

June 25, 2015

The Honorable Johnny Isakson
The Honorable Barbara Boxer
Senate Select Committee on Ethics
Hart Building Room 220
Washington, D.C. 20510

Dear Chairman Isakson and Vice Chairwoman Boxer:

The signatories* of the organizations listed below respectfully request that the Senate Select Committee on Ethics investigate the senators and/or staff members that may have broken laws and committed fraud to enable senators, Senate staffers, and their families to purchase health insurance on the District of Columbia's Small Business Exchange.

We believe the following laws may have been violated:

- Title 42 U.S. Code § 18031 – Affordable choices of health benefit plans, and § 18032 – Consumer choice [P.L. 111-148, § 1311 and § 1312];
- Title 18 U.S. Code – Crimes and Criminal Procedure, Chapter 47, § 1035 – False statement relating to health care matters; and
- 2014 District of Columbia Code, Division V – Local Business Affairs, Title 31, Insurance and Subsidies, Chapter 31D, Health Benefit Exchange – §31.31701.01 (11) and (16)(A)
- Title 18 U.S.C. §1001 – Statements or entries generally

Background

Prior to implementation of the Patient Protection and Affordable Care Act (ACA), members of Congress and their staff received health insurance benefits through the Federal Employees Health Benefit Program (FEHBP) administered by the Office of Personnel Management (OPM). However, changes to accessing FEHBP were made during the healthcare reform debate.

- *Exhibit A*
On July 14, 2009, the Senate Health, Education, Labor and Pensions (HELP) Committee accepted Admt. 226 to S. 1769, The Affordable Health Choices Act, by a vote of 12-11. The amendment, offered by Senator Tom Coburn (R-Okla.), would have required all members of Congress and their staff to participate in whatever health insurance was created under the act or amendment to the act. The amendment included no specific language with regard to premium assistance.

On September 29, 2009, the Senate Finance Committee, without objection, agreed to Admt. 328 to S. 1796, America's Healthy Future Act. The amendment, offered by Senator Chuck Grassley (R-Iowa), would have required all members of Congress and their staff to purchase health insurance in an exchange rather than through FEHBP. The

provision would have required the Secretary of Health and Human Services, in consultation with the Director of the Office of Personnel Management, to establish the procedures to provide financial assistance that would be actuarially based on age, with payments going directly to a health insurance plan.

During the following 30 days, then-Majority Leader Harry Reid (D-Nev.) oversaw the merging of the HELP and Finance Committees' respective bills. In order to bypass the Constitutional requirement that all revenue-raising bills must start in the House of Representatives, the new provisions amended H.R. 3590, which was named "The Patient Protection and Affordable Care Act (ACA)."

Senator Reid included language in the ACA regarding congressional health insurance benefits that was similar to that offered by Sen. Coburn in his amendment to the Affordable Health Choices Act:

**Senator Reid's Amendment
H.R. 3590 §1312(d)(3)(D)
(Enacted as Public Law 111-148)**

(D) MEMBERS OF CONGRESS IN THE EXCHANGE—

(i) REQUIREMENT.—Notwithstanding any other provision of law, after the effective date of this subtitle, the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are—

(I) created under this Act (or an amendment made by this Act); or

(II) offered through an Exchange established under this Act (or an amendment made by this Act).

(ii) DEFINITIONS—In this section:

(I) MEMBER OF CONGRESS—The term "Member of Congress" means any member of the House of Representatives or the Senate.

(II) CONGRESSIONAL STAFF—The term "congressional staff" means all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC.

Image from the Heritage Foundation's Backgrounder: Congress in Obamacare Trap: No Easy Escape

The language remained unchanged throughout the remaining legislative process, even though Sen. Grassley submitted two amendments that would have restored premium subsidies to members of Congress and their staff. One amendment was offered during the floor debate on ACA but never received a vote. The other was offered during the floor debate on H.R. 4872, the Health Care and Education Reconciliation Act of 2010. It was defeated on a procedural motion by a vote of 56 to 43.

