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B-328016

September 29, 2016

Congressional Requesters

Subject: *Department of Health and Human Services: Transitional Reinsurance Program*

This responds to your April 13, 2016 request for our opinion regarding the Department of Health and Human Services' (HHS) administration of the transitional reinsurance program established under section 1341 of the Patient Protection and Affordable Care Act (PPACA).<sup>1</sup> The transitional reinsurance program, which is financed by statutorily required contributions from participating health insurance issuers and group health plans (issuers), makes payments to eligible issuers to stabilize health insurance premiums and encourage issuer participation in the health insurance markets. Section 1341 designates a specified amount of collections from issuers for reinsurance payments and also directs the deposit of a specified amount of collections in the general fund of the United States Treasury (Treasury). You asked whether HHS has the authority, in the event its collections from issuers do not reach the specified amount for reinsurance payments, to prioritize collections for payments to issuers over payments to the Treasury.

In accordance with our regular practice, we contacted HHS to obtain additional factual information and its legal views on this matter.<sup>2</sup> HHS provided us with information and its legal views.<sup>3</sup>

As explained below, we conclude that HHS lacks authority to ignore the statute's directive to deposit amounts from collections under the transitional reinsurance program in the Treasury and instead make deposits to the Treasury only if its collections reach the amounts for reinsurance payments specified in section 1341. This prioritization of collections for payments to issuers over payments to the Treasury is not authorized. The agency must give effect to the extent possible to all of section 1341, and, therefore, is required to collect and deposit amounts for the Treasury, regardless of whether its collections fall short of the amounts specified in statute for reinsurance payments.

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<sup>1</sup> Pub. L. No. 111-148, tit. I, subtitle D, pt. V, § 1341, 124 Stat. 119, 208-11 (Mar. 23, 2010) (hereafter, "PPACA") (classified at 42 U.S.C. § 18061).

<sup>2</sup> GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <http://www.gao.gov/assets/210/203101.pdf>.

<sup>3</sup> Letter from Acting General Counsel, HHS, to Managing Associate General Counsel for Health Care, GAO (July 27, 2016) (hereafter, "HHS Response").

## BACKGROUND

HHS operates the 3-year reinsurance program provided for in section 1341 of PPACA on behalf of states.<sup>4</sup> To administer the program, HHS collects reinsurance contributions from issuers and makes reinsurance payments to eligible issuers.<sup>5</sup> With respect to contributions, section 1341(b)(3)(A) requires the Secretary to establish a method, based on estimates, for determining a contribution amount that each issuer must make to the reinsurance program. Section 1341(b)(3)(B) requires that the method be designed to collect a proportionate amount from each issuer and specifies three total amounts that the method is to be designed to collect for each of the program's 3 years (benefit years 2014, 2015, and 2016): (1) an amount for reinsurance payments under the program; (2) an amount for deposit into the Treasury; and (3) an unspecified amount for expenses related to administration of the reinsurance program.<sup>6</sup> The law specifies collections of \$10 billion for 2014, \$6 billion for 2015, and \$4 billion for 2016, for reinsurance purposes, and an additional \$2 billion for 2014, \$2 billion for 2015, and \$1 billion for 2016, for the Treasury.

To implement these requirements, HHS developed a "national per capita contribution rate" assessable against each issuer for each year of the program "by dividing the sum of the three amounts . . . by the estimated number of enrollees in plans that must make reinsurance contributions."<sup>7</sup> HHS projected that its method would result in total collections of \$12.02 billion for benefit year 2014, \$8.025 billion for benefit year 2015, and \$5.032 billion for benefit year 2016.<sup>8</sup>

Given uncertainty in its estimates of reinsurance contributions, the agency anticipated that its total collections might fall short of its projected amounts.<sup>9</sup> As a result, HHS originally announced in its annual notices of benefit and payment parameters for benefit years 2014 and 2015—issued on March 11, 2013, and March 11, 2014, respectively—that it planned to allocate collections on a *pro rata* basis to each of the three amounts, reflecting each amount's proportion of the planned total collection amount, if total collections did not reach the statutory amounts (or, in the case of administrative expenses, the amount HHS designed

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<sup>4</sup> See 45 C.F.R. § 153.210(c) (2015).

