

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

September 20, 2016

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

Dear Secretary Burwell:

The Energy and Commerce Committee is continuing its oversight of the implementation of the Patient Protection and Affordable Care Act (PPACA). At a joint hearing on Wednesday, September 14, before Subcommittee on Health and the Subcommittee on Oversight and Investigations, Acting Administrator of the Centers for Medicare and Medicaid Services (CMS) Andrew Slavitt, testified under oath about the Risk Corridors program, one of the three risk mitigation programs established through the PPACA.¹ Mr. Slavitt testified that CMS would produce three categories of information to the Committee by Friday, September 16, 2016, but CMS has not yet provided all of the requested details.

PPACA established the Risk Corridors program as a temporary three-year program that provides transfer payments to protect insurers suffering significant financial losses. Before the adoption of these provisions, CMS already publicly indicated its intention to make the program budget neutral – meaning, the total amount of payments to insurers would not exceed the amount paid into the program.² In addition to the assurances of CMS, on two occasions Congress passed – and the President signed – appropriations provisions restricting the funds available for

¹ Energy and Commerce Committee. The Affordable Care Act on Shaky Ground: Outlook and Oversight. September 14, 2016. Retrieved on September 14, 2016, from: <https://energycommerce.house.gov/hearings-and-votes/hearings/affordable-care-act-shaky-ground-outlook-and-oversight>.

² Dep't of Health and Human Serv., Centers for Medicare & Medicaid Serv., Center for Consumer Information & Insurance Oversight, *Risk Corridors and Budget Neutrality*, (April 11, 2014), available at: <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf>; see also Louise Radnofsky and Jennifer Corbett Dooren, *Explaining 'Risk Corridors,' The Next Obamacare Issue*, WALL STREET J., January 22, 2014, available at: <http://blogs.wsj.com/washwire/2014/01/22/explaining-risk-corridors-the-next-obamacare-issue/>.

payments to insurers participating in the program, so that no federal funds would be made available to make additional payments.³

While CMS told Congress and the taxpayers that it intended to implement this program in a budget neutral fashion, CMS meanwhile assured inquiring insurers that they would receive 100 percent of the funds claimed under PPACA.⁴ For the 2014 benefit year, however, CMS collected fees that amounted to approximately 12.6 percent of the requested amounts from insurers. As a result, CMS paid out \$362 million, roughly \$2.5 billion less than insurers expected to receive.⁵

Due to this shortfall, several insurance companies have filed lawsuits against the federal government, requesting that CMS pay insurers the full amount requested. On Friday, September 9, 2016, CMS published a memorandum regarding the insurers' lawsuits. At the end, this memorandum states:

We know that a number of issuers have sued in federal court seeking to obtain the risk corridors amounts that have not been paid to date. As in any lawsuit, the Department of Justice is vigorously defending those claims on behalf of the United States. However, as in all cases where there is litigation risk, we are open to discussing resolution of those claims. **We are willing to begin such discussions at any time.**⁶

Again, the memorandum expresses CMS' willingness to settle the lawsuits with the insurance companies although the U.S. Department of Justice (DOJ) – CMS's attorneys in the cases – has argued that the suits are not ripe for consideration.

During the joint hearing, U.S. Rep. Morgan Griffith asked Mr. Slavitt if CMS takes the position that insurance plans are entitled to be made whole on risk corridors payments, even if there is no congressional appropriation to do so. Mr. Slavitt responded under oath: "Yes, it is an obligation of the federal government."⁷ Mr. Slavitt also testified that the DOJ had reviewed the September 9, 2016, CMS memorandum that invited insurance companies to settle with CMS. Since Congress acted twice to protect taxpayer dollars by prohibiting the use of federal funds to make up for any shortfall in risk corridors payments, the Committee is concerned about the Administration's intent to use *any* federal funds to settle the suits brought by the insurance companies. It appears that any such settlements would come from the permanent appropriations for judgements ("Judgment Fund").

³ P.L. 113-235 at § 227; P.L. 114-113 at § 225.

⁴ Letter from Jason Montrie, Land of Lincoln Mutual Health Insurance Company, to Hon. Fred Upton, Chairman, Oversight and Investigations Subcommittee for the House Commit. Energy and Commerce, (May 31, 2016) (on file with the Committee).

⁵ Dep't of Health and Human Serv., Centers for Medicare & Medicaid Serv., The Three Rs: An Overview, Oct. 1, 2015, *available at* <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html>.

