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Washington's Obamacare Exemption

Upon the enactment of the Patient Protection and Affordable Care Act in 2010, Washington political elites have been protected from certain effects of the law related to the purchase of health care insurance. Specifically, Members of Congress and congressional staff have the ability to purchase health insurance on an Obamacare exchange that was intended for small employers only, and additionally receive a federal subsidy for their premium that is not available to other citizens who are required to purchase their insurance on an individual insurance exchange. The concern over the Washington Obamacare Exemption extends to what this says about the leadership of the legislative branch of government and how it is perceived by the American people. Simply stated, the Washington exemption shows that Congress is not willing to share the burden it has imposed on other citizens, further reducing the American people's critical view of Congress.

As Chairman of the U.S. Senate Committee on Small Business and Entrepreneurship whose jurisdiction includes oversight responsibilities affecting or related to small businesses, Senator David Vitter (R-La.) has been examining the process in which the exemption came to exist, in light of the Affordable Care Act establishing Small Business Health Option Programs for small employers only.

It is widely understood that congressional leadership played an important role in the crafting and implementation of the Washington Obamacare Exemption, and Congress should certainly be accountable for its own actions. However, Congress did not act alone. Documents have revealed that Congress had met with officials from the Office of Personnel Management (OPM) before OPM issued a rule that directed Congress to purchase health insurance offered by a Small Business Health Options Program (SHOP). In essence, OPM and the U.S. Department of Health and Human Services (HHS), with White House approval, were the enablers of actions later taken by Congressional leadership.

This briefing paper reviews what is already known about how the Washington Obamacare Exemption came to exist, the Committee's ongoing communication efforts with OPM, and an analysis of OPM's incomplete responses.

History of the Washington Obamacare Exemption/ How OPM Enabled Congress to Exempt Itself From Obamacare

President Obama signed the Patient Protection and Affordable Care Act (ACA) into law in March 2010. At the time, most Members of Congress, and most Americans for that matter, never read the bill and it was only after passage that its provisions became apparent through gradual revelation. Former Speaker of the House of Representatives Nancy Pelosi's infamous words, "We have to pass the bill so that you can find out what is in it," were both prescient and descriptive.

By April 2013, press reports indicated that congressional leaders were worried, having finally read and understood a key provision of the law in which Members of Congress and congressional staff would lose their employment-based health insurance under the Federal Employee Health Benefits Program on January 1, 2014, when it was to be replaced by coverage offered to individuals through a health insurance exchange established by the ACA.

The language of the law itself is very clear. Section 1312(d)(3)(D) of the 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 requiring itself to live by the law it enacted. Or at least that was the intent as expressed by the language in the law. However, at the same time as many Americans, especially business owners, were learning they would have to pay more for their health care, Members of Congress came to a similar conclusion. Members, and many congressional staff, especially senior staff, would not receive an income tested federal subsidy were they to purchase health insurance on an exchange as an individual because their income is too high. Furthermore, by losing their FEHB health plan with its employer contribution, Members and staff would be required to pay out of pocket for health insurance purchased on the exchange. Upon realizing this, discussions began on exempting lawmakers and Capitol Hill staff from this specific requirement.

The health insurance exchanges established by the ACA offered a federal subsidy in the form of a tax credit, but only to individuals with low incomes.

The issue had been foreseen during the drafting of the ACA and surfaced in the form of various amendments in late 2009 as the bill made its way through the legislative process. One amendment specified that Members of Congress give up their FEHBP and enroll in newly created “public plans.” Another amendment required Members and congressional staff to purchase coverage through an insurance exchange being created by the Act, but specified that the federal employer contribution could continue and be used in purchasing that coverage. In the end, it was then-Senate Majority Leader Harry Reid who included the language stated above, which did not provide for a federal contribution, and forced a vote on the Senate floor. The Reid-fashioned language, including the key phrase *“Notwithstanding any other provision of law...,”* became law. Later during debate, a floor amendment that would have enabled the continuation of an employer contribution never received a vote, as the Senate then passed what would become the ACA along party lines, 60 to 39, in a roll call vote on Christmas Eve, 2009. Three months

later, an amendment to another bill that would have enabled a federal employer contribution through an exchange was also defeated.

Subsequent to the legislative process, congressional staff worked with OPM representatives as early as 2011 to discuss the administration of the employee benefits package, with discussions getting underway in earnest in early 2013. During the rule-making process, OPM drafted changes that only applied to Congress in the applicable Federal regulation, 5 CFR Part 890, which the White House later approved. After many months of closed-door discussions and coordination between OPM and congressional staff, on October 2, 2013, OPM promulgated the final rule entitled “Federal Employees Health Benefits Program: Members of Congress and Congressional Staff.”

