Congress of the United States
Washington, DC 20515

September 22, 2011

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, D.C. 20515

Dear Secretary Sebelius:

The Repeal CLASS Working Group released a report[1] last week revealing that officials within the Department of Health and Human Services (HHS) warned that the Community Living Assistance Services and Supports (CLASS) long-term care entitlement program would be unsustainable, but that officials at HHS may have ignored those warnings. Today we received information that the HHS Administration on Aging is effectively closing the CLASS office, and that all the office's employees have been reassigned or asked to leave. These developments raise important questions about the future of the CLASS program as well as whether the public has been fully informed about the Administration's views on this costly program.

The Patient Protection and Affordable Care Act (PPACA)[2] created the unsustainable, long-term care entitlement program referred to as the CLASS Act.[3] CLASS provides a daily cash benefit to individuals who suffer from limitations in their activities of daily living and who have paid program premiums for several years.[4] Actuaries believe CLASS will suffer from adverse selection.[5] Because there is no medical underwriting for participation and the insurance is guaranteed issue, individuals who are likely to need the product in the future are disproportionately likely to sign up. Former U.S. Comptroller David Walker, appointed by President Bill Clinton, concluded that CLASS is "fiscally irresponsible, fundamentally unsustainable, and [Congress] ought to consider repealing it."[6]

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[1] CLASS' UNTOLD STORY: Taxpayers, Employers, and States on the Hook for Flawed Entitlement Program, September 2011, available at http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8920 or http://rpc.senate.gov/public/index.cfm?p=class-untold-story.

[2] PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010, PUB. LAW 111–148; HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, PUB. LAW 111–152.

[3] Janemarie Mulvey and Kirsten J. Colello, "Community Living Assistance Services and Supports Provisions in the Patient Protection and Affordable Care Act," Congressional Research Service, January 5, 2011 available at http://healthreform.kff.org/~/media/Files/KHS/docfinder/crs_1511CLASSAct.pdf.

[4] *Id.*

[5] For example, see Alfred A. Bingham, Jr., "Patient Protection and Affordable Care Act (HR 3590) and Affordable Health Care for American Act (HR 3962)," American Academy of Actuaries, January 14, 2010, p. 19, available at http://www.ltcconsultants.com/articles/2010/classactconcern/AAALetterReHealthCareReformJan14.pdf.

[6] David Walker response to question from Senator Thune, Hearing for "Perspectives on Deficit Reduction," United States Senate Committee on Finance, April 13, 2011.

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On February 15, 2011, you testified before the Senate Finance Committee that the CLASS program's "snapshot in the [PPACA] is totally unsustainable."[7] During testimony on March 30, 2011, before the Senate Labor-HHS Subcommittee on Appropriations, you said, "If, indeed, only the disabled community enrolls, this program is immediately insolvent in a fiscal manner, because there won't be enough income to pay for the benefits."[8] On numerous occasions, however, you have stated that the PPACA gives you authority to make changes to ensure CLASS' sustainability. For example, before the Energy and Commerce Health Subcommittee on March 3, 2011, you stated that "[CLASS] was unsustainable as the legislation was crafted, but I was given considerable flexibility and we are in the process of making, I think, the changes that will meet the criteria outlined in the law, which is, that it be sustainable without taxpayer support."[9] While we appreciate your acknowledgment that CLASS is unsustainable, it raises the question of why the Administration supported the inclusion of such a fiscally irresponsible program in the PPACA.

As detailed in the report we released September 15, 2011, Congress has obtained emails that demonstrate the Department of Health and Human Services (HHS) was well aware of CLASS' problems before the PPACA passed.[10] For example, in an email dated May 19, 2009, Mr. Foster wrote to Jennifer Snow (an HHS policy advisor) and five other Centers for Medicare and Medicaid Services (CMS) staff that CLASS was an actuarial nightmare:

> We skimmed through the draft legislation and offered the following preliminary comments. Nonsubsidized, voluntary insurance programs generally involve substantial "antiselection" by those who choose to participate. As summarized below, **this could be a terminal problem for this proposal.** The program is intended to be "actuarially sound," but at first glance **this goal may be impossible.** Due to the limited scope of the insurance coverage, the voluntary CLASS plan would probably not attract many participants other than individuals who already meet the criteria to qualify as beneficiaries.... The resulting substantial premium increases required to prevent fund exhaustion would likely reduce the number of participants, and a classic "assessment spiral" or "insurance death spiral" would ensue.[11] [Emphasis added]

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[7] Secretary Kathleen Sebelius response to question from Senator Thune, Hearing for "The President's Fiscal Year 2012 Budget Proposal," United States Senate Committee on Finance, February 15, 2011.

