactions about the budget request between April and July 2013 than Ms. Murray recalled during her interview. In fact, email exchanges between Ms. Murray and Mr. Fatemi over just a one-week period demonstrate much back and forth over the CSR program, and also indicate multiple in-person or phone interactions between the two.

On June 24, 2013, Mr. Fatemi asked Ms. Murray whether she had any update on “Reduced cost sharing.”⁶¹ His email further indicated that he had seen Ms. Murray the previous week.⁶² The next day, Ms. Murray responded, “No update – legal beagles are back at work.”⁶³

⁵⁷ Murray Tr., *supra* note 14, at 38.

⁵⁸ *Id.* at 37.

⁵⁹ *Id.* at 38.

⁶⁰ *Id.* at 100.

From: Murray, Ellen (HHS/ASFR)
Sent: Tuesday, June 25, 2013 12:28 PM
To: 'Fatemi, Erik (Appropriations)'
Subject: RE: Reduced cost sharing

No update - legal beagles are back at work.

-----Original Message-----

From: Fatemi, Erik (Appropriations) [REDACTED]
Sent: Monday, June 24, 2013 6:26 PM
To: Murray, Ellen (HHS/ASFR)
Cc: Hallett, Adrienne (Appropriations)
Subject: Reduced cost sharing

Hi, Ellen. Any update on this?
Great to see you last week.

Later that same day, Ms. Murray emailed HHS Deputy Secretary Bill Corr and General Counsel William Schultz about the CSR language. She wrote, “Senate Approps asked this morning if we have to have CSR language. Should I direct them to OMB?”⁶⁴ Given that Mr. Fatemi’s email was sent the day prior, on June 24, this email indicates that a conversation between Ms. Murray and the Senate Appropriations Committee—presumably Mr. Fatemi—likely occurred on June 25. Given that the email exchange continues into July, this conversation was probably not the one where Ms. Murray withdrew the funding request.

On June 26, Mr. Fatemi emailed Ms. Murray, “We’re starting to cut it close on this. We have to get the bill scored by CBO soon.” Mr. Fatemi also indicated that he would be leaving shortly for an event that evening.⁶⁵ Ms. Murray replied, “See you there - I’ll try to leave at the same time.”⁶⁶ This email implies another interaction between Ms. Murray and Mr. Fatemi on June 26.

⁶¹ Email from Erik Fatemi, Staff Dir., S. Comm. on Appropriations, to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (June 24, 2013) (on file with Committee).

⁶² *Id.*

⁶³ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Erik Fatemi, Staff Dir., S. Comm. on Appropriations (June 25, 2013) (on file with Committee).

⁶⁴ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Bill Corr, Deputy Sec’y, U.S. Dep’t of Health & Human Servs., & William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs. (June 25, 2013).

⁶⁵ Email from Erik Fatemi, Staff Dir., S. Comm. on Appropriations, to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (June 26, 2013) (on file with Committee).

⁶⁶ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Erik Fatemi, Staff Dir., S. Comm. on Appropriations, (June 26, 2013) (on file with Committee).

From: Murray, Ellen (HHS/ASFR)
Sent: Wednesday, June 26, 2013 4:32 PM
To: 'Fatemi, Erik (Appropriations)'
Subject: RE: Reduced cost sharing

See you there - I'll try to leave at the same time.

-----Original Message-----
From: Fatemi, Erik (Appropriations) [REDACTED]
Sent: Wednesday, June 26, 2013 4:27 PM
To: Murray, Ellen (HHS/ASFR)
Subject: RE: Reduced cost sharing

We're starting to cut it close on this. We have to get the bill scored by CBO soon. Meanwhile, I will probably leave here around 6:15 for the CAMR event....

On June 28, Erik Fatemi asked again about the CSR program. He wrote, “Any word? I have to show bill text to the minority on Monday. We can still make some changes past Monday, of course, but this is not an issue I want to be waffling back and forth on in front of the Republicans.”⁶⁷ Ms. Murray responded, “Not yet—I know this is unfair.”⁶⁸

From: Murray, Ellen (HHS/ASFR)
Sent: Friday, June 28, 2013 12:18 PM
To: 'Fatemi, Erik (Appropriations)'
Subject: RE: Reduced cost sharing

Not yet - I know this is unfair.

-----Original Message-----
From: Fatemi, Erik (Appropriations) [REDACTED]
Sent: Friday, June 28, 2013 11:25 AM
To: Murray, Ellen (HHS/ASFR)
Subject: RE: Reduced cost sharing

Any word? I have to show bill text to the minority on Monday. We can still make some changes past Monday, of course, but this is not an issue I want to be waffling back and forth on in front of the Republicans.

On July 1, Mr. Fatemi emailed Ms. Murray again, writing, “Pestering again. When do you think we’ll know?”⁶⁹

⁶⁷ Email from Erik Fatemi, Staff Dir., S. Comm. on Appropriations, to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (June 28, 2013) (on file with Committee).

⁶⁸ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Erik Fatemi, Staff Dir., S. Comm. on Appropriations, (June 28, 2013) (on file with Committee).

⁶⁹ Email from Erik Fatemi, Staff Dir., S. Comm. on Appropriations, to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (July 1, 2013) (on file with Committee).

From: Fatemi, Erik (Appropriations) <[REDACTED]>
Sent: Monday, July 01, 2013 12:52 PM
To: Murray, Ellen (HHS/ASFR)
Subject: RE: Reduced cost sharing

Pestering again. When do you think we'll know?

Two days later, on July 3, Mr. Fatemi emailed Ms. Murray that “We’re pulling the language tonight. Just thought I’d give you one last chance!”⁷⁰ Ms. Murray forwarded this email to Mr. Corr and Mr. Schultz.⁷¹

From: Murray, Ellen (HHS/ASFR)
Sent: Wednesday, July 03, 2013 3:21 PM
To: Schultz, William B (HHS/OGC); Corr, Bill (HHS/IOS)
Subject: FW: Reduced cost sharing

From Approps

-----Original Message-----
From: Fatemi, Erik (Appropriations) <[REDACTED]>
Sent: Wednesday, July 03, 2013 3:13 PM
To: Murray, Ellen (HHS/ASFR)
Subject: RE: Reduced cost sharing

We're pulling the language tonight. Just thought I'd give you one last chance!

Deputy Secretary Corr responded that he would call Ms. Murray shortly.⁷²

On July 5, Ms. Murray emailed HHS Deputy Assistant Secretary for Budget Norris Cochran regarding “Senate Table,” noting, “CSR is still on there.”⁷³ Ms. Murray asked, “Are they going to take it all out?”⁷⁴ Mr. Cochran responded, “Don’t know. I can talk to Erik [Fatemi], but would assume they plan to keep it in.”⁷⁵

⁷⁰ Email from Erik Fatemi, Staff Dir., S. Comm. on Appropriations, to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (July 3, 2013) (on file with Committee).

