

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES HOUSE OF REPRESENTATIVES,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-01967-RMC
)	
SYLVIA MATHEWS BURWELL , in her official)	
capacity as Secretary of Health and Human Services, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

EXHIBIT 23

Letter from Rep. Fred Upton to the Hon. Sylvia M. Burwell (June 10, 2014)

Congress of the United States
Washington, D.C. 20515

June 10, 2014

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

Dear Secretary Burwell:

We write to request information regarding your legal authority to adopt a provision from the President's FY 2015 budget to make risk corridor program payments from the Centers for Medicare & Medicaid Services (CMS) Program Management account. Under current law, payments made under the risk corridor program would constitute an unlawful transfer of potentially billions of taxpayer dollars to insurers offering qualified health plans under the President's health care law.

As you know, Section 1342 of the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) directs the Secretary of Health and Human Services (HHS) to operate a risk corridor program to limit the profits and losses of qualified health plans in the individual and small group markets. However, the provision does not specify a source of funding for the program.

On January 23, 2014, the Congressional Research Service's (CRS) American Law Division confirmed: "While the language of ACA § 1342(b)(1) establishes a directive to the Secretary to make such payments, it does not specify a source from which those payments are to be made. Therefore, § 1342 **would not appear to constitute an appropriation of funds for the purposes of risk corridor payments** under that section" (emphasis added).

CRS' analysis is consistent with GAO's longstanding interpretation of appropriations law. According to GAO's Principles of Appropriations Law (Red Book): "If the statute contains a specific direction to pay and a designation of funds to be used, such as a direction to make a specified payment or class of payments 'out of any money in the Treasury not otherwise appropriated,' then this amounts to an appropriation."¹ However, the GAO Red Book goes on to state: "Both elements of the test must be present. **Thus a direction to pay without a designation of the source of funds is not an appropriation**" (emphasis added). The risk corridor program in PPACA clearly fails to meet the second element of the test constituting an appropriation.

This interpretation also is consistent with the relevant legislative history. For instance, Section 3106 of the Affordable Health Choices Act (S. 1679), reported out of the Senate Committee on Health, Education, Labor, and Pensions as the President's health law was still taking shape, included a directive for the Secretary of HHS to administer a risk corridor program

¹ GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-16 (2004).

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and created a "Health Benefit Plan Start-Up Fund" with an initial appropriation "out of any moneys in the Treasury not otherwise appropriated" from which the Secretary of HHS could collect and make payments. However, the language enacted in Section 1342 of PPACA originated in a different piece of legislation (Section 2214 of America's Healthy Future Act, S. 1796), which did not designate a source of funds to be used or provide an appropriation, signifying that Congress deliberately chose to review funding for the risk corridor program through the annual appropriations process.

Furthermore, although the text of Section 1342 of PPACA references the Medicare Prescription Drug risk corridor, there are critical differences between the two programs. The Medicare Prescription Drug, Improvement, and Modernization Act (P.L. 108-173) contained a provision establishing a risk corridor program. In addition to describing the direction of payments, the legislative text also explicitly stated that payments for the program would come from a newly created Medicare Prescription Drug Account within the Federal Supplementary Medical Insurance Trust Fund.² This language provided a permanent appropriation for the risk corridor program in Medicare Part D. Section 1342 of PPACA includes no such language.

Finally, Section 1342 does not specify that any amounts received by HHS from plans that have overestimated premiums must be deposited in a revolving account or specifically made available for outgoing payments under the program. Thus, CRS concludes: "In the absence of any specific directions, federal law requires such amounts to be deposited in the General Fund of the Treasury, from which they may be further appropriated by Congress."

Given these facts, HHS may not make payments under Section 1342 absent additional congressional action appropriating funds for such payments. Without an explicit appropriation, any money spent on the risk corridor program would be based on an illegal transfer of funds and your agency could be held in violation of the Antideficiency Act.

Despite the overwhelming factual record that should foreclose any such efforts, HHS has left open the possibility that it will make payments to health insurance companies under the risk corridor program without seeking additional funding from Congress. For example, HHS published a final rule on May 16, 2014, stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In [the event that the program operates at a deficit], HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations."

It is unclear from HHS' statement whether the Department asserts that an appropriation has been made available to make payments through risk corridors under current law. Given these facts, we respectfully request the following:

- 1) Please explain whether you agree with the legal analysis of GAO and CRS, which consistent with precedent, appears to limit HHS's ability to make payments. In this response include:

- A. All legal analysis prepared by HHS regarding its statutory authority to make payments to health insurance companies under the risk corridor program.

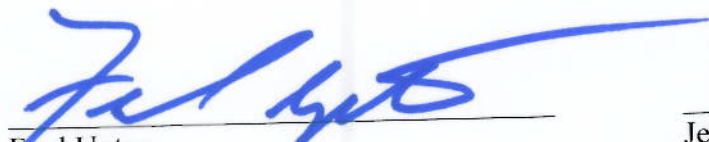
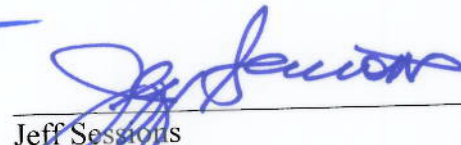
² 42 U.S.C. § 1860d-16(b)(1)(B).

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- B. All legal analysis prepared by HHS regarding its ability to make payments under risk corridors absent additional congressional appropriation.
- 2) Please provide a list of all other funding sources HHS believes it has legally or otherwise available for funding the risk corridor program absent an appropriation.

When the Senate considered your nomination, you made a commitment to "transparency and accuracy in a timely fashion." We therefore look forward to receiving a response to our requests no later than June 24, 2014. If you have any questions regarding this request, please contact Paul Winfree with Senate Budget Committee at (202) 224-0642, or Paul Edattel with the Energy and Commerce Committee at (202) 225-2927.

Sincerely,


Fred Upton
Chairman
United States House of Representatives
Committee on Energy and Commerce
Jeff Sessions
Ranking Member
United States Senate
Committee on the Budget

Attachment

cc: The Honorable Henry Waxman, Ranking Member
United States House of Representatives
Committee on Energy and Commerce

The Honorable Patty Murray, Chairman
United States Senate
Committee on the Budget