

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

October 24, 2016

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Lynch:

Pursuant to Rule X of the House of Representatives, the Committee on Energy and Commerce is continuing its oversight of the Risk Corridors program established under Section 1342 of the Patient Protection and Affordable Care Act (PPACA).

The Centers for Medicare and Medicaid Services (CMS) administers the Risk Corridors program, a temporary program intended to insulate insurers from significant financial losses. The program transfers payments from plans with lower than expected costs to plans experiencing higher than expected costs. During the administration of the Risk Corridors program, CMS publicly announced “that it intends to implement the risk corridors program in a budget neutral manner,” meaning that only the funds collected through the program would be used to make payments to insurers.¹ To ensure that CMS did not reverse course, Congress acted twice to restrict the use of federal funds to make additional payments to insurers through the program.²

During the 2014 benefit year, the Risk Corridors program collected only \$362 million while insurers claimed \$2.87 billion.³ As a result of this shortfall, insurers received 12.6 percent

¹ U.S. Dep’t of Health & Human Serv., Centers for Medicare & Medicaid Serv., Center for Consumer Info. & Ins. 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/>.

² P.L. 113-235 at § 227; P.L. 114-113 at § 225.

³ U.S. Dep’t of Health & 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>.

of the claimed amounts. A number of insurers have filed lawsuits against the Federal Government, requesting full payments for the amounts requested. The Department of Justice (DOJ) is representing CMS regarding these suits.

On September 9, 2016, CMS issued a memorandum regarding Risk Corridors payments for 2015. In the same memorandum, CMS discussed the pending lawsuits, stating that it is “open to discussing resolution of those claims” and “willing to begin such discussions at any time.”⁴ CMS also went out of its way to assert that “the Affordable Care Act requires the Secretary to make full payments to issuers” and that “HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.”⁵ At a joint hearing on Wednesday, September 14, before Subcommittee on Health and the Subcommittee on Oversight and Investigations, Acting Administrator of CMS Andrew Slavitt testified that the DOJ had “reviewed the language” in the CMS memorandum prior to its release.⁶ During the joint hearing, Mr. Slavitt also testified that insurance plans are entitled to be made whole on Risk Corridors payments, even if there is no congressional appropriation to do so, stating “[i]t is an obligation of the federal government.”⁷

Contrary to Mr. Slavitt’s stance that insurers are entitled to full payments, however, the DOJ has concluded that the Federal Government has no obligation to make Risk Corridors payments beyond the amounts collected by the Risk Corridors program, as explained in two briefs filed just last week.⁸ In its motion to dismiss the lawsuit filed by Blue Cross Blue Shield of North Carolina, DOJ argues that the insurer has received all the payments required under the law:

Section 1342 does not require HHS to make risk corridors payments beyond those funded from collections. And even if that intent were unclear when the Affordable Care Act was enacted in 2010, Congress removed any ambiguity when it enacted annual appropriations laws for fiscal years 2015 and 2016 that prohibited HHS from paying risk corridors amounts from appropriated funds other than collections. Thus, Blue Cross has, to date, received all the payments it is owed.⁹

⁴ U.S. Dep’t of Health & Human Serv., Centers for Medicare & Medicaid Services, *Risk Corridors Payments for 2015* (Sept. 9, 2016) available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF>.

⁵ *Id.*

⁶ *The Affordable Care Act on Shaky Ground: Outlook and Oversight: Hearing before the Subcomm. on Health & Subcomm. on Oversight & Investigations, H. Comm. on Energy & Commerce* (Sept. 14, 2016) available at: <https://energycommerce.house.gov/hearings-and-votes/hearings/affordable-care-act-shaky-ground-outlook-and-oversight>.

⁷ *Id.*

⁸ Motion to Dismiss, *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl. Sept. 30, 2016); Motion to Dismiss, *Moda Health Plan, Inc. v. United States*, No. 16-649C (Fed. Cl. Sept. 30, 2016).

⁹ Motion to Dismiss at 13, *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl. Sept. 30, 2016).