[8] Secretary Kathleen Sebelius, Hearing for "FY 2012 Budget Request for HHS," United States Senate Committee on Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, March 30, 2011.

[9] Secretary Kathleen Sebelius, Hearing for "FY 2012 HHS Budget and the Implementation of Public Laws 111-148 and 111-152," United States Senate Committee on Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, March 30, 2011.

[10] CLASS' UNTOLD STORY: Taxpayers, Employers, and States on the Hook for Flawed Entitlement Program, September 2011, available at http://rpc.senate.gov/public/index.cfm?p=class-untold-story orhttp://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8920.

[11] Email from Richard Foster (CMS/OL) to Jennifer Snow (CMS/OL) and five other staff, "FW: Request for TA on the CLASS Act sections dealing with a new trust fund," May 19, 2009, available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitA.pdf.

Despite your department's knowledge of CLASS' unworkable design, you sent a letter on July 6, 2009, to former Senator Kennedy "to express the Administration's support for the inclusion of the Community Living Assistance and Supports Act in the Affordable Health Choices Act."[12] You referred to the program as "innovative."[13] Just three days later in an email to CMS employees Jill Gotts, Amy Hall (Director of CMS Office of Legislation), and Jonathan Blum (CMS Deputy Administrator), Foster continued to stress the fundamental problems of the CLASS program. Foster stated that "[t]hirty-six years of actuarial experience lead me to believe that this program would collapse in short order and require significant Federal subsidies to continue.[14]

The accumulated evidence about CLASS' deficiencies indicates that it was primarily included in the PPACA because doing so improved the legislation's estimated impact on the deficit. CLASS improved the PPACA's impact inside the 10-year budget window, only because the government collects premiums for five years before the program pays any benefits.[15] Therefore, while both the Congressional Budget Office (CBO)[16] and CMS[17] have estimated that CLASS will exacerbate future budget deficits, in the short-term budget window CLASS' revenues will exceed its liabilities.

Although HHS was not able to satisfy actuarial concerns about CLASS before it was included in the PPACA, you wrote to Congressman Boustany on January 4, 2011, "We are using state-of-the-art actuarial science and economic analysis to help us craft a benefit plan that will best serve enrollees while meeting our obligations for a program that is solvent."[18] While your department works to implement this deeply flawed program, it is imperative that the actions you take are within your Congressional authority. We are encouraged by your February 15th statement before the Senate Finance Committee asserting that "the principal rule [is] the program will not start unless it will be solvent into the future."[19]

We believe that, since 18 months have passed since the PPACA became law, your department has had more than sufficient time to present the American people with the specifics of your plan to create a sustainable CLASS program. It is vital that Congress understands the

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[12] Letter from Kathleen Sebelius to Senator Edward Kennedy, July 6, 2009.
[13] *Id.*
[14] Email from Richard Foster (CMS/OACT) to Jill Gotts (CMS/OL), Amy Hall (CMS/OL), and Jonathan Blum (CMS/OA), "RE: Update on CLASS Act," July 9, 2009 available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitB.pdf.
[15] Douglas W. Elmendorf, Director, Congressional Budget Office, "Letter to the Honorable Nancy Pelosi, Speaker, U.S. House of Representatives," March 20, 2010, available at http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.
[16] *Id.*
[17] Centers for Medicare and Medicaid Services, "Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended," April 22, 2010 available at https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf.
[18] Secretary Kathleen Sebelius letter to Representative Charles Boustany, January 4, 2011.
[19] Secretary Kathleen Sebelius response to question from Senator Thune, Hearing for "The President's Fiscal Year 2012 Budget Proposal," United States Senate Committee on Finance, February 15, 2011.

changes you are considering making to CLASS. This is especially true since the Administration has requested $120 million for program administration for Fiscal Year 2012.[20]

Moreover, media reports today indicate that the HHS Administration on Aging (AOA) is closing the CLASS office. The Administration has denied that the office is being closed, but an employee of the office confirmed that the employees are being reassigned.[21] The public has a right to know what is happening to this office, whether HHS intends to implement the CLASS program, and if so, who is going to do the work.

Pursuant to Rules X and XI of the United States House of Representatives, the Oversight and Government Reform Committee, the Energy and Commerce Committee, the Appropriations Committee, and the Ways and Means Subcommittee on Oversight request that you provide answers to the following questions so we may better understand your approach for altering the CLASS framework described in the PPACA. In preparing your answers to these questions, please answer each question individually and include the text of each question along with your response.

