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Via Electronic Filing

March 16, 2018

Colonel Peter R. Marksteiner
Chief Executive and Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW, Room 401
Washington, DC 20439

Re: *Maine Community Health Options v. United States* (No. 2017-2395)
Appellant's Fed. R. App. P. 28(j) Notice of Supplemental Authority

Dear Colonel Marksteiner:

On February 12, 2018, HHS requested appropriation of \$12.3 billion to “fully fund” outstanding risk corridors (RCP) obligations. Ex. A. On February 16, two plaintiffs advised the Court of this development. On February 20, the Justice Department responded that the budget had been *revised*:

That budget document reflected an accounting treatment that was used by the agency during the initial administration of the risk corridors program.

Ex. B (emphasis added). These new developments highlight the significance of the agency's interpretation of the Congressional actions at issue in its accounting treatments. The GAO Redbook instructs that a payment-mandating statute without an appropriation constitutes an “obligation,” “authorized by law,” Vol. 2, 6-91, which “must” be fully recorded, not just “to the level of available budgetary resources.” Vol. 2, 7-8; 65 Comp. Gen. 4 (1985). HHS's “initial” accounting is compliant.

However, DOJ's use of the word “initial” requires clarification.

- On November 19, 2015 HHS “reiterated” that the statute required “full payments” and “HHS is recording those amounts that remain unpaid as

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fiscal year 2015 obligations of the United States.” Appx142. This was at the end of the second RCP year.

- On September 9, 2016 HHS committed that it “will record [RCP] payments due as an obligation of the United States for which full payment is required.” Appx144. This commitment was 33 months into the 36 month RCP program —*after* this lawsuit was filed.

HHS did not change its “initial accounting” because of the FY15 and FY16 appropriation riders enacted on December 16, 2014, Appx684, and December 18, 2015. Appx697. HHS did not understand the riders as repealing the statutory mandate for “full payments,” which it duly recorded as “obligations of the United States,” per the Redbook.

Thus, HHS’s “initial” accounting was operative throughout the RCP years; after the riders; while the RCP litigations were pending; and in the February 12 budget. The Justice Department’s argument that the statute was amended by “clear implication” or “clearly manifest” intent is at odds with the consistently *opposite* HHS view and led to the submission of a hastily-revised budget on February 19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Stephen J. McBrady
Stephen J. McBrady

CERTIFICATE OF COMPLIANCE

This letter complies with the length limits permitted by Federal Rule of Appellate Procedure (“Fed. R. App. Proc.”) 32(j). The body of the letter contains 349 words.

This letter complies with the typeface requirement of Fed. R. App. Proc. 32(a)(5) and the type style requirement of Fed. R. App. Proc. 32(a)(6): it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point size.

In preparing this certificate of compliance, I have relied upon the word count function of the word processing system that was used to prepare the motion.

March 16, 2018

/s/ Stephen J. McBrady
Stephen J. McBrady

Exhibit A

NEW INITIATIVE

The Budget Repeals and Replaces Obamacare

The Budget supports a two-part approach to repealing and replacing Obamacare. First, the Budget supports the enactment of legislation modeled after the Graham-Cassidy-Heller-Johnson bill. Second, the Budget includes reforms to help set government health care spending on a sustainable fiscal path. This proposal reduces the Federal deficit by \$679.7 billion over 10 years.

(dollars in millions)

Step One – Proposal Modeled After Graham-Cassidy-Heller-Johnson	
FYs 2019-2028	
HHS Impacts	\$458,711
Medicaid (non-add)	-\$1,083,570
Other HHS Programs (non-add)	\$1,542,281
Non-HHS	-\$373,133
Step One Impact	\$85,578
Step Two – Improving Program Sustainability and Achieving Deficit Reduction	
FYs 2019-2028	
HHS Impacts	-\$765,284
Medicaid (non-add)	-\$305,665
Other HHS Programs (non-add)	-\$459,619
Non-HHS	\$0
Step Two Impact	-\$765,284
Total	
FYs 2019-2028	
HHS Impacts	-\$306,573
Medicaid (non-add)	-\$1,389,235
Other HHS Programs (non-add)	\$1,082,662
Non-HHS	-\$373,133
Total Budget Impact	-\$679,706

Provide Appropriation to Pay Cost-Sharing Reductions

This proposal provides a mandatory appropriation for Cost-Sharing Reduction payments for FY 2018 through the end of calendar year 2019. [No budget impact]

Fully Fund the Risk Corridors Program

This proposal provides a mandatory appropriation to fully fund the Risk Corridors Program, including exempting the program from sequestration.