- *Exhibit B*

In 2013, as ACA's open enrollment season approached, members of Congress and their staff began to clearly understand the repercussions to them as a result of the law. Unlike a majority of Americans that get their health insurance via their employer, Congress and their staff were now required by law to purchase their health insurance in

the individual marketplace. Following ACA's rules, this meant only those with a household income between 100 and 400 percent of the federal poverty level were entitled to taxpayer-funded premium credits if the insurance was purchased from a state-based or the District of Columbia's Exchange.

An April 24, 2013 *Politico* article discussed how "[c]ongressional leaders in both parties are engaged in high-level, confidential talks about exempting lawmakers and Capitol Hill aides from the insurance exchanges they are mandated to join as part of President Barack Obama's health care overhaul." An April 26, 2013 article in *The Hill* noted that many members of Congress were denying that any deliberations were underway to carve out a special exemption for themselves and their staff from ACA's provisions.

- *Exhibit C*

On August 8, 2013, the Office of Personal Management (OPM) published a proposed regulation (a companion Benefits Administration Letter was issued on August 7) that allowed members of Congress and their staff to purchase their health insurance via an Exchange; which includes the following:

- Health benefit plans offered by OPM under chapter 89 of title 5 through FEHBP are not available under ACA, nor can they be offered through the Exchanges. Members of Congress and their staff are limited to purchasing plans from the ACA Exchanges.
- ACA did not alter the definition of "employee" as used in 5 U.S.C. 8901 (1)(B)&(C) or the definition of "health benefits plan."
- "Although, pursuant to its authority under chapter 89 of title 5, OPM will have no role in 'contracting for' or 'approving' health benefit plans that are offered through the Exchanges, there is no doubt that such plans fit within the definition of 'health benefit plan' under 8901(6)."
- "Because there are now employees covered by chapter 89 who will be purchasing health benefits plans on Exchanges, we believe that it is appropriate to clarify that the provisions that authorize an employer contribution for 'health benefits plans under this chapter,' and authorize the continuation of such coverage into retirement, includes all health benefits plans fitting within the definition set forth in 8901(6)."
- In order to clarify that contributions will continue without interruption, a new paragraph (h) was added to section 890.501 of OPM regulations.
- While the ACA defines "congressional staff" to include those that work for "the official office of a Member of Congress," no law or regulation exists that provides a definition of an "official office." Thus, OPM left it to members to determine which of their employees worked for their "official office," as opposed to working on committee or leadership staff, for the purpose of which employees would remain on FEHBP or utilize the ACA exchanges.

- *Exhibit D*
The convoluted proposed regulation was criticized by many healthcare and legal experts as changing the law. Heritage Foundation Senior Research Fellow Ed Haislmaier pointed out that while OPM uses the general definition of a health plan under chapter 89 of Title 5, the definition fits group plans, not individual plans that are offered under ACA. He further says, “the *real* issue is not the definition of a ‘health plan,’ but rather the (lack of) *legal authority* for the federal government to pay for health plans through FEHBP that OPM has *neither* ‘contracted for’ nor ‘approved.’”
- *Exhibit E*
On October 2, 2013, OPM published a final regulation (a companion Benefits Administration Letter was issued on September 30). The agency noted it had received 60,000 comments from the public regarding the proposed regulation. The final rule announced modifications to the proposed rule. Among the changes were the following:
 - Members of Congress and designated congressional staff must enroll in an appropriate Small Business Health Options Program (SHOP) as determined by the Director of OPM.
 - All references to annuitants purchasing coverage on the Exchange were deleted.

Legal Violations

Because the Senate is indisputably not a small business, senators and/or staff members may have committed fraud when submitting applications for the Senate to participate in the Small Business Exchange. The application has enabled senators, Senate staffers, and their families to purchase health insurance on the Small Business Exchange. In addition, this potentially unlawful arrangement allows senators, senate staffers, and their families to receive taxpayer-funded premium subsidies without regard to household income.