<sup>5</sup> 45 C.F.R. §§ 153.220(a), 153.235(a) (2015). HHS collects reinsurance contributions from issuers in Connecticut, but makes payments to Connecticut's transitional reinsurance program, which administers the program in the state. 79 Fed. Reg. 13,744, 13,752 (Mar. 11, 2014).

<sup>6</sup> PPACA, §§ 1341(b)(3)(B), (b)(4)(B), 124 Stat. at 210 (classified at 42 U.S.C. §§ 18061(b)(3)(B), (b)(4)(B)).

<sup>7</sup> 78 Fed. Reg. 15,410, 15,459 (Mar. 11, 2013).

<sup>8</sup> *Id.* at 15,460; 79 Fed. Reg. at 13,775; 80 Fed. Reg. 10,750, 10,775 (Feb. 27, 2015). For benefit year 2014, HHS determined a per enrollee contribution amount of \$63 for each issuer. We did not audit HHS's method of determining the per enrollee contribution rate or the soundness of its projection of total collections.

<sup>9</sup> 78 Fed. Reg. at 15,468.

its contribution rate to collect).<sup>10</sup> For example, in the event of a shortfall for benefit year 2014, the agency indicated it would allocate 83.2 percent of collections to reinsurance payments, 16.6 percent to the Treasury, and 0.2 percent to administrative expenses.<sup>11</sup>

On March 21, 2014, however, HHS changed course, citing uncertainty in the estimates used to develop the contribution rate and further considering “the authority granted to [it] to establish standards necessary to implement the program.”<sup>12</sup> It announced that it would allocate all collections first for reinsurance payments until collections totaled the target amount set forth for reinsurance payments in section 1341(b)(3)(B)(iii) for each benefit year. Any remaining collections up to the projected collection totals would be allocated to administrative expenses and the Treasury on a *pro rata* basis.<sup>13</sup>

When total collections for benefit year 2014—\$9.7 billion—fell short of the target amount for reinsurance payments, HHS did not allocate any collections to the Treasury or to administrative expenses.<sup>14</sup> Because the agency collected less than the \$10 billion target for reinsurance payments, it allocated all of its collections for those payments. The agency received \$7.9 billion in reinsurance claims and paid these in full, leaving approximately \$1.7 billion in collections, which it carried over for reinsurance payments in subsequent benefit years.<sup>15</sup> As a result, HHS did not deposit any amounts collected from issuers into the Treasury.<sup>16</sup> For benefit year 2015, the agency expects to collect a total of \$6.5 billion by the end of calendar year 2016, less than its projected collection of \$8.025 billion.<sup>17</sup>

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<sup>10</sup> *Id.* at 15,460; 79 Fed. Reg. at 13,777.

<sup>11</sup> 78 Fed. Reg. at 15,460. In its final notice of benefit and payment parameters for 2015, HHS indicated that, in the event of a shortfall for benefit year 2015, the agency would allocate collections on a *pro rata* basis to reinsurance payments (74.8 percent), the Treasury (24.9 percent), and administrative expenses (0.3 percent). 79 Fed. Reg. at 13,777. Further, the agency specified for both years that, if collections exceeded the projected amounts for reinsurance payments and the Treasury, it would allocate a surplus in collections to reinsurance payments. *Id.*

<sup>12</sup> HHS Response, at 7; see also 79 Fed. Reg. 15,808, 15,820 (proposed Mar. 21, 2014).

<sup>13</sup> 79 Fed. Reg. at 15,820; 79 Fed. Reg. 30,240, 30,258 (May 27, 2014).