1. As of September 15, 2011, how many people were employed by the AOA to work on the CLASS program, either in a full-time or part-time capacity? Please list each person and their primary responsibilities. As of September 30, 2011 which of these people have been reassigned or are leaving HHS? For the people who have been reassigned, what have they been reassigned to work on? Who will work on the CLASS program going forward? Please list each person and their primary responsibilities.

2. It is being widely reported today that the head actuary in the CLASS Office, Bob Yee, has been let go because "HHS has decided to close down the CLASS Office effective tomorrow."[22] Has Mr. Yee been let go by the Department? If so, why? Does HHS have any actuaries assigned to the CLASS program at present? If so, please list their names and how long they have been working on CLASS.

3. Is HHS planning to reorganize the CLASS Office as a part of the Office of the Assistant Secretary for Planning and Evaluation? If so, why is the Department moving this program to a division that has already called CLASS "a recipe for disaster?"[23]

4. Earlier today HHS issued a statement which says, in part, "...it is an open question whether the program will be implemented." Does HHS intend to implement the CLASS

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[20] Department of Health and Human Services, "Budget in Brief for Fiscal Year 2012," available at http://www.hhs.gov/about/FY2012budget/fy2012bib.pdf.

[21] Meghan McCarthy, "Republicans Circulate Memo Saying HHS Closing CLASS Office," September 22, 2011 available at http://www.nationaljournal.com/healthcare/republicans-circulate-memo-saying-hhs-closing-class-office-20110922.

[22] *Id.*

[23] Email from William Marton (HHS/ASPE) to Marc Cohen, "RE: Data on LTC premiums from 2005," available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitM.pdf

program, or does this reassignment of employees in the AOA indicate that the CLASS program will not be implemented? If HHS has decided not to implement the CLASS program, will you recommend that Congress pass legislation to repeal CLASS?

5. Before the Senate Finance Committee on February 15, 2011, you testified that "[CLASS] is designed for people to set aside their own money and then draw out their own money with no taxpayer support. So, the framework is not perhaps designed to mandate that only a few options could be available since people are basically spending their own money."[24] You also expressed this same view before the House Energy and Commerce Committee on February 16, 2011.[25]

   Is this your interpretation of the CLASS program? Do individuals actually set aside and spend only their own money through CLASS? Or is CLASS meant to be an insurance product where the majority of participants will **not** eventually collect benefits, at least not nearly as large as the premiums they had paid?

6. During the Senate Finance hearing on February 15, 2011, you stated that HHS is considering changing the annual minimum earnings requirement for participation in CLASS from $1,200 to $12,000. According to the Congressional Research Service (CRS), the Secretary of HHS only has the authority to make the minimum earnings requirements less stringent, not more stringent.[26] Do you agree with the legal experts at CRS? If not, please explain.

7. According to Section 3203(a)(1)(A) of the Public Health Service Act added by the PPACA, monthly premiums for CLASS shall not exceed $5, indexed to the consumer price index, for individuals below the poverty line and for an individual age 21 or younger who is both actively employed and a full-time student.[27] Do you believe that HHS can increase the nominal five-dollar premium for individuals below the federal poverty line? If so, please explain the legal basis for such authority.

8. According to Section 3203(b)(1)(B) of the Public Health Service Act added by the PPACA, the following enrollees are exempt from a premium increase: someone who has attained the age of 65, someone who has paid premiums for at least 20 years, and someone who is not actively employed.[28] Do you believe that HHS can change this provision? If so, please explain the legal basis for such authority.

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[24] Secretary Kathleen Sebelius response to question from Senator Thune, Hearing for "The President's Fiscal Year 2012 Budget Proposal," United States Senate Committee on Finance, February 15, 2011.

[25] Secretary Kathleen Sebelius response to question from Congressman Boustany, Hearing for "The President's Fiscal Year 2012 Budget Proposal," United States House Committee on Ways and Means, February 16, 2011.

[26] Edward C. Liu, "Authority of the Secretary of HHS to Make Exceptions to Minimum Earnings Requirement for Eligibility Under the CLASS Act," Congressional Research Service, March 15, 2011.

[27] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3203(a)(1)(A)(ii)(I)

[28] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII - COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3203(b)(1)(B)(ii)

9. According to Section 3203(b)(3) of the Public Health Service Act added by the PPACA, no underwriting – other than on the basis of age – shall be used to determine the monthly premium for enrollment in the CLASS program.[29] Do you believe that HHS can change this provision? If so, please explain the legal basis for such authority.