⁷¹ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Bill Corr, Deputy Secretary, U.S. Dep’t of Health & Human Servs., & William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs. (July 3, 2013) (on file with Committee).

⁷² Email from Bill Corr, Deputy Secretary, U.S. Dep’t of Health & Human Servs., to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. and William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs. (July 3, 2013) [HHSCSR0000070].

⁷³ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to Norris Cochran, Deputy Assistant Sec’y for Budget, U.S. Dep’t of Health & Human Servs. (July 5, 2013) [HHSCSR0000019].

⁷⁴ *Id.*

⁷⁵ Email from Norris Cochran, Deputy Assistant Sec’y for Budget, U.S. Dep’t of Health & Human Servs., to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (July 5, 2013) [HHSCSR0000019].

In her testimony before the committees, Ms. Murray could only recall one phone conversation with Mr. Fatemi. But based on these emails, there was in fact a substantial amount of back-and-forth about the CSR program between Ms. Murray and Mr. Fatemi in the weeks before the Senate rejected the Administration's request for funding for the CSR program. The emails also indicate that in-person interactions and at least one conversation occurred between the two. Notably, these emails do not appear to include reference to the one conversation Ms. Murray recalled having with Mr. Fatemi—the one where she informally withdrew the Administration's budget request for the CSR program. These emails also show that the Administration continued to internally discuss the budget request for CSR funding months after it was publicly included in the President's budget. These emails do not explain, however, how or why the Administration withdrew its budget request for CSR program.

D. Administration Officials Discussed Funding the CSR Program through the Permanent Appropriation for Tax Refunds and Credits as Early as July 2013

The committees have not yet identified who first identified the permanent appropriation for tax refunds and credits as a potential source of funding for the CSR program, or when this identification took place. The committees recently learned, however, that HHS, Treasury, and OMB officials discussed the idea to fund the CSR program from the permanent appropriation as early as July 31, 2013—only weeks after HHS informally withdrew its request for an annual appropriation for the program. Moreover, these officials discussed the permanent appropriation as a source of funds for the CSR program in the context of the potential impact of sequestration⁷⁶ on the program. These interagency conversations came after internal deliberations at HHS regarding the source of funding for CSR payments.

HHS officials appear to have discussed the appropriation for CSR payments in a meeting on June 18, 2013—the week before Ms. Murray's emails with Mr. Fatemi began. HHS Deputy General Counsel Ken Choe sent a meeting request to HHS General Counsel William Schultz and other HHS counsels. According to Mr. Choe's meeting request, the meeting was about the "appropriation for CSR payments" and would take place in "Bill's office."⁷⁷ Three days later, on June 21, 2013, Mr. Schultz requested copies of Section 1402 and 1412 of the ACA.⁷⁸

On July 2, 2013—in the midst of her email conversations with Senate Appropriations Staff Director Erik Fatemi—HHS Assistant Secretary for Financial Resources Ellen Murray sent HHS General Counsel William Schultz a copy of the Memorandum of Understanding between the IRS and CMS governing the Advanced Premium Tax Credit (APTC) payments. Ms. Murray

⁷⁶ The Budget Control Act of 2011, as amended by the American Taxpayer Relief Act of 2012, required nearly across-the-board budget cuts for most annually appropriated programs. Known as "sequestration," the cuts would reduce federal spending by more than \$1 trillion over ten years. Most permanent appropriations—including the permanent appropriation for tax credits and refunds—were not subject to sequestration.

⁷⁷ Meeting between William Schultz, Gen. Counsel, U.S. Dep't of Health & Human Serv., Ken Choe, Deputy Gen. Counsel, U.S. Dep't of Health & Human Servs., et al. (June 18, 2013) [HHSCSR00000063].

⁷⁸ Email from William Schultz, Gen. Counsel, U.S. Dep't of Health & Human Servs., to Law Library (June 21, 2013) [HHSCSR00000042].

wrote, “Could do the same for CSR or modify this MOU.”⁷⁹ Mr. Schultz replied, “Makes sense” and asked if he needed to do anything at that time.⁸⁰ Ms. Murray responded, “No, just a FYI.”⁸¹ Mr. Schultz later wrote to Ms. Murray that the MOU was “very interesting and helpful to read.”⁸² Modifying the APTC MOU, which identified 31 U.S.C. § 1324 as the source of funding for the APTC payments, to include the CSR program would presumably link the CSR payments to the same appropriation. Accordingly, this email chain is the earliest reviewed by the committee to date potentially linking the CSR payments to the permanent appropriation for tax refunds and credits.

On July 31, 2013, HHS Deputy General Counsel Ken Choe emailed OMB General Counsel Geovette Washington, OMB counsel Sam Berger and White House Special Assistant and Senior Counsel to the President Jeremy Maltby about 31 U.S.C. § 1324—the permanent appropriation for tax refunds and credits. He asked whether this “pot of money appropriated for tax credits” was subject to sequestration, noting that his inquiry was “time-sensitive.”⁸³ Mr. Choe subsequently added Treasury General Counsel Christopher Meade and HHS General Counsel William Schultz to the chain, ensuring that key officials at HHS, Treasury, OMB, and the White House were involved in the conversation.

Including OMB’s “budget folks” in his response, Sam Berger replied that the premium tax credits are exempt from sequestration because they are refundable tax credits to individuals.⁸⁴ He continued to explain that while CSRs are not explicitly exempt, “there is a question” as to whether they would be exempt from sequestration “were we to determine they were paid from 31 USC 1324.”⁸⁵ He acknowledged that the issue of funding the CSR payments from the permanent appropriation wouldn’t be resolved “by tomorrow,”⁸⁶ indicating that discussions about utilizing the permanent appropriation as the source of funding were already underway.

HHS Deputy General Counsel Choe then asked if those included on the email chain would be comfortable if the CMS Administrator testified that the question of how sequestration affects cost sharing reductions is under consideration by OMB.⁸⁷ Mr. Berger replied with a

⁷⁹ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Serv. (July 2, 2013) [HHSCSR00000021].

⁸⁰ Email from William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Serv., to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (July 2, 2013) [HHSCSR00000033].

⁸¹ Email from Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs., to William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Serv. (July 2, 2013) [HHSCSR00000033].

⁸² Email from William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Serv., to Ellen Murray, Assistant Sec’y for Fin. Res., U.S. Dep’t of Health & Human Servs. (July 2, 2013) [HHSCSR00000021].

