

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

August 16, 2017

Ms. Kathleen McGettigan  
Acting Director  
Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415

Dear. Ms. McGettigan:

The Committee on Homeland Security and Governmental Affairs is examining the regulation issued by the Office of Personnel Management (OPM) in 2013 that enabled Members of Congress and their staff to purchase health insurance offered by a District of Columbia Small Business Health Options Plan (SHOP) exchange and receive an employer contribution.<sup>1</sup> I write to request information about the development of this regulation.

Section 1312 of the Affordable Care Act required that Members of Congress and their staff purchase health insurance on a federal or state exchange.<sup>2</sup> On March 24, 2010, the Senate voted on an amendment that if approved would have allowed an employer contribution. The amendment was defeated by a 43 to 56 margin.<sup>3</sup> OPM subsequently issued a regulation allowing Members and their staff to purchase health insurance on the SHOP exchange. The SHOP exchange is intended for employers with less than 50 employees, yet Congress employs more than 16,000 people.<sup>4</sup> OPM's regulation had the effect of classifying Congress as a small business with less than 50 employees, permitting the federal government to provide an employer contribution to Members of Congress and staff towards the purchase of health insurance in an amount equal to the government's contribution offered to federal employees enrolled in the Federal Employee Health Benefits Program.<sup>5</sup> Without this classification, Members of Congress and their staff would be required to purchase health insurance on the individual exchange, where no employer contributions are permitted. The rule went into effect on October 2, 2013.<sup>6</sup>

---

<sup>1</sup> Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653 (Oct. 2, 2013).

<sup>2</sup> §1312(d)(3)(D), Patient Protection and Affordable Care Act (ACA), 124 Stat. 119.

<sup>3</sup> 111<sup>th</sup> Congress, Vote on S.Amdt.3564 to H.R.4872, Health Care and Education Reconciliation Act of 2010, rejected in Senate by Yea-Nay Vote. 43 – 56, Record Vote Number: 69), 03/24/2010.

*See also* RonJohnson.gov, *Background on Lawsuit* (Jan. 6, 2014) <http://www.will-law.org/wp-content/uploads/2015/06/OPM-Lawsuit-Fact-Sheet.pdf>.

<sup>4</sup> Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653 (Oct. 2, 2013); Letter from Sen. David Vitter, Chairman, S. Comm. on Small Business & Entrepreneurship, to Beth F. Cobert, Acting Director, Office of Personnel Management (Feb. 2, 2016).

<sup>5</sup> Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653 (Oct. 2, 2013).

<sup>6</sup> *Id.*

In 2014, I filed a federal lawsuit challenging the Obama Administration's attempts to exempt Members of Congress and their staff from the full effects of the Affordable Care Act.<sup>7</sup> Although the lawsuit was dismissed for lack of standing, my intent was to prevent the unlawful usurpation of legislative power by the Obama Administration.<sup>8</sup> In 2016, the Committee held a hearing to consider the nomination of Beth F. Cobert to be the Director of the Office of Personnel Management.<sup>9</sup> Following the hearing, I submitted questions for the record requesting information about the development of the OPM rule. I have yet to receive satisfactory responses from OPM.

To ensure a full and complete record of all relevant documents and communications for production to the Committee, please preserve all records relating to the OPM regulation titled "Federal Employee Health Benefits Program: Members of Congress and Congressional Staff," 78 Fed. Reg. 60,653, and provide a detailed explanation of the agency's actions to preserve all relevant records. In addition, to allow the Committee to understand what records may no longer exist, I also request a detailed accounting of any relevant records that have been destroyed, to include the identity of the record, the date of its destruction, the reason for its destruction, the official who authorized its destruction, and why such records were not preserved in accordance with the Federal Records Act.

As an initial request for records, please produce the following information and material:

1. All documents and communications for the period January 1, 2010 to October 2, 2013, including emails between or among employees or contractors of OPM and any outside party, referring or relating to the development or promulgation of OPM regulation, "Federal Employee Health Benefits Program: Members of Congress and Congressional Staff," 78 Fed. Reg. 60,653.
2. A description of the process OPM followed internally to secure all documents and communications responsive to the aforementioned request.

Please provide this information as soon as possible but no later than 5:00 p.m. on August 31, 2017.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency, economy, and effectiveness of all agencies and departments of the Government."<sup>10</sup> Additionally, S. Res. 62

---

<sup>7</sup> Rick Esenberg, *WILL AND SENATOR RON JOHNSON FILE SUIT TO STOP CONGRESSIONAL EXEMPTION FROM OBAMACARE*, Wisconsin Institute for Law & Liberty (January 6, 2014) <http://www.will-law.org/will-and-senator-ron-johnson-file-suit-to-stop-congressional-exemption-from-obamacare/>.

<sup>8</sup> Wisconsin Institute for Law & Liberty, *Johnson v. OPM*, see <http://www.will-law.org/our-cases/good-government/johnson-v-opm/#case-documents>.

<sup>9</sup> The U.S. Senate Committee on Homeland Security and Governmental Affairs, *Nomination of the Honorable Beth F. Cobert to be Director, Office of Personnel Management* (February 4, 2016) <https://www.hsgac.senate.gov/hearings/nomination-of-the-honorable-beth-f-cobert-to-be-director-office-of-personnel-management>.

<sup>10</sup> S. Rule XXV(k); see also S. Res. 445, 108th Cong. (2004).

Ms. Kathleen McGettigan

August 16, 2017

Page 3

(115th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”<sup>11</sup> When delivering the information, please produce to the Majority staff in room 340 of the Dirksen Senate Office Building and to the Minority staff in room 442 of the Hart Senate Office Building. For purposes of this request, please refer to the definitions and instructions in the enclosure.

If you have any questions about this request, please ask your staff to contact Josh McLeod or Scott Wittmann of the Committee staff at (202) 224-4751. Thank you for your attention to this matter.

Sincerely,



Ron Johnson  
Chairman

cc: The Honorable Claire McCaskill  
Ranking Member

Enclosure

---

<sup>11</sup> S. Res. 73 § 12, 114th Cong. (2017).