IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	)	Case No. 14-cv-01967-RMC

EXHIBIT H

Congressional Research Service

MEMORANDUM

July 29, 2013

To: Honorable Tom Coburn

Subject: **Potential Effects of a Government Shutdown on Implementation of the Patient Protection and Affordable Care Act (ACA)**

This memorandum responds to your request of July 25, 2013, regarding the potential effects of a funding lapse and related government shutdown on implementation of the Patient Protection and Affordable Care Act, commonly referred to as ACA.[1] Specifically, you asked CRS to address several questions that you posed. As discussed, this memorandum includes information that CRS was able to provide in the time available.

The memorandum begins with an overview of how failure to enact annual appropriations causes a government "shutdown." This process involves a cessation of affected federal government operations, albeit with several exceptions. After providing this overview of the shutdown process, the memorandum then presents the questions you posed. The questions are listed as bolded headings and are followed by answers from CRS.

Some caveats are necessary when addressing this subject. In the context of a prospective or actual lapse in appropriations and government shutdown, several presidential administrations have interpreted the nature and scope of restrictions on government activities during a shutdown and any related exceptions. These interpretations came by way of legal opinions and guidance documents issued by the Department of Justice's Office of Legal Counsel and the Office of Management and Budget (OMB). In these documents, the administrations identified specific exceptions that govern federal agency decisions regarding which operations may continue during a government shutdown under certain circumstances. These exceptions arguably have been read broadly, resulting in a situation where executive agencies may exercise some discretion. It is important to note that past views and practice in the executive branch do not necessarily constrain or guide what may happen in the event of a future funding lapse and shutdown. Consequently,

[1] ACA was signed into law on March 23, 2010 (P.L. 111-148; 124 Stat. 119). A week later, on March 30, 2010, the President signed the Health Care and Education Reconciliation Act (HCERA; P.L. 111-152, 124 Stat. 1029), which amended multiple health care and revenue provisions in ACA. Several other bills that were subsequently enacted made more targeted changes to specific ACA provisions. All references to ACA refer to the law as amended. While a detailed examination of ACA is beyond the scope of this memorandum, numerous CRS products that provide more in-depth information on the many new programs and activities authorized and funded by the law are available at http://www.crs.loc.gov (see under Issues Before Congress: Health).

funding is subsequently provided for the IRS, and any outstanding tax liabilities accrued during that time period may be subject to enforcement and collection at that time.

(5) Would the ACA changes to Medicare, such as the reduction in payments to health care providers and Medicare Advantage plans, continue during a shutdown?

A short-term government shutdown would likely have little impact on Medicare claims payments based on what happened during the shutdowns in 1995-1996, nor would it affect underlying program requirements. Medicare continued to pay physicians and hospitals during those shutdowns according to the prevailing payment rates because claims are paid out of the Medicare trust funds. These outlays represent mandatory spending, which is not controlled by the appropriations committees. However, CMS's contractual payments to the vendors that process the claims on its behalf come from the agency's operating budget, which is funded through annual discretionary appropriations. During the 1995-1996 shutdowns, the claims vendors continued to process and pay claims with the expectation that they would be paid for their services later. Prospectively, if a shutdown were to last for many weeks or months, Medicare claims payments might cease as vendors ran out of cash to cover their operating costs.[43]

(6) Would premium credits and cost-sharing subsidies continue during a shutdown?

Section 36B of the IRC provides a refundable tax credit to subsidize the health insurance premiums for certain low-income taxpayers who enroll in a health plan offered through a health insurance exchange established by a state.[44] Like many other tax credits, the monies used to fund such provisions are permanently appropriated outside of the annual appropriations process.[45] Therefore, the funds for such credits would continue to be available via this permanent appropriation during a government shutdown caused by a lapse in annual appropriations. CRS is not aware of any official position from the IRS with respect to this provision, but it may be likely that at least some of the eligibility and processing functions associated with payment of this credit might continue during a government shutdown, even if the salaries of the federal employees who would be making those determinations are paid from annual appropriations that have lapsed. This is because the IRS could rely upon that portion of the Civiletti opinion which indicates that continued availability of money for benefit payments would necessarily imply that continued administration of the program is authorized by law despite the lapse in discretionary funding.[46]