10. According to Section 3203(c) of the Public Health Service Act added by the PPACA, individuals eligible for the nominal premium can self-attest to their qualifications.[30] Do you believe that HHS can change this provision? If so, please explain the legal basis for such authority.

11. According to Section 3204 of the Public Health Service Act added by the PPACA, individuals can be auto-enrolled in the CLASS program if their employer elects to enroll his or her workers.[31] Individuals would then have the ability to opt-out of the program.[32] Do you believe that HHS can change this provision? If so, please explain the legal basis for such authority.

12. Please describe any other changes to the CLASS program HHS is planning (or has considered) beyond those directly addressed earlier in your responses. Which of these changes do you believe you have the statutory authority to make? Have you considered any changes that would require a statutory change in order to give you additional authority? If so, please explain.

13. In a July 7, 2011, letter to Congressman Boustany, you wrote that "I am also firmly committed to implementing [CLASS] only if it is financially solvent, actuarially sound, and consistent with the statute."[33] How will the Congress know that the plan that HHS produces will be financially solvent, actuarially sound, and consistent with the statute? Will the American Academy of Actuaries be allowed to review the proposal(s) before they are issued in regulations? Will CMS be contracting with an outside actuary to review the CLASS program design?

14. In an internal HHS document about technical corrections for CLASS, concern was expressed that "it is possible the authority in the bill to modify premiums will not be sufficient to ensure the program is sustainable."[34] Given this, why did you repeatedly testify before Congress that you had the authority to fix CLASS?

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[29] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII – COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3203(b)(3)

[30] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII – COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3203(c)

[31] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII – COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3204(a)(1)

[32] See PUBLIC HEALTH SERVICE ACT (42 U.S.C. 201 ET SEQ.) TITLE XXXII – COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS SECTION 3204(b)

[33] Secretary Kathleen Sebelius letter to Representative Charles Boustany, July 7, 2011.

[34] CLASS: Suggested Technical Corrections, Last Updated 01/04/10available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitQ.pdf.

15. In a bicameral staff briefing on March 4, 2011, Assistant Secretary of Aging Kathy Greenlee said she would provide Congress with copies of your General Counsel's opinion stating the Secretary of HHS had sufficient legal authority to make structural changes to CLASS. More than six months have passed and Congress has not received the General Counsel's opinion. Can you please provide a copy of the General Counsel's opinion? Please explain why it took over six months for Congress to receive this opinion.

16. Can you specify the employer obligations for the options you are considering? Can you confirm that employers will not be required to enroll their workers into CLASS?

17. How many HHS employees outside of AOA are working on the CLASS program? Please describe the nature of their work.

18. What evidence does the department have that previous taxpayer money spent on educating the public about long-term care needs has been well spent?

We also have concerns about CLASS' inclusion in the PPACA. Please provide a record of all public statements related to CLASS that the Secretary has made between the time of her confirmation and the present. We also request that you provide answers to the following questions. In preparing your answers to these questions, please answer each question individually and include the text of each question along with your response.

19. Did you or anyone at HHS or CMS have any conversations with anyone in the White House, including the White House Office of Health Reform, the White House Counsel's Office, and/or the Office of Management and Budget, about the CLASS program or other potential long term care insurance programs to be included in the health care legislation? Please summarize when these conversations occurred, who participated, and what was said. Please provide copies of any email communications. Please also state whether you are currently engaged in conversations with these offices about implementing CLASS. Please summarize and provide copies of any email communications.

20. From May 16, 2009, to the present, have you or anyone at HHS or CMS had any conversations with anyone in the White House, including the White House Office of Health Reform, the White House Counsel's Office, and/or the Office of Management and Budget, about how you plan to resolve the design problems with the CLASS program within your purported authority? Please summarize when these conversations occurred, who participated, and what was said. Please provide copies of any email communications.

21. Why did you support the inclusion of the CLASS program into the PPACA in a July 2009 letter to Senator Kennedy when your department knew at that time that it was unsound and presented a substantial risk of a future bailout?

22. Were any concerns about the CLASS program's sustainability communicated to you, Secretary Sebelius, by HHS staff from May 19, 2009, to March 23, 2010? If so, please explain what actions you took upon hearing the sustainability concerns? If you weren't told about CLASS' problems before PPACA passed, what actions have you taken to remedy this significant communication failure at HHS?