<sup>14</sup> HHS Response, at 1; CMS, Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2015 Benefit Year (June 30, 2016), at 9 (hereafter, “CMS 2015 Summary Report”).

<sup>15</sup> HHS Response, at 2-3; CMS 2015 Summary Report, at 9.

<sup>16</sup> HHS Response, at 3.

<sup>17</sup> HHS Response, at 1.

## DISCUSSION

It is well established that statutory analysis “begins with the plain language of the statute.”<sup>18</sup> If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls.<sup>19</sup> When determining whether statutory language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.”<sup>20</sup> Therefore, we analyze HHS’s authority to allocate collections from issuers first to reinsurance payments, resulting in the deposit of no amounts in the Treasury, by looking to the language of section 1341. Specifically, we consider (1) whether section 1341 requires the agency to collect amounts for the Treasury, and (2) whether section 1341 requires the agency to deposit those amounts in the Treasury, including when collections for reinsurance payments fall short of the statutory targets. We also consider the agency’s legal views regarding the prioritization of collections in light of our analysis.

### Requirement to Collect Amounts for Treasury

Section 1341(b)(1)(A) directs the Secretary to adopt regulations requiring health insurance issuers to contribute to the reinsurance program at the contribution amount established using the method developed under section 1341(b)(3)(A). Section 1341(b)(3)(B) provides that this method shall be designed to collect a proportionate amount from each issuer and further that:

(ii) the contribution amount can include an additional amount to fund the administrative expenses of the applicable reinsurance entity;

(iii) the aggregate contribution amounts for all States shall, based on the best estimates of the [National Association of Insurance Commissioners] and without regard to amounts described in clause (ii), equal \$10,000,000,000 for plan years beginning in 2014, \$6,000,000,000 for plan years beginning [in] 2015, and \$4,000,000,000 for plan years beginning in 2016; and

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<sup>18</sup> *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); see also *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text. . .”).

<sup>19</sup> *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); see also *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . .”).

<sup>20</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)); see also *King v. Burwell*, 576 U.S. \_\_\_, 135 S. Ct. 2480, 2489 (2015) (“Our duty . . . is to construe statutes, not isolated provisions.”) (quoting *Graham Cnty. Soil & Water Conservation Dist. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010)) (internal quotation marks omitted).

(iv) in addition to the aggregate contribution amounts under clause (iii), each issuer's contribution amount for any calendar year under clause (iii) reflects its proportionate share of an additional \$2,000,000,000 for 2014, an additional \$2,000,000,000 for 2015, and an additional \$1,000,000,000 for 2016.

Section 1341(b)(4) specifies that amounts collected under section 1341(b)(3)(B)(iv) “shall be deposited into the general fund of the Treasury of the United States and may not be used for the program established under this section.” We, therefore, refer to the amounts in clause (iv) as the “Treasury amounts,” the amounts in clause (iii) as the “reinsurance amounts,” and amounts collected under clause (ii) as the “administrative amounts.”

By their plain terms, the provisions of section 1341 require HHS to collect amounts for the Treasury and do so without qualification. Specifically, the statute requires the Secretary to design a method to collect contribution amounts from each issuer that in total results in the collection of the amounts specified in sections 1341(b)(3)(B)(iii) and (iv)—the reinsurance amounts and the Treasury amounts. In contrast to section 1341(b)(3)(B)(ii), which provides that “the contribution amount *can* include an additional amount” for administrative expenses, the statute uses mandatory terms to describe the requirement to collect aggregate contribution amounts that include the reinsurance amounts and Treasury amounts. With respect to the Treasury amount, sections 1341(b)(3)(B) and 1341(b)(3)(B)(iv), read together, provide, “The method under this paragraph *shall* be designed so that . . . in addition to the aggregate contribution amounts under clause (iii), each issuer’s contribution amount for any calendar year under clause (iii) reflects its proportionate share of an additional [\$2 billion for 2014, \$2 billion for 2015, and \$1 billion for 2016]” (emphasis added). That is, the aggregate contribution amounts specified in clause (iii) for reinsurance are increased by the amounts in clause (iv) for Treasury, to produce a total aggregate contribution amount of \$12 billion for 2014, \$8 billion for 2015, and \$5 billion for 2016.