The language in the OPM final rule enabled Members of Congress and congressional staff members to purchase health insurance offered by the Small Business Health Options Program (SHOP) in Washington, D.C. The final rule also enabled the provision of a federal employer contribution toward the premium payments for plans purchased on the SHOP exchange.

Problems with OPM’s Final Rule

The central problem is that the OPM final rule ignored a key provision of the ACA itself, which swept aside other provisions of law related to providing group health plan insurance with a government contribution for Members and staff. The rule also ignored the plain language of the ACA on the purpose of SHOP, which according to the law is “designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State” (42 USC §18031(b)(1)(B)). Finally, the OPM rule ignored the statutory definition of a “qualified employer,” which means a small employer, which is further defined to mean “an employer who employed an average of at least 1 but not more than 100 employees...” (45 CFR §155.20 Definitions; 42 USC 18024; and section 1304(b)(2) of PPACA).

OPM, in a document provided to the Committee, claimed that the agency has the authority to interpret the law contrary to its plain language and Congressional intent, and then act in accordance with its own intentional misinterpretation. In reality, there is no workaround. U.S. code trumps federal regulations.

The ACA placed language in 42 USC §18031(b)(1) that required states, no later than January 1, 2014, to “establish an American Health Benefit Exchange for the State that...provides for the establishment of a Small Business Health Options Program (*in this title referred to as a “SHOP Exchange*) that is designed to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market in the State...” Furthermore, as discussed previously, 42 USC §18031 defines a “qualified employer” as a small employer, which is further defined to mean “an employer who employed an average of at least 1 but not more than 100 employees...” (45 CFR §155.20 Definitions; 42 USC 18024; and section 1304(b)(2) of PPACA). Congress, with its own single Employee Identification Number (EIN) and over 16,000 employees, is clearly not a small

employer eligible to participate in a SHOP Exchange. Additional information recently provided by OPM showing that the Congress provides the monthly employer contribution to DC Health Link as a single lump sum reinforces that point.

In response to the concerns listed above, OPM has argued that "...While §1312 of the ACA circumscribed the ability of the Federal Government to offer certain health insurance plans to members of Congress and certain staff, it did not alter the definition of 'employee' or the definition of 'health benefits plan' in 5 USC § 8901. Therefore, it left intact the Government's contribution towards their benefits plan premiums." These are permitted under 5 USC §8906, which reads: "Employees enrolled in a health benefits plan under 5 USC Ch. 89 are eligible for a Government contribution toward the cost of their health care premium."

The problem with OPM's logic is that the opening phrase of the relevant Section 1312(d)(3)(D) states: "*Notwithstanding any other provision of law...*" The word "notwithstanding" means "in spite of," thereby sweeping aside "other provisions of law," such as 5 USC §8906. "Notwithstanding" definitively dictates that Section 1312(d)(3)(D) takes precedence over any conflicting provision also in the bill or elsewhere in code. However, OPM – whether intentionally or unintentionally – failed to recognize that meaning and used 5 USC §8906 as justification to promulgate the final rule. Thus, the OPM final rule allowing a federal contribution, which contradicts the ACA, is clearly in violation of statute.

Committee Interaction with OPM

Shortly after the OPM final rule was promulgated in 2013, the Committee Chairman wrote to the Director of OPM on multiple occasions requesting information, including "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." While much information has been provided, a completely satisfactory response has yet to be received.

Analyzing OPM's Most Recent Response

On February 2, 2016, the Committee Chairman wrote to OPM Acting Director Beth Cobert, asking the same questions and requesting the same information that had been submitted to her predecessor and insufficiently addressed. Ms. Cobert failed to respond, and the Committee Chairman sent a follow-up letter on February 24, 2016.

Interestingly, Ms. Cobert did not affix her signature to the March 15, 2016, OPM response letter. Instead, she delegated the response to OPM's Director of Congressional, Legislative and Intergovernmental Affairs. While incomplete, OPM's response provided some helpful information, which furthered the Committee's understanding of how this exemption was coordinated between OPM, Congressional leadership, and HHS. It also revealed new information that is cause for even greater concern.

In the February 24 letter, the Small Business Committee Chairman asked Ms. Cobert to confirm the position of OPM as to whether Congress is a small business, as indicated by 5 CFR §890.102, with employees eligible to purchase health insurance on a SHOP Exchange.