23. On October 22, 2009, William Marton, an employee in the HHS Office of the Assistant Secretary for Planning and Evaluation, wrote that CLASS "[s]eems like a recipe for disaster."[35] Despite this, Richard Frank, the Assistant Secretary in Planning and Evaluation, told a public gathering at the Kaiser Foundation on October 20, 2009 that "we're entirely persuaded that reasonable premiums, solid participation rates, and financial solvency over the 75-year period can be maintained."[36] Please address the discrepancies between the comments of Mr. Marton and Mr. Frank. Do you think it was appropriate for Mr. Frank to make a public statement about being "entirely persuaded" about CLASS' sustainability when people in your department were still highly skeptical? Did Mr. Frank knowingly mislead the public?

24. To whom did HHS communicate internal concerns about the solvency and lack of authority regarding CLASS, as noted in the January 2010 technical corrections document?[37] Please provide these communications.

We ask that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on October 6, 2011. Please deliver the requested documents and information to the Majority Staff of the Oversight and Government Reform Committee in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

If you have any questions about this request, please contact Brian Blase or Sery Kim of the Oversight and Government Reform Committee staff at 202-225-5074 or Stacy Cline of the Energy and Commerce Committee staff at 202-226-0368. Thank you for your attention to this matter.

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[35] Email from William Marton (HHS/ASPE) to Marc Cohen, "RE: Data on LTC premiums from 2005," available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitM.pdf

[36] Comments made on October 20, 2009 at Kaiser Family Foundation Event. —The Sleeper Issue: Long-term Care and the CLASS Act.‖ Page 49-50 http://www.kff.org/healthreform/upload/102009_KFF_CLASS_Act_Transcript_Final.pdf.

[37] CLASS: Suggested Technical Corrections, Last Updated 01/04/10available at http://energycommerce.house.gov/media/file/PDFs/CLASS/ExhibitQ.pdf.

Sincerely,

Darrell Issa, Chairman
Committee on Oversight and
Government Reform
United States House of Representatives

Trey Gowdy, Chairman
Health Care, District Of Columbia,
Census and the National Archives
Subsommittee
Committee on Oversight and
Government Reform
United States House of Representatives

Fred Upton, Chairman
Committee on Energy and Commerce
United States House of Representatives

Joe Pitts, Chairman
Health Subcommittee
Committee on Energy and Commerce
United States House of Representatives

Cliff Stearns, Chairman
Oversight and Investigations Subcommittee
Committee on Energy and Commerce
United States House of Representatives

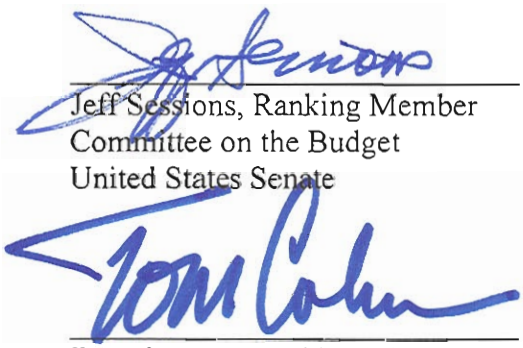
Denny Rehberg, Chairman
Labor, Health and Human Services, and
Education Subcommittee
Committee on Appropriations
United States House of Representatives

Charles Boustany, M.D., Chairman
Oversight Subcommittee
Committee on Ways and Means
United States House of Representatives

Michael C. Burgess, M.D.
Committee on Energy and Commerce
United States House of Representatives

Phil Gingrey, M.D.
Committee on Energy and Commerce
United States House of Representatives

John Thune, Chairman
Republican Policy Committee
United States Senate



Jeff Sessions, Ranking Member
Committee on the Budget
United States Senate

Lindsey Graham
Committee on Appropriations
United States Senate

Tom Coburn, Ranking Member
Permanent Subcommittee on Investigations
United States Senate

Enclosure

cc: The Honorable Elijah Cummings, Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives

The Honorable Danny Davis, Ranking Member
Subcommittee on Health Care, District of Columbia, Census and the National Archives
United States House of Representatives

The Honorable Henry Waxman, Ranking Member
Energy and Commerce Committee
United States House of Representatives

The Honorable Frank Pallone, Jr., Ranking Member
Health Subcommittee, Energy and Commerce Committee
United States House of Representatives

The Honorable Diane DeGette, Ranking Member
Oversight and Investigations Subcommittee, Energy and Commerce Committee
United States House of Representatives