⁸³ Email from Ken Choe, Deputy Gen. Counsel, U.S. Dep’t of Health & Human Servs., to Geovette Washington, Gen. Counsel, Office of Mgmt. & Budget, Sam Berger, Office of Mgmt. & Budget, & Jeremy Maltby, White House Special Assistant and Senior Counsel to the President (July 31, 2013) [01202016.WM.UST.002801].

⁸⁴ Email from Sam Berger, Office of Mgmt. & Budget, to Ken Choe, Deputy Gen. Counsel, U.S. Dep’t of Health & Human Servs., Geovette Washington, Gen. Counsel, Office of Mgmt. & Budget, Jeremy Maltby, White House Special Assistant and Senior Counsel to the President, William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs., Christopher Meade, Gen. Counsel, U.S. Dep’t of the Treasury, *et al.* (July 31, 2013) [01202016.WM.UST.002801–02].

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Email from Ken Choe, Deputy Gen. Counsel, U.S. Dep’t of Health & Human Servs., to Geovette Washington, Gen. Counsel, Office of Mgmt. & Budget, Sam Berger, Office of Mgmt. & Budget, & Jeremy Maltby, White House

proposed response from OMB: “We believe that sequestration is not necessary, should not occur, and is highly destructive to core government functions. Congress can and should act to undo the sequester. As we move into FY 2014, HHS and OMB will continue to examine how sequestration affects cost sharing reductions.”⁸⁸

This email chain is the earliest reviewed by the committees to date explicitly linking the source of funding for the CSR program to 13 U.S.C. § 1324—the permanent appropriation ultimately used by the Administration to fund the program. Furthermore, these are the earliest emails reviewed by the committees linking the potential impact of sequestration on the CSR program to the source of funding for the program, indicating that alleviating the stress of a sequestration cut on the CSR program was a concern for HHS, Treasury, OMB, and White House officials.

The very next day, on August 1, 2013, CMS Administrator Marilyn Tavenner testified before the Committee on Energy and Commerce about the potential impact of sequestration on the CSR program—the very issue discussed amongst HHS, Treasury, OMB, and White House officials the day before. She testified:

Mr. Pitts. Ms. Tavenner, on April the 10th, 2013, the Office of Management and Budget released its sequestration preview report for fiscal year 2014. In this report, OMB confirmed the cost-sharing subsidy program in the ACA is subject to sequester to 7.2 percent reduction, a reduction of \$4 billion. Has CMS communicated to officials operating an exchange, both Federal and State, how this sequester will be applied?

Ms. Tavenner. We have not. We are still working with OMB.

Mr. Pitts. Will the navigators and other assistance personnel be expected to properly explain to enrollees the new cost-sharing levels under sequester?

Ms. Tavenner. That is currently under review with OMB, so I would have to get back to you on that.

Mr. Pitts. Well, doesn’t this mean applicants may not be aware of their financial liability when signing up for an exchange plan?

Ms. Tavenner. Congressman Pitts, I will have to work with OMB and get back with you on that.⁸⁹

Special Assistant and Senior Counsel to the President, William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs., Christopher Meade, Gen. Counsel, U.S. Dep’t of the Treasury, *et al.* (July 31, 2013) [01202016.WM.UST.002801–02].

⁸⁸ *Id.*

⁸⁹ *PPACA Pulse Check: Hearing Before the H. Comm. on Energy & Comm.*, 113th Cong. 104-105 (2013).

Ms. Tavenner's response indicates that she received instruction to refer questions about the impact of sequestration on the CSR program to OMB. She did not acknowledge or indicate to the Committee—and thereby Congress and the American people—that the CSR program may not be subject to sequestration. The committees have not learned whether Ms. Tavenner knew of the conversations taking place between HHS, Treasury, OMB, and the White House about the source of funding for the CSR program in July 2013, though it seems unlikely that Ms. Tavenner would have been involved in decisions about the source of funding at this point in time.

E. The Administration Scrambled to Make CSR Payments by January 2014

The first cost sharing reduction payments were scheduled to be paid in January 2014. Yet, the IRS did not learn that source of funding for these payments would come from the IRS-administered permanent appropriation for tax refunds and credits until December 12, 2013. As the July 2016 CSR Report highlights, IRS officials raised concerns about the source of funding, and that those concerns fell on deaf ears because the Administration's decision on the source of funding was all but final by that time.⁹⁰

Documents reviewed since July 2016, however, provide a much richer understanding of what happened at the IRS between December 2013 and January 2014. Senior IRS officials raised concerns not just to the IRS's legal department—as discussed in the July 2016 CSR report—but also to the Office of the General Counsel at Treasury and other senior Treasury officials. After learning of the decision on the source of funding, IRS officials worried about the potential impact of sequestration on their readiness to make the payments. They did not learn that the CSR program would not be subject to sequestration until January 14, 2013—just over a week before the first payments were to be made and months after HHS officials knew of the decision. IRS officials rushed to draft and finalize a Memorandum of Understanding with CMS governing the CSR payments in a two-week time span. Emails regarding the MOU further document the IRS's concern over the source of funding decision. And, given their concerns over the legality of the source of funding, IRS officials insisted on having Secretary Lew's January 15, 2014, Action Memorandum authorizing the payments in hand before proceeding beyond organizational discussions with CMS. All of this occurred before the first payments went out on January 22, 2014. Despite their concerns, the IRS had to get on board and make the payments happen.

1. IRS Officials Raised Concerns About the Legality of the Source of Funding for the CSR Program Immediately After Learning of the Decision

The IRS officials who would be charged with administering the CSR payments were among the last to learn that the permanent appropriation for tax refunds and credits would fund the payments. As IRS Chief Risk Officer David Fisher testified, upon learning of the decision, senior IRS officials immediately began raising significant concerns about audit trail issues,

⁹⁰ JULY 2016 CSR REPORT, *supra* note 12, at 62–67.

sequestration, and whether the account could be used to make the CSR payments. The committees have now learned that senior IRS officials raised these concerns not just to the IRS's legal department, as Mr. Fisher described, but also to the Treasury General Counsel's office and other Treasury officials.

