

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

March 23, 2016

The Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Mr. Andy Slavitt
Acting Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Secretary Burwell and Acting Administrator Slavitt:

Pursuant to Rule X of the House of Representatives, the Committee on Energy and Commerce is examining the Transitional Reinsurance Program established under Section 1341 of the Patient Protection and Affordable Care Act (PPACA). In administering this program, the Administration unlawfully diverted payments—which were supposed to go to the U.S. Treasury—to insurance companies instead. This decision contradicts past rules issued by the Administration¹ and the clear intent of Congress.

The Transitional Reinsurance Program is one of three risk mitigation programs established under PPACA. Through this program, HHS collects contributions from health insurers on behalf of all group health plans, and then uses those contributions to make reinsurance payments to insurers who enroll high-risk individuals. The law also requires that a portion of the contributions to the reinsurance fund be returned to the U.S. Treasury and portions intended for the U.S. Treasury “may not be used for the [reinsurance] program.”²

¹ Department of Health and Human Services, HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13777 (Mar. 11, 2014).

² 42 U.S.C. § 18061(b)(4).

In accordance with the provisions in PPACA, CMS published a final rule in March 2014, allotting a portion of the contributions to the U.S. Treasury. However, CMS changed course just two months later. In a final rule issued May 2014, CMS announced it would prioritize payments to health insurers, and would only allocate money to the U.S. Treasury once health insurers were paid in full. On February 12, 2016, the Administration announced that it would divert payments intended for the U.S. Treasury in order to fund payments to health insurers instead, for the 2015 benefit year.³

Prioritizing payments to health insurers over the U.S. Treasury constitutes a clear violation of federal law. A memorandum authored by the non-partisan Congressional Research Service (CRS) also challenges the legality of the Administration's decision, concluding that CMS actions "appear to be in conflict with a plain reading of §1341(b)(4)."⁴ According to CRS, the "statute unambiguously states" that each health insurer's contribution to the reinsurance program must contain an amount that reflects the Treasury's proportionate share, and that those shares must be deposited to the U.S. Treasury.⁵ CRS notes that "a contrary agency interpretation would not be entitled to deference under *Chevron*."⁶

To assist the Committee in addressing these concerns, please provide all documents and communications referring or relating to the Administration's decision to prioritize payments made to insurance companies under the Transitional Reinsurance Program, by April 6.

An attachment to this letter provides additional information on how to respond to the Committee's request. If you have any questions regarding this request, please contact Emily Felder or Jessica Donlon with the Committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman



Tim Murphy
Chairman
Subcommittee on Oversight
and Investigations



Joseph R. Pitts
Chairman
Subcommittee on Health

³ Centers for Medicare and Medicaid Services, The Transitional Reinsurance Program's Contribution Collections for the 2015 Benefit Year (Feb. 12, 2016).

⁴ Memorandum to the Committee on Energy and Commerce regarding information on the ACA Transitional Reinsurance Program, (Feb. 23, 2016) (on file with Committee).

⁵ *Id.*

⁶ *Id.*

cc: The Honorable Frank Pallone, Ranking Member

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Gene Green, Ranking Member
Subcommittee on Health