Correspondingly, as noted above, sections 1341(b)(1)(A) and (b)(3)(A) require the Secretary to adopt regulations requiring health insurance issuers to contribute to the reinsurance program at the contribution amount established using this method. In other words, sections 1341(b)(1)(A) and (b)(3)(A) provide for the implementation of the collection methodology developed under section 1341(b)(3)(B) so as to achieve the intended results. Taken together, sections 1341(b)(3)(A) and 1341(b)(3)(B) require the Secretary to collect a contribution amount from each issuer that is designed to fund, at a minimum, amounts for reinsurance payments under clause (iii) and the Treasury under clause (iv), and that reflects each issuer’s proportionate share of these amounts.

Indeed, HHS’s regulations provide for the establishment and collection of an annual contribution amount designed to fund the reinsurance and Treasury

amounts, as well as an additional amount for administrative expenses.<sup>21</sup> Accordingly, the agency has, for each of benefit years 2014, 2015, and 2016, calculated a national per capita contribution rate “by dividing the sum of the three amounts . . . by the estimated number of enrollees in plans that must make reinsurance contributions.”<sup>22</sup> To date, HHS has collected amounts based on these rates for benefit years 2014 and 2015, and, therefore, the agency has necessarily collected from each issuer amounts for the Treasury under section 1341(b)(3)(B)(iv).

### Requirement to Deposit Amounts in the Treasury

To determine whether HHS may use amounts collected under clause (iv) for Treasury to make reinsurance payments instead, we look to the language of section 1341(b)(4)—titled, “Expenditure of Funds”—which governs the agency’s use of the funds it collects. Section 1341(b)(4) explicitly prohibits the use of amounts collected under section 1341(b)(3)(B)(iv) to carry out the reinsurance program.

Section 1341(b)(4) requires the Secretary to promulgate regulations providing that:

(A) the contribution amounts collected for any calendar year may be allocated and used in any of the three calendar years for which amounts are collected based on the reinsurance needs of a particular period or to reflect experience in a prior period; and

(B) amounts remaining unexpended as of December, 2016, may be used to make payments under any reinsurance program of a State in the individual market in effect in the 2-year period beginning on January 1, 2017.

*Notwithstanding the preceding sentence, any contribution amounts described in paragraph (3)(B)(iv) shall be deposited into the general fund of the Treasury of the United States and may not be used for the program established under this section. (Emphasis added.)*

The first sentence specifically authorizes the agency to use amounts collected to make reinsurance payments to issuers in any of the 3 years in which the program is in effect. It further allows the agency to use collections remaining unexpended at the conclusion of the final year of the program—benefit year 2016—to

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<sup>21</sup> 45 C.F.R. § 153.220 (2015) (providing, in part, that “HHS will set in the annual HHS notice of benefit and payment parameters for the applicable benefit year the national contribution rate and the proportion of contributions collected under the national contribution rate to be allocated to: (1) Reinsurance payments; (2) Payments to the U.S. Treasury as described in paragraph (b)(2) of this section; and (3) Administrative expenses of the applicable reinsurance entity or HHS when performing reinsurance functions under this subpart.”).

<sup>22</sup> 78 Fed. Reg. 15,410, 15,459-60 (Mar. 11, 2013); 79 Fed. Reg. 13,744, 13,775 (Mar. 11, 2014); 80 Fed. Reg. 10,750, 10,775 (Feb. 27, 2015).

continue to make reinsurance payments for 2 additional years—benefit years 2017 and 2018. However, the second sentence of paragraph (4) (which begins, “Notwithstanding the preceding sentence . . .”) explicitly limits the agency’s authority to use amounts collected for the Treasury under section 1341(b)(3)(B)(iv) to make reinsurance payments in any year. Instead, the sentence very clearly directs the agency to deposit amounts collected under section 1341(b)(3)(B)(iv) in the Treasury.

