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February 2, 2016

The Honorable Beth F. Cobert
Acting Director
Office of Personnel Management
1900 E Street NW
Washington, DC 20415

Dear Ms. Cobert:

Your nomination by the President to become the next Director of the Office of Personnel Management (OPM) will be the subject of a hearing on Feb. 4, 2016, by the U.S. Senate Committee on Homeland Security and Government Affairs. I write to you today because, in spite of multiple communications with your predecessors, a number of questions related to the special health care exemption given to Members of Congress and congressional staff under federal law remain completely unanswered.

Let me first review some basic facts. Section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act (ACA), entitled "Members of Congress in the Exchange," states that:

"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 services as a Member of Congress or congressional staff shall be 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)."*

In other words, Congress was forcing itself to live by the law it enacted.

However, on Oct. 2, 2013, OPM promulgated a final rule entitled "Federal Employees Health Benefits Program: Members of Congress and Congressional Staff," which amends 5 CFR Part 890. This was done at the demand of unnamed Congressional leadership staff, as well as White House officials, and without any notification to Congress until it was finalized. The final rule enabled Members of Congress and congressional staff members to purchase health insurance offered by a Small Business Health Options Plan (SHOP) exchange by falsely claiming that both the U.S. Senate and the U.S. House of Representatives only had 45 employees. You well know that the Congress has more than 16,000 employees. Furthermore, it enabled the provision of a

government contribution, or subsidy, equal to the government's share of premium contributions offered to federal employees enrolled in a health insurance plan offered through the Federal Employee Health Benefits Program (FEHBP). Such a subsidy is not available to other Americans who purchase their health insurance on a federal or state based exchange as the ACA mandated. Therefore this amounts to a special exemption for Congress.

As jurisdiction of the U.S. Senate Committee on Small Business and Entrepreneurship includes oversight responsibilities affecting or related to small businesses, I have at least four major concerns with the actions of OPM. First, OPM's final rule undermines the intent of Congress that its Members and staff share the same burden they have imposed on American citizens by purchasing their health insurance on a federal or state based individual health insurance exchange. Second, OPM's rule undermines the purpose for a SHOP exchange, which is to assist small business employers in providing health insurance to their employees. Third, OPM's rule incentivized false representations that Congress is a small business, even though it has thousands of employees—an action that appears to circumvent the provisions of Section 1312, cited above. And finally, OPM's rule violates the ACA provisions of Section 1312(d)(3)(D), which clearly indicate a government subsidy for health coverage for Members and congressional staff is not available unless the income requirements of the law that apply to other Americans are fully met.

While OPM has taken the position that the ACA did not alter its authority under 5 U.S.C Chapter 89, in fact the clear language of Section 1312(d)(3)(D), which reads “Notwithstanding any other provision of law...,” makes congressional intent quite clear—that Members of Congress and congressional staff are to share in the requirement they mandated for other Americans by purchasing their health insurance on an individual health insurance exchange. In my view, OPM has operated arbitrarily and outside its authority by promulgating a final rule that has enabled the purchase of SHOP exchange plans accompanied by a government subsidy not available to other citizens.

Shortly after the final rule was promulgated, your office received a direct congressional request from my office to provide “all correspondence OPM officials had within the Administration and with Members of Congress and their staff regarding how the agency arrived at its position in the final rule” that ultimately impacted how Members of Congress and their staff receive and are awarded health benefits. It had been widely reported that OPM was in deliberations with Congress and officials in the White House, including the President, over the specifics of this rule. Since that time additional information has come to light indicating that false information was provided to the District of Columbia Health Benefits Exchange, now named DC Health Link. According to the application DC Health Link approved, Congress was represented as a small business in order to qualify for the purchase of health insurance on the SHOP exchange.

Allowing Congress to determine itself as a “small business” obviously should not have passed the common sense test, yet OPM was directly involved in the promulgation and implementation of the final rule that has enabled this Washington exemption from an onerous effect of the ACA. To date, information I have received from your predecessor has not been responsive to the questions I have posed. In order for your nomination to move forward, please answer the following questions and provide the information requested:

1. Prior to issuing the rule, did anyone within OPM, advising on this particular matter, at any point, argue that OPM did not have the authority to determine that FEHBP contribution could be used towards purchasing a plan on an exchange or with a private insurance plan outside FEHBP?
2. Please disclose all correspondence of any kind, including emails and meetings OPM officials had with Members of Congress and/or any of their staff, prior to issuing the proposed rule on August 2, 2013, and prior to issuing the final rule October 2, 2013.
3. Please disclose all correspondence of any kind, including emails and meetings that OPM officials have had with the White House, including the President, with regards to this ruling that allows Members and congressional staff to keep their generous taxpayer funded subsidy for health insurance.
4. Was there, at any point, disagreement between OPM, Members of Congress, the White House, their respective staff with regard to OPM's authority to authorize FEHBP subsidies for health plans on an exchange?
5. Please disclose all correspondence of any kind, including emails and meetings that OPM officials have had with the U.S. Senate Disbursing Office and the Office of the Clerk of the House of Representatives suggesting staff report Congress only employs 45 full-time equivalent employees, and therefore meets the criteria of a "small business."

As you are aware, the President committed to faithfully executing the law, and that duty carries over to you in your role directing an office that is an independent establishment within the executive branch of government. Should you or anyone within the Executive Office of the President, wish to see the nomination move forward, I will be happy to oblige and help facilitate upon a complete and full response to the requested information now pending for over two years.

Sincerely,



David Vitter
United States Senator, Chairman of Senate
Committee on Small Business and
Entrepreneurship