In total, the DOJ has filed at least four motions to dismiss in response to risk corridors lawsuits, that make similar arguments.¹⁰

It is the Committee's understanding, however, that despite DOJ's admission that CMS has no legal obligation and no funds available to make any Risk Corridors payments beyond those funded by collections, DOJ has recently engaged in settlement negotiations with insurers. The Washington Post recently reported that DOJ officials privately told multiple insurers that they are "eager to negotiate a broad settlement," that could include 175 health plans.¹¹ DOJ appears to be actively negotiating the settlement, seeking to reach an agreement with insurers within weeks.¹²

According to the U.S. Attorneys' Manual instructions for United States Attorneys, settling claims brought against the United States is appropriate when "it is less costly to compromise a claim against the United States than to undertake further legal action in defense against the claim."¹³ A settlement is also appropriate when "a compromise of a claim against the United States is substantially more favorable than the verdict or judgment that would probably result from further litigation."¹⁴ These guiding principles for settling claims against the United States are legitimate, appropriate, and necessary, because a failure to abide by such principles would mean that DOJ officials were distributing taxpayer funds to claimants with unmeritorious and unworthy claims, in breach of their responsibility as officers and employees of the United States and their fiduciary duties as government attorneys. Since the DOJ makes compelling arguments in its briefs that the Federal Government has *no* obligation and no funds available to make Risk Corridors payments, it is difficult to understand how the type of the assessment contemplated by the U.S. Attorneys' Manual would lead to a decision to hand out taxpayer money to settle these unmeritorious claims, particularly before the Court of Federal Claims has even had an opportunity to rule on DOJ's motions to dismiss.

Despite our understanding of the parameters that typically govern settlement decisions, and our assessment of the strength of the Government's position in this litigation, as forcefully presented by the DOJ itself, the Committee is concerned that the administration may use the settlement process to do exactly what Congress has twice prohibited—use taxpayer dollars to bail out insurance companies from losses sustained under the PPACA. Using the Judgment Fund, a permanent appropriation for certain types of judgments, to make Risk Corridors payments to insurers through settlement would circumvent Congressional intent to prohibit the expenditure of federal funds on this program.

¹⁰ See e.g., Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I, Land of Lincoln Mutual Health Insurance Company, No. 16-744C (Fed. Cl. Sept. 23, 2016); Motion to Dismiss, Blue Cross and Blue Shield of North Carolina v. United States, No. 16-651C (Fed. Cl. Sept. 30, 2016); Motion to Dismiss, Moda Health Plan, Inc. v. United States, No. 16-649C (Fed. Cl. Sept. 30, 2016).

¹¹ Amy Goldstein, *Obama Administration may use obscure fund to pay billions to ACA insurers*, WASH. POST, Sept. 29, 2016, https://www.washingtonpost.com/national/health-science/obama-administration-may-use-obscure-fund-to-pay-billions-to-aca-insurers/2016/09/29/64a22ea4-81bc-11e6-b002-307601806392_story.html.

¹² *Id.*

¹³ U.S. Attorneys' Manual, *Bases for the Compromising or Closing of Claims Involving the United States*, 4-3.200, available at <https://www.justice.gov/usam/usam-4-3000-compromising-and-closing#4-3.120>.

¹⁴ *Id.*

Accordingly, the Committee requests that the DOJ produce the following documents and information by November 7, 2016:

1. If the administration is engaging with plaintiffs to settle these lawsuits, please explain how this decision is justified in light of the compelling arguments expressed by DOJ in its motions to dismiss, and whether this decision is consistent with the standards set forth in the U.S. Attorneys' Manual regarding criteria for settlements negotiated by U.S. Attorneys.
2. 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.

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 Emily Felder or Adam Buckalew of the majority committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman



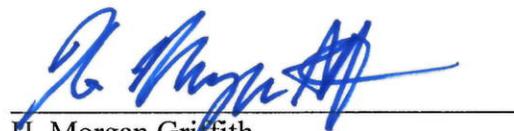
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