The fact that HHS’s collections ultimately fell short of the projected amounts does not alter the meaning of the statute. Addressing similar circumstances, courts have held that an agency has an obligation to “effectuate the original statutory scheme as much as possible.”<sup>23</sup> Specifically, where actual funding has fallen short of an agency’s original expectations, courts have directed the agency to distribute available funds to approximate “the allocation plan Congress designed in anticipation of *full* funding.”<sup>24</sup> In such cases, courts have held that a *pro rata* distribution of funds would most closely adhere to Congress’s original allocation plan.<sup>25</sup> Section 1341(b)(3)(B) identifies amounts to be collected for reinsurance payments and Treasury—\$10 billion and \$2 billion, respectively, for 2014—and HHS designed a national per capita contribution rate reflective of these amounts. HHS continues to have an obligation to carry out the statutory scheme using a method reflective of the specified amounts even though actual collections were lower than projected. Directing amounts collected to the two statutorily required purposes—reinsurance payments and the Treasury—on a *pro rata* basis would carry out the statutory scheme as closely as possible, in contrast to HHS’s approach, which ignores the statute’s directive to deposit certain collections in the Treasury. We do not see any flexibility under section 1341(b)(4) to allow HHS to expend the *pro rata* share of collections attributable to the Treasury under section 1341(b)(3)(B)(iv)—approximately \$3 billion as of July 2016—to make reinsurance payments. Instead, these collections must be deposited in the Treasury.

### HHS’s Position

HHS does not deny that section 1341 requires it to design and implement a method to collect amounts for the Treasury, and, as discussed above, the

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<sup>23</sup> See, e.g., *City of Los Angeles v. Adams*, 556 F. 2d 40, 50 (D.C. Cir. 1977) (holding that in confronting limited appropriations the Federal Aviation Administration “was required to distribute the money available so as to preserve the allocation formula provided [by the statute]”).

<sup>24</sup> See, e.g., *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F. 3d 1338, 1348-49 (D.C. Cir. 1996) (holding that Congress did not intend, in the case of insufficient funding, “for the numerous detailed provisions of the [Indian Self-Determination Act] to be shunted aside by a Secretary exercising total discretion in the allocation of the funds”).

<sup>25</sup> *Adams*, 556 F.2d at 50 (rejecting an agency’s funding allocation method in favor of a *pro rata* method that would preserve the allocation formula provided by the statute even when the agency had insufficient funds); *Ramah Navajo Sch. Bd.*, 87 F. 3d at 1348-49 (noting that a *pro rata* reduction in payments would “easily effectuate the original statutory scheme”).

agency has done so.<sup>26</sup> HHS asserts, however, that the statute does not prescribe how contributions are to be allocated if the total amount collected is insufficient to meet the statutory targets.<sup>27</sup> Therefore, the agency argues, “[i]n the absence of express statutory direction concerning how to address a shortfall in collections, the Secretary has authority . . . [to] determine the manner in which payments should be made in the event of a shortfall.”<sup>28</sup> Employing this asserted discretion, HHS further argues that section 1341 permits it to prioritize payments to issuers over payments to the Treasury where collections do not reach statutory targets.<sup>29</sup> The basis for HHS’s view appears to be that the agency does not actually collect amounts for the Treasury—and is not required to—until its collections reach the amount specified in section 1341(b)(3)(B)(iii) for reinsurance payments.

HHS’s assertion that the statute is silent with respect to allocation of collections overlooks the fact that section 1341 expressly directs HHS to collect amounts for the Treasury and prohibits the use of these amounts for any purpose other than deposit in the Treasury. HHS’s analysis focuses on words and phrases in the statute in isolation rather than in their appropriate context.