On December 11, 2013, HHS Senior Analyst Heather Tompkins emailed HHS Deputy General Counsel Ken Choe to let him know about an "ongoing workgroup between CMS, IRS, and our ASFR Finance colleagues on APTCs."⁹¹ Ms. Tompkins explained that the IRS participants in that workgroup were the individuals to contact regarding cost-sharing reductions, and specifically highlighted the IRS' Chief Financial Officer's office.⁹² Mr. Choe forwarded that email to Treasury Deputy General Counsel Roberto Gonzalez.⁹³

The following day, the IRS CFO's office learned for the first time about the Administration's plan to fund the CSR program using the § 1324 permanent appropriation. On December 12, 2013, IRS accountant Anne Field emailed several IRS officials including IRS Deputy Chief Financial Officer Gregory Kane and IRS Deputy Associate Chief Financial Officer Howard Marcus. Ms. Field explained that, per discussions with Sean Creighton at CMS, the legal counsels of OMB, Treasury, and HHS had determined that the appropriate source of funds for the CSR payments are the funds appropriated for the Advance Premium Tax Credits.⁹⁴ She commented, "[t]his is the first we've heard of this."⁹⁵

Mr. Marcus replied, asking the group, "can we also make sure that legal agrees that this can be done."⁹⁶ Mr. Kane responded that he was trying to discuss the issue with Sarah Hall Ingram, Director of the Affordable Care Act office within the IRS, because he was concerned that the IRS CFO's office had not been involved in the decision.⁹⁷

Mr. Kane then forwarded Ms. Field's December 12 email to Sarah Hall Ingram, Director of the IRS's Affordable Care Act Office, and Thomas Reeder, Health Care Counsel in the IRS Office of the Chief Counsel, copying Robin Canady, IRS Chief Financial Officer. Mr. Kane asked, "Are either of you aware of this and do we know who at IRS has been involved in the discussion?"⁹⁸ Mr. Kane further stated that three weeks would not be sufficient time to address the accounting issues, noting that GAO already had concerns about treating APTC as a refund on

⁹¹ Email from Heather Tompkins, Senior Analyst, U.S. Dep't of Health & Human Servs., to Ken Choe, Deputy Gen. Counsel, U.S. Dep't of Health & Human Servs., *et al.* (Dec. 11, 2013) [HHSCSR 000000229].

⁹² *Id.*

⁹³ Email from Ken Choe, Deputy Gen. Counsel, U.S. Dep't of Health & Human Servs., to Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep't of the Treasury (Dec. 11, 2013) [HHSCSR 000000229].

⁹⁴ Email from Anne Field, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., *et al.* (Dec. 12, 2013) [0102016.WM.UST-000124].

⁹⁵ *Id.*

⁹⁶ Email from Howard Marcus, Deputy Associate Chief Fin. Officer, I.R.S., to Anne Field, I.R.S., *et al.* (Dec. 12, 2013) [0102016.WM.UST-000128].

⁹⁷ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Howard Marcus, Deputy Associate Chief Fin. Officer, I.R.S., *et al.* (Dec. 12, 2013) [0102016.WM.UST-000130].

⁹⁸ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Sarah Hall Ingram, Dir., Affordable Care Act Office, I.R.S., *et al.* (Dec. 12, 2013) [0102016.WM.UST-00132].

the IRS's statements and that the GAO might have trouble distinguishing the CSR payments from APTC payments when the IRS sent its books to the GAO.⁹⁹

Ms. Ingram replied, "News to me—we don't administer the cost sharing thing—either up front or on any tax return."¹⁰⁰ She further noted that the IRS would not be getting cost sharing data from the marketplaces and "there is no entry on the tax return about cost sharing."¹⁰¹ Mr. Kane replied that he was concerned about the audit support and other issues that could arise, "esp since we were not planning for it." He said he was considering notifying the IRS's Office of General Legal Services (GLS), specifically Linda Horowitz, Deputy Chief Counsel for GLS, and Kirsten Witter, Chief of the Ethics and General Government Branch within GLS.¹⁰²

Ms. Ingram then told him, "Run, do not walk, to [General Legal Services] and get them to sort out who has been talking with whom at Treasury."¹⁰³ She said she did not know why Treasury's legal counsel would be discussing this issue without the ACA team and that she had not heard anything from the "Treasury ACA nerds in [the Office of Tax Policy]."¹⁰⁴ Mr. Reeder then replied, "This is disconcerting."¹⁰⁵

Mr. Kane forwarded his emails with Ms. Ingram to Ms. Witter and Ms. Horowitz asking for their perspectives.¹⁰⁶ Ms. Horowitz replied only to Mr. Kane that she had not heard of the issue and would talk to Ms. Witter in the morning.¹⁰⁷ Mr. Kane replied, "I find this very interesting these discussions have been going on impacting our account and no one thought to invite IRS."¹⁰⁸

The next day, on December 13, Mr. Kane forwarded the email chain to senior Treasury CFO and budget officials including Department Budget Director Robert Mahaffie and Treasury Deputy Chief Financial Officer Dorrice Roth. Mr. Kane asked whether they were aware of the decision on the source of funding for the CSR program, and stated that IRS counsel—who had not been contacted and "disagree this is legal"—would be reaching out to Treasury.¹⁰⁹ Mr. Kane

⁹⁹ *Id.*

¹⁰⁰ Email from Sarah Hall Ingram, Dir., Affordable Care Act Office, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., et. al (Dec. 12, 2013) [0102016.WM.UST-000136].

¹⁰¹ *Id.*

¹⁰² Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Sarah Hall Ingram, Dir., Affordable Care Act Office, I.R.S. (Dec. 12, 2013) [0102016.WM.UST-00136].

¹⁰³ Email from Sarah Hall Ingram, Dir., Affordable Care Act Office, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., et al. (Dec. 12, 2013) [0102016.WM.UST-000138].

¹⁰⁴ *Id.*

¹⁰⁵ Email from Tom Reeder, Counsel, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., et al. (Dec. 12, 2013) [0102016.WM.UST-000190].

¹⁰⁶ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Linda Horowitz, Deputy Chief Counsel, Gen. Legal Servs., I.R.S. & Kirsten Witter, Chief, Ethics & Gen. Gov't Branch, Gen. Legal Servs., I.R.S. (Dec. 12, 2013) [0102016.WM.UST-000138].

¹⁰⁷ Email from Linda Horowitz, Deputy Chief Counsel, Gen. Legal Servs., I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., (Dec. 12, 2013) [0102016.WM.UST-000143].

¹⁰⁸ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Linda Horowitz, Deputy Chief Counsel, Gen. Legal Servs., I.R.S., (Dec. 12, 2013) [0102016.WM.UST-000143].