The response stated “OPM does not take the position that Congress is a small employer, nor has OPM taken such a position in the past. Nothing in the proposed or final rule indicates that Congress shall be considered a small employer...”

This clearly contradicts OPM’s final rule, which is, by definition, its position. In the final rule, OPM states that a Member of Congress and a congressional staff member “may purchase health benefit plans, as defined in 5 USC 8901(6), that are offered by an appropriate SHOP as determined by the Director [of OPM]” (5 CFR §890.102).

According to the law, the purpose of SHOP is “to assist qualified employers in the State who are small employers in facilitating the enrollment of their employees in qualified health plans offered in the small group market.” The definition of a “qualified employer” means a small employer, which is further defined as “an employer who employed an average of at least 1 but not more than 100 employees....” This is the statutory language, as discussed previously.

When constructing the final rule that created Washington’s Obamacare Exemption, OPM deliberately misinterpreted the ACA, and OPM’s assertion that it does not and has not taken a position that Congress is a small employer is simply false. In promulgating the final rule, OPM clearly decided to treat Congress as a small employer, and yet continues to deny it has any position, one way or another.

This central contradiction may be the reason the Acting Director of OPM did not sign the letter responding to the Chairman’s questions.

On a question related to White House involvement in discussions to extend the special exemption to Congress, no specific information was provided. It is inconceivable that there were no conversations with the White House on such an important matter, especially since the President’s Office of Management and Budget (OMB) reviews and approves all proposed rules as a part of the regulatory process. Yet, the extent and substance of such deliberations remains unknown. Continuing to withhold this information is unacceptable.

The OPM response letter continues with what is essentially an arbitrary bureaucratic edict that Congress can participate in SHOP because OPM says so. The letter states “Congress is eligible to participate in the DC SHOP *notwithstanding* the size restrictions that may apply to other employers seeking to participate in a SHOP.” *[As an interesting side-note, OPM’s use of the word “notwithstanding” in this context means “in spite of,” which is the same term that OPM defined conversely and failed to abide by when developing the rule that led to Washington’s Obamacare Exemption.]*

OPM’s response continues, stating that the “Federal Government is tasked under Title 5 with offering employer-sponsored group health insurance to Federal employees, which is defined under Title 5 to include Members of Congress and their staff.” This was certainly true pre-ACA,

but the overriding “*notwithstanding any other provision of law*” language in Section 1312(d)(3)(D) of the ACA now takes precedence over the Title 5 definition.

OPM continues that “because the SHOPS are set up to manage group enrollment and premium collections for employer-sponsored coverage, OPM determined that they were the appropriate vehicle for the provision of employer-sponsored group health benefit plans for Members of Congress and designated congressional staff.” The emphasis here is on “OPM determined.” OPM admits to establishing the authority for itself to make such a determination in its final rule. In 5 CFR §890.102, OPM writes that a Member of Congress and a congressional staff member “may purchase health benefit plans, as defined in 5 USC 8901(6), that are offered by an appropriate SHOP *as determined by the Director*.”

A federal agency, with White House OMB approval, gave itself the authority to enable action by the Congress that is outside the law passed by Congress itself. By misinterpreting the law and augmenting its own authority, OPM created the rule that enabled Congress to exempt itself from Obamacare.

OPM does acknowledge that “generally SHOPS do not serve employers as large as Congress.” But then, in a reversal of the statement it has just made, OPM cites the “*notwithstanding any other provision of law*” language as “allowing Congress to be eligible to participate in the SHOP without taking into consideration whether Congress is a small employer.”

This inversion of the meaning of that key phrase and its plain reading is illogical. A law cannot sweep aside its own provisions. In fact, it sweeps aside provisions of law other than its own, which is the point of the key phrase in Section 1312(d)(3)(D) of the ACA.

OPM goes on to cite a non-authoritative and equally questionable guidance document issued by HHS on September 30, 2013, to support OPM’s arbitrary determination contained in its final rule, which took effect two days later on October 2, 2013. The last-minute HHS guidance reads: “[The Centers for Medicare and Medicaid Services (CMS)] clarifies that offices of the Members of Congress, as qualified employers, are eligible to participate in a SHOP regardless of the size and offering requirements set forth in the definition of ‘qualified employer’ in the Exchange final rule...”

In other words, HHS, also ignoring the statutory language of the ACA regarding a qualified employer, replaced it with its own definition. Compared to OPM, which assumed determining authority for itself and at least had the support of the White House OMB, HHS did not have anyone with authority sign the CMS/CCIIO guidance.