Under the ACA, “the only health plans that the Federal Government may make available to Members of Congress and congressional employees with respect to their service as a Member of Congress or congressional employees shall be health plans that are –

(I) created under this Act (or an amendment made by this Act); or

(II) offered through an Exchange established under this Act (or an amendment made by this Act).

42 U.S.C. § 18032(d)(3)(D)(i). This section does not specify what health insurance should be offered to the affected congressional employees. It only specifies that the insurance must be created either under “this Act” or offered through an exchange established under “this Act.” Because Congress has not created health insurance specifically for the affected congressional employees, the affected employees must purchase insurance on an exchange established under the ACA. In other words, they must purchase insurance on an exchange created either by their state of residence (or by the District, if they are a D.C. resident) or by the federal government, if

their state of residence did not establish an exchange. Because the ACA unequivocally limits the purchase of insurance on a “SHOP Exchange” to employees of small businesses, the affected employees obviously must purchase health insurance through an individual exchange.

Simply put, there is no mention in Section 1312 of ACA that Congress or any subcomponent thereof such as a member’s personal office is qualified as a small business. There is no mention of premium and cost sharing subsidies being provided to members of Congress and their staff. It simply states that members of Congress and congressional staff employed by the official offices are required to participate in ACA.

Under ACA, the cost sharing subsidies are only provided for individuals and families with household incomes that exceed 100 percent but do not exceed 400 percent of the federal poverty level (FPL).

- *Exhibit F*

Judicial Watch filed a Freedom of Information Act (FOIA) with the D.C. Exchange Authority to obtain the forms used by the House of Representatives and the Senate to apply for health insurance via the small business exchange. The D.C. Exchange provided a total of nine application pages, with several items redacted. The forms are available on the Judicial Watch website and are also attached to this ethics complaint.

For the forms submitted to the D.C. Exchange for the Senate, the name of the employer has been listed as the “United States Senate” and its employer type listed as a “state/local government.” The primary business address, as well as the contact address, are listed as the “United States Senate, Disbursing Office, Washington, D.C., 20510.” The number of full time equivalents (FTES) seeking to obtain health insurance is listed as 45.

The Federal Employer Number (EIN), contact name and email address, and phone number of the applicant have been redacted.

Under the “Finalize Employees” section of the application, the First and Last names are listed respectively as “Twenty” and “Congress.” The Date of Birth is listed as 01/01/1994. The ZIP code is listed as “20002,” and the EE Class is listed as “all employees.” (EE = eligible employees.)

Under the confirmation section, the applicant has attested in the affirmative that he or she employs 50 or fewer full time equivalent employees and that he or she will offer coverage to all full-time employees working an average of 30 hours per week through the D.C. Health Link (or, for multi-state employers, any other exchange serving those work locations outside of D.C.).

Under the Electronic Signature section, the applicant has agreed that the following is true:

“I’ve provided true and correct answers to all the questions on this form to the best of my knowledge. I know that if I’m not truthful there may be a penalty. I know that I must tell (D.C. HealthLink) if any changes about that I wrote on this application.”

The date of the electronic signature is 11/03/2013. The first and last names of the person filing the application have been redacted.

- *Exhibit G*

Judicial Watch filed a lawsuit on Oct. 15, 2014 on behalf of D.C. resident Kirby Vining. The plaintiff in *Kirby Vining v Executive Board of the District of Columbia Health Benefit Exchange Authority*, “seeks a judgment declaring that the U.S. Congress’ participation in the District of Columbia’s ‘Small Business Exchange’ is unlawful and an injunction prohibiting Defendants from allowing Congress to participate in the exchange or expending taxpayer dollars on Congress’ participation.”