¹⁰⁹ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury, et al. (Dec. 13, 2013) [0102016.WM.UST-000190].

stated, “It is our belief there is an account at HHS and so something has to be driving this.”¹¹⁰ He also asked if Treasury Assistant Secretary for Management Nani Coloretti was aware and how he should proceed.”¹¹¹

Shortly thereafter, Dorrice Roth forwarded Mr. Kane’s email to Ms. Coloretti and Assistant General Counsel Rochelle Granat and asked if they were aware of the issue. Ms. Granat then forwarded Ms. Roth’s email to Treasury General Counsel Christopher Meade and Deputy General Counsel Roberto Gonzalez asking them to read it, noting she had not responded to Ms. Roth.¹¹² Mr. Gonzalez responded, “There are a number of inaccuracies in the below and there appears to be some confusion.”¹¹³ Mr. Gonzalez later confirmed that he had spoken with Ms. Coloretti.¹¹⁴

Less than a week later, officials from OMB stepped in, potentially to smooth over the situation. On December 21, 2013, Tom Reilly, Deputy Associate Director for Health at OMB, emailed Gregory Kane and Margaret Sherry, IRS Deputy Commissioner for Operations Support. He wrote that his boss, Julian Harris, Associate Director for Health at OMB, spoke with Christian Weideman, Chief of Staff to Secretary Lew, about the “relatively recent decision” on an ACA program—presumably the CSR program.¹¹⁵ IRS officials then began to prepare for a phone conversation with OMB, which was scheduled to take place at 9:00 a.m. on Monday, December 23.

As the emails indicate, several high-level IRS officials were concerned about the source of funding for the CSR program. The news was “disconcerting” to these officials. So much so, that one of them instructed her colleagues to “run, do not walk” to IRS’ General Legal Services. Although Treasury and OMB learned about their concerns, there was little time to assuage them, because the CSR payments were shortly due.

2. The Administration Rushed to Write a Memorandum of Understanding Governing the CSR Account

Although the first CSR payments were to be paid at the end of January 2014, the agencies did not have necessary agreements in place about the process of making those payments at the

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Email from Rochelle Granat, Assistant Gen. Counsel, U.S. Dep’t of the Treasury, to Christopher Meade, Gen. Counsel, U.S. Dep’t of the Treasury, & Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep’t of the Treasury (Dec. 13, 2013) [0102016.WM.UST-001608].

¹¹³ Email from Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep’t of the Treasury, to Rochelle Granat, Assistant Gen. Counsel, U.S. Dep’t of the Treasury, & Christopher Meade, Gen. Counsel, U.S. Dep’t of the Treasury (Dec. 13, 2013) [0102016.WM.UST-001777].

¹¹⁴ Email from Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep’t of the Treasury, to Rochelle Granat, Assistant Gen. Counsel, U.S. Dep’t of the Treasury, & Christopher Meade, Gen. Counsel, U.S. Dep’t of the Treasury (Dec. 13, 2013) [0102016.WM.UST-001786].

¹¹⁵ Email from Tom Reilly, Deputy Assistant Dir., Health, Office of Mgmt. & Budget, to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., & Margaret Sherry, Deputy Comm’r for Operations Support, I.R.S. (Dec. 21, 2013) [0102016.WM.UST-000413].

start of the year.¹¹⁶ Documents confirm that the agencies scrambled to write a Memorandum of Understanding (MOU) while awaiting analysis on the legal basis for using the § 1324 permanent appropriation to fund the CSR payments. Emails recommending the creation of a separate MOU for the CSR payments instead of amending the APTC MOU further document the IRS's concern over the source of funding decision. The IRS ultimately reviewed OMB's memorandum on the source of funds on January 13—four days before the IRS and CMS signed the MOU.

As discussed above, HHS Assistant Secretary for Financial Resources Ellen Murray and HHS General Counsel William Schultz discussed the potential modification of the MOU governing the APTC payments to also include CSR payments on July 2, 2013. Six months later, in early January 2014, IRS officials discussed the same issue. On January 3, 2014, Kristen Witter emailed Gregory Kane and Linda Horowitz that she had been asked again about the status of the MOU between the IRS and CMS on the CSR payments. Noting that she was “still waiting for the legal analysis from Justice,” Ms. Witter wrote, “I recall that we were going to use the [APTC] MOU as a starting point.”¹¹⁷ Referencing “pressure to get this moving quickly and finalized,” Ms. Horowitz told Ms. Witter and Mr. Kane that they should move forward with revisions and then add any legal changes.¹¹⁸ She added that she was “still hoping for something in writing from OMB/OLC or Treasury that sets forth an analysis of the legal basis for using the refund appropriation as the source of funding for these payments.”¹¹⁹

The IRS continued to wait for a legal analysis of the source of funding for the CSR program. On January 6, 2014, IRS Deputy Associate Chief Financial Officer Howard Marcus emailed Mr. Kane and others in the CFO's office asking if they would receive anything from counsel on this decision.¹²⁰ Mr. Kane responded, “eventually,” and noted that it would most likely come from IRS Chief Counsel Bill Wilkins or OMB.¹²¹ In the meantime, IRS employees continued to work on a draft MOU.

On January 9, Mr. Kane sent the original APTC MOU and a draft MOU for the CSR payments to IRS Chief Financial Officer Robin Canady. He wrote, “Counsel is concerned about marrying these two sections together in the previous MOU for the following reasons.”¹²² The reasons included [paraphrased]:

¹¹⁶ JULY 2016 CSR REPORT, *supra* note 12, at 85–86.

¹¹⁷ Email from Kirsten Witter, Chief, Ethics & Gen. Gov't Branch, Gen. Legal Servs., I.R.S. to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., & Linda Horowitz, Deputy Chief Counsel, Gen. Legal Servs., I.R.S. (Jan. 3, 2014) [0102016.WM.UST-000434].

¹¹⁸ Email from Linda Horowitz, Deputy Chief Counsel, Gen. Legal Servs., I.R.S., to Kirsten Witter, Chief, Ethics & Gen. Gov't Branch, Gen. Legal Servs., I.R.S. & Gregory Kane, Deputy Chief Fin. Officer, I.R.S. (Jan. 3, 2014) [0102016.WM.UST-000434].

¹¹⁹ *Id.*

¹²⁰ Email from Howard Marcus, Deputy Associate Chief Fin. Officer, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., et al. (Jan. 6, 2014) [0102016.WM.UST-000448].

¹²¹ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Howard Marcus, Deputy Associate Chief Fin. Officer, I.R.S., et al. (Jan. 6, 2014) [0102016.WM.UST-000448].

¹²² Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Robin Canady, Chief Fin. Officer, I.R.S. (Jan. 9, 2014) [0102016.WM.UST-000869].