Specifically, HHS argues that because “section 1341(b)(3)(B)(iv) describes [the Treasury amounts] as being ‘in addition’ to the aggregate contribution amounts under clause (iii),” collections for the reinsurance amount in section 1341(b)(3)(B)(iii) are necessarily prioritized.<sup>30</sup> Relatedly, HHS argues that use of the phrase “any contribution amounts” in section 1341(b)(4) to describe the amounts to be deposited in the Treasury “suggests that there may be circumstances in which the additional amounts are not collected; otherwise, the statute would have referred to ‘the’ contribution amounts collected.”<sup>31</sup>

We do not find these arguments persuasive given the language and structure of section 1341 as a whole. Section 1341(b)(3)(B) directs the Secretary to design a single contribution amount to be assessed against each issuer, a portion of which would yield funds for the Treasury “in addition” to the amount for reinsurance payments. The statute’s distinction between the two purposes and corresponding targets does not change or qualify the direction to collect a single

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<sup>26</sup> See 45 C.F.R. § 153.220 (2015) (providing for the establishment and collection of an annual contribution amount designed to fund the reinsurance amount, the Treasury amount, and the administrative amount); see *also* 78 Fed. Reg. at 15,459-60; 79 Fed. Reg. at 13,775; 80 Fed. Reg. at 10,775.

<sup>27</sup> HHS Response, at 4.

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> HHS Response, at 5; 79 Fed. Reg. at 30,258.

<sup>30</sup> HHS Response, at 5; see *also* 79 Fed. Reg. 30,240, 30,258 (May 27, 2014).

<sup>31</sup> HHS Response, at 5.

contribution amount comprised of the two sums: one associated with reinsurance payments and the other associated with deposits for the Treasury. In fact, section 1341(b)(3)(B) expressly links the collection of the reinsurance and Treasury amounts by cross-referencing the requirement to collect for reinsurance payments (clause iii) in the provision regarding Treasury payments (clause iv). Nothing in the structure or text of section 1341(b)(3)(B) suggests that the phrase “in addition to the aggregate contribution amount under clause (iii)” is capable of being read to mean “after collecting the aggregate contribution amounts under clause (iii).”<sup>32</sup>

The agency’s contention regarding the word “any” is equally unconvincing. As a whole, section 1341(b)(4) speaks only to how HHS may spend the funds collected under section 1341(b)(3)(B); it does not alter the requirement for a contribution rate that includes amounts for the Treasury as set forth in section 1341(b)(3)(B)(iv). In the context of a statutory provision that requires the Secretary to develop a contribution amount based on estimates and that, in practice, might result in collections lower or higher than the statutory targets, we do not see any basis to read the term “any” to mean anything other than “however much the agency collects.”

HHS also asserts that the word “reflects” in section 1341(b)(3)(B)(iv) is “more permissive” than the language regarding the collection of amounts for reinsurance payments and, thus, “gives the Secretary discretion to prioritize collections for the reinsurance program.”<sup>33</sup> HHS does not explain why it understands the term “reflect” to be “more permissive.” We are unable to identify a basis for interpreting the term in this manner, particularly in the context of a statutory provision framed in explicitly mandatory language. Specifically, sections 1341(b)(3)(B) and 1341(b)(3)(B)(iv) provide that, “The method under this paragraph *shall* be designed so that . . . in addition to the aggregate contribution amounts under clause (iii), each issuer’s contribution amount for any calendar year under clause (iii) reflects its proportionate share of an additional [amount for the Treasury].” (Emphasis added). Indeed, unlike the language in section 1341(b)(3)(B)(ii) pertaining to administrative expenses, which uses the clearly permissive term “can,” we find no permissive language in section 1341(b)(3)(B)(iv).