In addition to the premium tax credits discussed in the preceding paragraph, certain individuals and families receiving the credits are also eligible for coverage with lower cost-sharing (i.e., out-of-pocket costs such as deductibles and copays) than otherwise required under the applicable health plan. Under § 1402 of ACA, health plans must reduce the cost-sharing for these enrollees. The affected plans are then to be reimbursed by the Treasury in the same amount. However, unlike the refundable tax credits, these payments to the health plans do not appear to be funded through a permanent appropriation. Instead, it

[43] John Gorman, "What Happens to Medicare/Medicaid if There's a Government Shutdown?" Gorman Health Group blog, January 15, 2103, at http://blog.gormanhealthgroup.com/2013/01/15/what-happens-to-medicaremedicaid-if-theres-a-government-shutdown/.

[44] I.R.C. § 36B. Treasury regulations implementing this provision have stated that such credits will also be available in those exchanges established by HHS on behalf of a state. Treas. Reg. § 1.36b-1(k). Some have questioned whether the statute permits these credits with respect to coverage in federally facilitated exchanges. A full discussion of that issue is beyond the scope of this memorandum.

[45] 31 U.S.C. § 1324.

[46] See above in the section titled"Antideficiency Act: Restrictions and Exceptions." This argument would be similarly applicable to the advance payments of the refundable tax credit, contemplated under §1412 of the ACA. 42 U.S.C. § 18082.

appears from the President's FY2014 budget that funds for these payments are intended to be made available through annual appropriations.[47] Consequently, in the event of a government shutdown, it does not appear that such cost-sharing payments to health plans would be excepted from the Antideficiency Act, although the provisions of § 1402 requiring insurers to reduce cost-sharing payments could continue to remain in effect.

(7) Would state and federal exchanges be able to operate during a shutdown?

Yes, other sources of funding besides annual discretionary appropriations are available in FY2014 and beyond to support exchange operations. As discussed in the answer to question #1, the HHS Secretary currently is using funding from ACA and other sources to establish the federally facilitated exchanges and related information technology (i.e., data services hub) and to engage in consumer outreach and education. ACA also provided the Secretary with an indefinite annual appropriation to award exchange planning and establishment grants to states through 2014. Each year, the Secretary determines the amount of funding that will be made available to states through this grant program.[48]

Beginning in 2015, exchanges must be self-sustaining. To help meet that goal, ACA permits exchanges to assess fees on insurance carriers that offer plans through the exchanges, or to otherwise generate funding, to support exchange operations.[49] The HHS Secretary also is planning to assess fees on carriers that participate in federally facilitated exchanges. HHS projects that those fees will total $450 million in FY2014.[50] It plans to use the funds to support exchange operations and consumer outreach and education.

(8) Would a shutdown suspend the requirements of the individual mandate?

Section 5000A of the IRC imposes a penalty upon taxpayers who do not maintain "minimum essential coverage" during the tax year.[51] This provision, also known as the "individual mandate," applies to tax years beginning after December 31, 2013 (i.e., calendar years 2014 and on),[52] and is intended to be assessed as part of a taxpayer's annual income tax return required to be filed during April of the year following the applicable tax year.[53] Therefore, the IRS will likely begin assessing the individual mandate beginning in early 2015, for penalties incurred during 2014. The law specifies certain groups of individuals as exempt from the individual mandate and its associated penalties.[54] It also gives the HHS Secretary the authority to establish a hardship exemption for other individuals who do not qualify for one of the statutory exemptions.[55]

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[47] OMB, *The Budget for Fiscal Year 2014, Appendix*, at 448, at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/hhs.pdf.

[48] For more information, see CRS Report R43066, *Status of Federal Funding for State Implementation of Health Insurance Exchanges*, by Annie L. Mach and C. Stephen Redhead.

[49] ACA § 1311(d)(5)

[50] U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, *Fiscal Year 2014, Justification of Estimates for Appropriations Committees*, at 14, at http://www.cms.gov/About-CMS/Agency-Information/PerformanceBudget/Downloads/FY2014-CJ-Final.pdf.

[51] I.R.C. § 5000A.

[52] I.R.C. § 5000A(a) (applying to "each month beginning after 2013").

[53] I.R.C. § 5000A(b)(2).

[54] I.R.C. § 5000A(d)-(e).

[55] I.R.C. § 5000A(e)(5).