- The existing MOU references that the source of funding for the PTC, including APTC, is 31 U.S.C. 1324, a permanent indefinite appropriation to the Secretary of the Treasury for the payment of refunds and refundable credits administered by the IRS.
- ACA law specifically called out this was the funding source while the ACA law does not address CSR payments being paid from this fund.
- It is our understanding there will be no written opinion provided to IRS or CMS so without knowing how this is tied together they are concerned having everything prefaced with this opening section.¹²³

Mr. Kane explained in a separate email to Mr. Canady and Margaret Sherry that IRS counsel recommended addressing CSRs in a separate MOU from the PTCs because, in part, the “ACA law does not address CSR payments being paid from this fund and we may not have an actual written opinion on the legal analysis for using this funding source.”¹²⁴

Ultimately, IRS and CMS entered into a separate MOU governing the CSR payments. The parties quickly drafted the CSR MOU, exchanging drafts until January 17—the same day the MOU was signed. One of the last issues to be resolved was whether to specifically cite 31 U.S.C. § 1324 as the source of funding. On January 15, HHS added back into the MOU language citing § 1324.¹²⁵ The IRS does not appear to have challenged this edit. On January 16, Gregory Kane emailed Charles Messing and Kirsten Witter that he left the decision to IRS and Treasury counsel, “if they are fine with it.”¹²⁶

The final MOU read, in part “The source of funding for CSR is 31 U.S.C. § 1324, a permanent, indefinite appropriation to the Secretary of the Treasury. IRS manages and administers this appropriation on behalf of the Secretary of the Treasury. Per OMB, guidance, CSR are not subject to sequestration.”¹²⁷

3. IRS Officials Learned the CSR Program Would Not Be Subject to Sequestration Days Before the First Payments Were Made

While IRS officials busily drafted the MOU governing CSR payments, IRS and Treasury officials also sought clarification about the impact of sequestration on the payments. These officials believed sequestration played a vital role in the administration of the CSR payments, specifically, that the IRS would not be ready to make CSR payments at the end of January if the

¹²³ *Id.*

¹²⁴ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Margaret Sherry, Deputy Comm’r, Operations Support, I.R.S. & Robin Canady, Chief Fin. Officer, I.R.S. (Jan. 9, 2014) [0102016.WM.UST-001804–05].

¹²⁵ Email from Charles Messing I.R.S., to Kirsten Witter, Chief, Ethics & Gen. Gov’t Branch, Gen. Legal Servs., I.R.S. & Gregory Kane, Deputy Chief Fin. Officer, I.R.S. (Jan. 15, 2014) (indicating that HHS added back in language citing 31 U.S.C. § 1324 as the source of funding for the CSR payments) [0120216.WM.UST-001186].

¹²⁶ Email from Gregory Kane, Deputy Chief Fin. Officer, I.R.S., to Charles Messing, I.R.S. & Kirsten Witter, Chief, Ethics & Gen. Gov’t Branch, Gen. Legal Servs., I.R.S. (Jan. 16, 2014) [0120216.WM.UST-002480].

¹²⁷ Memorandum of Understanding between the I.R.S. and the Ctrs. for Medicare & Medicaid Servs., MOU14-127 (Jan. 17, 2014) (on file with Committee).

payments would be subject to the sequester. They did not learn that the CSR payments would not be subject to sequestration until January 14, 2014—days before the first payments were due to be made and months after HHS officials appear to have been aware of the decision.

On January 9, 2014, Treasury Budget Director Robert Mahaffie emailed IRS Deputy Chief Financial Officer Gregory Kane, copying Treasury Budget Analyst Lily Kwok. Mr. Mahaffie wrote that Ms. Kwok was checking OMB's sequestration report to determine whether the cost sharing account was listed as subject to sequestration.¹²⁸ Ms. Kwok responded, "Yes, it's subject to sequestration (7.2%)."¹²⁹

IRS officials worried that a decision that the CSR payments were subject to sequestration could delay their processing of the payments. On January 13, Howard Marcus wrote to Gregory Kane and others in the CFO's office, "Of course if sequestration is in play for CRS [sic] we are not ready for the end of January."¹³⁰

The next day, word began to spread that the CSR payments would not be subject to sequestration. On January 14, Lily Kwok emailed Robert Mahaffie and others that the CSR program was no longer subject to sequestration. She wrote, "You can take this off your radar."¹³¹ Mr. Mahaffie also told Mr. Kane via email that OMB will be sending "a note stating the CSR is not subject to sequestration."¹³²

That note came on January 16, one day before the IRS and CMS signed the Memorandum of Understanding governing CSR payments. OMB Deputy Associate Director for Health Tom Reilly emailed Robert Mahaffie that "OMB has determined that the advance payments authorized under section 1412 of the ACA, including both the premium tax credit and cost-sharing reduction portions, are exempt from sequestration."¹³³

The same day, Mr. Reilly sent a similar email to HHS Deputy Assistant Secretary for Budget Norris Cochran and other HHS officials.¹³⁴ Emails reviewed by the committees,

¹²⁸ Email from Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury, to Gregory Kane, Deputy Chief Fin. Officer, I.R.S. & Lily Kwok, Budget Analyst, U.S. Dep't of the Treasury (Jan. 9, 2014) [0120216.WM.UST-002234].

¹²⁹ Email from Lily Kwok, Budget Analyst, U.S. Dep't of the Treasury, to Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury & Gregory Kane, Deputy Chief Fin. Officer, I.R.S. (Jan. 9, 2014) [0102016.WM.UST-002234-35].

¹³⁰ Email from Howard Marcus, Deputy Associate Chief Fin. Officer, I.R.S., to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., et al. (Jan. 13, 2014) [0120216.WM.UST-001000].

¹³¹ Email from Lily Kwok, Budget Analyst, U.S. Dep't of the Treasury, to Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury, et al. (Jan. 14, 2014) [0102016.WM.UST-002339].

¹³² Email from Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury, to Gregory Kane, Deputy Chief Fin. Officer, I.R.S., and Lily Kwok, Budget Analyst, U.S. Dep't of the Treasury (Jan. 14, 2014) [01202016.WM.UST-002316].

¹³³ Email from Tom Reilly, Deputy Assistant Dir., Health, U.S. Office of Mgmt. & Budget, to Robert Mahaffie, Dir. for Dep'tl Budget, U.S. Dep't of the Treasury, et al. (Jan. 16, 2014) [01202016.WM.UST-002315].

¹³⁴ Email from Tom Reilly, Deputy Assistant Dir., Health, U.S. Office of Mgmt. & Budget, to Norris Cochran, Deputy Assistant Sec'y for Budget, U.S. Dep't of Health & Human Servs., et al. (Jan. 16, 2014) [HHSCSR00000023].

however, indicate that HHS officials learned that the CSR payments would not be subject to sequestration long before IRS and Treasury officials did.