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<sup>32</sup> HHS also asserts that, if Congress had not intended HHS to collect amounts for reinsurance payments first, it could have “required the collection of \$12 billion for the 2014 benefit year and then specified how to allocate the funds collected.” HHS Response, at 5. Instead, according to the agency, Congress’s separation of the two amounts in clauses (iii) and (iv) “suggests there is an initial amount and then additional funds are collected in excess of that initial amount.” *Id.* Indeed, Congress could have drafted section 1341(b)(3) differently; however, the mere fact that Congress chose to identify the reinsurance and Treasury amounts in two different clauses, one of which necessarily precedes the other, does not suggest that Congress considered collection of the later item (Treasury amounts) to be any less mandatory than collection of the earlier item (reinsurance amounts).

<sup>33</sup> HHS Response, at 5; 79 Fed. Reg. 30,240, 30,258 (May 27, 2014).

Moreover, the agency's view, which appears to be that it does not—and is not required to—collect amounts for the Treasury under section 1341 until contributions for reinsurance payments reach the statutory target, is undermined by its own rules and regulations. As discussed earlier, HHS regulations provide for the establishment and collection of an annual contribution amount designed to fund all three components of the program.<sup>34</sup> Accordingly, the agency has collected amounts based on this regulation.<sup>35</sup> In response to our inquiry, HHS seems to suggest that it has not done so.

In this respect, HHS's position regarding prioritization of collections for reinsurance payments appears to be driven solely by the factual circumstances present here, namely, lower than expected collections. However, a funding shortfall does not give an agency "a hinge for enlarging its discretion to decide which [priorities] to fund."<sup>36</sup> To the contrary, as discussed above, the agency's obligation under such circumstances is to give maximum effect to the original statutory scheme and allocate funds as closely as possible to the "plan Congress designed in anticipation of *full* funding."<sup>37</sup> HHS currently intends to allocate all collections to reinsurance payments until collections reach the statutory targets for these payments. Our conclusion that reinsurance payments and Treasury deposits are both required under section 1341 supports instead a *pro rata* distribution of all collections between the two.

Lastly, HHS's position selectively ignores one of the statute's purposes—which is collecting funds for the Treasury—giving effect to only one of the statute's purposes—stabilization of health insurance premiums. Specifically, in support of its decision to prioritize collections for reinsurance payments, the agency noted that prioritizing the allocation of reinsurance contributions to the reinsurance payment pool "furthers the statutory goals of the program by bringing more certainty to the individual market and helping moderate future premium increases."<sup>38</sup> The agency also noted that, given uncertainty in its own estimates and whether they would produce collections meeting the targets in section 1341(b), its prioritization of collections for reinsurance payments would "help assure that the reinsurance payment pool is sufficient to provide the premium stabilization benefits intended by the statute."<sup>39</sup>

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<sup>34</sup> 45 C.F.R. § 153.220 (2015).

<sup>35</sup> 78 Fed. Reg. 15,410, 15,459-60 (Mar. 11, 2013); 79 Fed. Reg. 13,744, 13,775 (Mar. 11, 2014); 80 Fed. Reg. 10,750 10,775 (Feb. 27, 2015).

<sup>36</sup> *City of Los Angeles v. Adams*, 556 F.2d 40, 43 (D.C. Cir. 1977).

<sup>37</sup> *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F. 3d 1338, 1348 (D.C. Cir. 1996); see also *Adams*, 556 F.2d at 50.

<sup>38</sup> HHS Response, at 5; see also 79 Fed. Reg. at 30,258.

<sup>39</sup> 79 Fed. Reg. at 30,257; see also HHS Response, at 7.