On November 7, 2014, the DC Exchange Authority filed a Motion to Dismiss. According to Judicial Watch “the District government concedes that the law does not allow Congress to participate in its Small Business Exchange” but argues that “the Office of Personnel Management (OPM) could override the District’s laws (and, implicitly the Affordable Care Act).”

Judicial Watch responded on behalf of Kirby Vining, stating, “Defendants argue that a determination made by the director of the federal Office of Personnel Management...can overturn a law enacted by the D.C. Council. Not only is Defendants’ argument at odds with the well-established doctrine of preemption, but Congress plainly knows how to block or reverse D.C. laws ... The D.C. law that created the Small Business Exchange is completely consistent with, not preempted by, federal law ...

“When Congress applied to participate in the Small Business Exchange, representatives falsely asserted that the House and the Senate each employ 50 or fewer full-time employees ... Defendants had to have been aware of these false statements. Not only is it obvious that Congress, with its 535 members, employs more than 50 people, but Defendants’ own guidelines require verification of employer information.”

Conclusion

- There are far more than 45 FTEs in the U.S. Senate. According to the Senate Disbursing Office there are more than 7,000.
- To the best of our knowledge, no one uses “Twenty” as a first name or “Congress” as a last name.

- The Senate is not a “state or local government,” nor is it a small business. Individual Senate offices are also not small businesses. Even though individual offices are responsible for their own budgets and hire their own personnel, this is no different than other government entities. Even if the Senate could be considered a business, it would be a large one and no large businesses (more than 100 employees) are able to participate in an ACA Exchange until 2017.

We believe that the application submitted to the D.C. HealthLink Exchange may be fraudulent and has been misused as a mechanism to get access to taxpayer money to pay for the health insurance of senators, their staff, and their families.

Senators and their staff are required to take an oath to uphold the Constitution. Americans expect their elected officials, and the people that work for them, to follow the laws they create.

We respectfully ask that your committee investigate the senators and/or staff members that may have broken laws and committed fraud to enable senators, Senate staffers, and their families to purchase health insurance on the District of Columbia’s Small Business Exchange, reveal the names of those that submitted the application, and take appropriate action if laws have been broken.

Sincerely,

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Healthy Policy Analyst

George Landrith
President, Frontiers of Freedom

David Bozell
President, ForAmerica

Jenny Beth Martin
Co-Founder, Tea Party Patriots

Adam Brandon
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Sean Noble
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Phil Kerpen,
President, American Commitment

Thomas Schatz
President, Council for Citizens Against
Government Waste

*The views expressed and materials presented represent the views of the signatories and do not necessarily represent the opinion of the organizations listed. Titles and their respective organizations are listed for identification purposes only.

LINKS TO EXHIBITS

A. Heritage Foundation Backgrounder

<http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape>

B. Politico and Hill articles

<http://www.politico.com/story/2013/04/obamacare-exemption-lawmakers-aides-90610.html>

<http://thehill.com/homenews/house/296333-dem-leaders-wont-seek-exemption>

C. Proposed Regulation

<http://www.gpo.gov/fdsys/pkg/FR-2013-08-08/pdf/2013-19222.pdf>

<https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204.pdf>

D. Heritage Foundation, The Daily Signal

<http://dailysignal.com/2013/08/07/administration-disregards-the-law-and-gives-special-obamacare-deal-to-congress/>

E. Final Regulation

<http://www.gpo.gov/fdsys/pkg/FR-2013-10-02/pdf/2013-23565.pdf>

<https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-207.pdf>

F. Vining v Executive Board of DC Health Benefit Exchange Authority

<http://www.judicialwatch.org/wp-content/uploads/2014/10/Vining-v-DC-Health-Benefit-Exchange.pdf>

G. Judicial Watch Press Release

<http://www.judicialwatch.org/press-room/press-releases/d-c-government-concedes-law-not-allow-congress-obtain-obamacare-small-business-exchange/>