For example, on September 4, 2013, Chief of Staff to the CMS Administrator Aryana Khalid emailed HHS General Counsel William Schultz expressing her confusion on how cost sharing reductions would affect the contracts qualified health plans offering insurance on the health insurance exchange would sign with CMS.¹³⁵ She wrote, “If we will eventually say sequester doesn’t affect CSR we aren’t sure why that affects the contract.”¹³⁶ Notably, Ms. Khalid sent this email just weeks after OMB counsel Sam Berger wrote to Mr. Schultz’ deputy, Ken Choe, that, while CSR payments were not explicitly exempt from sequestration, the issue of whether CSR payments funded from 31 U.S.C. § 1324 would be exempt was under consideration.

Similarly, on December 6, 2013, HHS press official Jennifer Friedman emailed Lisa Thimjon, HHS Director of Special Projects for the Office of the Assistant Secretary for Legislation, asking how to respond to a question from Reuters on how sequestration would be applied to the cost sharing reduction program payments. The prepared answer was “cost-sharing reductions are funded through the same Treasury account as the PTCs for Marketplace enrollees. This account is exempt from sequestration, therefore, there will be no sequestration impact on cost-sharing reductions.”¹³⁷ Ms. Friedman further wrote that if pressed by the reporter, to respond that “[w]hen the OMB preview report for sequestration was released in April of this year, we incorrectly identified cost-sharing reductions as a program subject to sequestration, but have since determined it is funded through a source that is exempt.”¹³⁸ Ms. Thimjon replied, “This is all that’s out there currently—ASFR is currently working with OMB on getting this resolved.”¹³⁹ This email indicates not only that HHS press officials knew that the CSR payments would not be subject to sequestration over a month before relevant IRS officials knew, but also that HHS press officials were authorized to reveal this decision to a reporter.

It is clear from documents reviewed to date that the IRS placed great importance on knowing whether CSR payments would be subject to sequestration. It is also clear that relevant IRS officials did not informally learn of the decision that the CSR payments would not be subject to sequestration until January 14, 2016—two days before OMB officially notified IRS and HHS of the sequestration decision. HHS officials—including press officials—apparently knew of this decision far earlier. As with the source of funding decision, the IRS was among the last to know.

¹³⁵ Email from Aryana Khalid, Chief of Staff to Adm’r, Centers for Medicare & Medicaid Servs., U.S. Dep’t of Health & Human Servs., to William Schultz, Gen. Counsel, U.S. Dep’t of Health & Human Servs. (Sept. 4, 2016) [HHSCSR0000039].

¹³⁶ *Id.*

¹³⁷ Email from Jennifer Friedman, U.S. Dep’t of Health & Human Servs., to Lisa Thimjon, Office of the Assistant Sec’y for Legis., U.S. Dep’t of Health & Human Servs. (Dec. 6, 2013) [01202016.WM.UST-002216].

¹³⁸ *Id.*

¹³⁹ Email from Lisa Thimjon, Office of the Assistant Sec’y for Legis., U.S. Dep’t of Health & Human Servs., to Jennifer Friedman, U.S. Dep’t of Health & Human Servs. (Dec. 6, 2013) [01202016.WM.UST-002216].

4. The Action Memorandum Signed by Secretary Lew Was Vital to Moving Forward

As detailed in the committees' July 2016 CSR Report, Treasury did not typically use an Action Memorandum to approve the funding sources for programs. The Chief of the IRS's Ethics and General Government Law Branch told the committees that, in her experience, action memoranda were generally used "to permit the acceptance of gifts to the agency."¹⁴⁰ With respect to the source of funding for the CSR program, however, Secretary Lew signed an Action Memorandum authorizing the IRS not to accept a gift, but "to use the section 1324(b) appropriation as the source for [CSR] payments."¹⁴¹ IRS Chief Counsel Bill Wilkins told the committees that he understood the Action Memorandum to be a "decision document that authorized and commanded action."¹⁴² The committees have since learned that the IRS considered the Action Memorandum to be essential to moving forward and making CSR payments from the permanent appropriation. Given the importance of this final, decision-making document, it is inexcusable that the Department of the Treasury still refuses to produce an unredacted version of this document to the committees.

On January 10, 2014, Chief of Staff to Secretary Lew Christian Weideman emailed IRS Senior Adviser to the Chief of Staff David Vandivier and other senior Treasury officials to set up a meeting the following week to discuss the IRS' operational readiness to begin making APTC and CSR payments at the end of the month. According to Mr. Weideman, the meeting would include Secretary Lew, Commissioner Koskinen, and staff from Treasury and IRS.¹⁴³ Mr. Vandivier then emailed IRS General Counsel Bill Wilkins about the meeting.¹⁴⁴ Adding Treasury Deputy General Counsel Roberto Gonzalez to his reply, Mr. Wilkins wrote, "Please understand that operations are contingent on our getting the decision memorandum with the Secretary's approval."¹⁴⁵ Mr. Wilkins explained that he copied Treasury Deputy General Counsel Roberto Gonzalez "to re-emphasize our earlier discussion."¹⁴⁶ He concluded that the IRS could discuss operational issues while waiting for the memo, "but it would feel better if we had the decision memorandum in hand."¹⁴⁷ Mr. Gonzalez confirmed that the memo was on track for Tuesday.¹⁴⁸

¹⁴⁰ H. Comm. on Ways & Means, Transcribed Interview of Kristin Witter, at 23-25 (Apr. 8, 2016).

¹⁴¹ Action Memorandum from Mark Mazur, Ass't Sec'y for Tax Policy, U.S. Dep't of the Treasury, to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury, *Cost-Sharing Payments Under the Affordable Care Act* (Jan. 15, 2014) (on file with Committee).

¹⁴² H. Comm. on Ways & Means, Transcribed Interview of William Wilkins at 37 (Mar. 17, 2016); JULY 2016 CSR REPORT, *supra* note 12, at 81-82.

¹⁴³ Email from Christian Weideman, Chief of Staff, U.S. Dep't of the Treasury, to David Vandivier, Senior Advisor to the Chief of Staff, I.R.S., et al. (Jan. 10, 2014) [0102016.WM.UST-001574].

¹⁴⁴ Email from David Vandivier, Senior Advisor to the Chief of Staff, I.R.S., to William Wilkins, Gen. Counsel, I.R.S. (Jan. 10, 2014) [0102016.WM.UST-001871].

¹⁴⁵ Email from William Wilkins, Gen. Counsel, I.R.S., to David Vandivier, Senior Advisor to the Chief of Staff, I.R.S., and Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep't of the Treasury (Jan. 10, 2014) [0102016.WM.UST-001871].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Email from Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep't of the Treasury, to William Wilkins, Gen. Counsel, I.R.S., et al. (Jan. 10, 2014) [0102016.WM.UST-001871].