We agree that a purpose of section 1341 is to provide premium stabilization in the initial years of PPACA's health insurance reforms. However, this is not the sole purpose of section 1341. Congress clearly intended that the program established under section 1341 would generate collections for the Treasury.<sup>40</sup> Moreover, the agency could have addressed any shortfall in collections that resulted from uncertainty in its estimates by revising its national contribution rate method in the program's second and third years to collect more funds. Instead, the agency impermissibly chose to interpret the statute in a manner that ignored the statutory requirement to collect funds for the Treasury.<sup>41</sup>

## CONCLUSION

HHS's administration of the transitional reinsurance program is based on an interpretation of section 1341 that is inconsistent with the plain language of the statute. Indeed, the agency's own interpretation of section 1341 is internally inconsistent. On the one hand, the agency asserts that it must collect amounts for the Treasury under section 1341(b)(3)(B)(iv), while, on the other, the agency appears to maintain that it does not collect—and is not required to collect—any amounts under clause (iv) if its total collections do not meet the targets under clause (iii).

In light of the foregoing analysis, we conclude that HHS lacks authority to ignore the statute's directive to deposit amounts from collections under the transitional reinsurance program to the Treasury and instead make deposits in the Treasury

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<sup>40</sup> HHS acknowledged this second purpose, commenting in a 2011 proposed rulemaking that the Congressional Budget Office considered the Treasury amounts "to score as an offset for the costs of administering the Early Retiree Reinsurance Program," that is separately authorized under PPACA. 76 Fed. Reg. 41,930, 41,935 (proposed July 15, 2011). We also find evidence of Congress's goal in directing collections under the transitional reinsurance program to the Treasury in the legislation reported out of the Senate Finance Committee on October 19, 2009, provisions of which were enacted as part of PPACA. In particular, that legislation expressly provided that each issuer's contribution amount was to "reflect[] its proportionate share of the \$5,000,000,000 amount used to fund the retiree reinsurance program . . . ." America's Healthy Future Act of 2009, S. 1796, 111th Cong. § 2213 (as reported by S. Fin. Comm., Oct. 19, 2009). This legislative history suggests that the collections for the Treasury under section 1341 of PPACA were intended as an offset for the Early Retiree Reinsurance Program, for which Congress ultimately appropriated \$5 billion out of the general fund of the Treasury. See PPACA, § 1102(e), 124 Stat. at 145.

<sup>41</sup> Cf. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."). In support of its authority to prioritize collections for reinsurance payments, HHS notes that it "followed the standard rulemaking process, providing advance notice and an opportunity for public comment," and that all public comments on the proposal were supportive of this approach. HHS Response, at 7 (citing 79 Fed. Reg. at 15,811, 15,820-21). This fact does not alter our conclusion that the agency's interpretation of the statute exceeds its authority. It is well settled that a rule that was promulgated under notice and comment rulemaking may nevertheless exceed an agency's authority. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (invalidating FDA's regulation of tobacco products on the grounds that Congress did not give FDA the authority to do so).

only if its collections reach the amounts for reinsurance payments specified in section 1341. The agency is not authorized to prioritize collections in this manner. The agency must give effect to the extent possible to all of section 1341, and, to do so, is required to collect and deposit amounts for the Treasury, regardless of whether its collections fall short of the amounts specified in statute for reinsurance payments. HHS may not use amounts collected for the Treasury to make reinsurance payments.

If you have any questions, please contact Helen T. Desaulniers, Managing Associate General Counsel, at (202) 512-4740. Assistant General Counsel Christine F. Davis, Sandra C. George, and Jennifer L. Rudisill made key contributions to this opinion.

A handwritten signature in cursive script, appearing to read "S. Poling".

Susan A. Poling  
General Counsel

*List of Congressional Requesters*

The Honorable Mike Enzi  
Chairman  
Committee on the Budget  
United States Senate

The Honorable Orrin G. Hatch  
Chairman  
Committee on Finance  
United States Senate

The Honorable Lamar Alexander  
Chairman  
Committee on Health, Education, Labor and Pensions  
United States Senate

The Honorable Tom Price  
Chairman  
Committee on the Budget  
House of Representatives

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
House of Representatives

The Honorable Kevin Brady  
Chairman  
Committee on Ways and Means  
House of Representatives

The Honorable John Barrasso  
United States Senate