

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 3, 2015

The Honorable Sylvia Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Burwell:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committee on Energy and Commerce and the Committee on Ways and Means are conducting oversight into the implementation of the Patient Protection and Affordable Care Act (“PPACA”). Specifically, the Committees are examining the implementation of the PPACA’s cost-sharing reduction program.

Section 1402 of the PPACA reduces health care costs for certain qualified individuals who purchase health plans in public insurance exchanges (“beneficiaries”) by requiring insurance companies to reduce co-payments, deductibles, and other out-of-pocket costs for those beneficiaries. Sections 1402 and 1412(c)(3) together authorize the federal government to make direct payments to insurance companies to offset estimated costs incurred by providing the cost-sharing reductions to beneficiaries (“Section 1402 Offset Program payments”).

Congress has never appropriated any funds to permit the administration to make any Section 1402 Offset Program payments to insurance companies. Despite lacking an appropriation, Centers for Medicare and Medicaid Services (“CMS”) Administrator Marilyn Tavenner informed the House Committee on Oversight and Government Reform in December 2014 that insurers, “have been paid a cumulative total of \$2.7 billion in advance [Section 1402 Offset Program] payments through the November 2014 payment cycle.”¹

Article I of the U.S. Constitution expressly prohibits the expenditure of public funds without an appropriation made by law.² Accordingly, it appears the Department of Health and Human Services (“HHS”) has directed the Treasury Department to make payments to insurers for the Section 1402 Offset Payments, and that the Treasury Department has made and continues to make these payments, even though no funds are lawfully available to do so.

¹ The Affordable Care Act, Before the H. Comm. on Oversight and Gov’t. Reform, 113th Cong., Statement of Marilyn Tavenner (Dec. 9, 2014).

² U.S. Const. art. I, §9, cl. 7 (stating, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

We note that in its FY 2014 budget submission to Congress, the administration acknowledged that it needed an appropriation to fund payments to insurers related to the Section 1402 cost-sharing reduction program.³ Specifically, in the CMS portion of its budget submission, the administration requested that Congress appropriate for this program “such sums as necessary” for FY 2014 and \$1.42 billion for the first quarter of FY 2015.⁴ In the justification it prepared in support of the FY 2014 budget submission to Congress, CMS asked for an “annual” appropriation for Section 1402 Offset Program payments in the amount of “\$4.0 billion in the first year of [PPACA Exchange] operations...[and] a \$1.4 billion advance appropriation for the first quarter of FY 2014...to permit CMS to reimburse [certain insurance] issuers.”⁵ Congress denied the administration’s request for an appropriation to fund Section 1402 Offset Program payments to insurance companies, and no funds have since been appropriated.⁶

Notwithstanding the absence of appropriations for Section 1402 Offset Program payments, then-HHS Secretary nominee Sylvia Burwell stated in a May 21, 2014 letter that, for “efficiency” purposes, the administration was making Section 1402 Offset Program payments “from the same account from which the premium tax credit portion of the advance payments are made.”⁷ Section 1401 of the PPACA, which created the refundable tax credit providing premium assistance for coverage under a qualified health plan (codified at § 36B of the Internal Revenue Code (“IRC”)), also provides a permanent funding stream for the credits. Section 1401(d) amends 31 USC § 1324, which appropriates amounts necessary to pay refunds under the IRC, to affirmatively include § 36B. No such permanent funding stream is found in the Section 1402 Offset Program. The non-partisan Congressional Research Service has likewise opined that, “unlike the refundable tax credits [the offset program payments] do not appear to be funded through a permanent appropriation. Instead, it appears...that funds for these payments are intended to be made...through annual appropriations.”⁸

In short, we are concerned that administration is unlawfully and unconstitutionally misusing the permanent appropriation intended only to pay for tax refunds due under the IRC to make Section 1402 Offset Program payments to insurance companies, even though (i) it is clear that 31 U.S.C. § 1324 may not be used for that purpose, and (ii) Congress has never appropriated any other funds for the advance cost-sharing reduction payments to insurers.

³ See OMB, Fiscal Year 2014 Budget, App. at 448 (April 10, 2013).

⁴ Id.

⁵ FY 2014 CMS Justification of Estimates for Appropriations Committees at 2, 7. See also Id. at 183-84 (“CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014”).

⁶ See also July 29, 2013 CRS Memo to Sen. Coburn at 9-10 (confirming that Congress had not appropriated funds for Section 1402 Offset Program payments).

⁷ Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee (May 21, 2014).

⁸ CRS Memo to Sen. Coburn at 9-10.

To assist the Committees' understanding of HHS' administration of the cost-sharing reduction program, please provide as to the following a full explanation for, and all documents relating to:

1. The administration's decision to make Section 1402 Offset Program payments to insurers, despite the lack of appropriation to do so; and
2. The administration's abrupt reversal in course from its FY 2014 budget submission to Congress, in which it requested an "annual" appropriation to fund the Section 1402 Offset Program payments, to its FY 2015 Budget submission, which did not include annual appropriation request.

Additionally, please confirm:

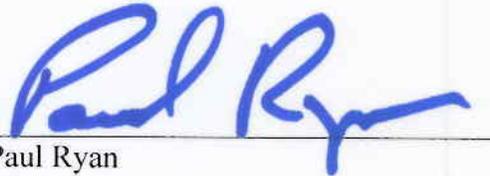
3. Whether HHS has changed, or in any way modified, its direction to the Treasury Department to make Section 1402 Offset Program payments to insurers; and
4. The cumulative amount of such Section 1402 Offset Program payments that HHS has directed Treasury to advance to insurers to date.

We ask that HHS provide its responses to the Committees by February 17, 2015. If you have any questions, please contact Emily Newman with Committee on Energy and Commerce staff at (202) 225-2927 or Amanda Neely with Committee on Ways and Means staff at (202) 225-2610.

Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce



Paul Ryan
Chairman
Committee on Ways and Means

Attachment

cc: The Honorable Frank Pallone Jr., Ranking Member
Committee on Energy and Commerce

The Honorable Sander Levin, Ranking Member
Committee on Ways and Means