Five days later, on January 15, 2013, a Treasury employee sent the signed Action Memorandum to Treasury General Counsel Christopher Meade and Deputy General Counsel Roberto Gonzalez.¹⁴⁹ With the Action Memorandum in hand, the IRS could begin making CSR payments from the permanent appropriation for tax refunds and credits the following week.

Since releasing its July 2016 CSR Report, the committees have learned a great deal about the work done at the IRS in December 2013 and January 2014 to prepare to make CSR payments from the permanent appropriation for tax refunds and credits. IRS officials were blindsided by the decision about the source of funding and raised substantial concerns about the legality of the decision to the IRS General Counsel's Office, Treasury General Counsel's office, and other senior Treasury officials. These concerns may have prompted the unusual Action Memorandum approved by Secretary Lew.

F. OMB's Memorandum Does Not Provide a Cognizable Legal Basis for Using the Permanent Appropriation as the Source of Funding for the CSR Program

OMB's memorandum on the source of funding for the CSR program was an integral part of the Administration's justification that the permanent appropriation for tax refunds and credits could be used to fund the program. The committees first learned about this memorandum through witness testimony describing the contents of the memorandum. At the time the committees released the July 2016 CSR report, OMB had still refused to produce the document—even subject to subpoena. Since publishing its report, the committees have reviewed the memorandum and found that it does not provide a cognizable legal basis for using the permanent appropriation to fund the CSR program.

The memorandum, dated December 19, 2013 and entitled "Funding for Advance CSR payments," was from John Simpkins, Steve Aitken, and Sam Berger to the "General Counsel."¹⁵⁰ The purpose of the memorandum was to analyze the source of funding for ACA subsidies, specifically whether advance CSR payments can be funded from the permanent appropriation at 31 U.S.C. § 1324. The drafters state at the outset that they "believe" funding payments from the permanent appropriation is permissible, and ultimately conclude that it is "permissible" for the Administration to make advance CSR payments from the 31 U.S.C. § 1324 appropriation based on the "purpose, text, and structure" of the Affordable Care Act.¹⁵¹ The drafters also indicated in the first footnote that the memorandum did not address if an appropriation had been provided for payments made under section 1402, the provision authorizing the CSR program.¹⁵²

The memorandum argues that sections 1412(c)(2), which provides for advance payment of the premium tax credit, and 1412(c)(3), which provides for advance payment of cost sharing

¹⁴⁹ Email from [U.S. Dep't of the Treasury employee] to Christopher Meade, Gen. Counsel, U.S. Dep't of the Treasury, & Roberto Gonzalez, Deputy Gen. Counsel, U.S. Dep't of the Treasury (Jan. 15, 2014) [0102016.WM.UST-001643].

¹⁵⁰ Memorandum from John Simpkins, Steve Aitkin, and Sam Berger, Office of Mgmt. & Budget, to General Counsel, Office of Mgmt. & Budget (Dec. 19, 2013).

¹⁵¹ *Id.*

¹⁵² *Id.*

reductions, should be read together as a unified whole instead of as separate provisions, and as appropriated from the same mandatory funding source. In the opinion of the drafters, this is consistent with the provision's "stated purpose."¹⁵³ The drafters argue that insurers would charge higher premiums without a permanent appropriation. This, in turn, would lead to increases in the subsidies to cover premiums, and so the permanent appropriation would be used to cover the costs eventually. According to the drafters, this could not be Congress's intended outcome.¹⁵⁴ The drafters further argue that Congress could have established separate advance payments for PTCs and CSRs, with payments made by the Secretary of the Treasury and the HHS Secretary, respectively, but instead created one unified advance payment program with payments for both parts of the payment made by the Treasury Secretary.¹⁵⁵

The memorandum includes a long discussion of selected legislative history, citing versions of prior health care bills that were not enacted and floor statements by Senators and Members of Congress not specifically related to CSR payments. In the drafters' view, however, these statements suggested that Congress viewed the two subsidies as intertwined.¹⁵⁶

The memorandum only briefly addresses the fact that section 1412 is not listed in the appropriation at 31 U.S.C. § 1324, and does not at all address the fact that section 1402—which authorizes the CSR program—is not included in the permanent appropriation. Instead, in concluding that the permanent appropriation can be used for advance payment of CSRs, the drafters argue that section 1324 has been interpreted to provide funding for payments made pursuant to provisions not listed and that, in this instance, the drafters point to section 36B, which was specifically enumerated and operates through section 1412.¹⁵⁷ The drafters do not mention that section 36B was created by the ACA to allow for payment of premium tax credits through the permanent appropriation for tax credits and refunds, and that there is no language in the ACA tying the CSR program to the permanent appropriation at 31 U.S.C. § 1324 appropriation.

The justification for funding the CSR program from the permanent appropriation is based almost entirely on the fact that section 1412 authorizes advance payments of both CSRs and premium tax credits. But this analysis is tenuous at best, and does not even address that the clear text of the ACA provided an authorization and an appropriation for premium tax credits, but only an authorization for CSR payments. The Administration went to great lengths to keep this memorandum from the committees, only providing it for *in camera* review after much effort. Perhaps the shaky analysis provides a reason why.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

V. Conclusion

The Obama Administration has been unconstitutionally funding the cost sharing reduction program—an Affordable Care Act program—through a permanent appropriation intended only for tax refunds and credits. As detailed in the committees’ July 2016 report, the Administration knew that the ACA did not fund the CSR program. It even requested an annual appropriation for the CSR program from Congress. The Administration, however, surreptitiously withdrew that request and developed a *post hoc* justification to pay for the CSR program through the 31 U.S.C. § 1324 permanent appropriation. The Administration still has refused to explain why it withdrew that request.

Nevertheless, the committees’ persistence pulled back the curtain further to learn more about how the Administration came to unconstitutionally fund the CSR program. Documents reviewed since July 2016 reaffirmed that Administration officials understood that CSRs were not tax credits, and therefore needed an annual appropriation. And just before the Administration withdrew its request for an annual appropriation, HHS and the Senate Appropriations Committee had—not just one—but several conversations about the Administration’s funding request for the CSR program. As the Administration scrambled to make the CSR payments on time, senior IRS officials learned about the source of funding for the CSR program and immediately raised concerns about the legality of the funding source. As they quickly pulled together a memorandum of understanding needed to administer the payments, they were provided an unusual Action Memorandum signed by Secretary Lew explicitly authorizing the permanent appropriation as the source of funding and shown OMB’s memorandum justifying the Administration’s actions. This memorandum, however, does not provide a cognizable legal basis for using the permanent appropriation to fund the CSR program.

Questions, however, still remain—especially why Administration withdrew its request for an annual appropriation. The committees plan to continue to press until this and other outstanding questions are answered.