The OPM response concludes with explanations surrounding their health benefit plan contracting authority under 5 USC §8902 and how that authority interacts with the definition of a “health benefits plan” in 5 USC §8901(6). OPM states, “The contracting provision of 5 USC §8902 does not preclude OPM from offering plans purchased via a SHOP to Members of Congress and congressional staff.” Of course, it does not specifically allow them either. Specified authority to allow the offering of plans purchased via a SHOP required yet another concocted extrapolation provided by the final rule.

In an additional example of extralegal executive action, OPM admits in their response that “in the final rule, OPM clarifies that the definition of “health benefits plan” in Title 5 includes both plans for which OPM contracts and, in the case of Members of Congress and designated staff, certain Exchange plans.” In other words, they gave themselves the specific authority in their own regulation because it certainly does not exist in U.S. code.

OPM finally states that “Plans offered to Members of Congress and designated congressional staff via the SHOP are not subject to the contracting requirements outlined in 5 USC §8902.” Clearly, subjecting plans offered to Members and staff via the SHOP to the same requirements as other FEHBP plans could leave the door wide open to fraud and abuse, not to mention plans that do not serve the insured individual, but that is yet another issue.

Conclusion

In summary, 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. HHS supported this arbitrary rule, as did the White House through its approval of the rule by OMB.

The years-long concerns of the Chairman of the U.S. Senate Committee on Small Business and Entrepreneurship remain, including:

- 1) OPM’s final rule, and the supporting memorandum from HHS, undermine the intent of Congress clearly stated in the ACA that its Members and staff share the same burden they have imposed on other American citizens;
- 2) OPM’s final rule undermines the purpose for a SHOP exchange, which is to assist small business employers in providing health insurance to their employees;
- 3) OPM’s rule enabled false representations that Congress is a small business, even though it has thousands of employees;
- 4) And 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.

To date, information received from OPM has not been fully responsive to the questions posed previously. The request for information and the questions posed, with a brief summation of what has been received, includes:

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?

No information was provided indicating there was any internal voice within OPM in opposition to the approach ultimately taken, only that the office evaluated potential interpretations of the statute in the course of drafting the proposed rule. All information provided to the Committee to date on this question reflects explanations regarding how OPM did, in fact, have the authority to determine that a FEHBP contribution could be provided, albeit authority that OPM gave itself by crafting its own regulation. The only information provided reflecting an opposing position were various letters that originated outside of OPM.

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.

Copies of a significant number of emails between OPM and congressional staff were provided, and were helpful. Information provided included copies of correspondence with specific Members of Congress, letters to and from congressional administrative leadership and staff, and related meeting notifications

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.

No specific information related to a meeting or conversation with the White House or OMB was provided, not even basic administrative memoranda/correspondence transmitting the proposed rule from OPM to OMB for approval, or copies of any correspondence indicating actual OMB approval. OPM did indicate they consulted with a variety of agencies and officials during the development of the proposed and final rule, but provided no documentation or specifics as to which agencies and officials, indicating that information was part of the “deliberative process” and was being withheld.

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?

OPM indicated in their response that the only disagreement came from outside the agency. Some limited correspondence from Members of Congress to OPM indicating their disagreement regarding OPM authority to authorize FEHBP subsidies was provided. Public comments in opposition that were provided to OPM during development of the proposed rule were provided. No information connected to the White House was provided.

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.”

OPM responded that the office does not take the position that Congress is a small employer, nor has OPM taken such a position in the past. OPM indicated they are not aware of any correspondence that is responsive to the question. As discussed previously, this response is contradicted by the fact that the final rule is the position of OPM. Again, in the final rule OPM arbitrarily determined that Members of Congress and congressional staff could purchase their health insurance on a SHOP exchange, which the law allows only for small employers which have 100 or fewer employees. Information that was provided indicates that both congressional administrative staff and OPM were aware that Congress employs well in excess of 100 employees.

While much attention to date has been focused on the executive branch, Congress—itsself—has been a party to this Washington Exemption. It is congressional administrative staff, after all, that represented to DC Health Link in its initial—and clearly fraudulent—online application that Congress contained fewer than 100 employees. But while Congress created the law and then perpetrated its violation, the Office of Personnel Management certainly enabled the violation through its promulgation of an illegal final rule.

The one question that now remains is what does the U.S. Congress do about it? The obvious answer for Congress is that it either follows the law or changes the law. Which will it be? Doing nothing is not an option.