⁶ Centers for Medicare and Medicaid Services (CMS), Risk Corridors Payments for 2015. September 9, 2016. Retrieved on September 14, 2016, from: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF> (emphasis added).

⁷ Energy and Commerce Committee. The Affordable Care Act on Shaky Ground: Outlook and Oversight. September 14, 2016. Retrieved on September 14, 2016, from: <https://energycommerce.house.gov/hearings-and-votes/hearings/affordable-care-act-shaky-ground-outlook-and-oversight>.

Additionally, during his testimony, Mr. Slavitt agreed to provide three categories of information to the Committee by September 16, 2016. First, Mr. Slavitt agreed to produce the names of the individuals at CMS and HHS who have spoken to the Department of Justice about the lawsuits brought by insurance companies regarding the risk corridors payments. Second, Mr. Slavitt agreed to provide a list of the insurance companies who have sued, or indicate they will sue CMS or the United States regarding risk corridors payments. Third, Mr. Slavitt testified that he would provide the Committee with a list of insurance companies that CMS was aware have inquired about settlements to risk corridors lawsuits, including those that CMS had referred to the DOJ. Finally, Chairman Pitts asked Mr. Slavitt how CMS intended to pay for CMS's stated obligation to make insurers whole under the risk corridor program when there are no appropriated funds lawfully available to do so. In a remarkable statement by Mr. Slavitt, he stated that he was unsure how CMS would make payment, but would check with the Office of Management and Budget and respond to Chairman Pitts.

On Friday, September 16, 2016, CMS produced a list of insurance companies who have sued the United States regarding risk corridors payments, but failed to provide a list of companies who have indicated they intend to sue CMS or the United States regarding risk corridor payments. Additionally, CMS has not provided information or documents for the other two categories, nor has Mr. Slavitt responded to Chairman Pitts's question. The Committee is concerned that your Department has failed to provide the information that Mr. Slavitt testified, under oath, that he would provide to the Committee. Further, the Administration's explicit offer to settle these lawsuits appears to be a direct circumvention of the clear Congressional intent to prohibit the expenditure of federal dollars on this program.

The Committee requests that the CMS produce the following documents and information by October 4, 2016:

1. Mr. Slavitt's explanation of how CMS intends to pay for CMS's stated obligation to make insurers whole under the risk corridor program when there are no appropriated funds lawfully available to do so. If Mr. Slavitt does not know, who does and what is his or her explanation?
2. The identities of all insurance companies who have indicated that they may sue CMS or the United States regarding risk corridor payments, but have not yet filed suit.
3. The names and titles of the individuals at the CMS who have had conversations with the Department of Justice about the lawsuits brought by insurance companies regarding the risk corridors payments;
4. The identities of all insurance companies that CMS is aware have inquired about settling risk corridor claims, including but not limited to identification of each inquiry referred to the Department of Justice regarding settlements to risk corridors suits; and
5. All documents and communications referring or relating to the lawsuits or discussions of other legal action related to the risk corridor program, including but not limited to the

source of funds for any such settlements and communications between employees of the Department of Health and Human Services and the Department of Justice.

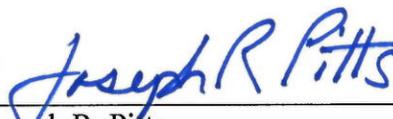
6. Does CMS take the position that it is legal to use the Judgment Fund to pay settlements in lawsuits concerning the risk corridors program? If so, why? If not, why?
7. Does the Department of Justice take the position that it is legal to use the Judgment Fund to pay settlements in lawsuits concerning the risk corridors program? If so, why? If not, why?
8. Has CMS ever preemptively announced that they are willing to settle litigation claims against the United States, as it did in the September 9, 2016, memorandum? If so, when?
9. Is CMS aware of whether any executive branch department or agency completed a legal memorandum of the use of the Judgment Fund for settlements in lawsuits concerning the risk corridors program? If so, please provide the committee with a copy of this memorandum.

An attachment to this letter provides additional information about how to respond to the committee's request. If you have any questions regarding this request, please contact Adam Buckalew or Emily Felder of the majority committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman



Joseph R. Pitts
Chairman
Subcommittee on Health



Tim Murphy
Chairman
Subcommittee on Oversight
and Investigations



Leonard Lance
Member



H. Morgan Griffith
Member