[Budget Impact: \$812 million in FY 2018]

Prohibit Governmental Discrimination against Health Care Providers that Refuse to Cover Abortion

The Budget also proposes to prohibit the Federal Government, as well as state and local governments that receive Federal financial assistance for health-related activities, from penalizing or discriminating against health care providers based on the providers’ refusal to be involved in, or provide coverage for, abortion services. [No budget impact]

Reform Medical Liability

The current medical liability system disproportionately benefits a relatively small group of plaintiffs and lawyers at the expense of adding to the cost of health care for every American and imposing a burden on health care providers. The current medical liability system does not work for patients or providers, nor does it promote high-quality, evidence-based care. The Budget proposes medical liability reforms that will save HHS programs \$30.8 billion over 10 years and \$52.1 billion to the Federal Government overall. A significant portion of these savings are attributable to the estimated reduction in unnecessary services and curbing the practice of defensive medicine. These medical liability reforms will benefit all Americans by cutting unnecessary health care spending.

In addition to reducing health care costs, these reforms help physicians focus on patients and on evidence-based medicine rather than on frivolous lawsuits. By providing a safe harbor based on clinical guidelines, physicians can focus on delivering effective care, and, if an inherently risky medical procedure does not work out as intended, physicians will be able to express sympathy to a grieving family without fear of giving rise to a lawsuit.

Specifically, the Budget proposes the following medical liability reforms:

- Capping awards for noneconomic damages at \$250,000 indexed to inflation;
- Providing safe harbors for providers based on clinical standards;
- Authorizing the Secretary to provide guidance to states to create expert panels and administrative health care tribunals;
- Allowing evidence of a claimant’s income from other sources such as workers’ compensation and auto insurance to be introduced at trial;
- Providing for a three-year statute of limitations;

Centers for Medicare & Medicaid Services: Overview



<i>dollars in millions</i>	2017	2018	2019	2019 +/- 2018
Current Law /1 /2				
Medicare /3	597,414	588,346	651,789	+63,443
Medicaid	374,681	402,088	420,241	+18,153
CHIP	16,251	12,818	5,724	-7,094
State Grants and Demonstrations /4	503	583	578	-5
Other Health Insurance Programs /5	8,683	30,880	16,692	-14,188
Center for Medicare and Medicaid Innovation	1,136	1,278	1,592	+314
Total Net Outlays, Current Law	998,668	1,035,993	1,096,616	+60,623
Proposed Law /2				
Medicare /3	-	38	-15,396	-15,434
Medicaid	-	-1,700	-8,209	-6,509
CHIP	-	4,500	5,700	+1,200
General Revenue Payments for Hospitals /6	-	-	14,540	+14,540
Cost-Sharing Reduction Impacts	-	-180	-471	-291
Program Management /7	-	812	12	-800
Total Proposed Law	-	3,470	-3,824	-7,294
Total Net Outlays, Proposed Law /8	998,668	1,039,463	1,092,792	+53,329
<p>1/ Reflects the annualized level of the Continuing Resolution that ended April 28, 2017, including the across the board reduction, the 21st Century Cures Act, and directed transfers.</p> <p>2/ Does not reflect the Children's Health Insurance Program (CHIP) funding extension through FY 2023, as the Budget was finalized prior to the enactment of P.L. 115-120.</p> <p>3/ Current law Medicare outlays net of offsetting receipts.</p> <p>4/ The following programs/laws were excluded from the Current Law Outlays table because outlays were less than \$1 million: Ticket to Work and Work Incentives Improvement Act, Federal Reimbursement of Emergency Health Services Furnished to Undocumented Aliens, and the Medicaid Emergency Psychiatric Demonstration.</p> <p>5/ Reflects other CMS health insurance programs. FY 2018 assumes outlays of \$11,513 million (post-sequester) for the Risk Corridors Program.</p> <p>6/ Reflects hospital payments that are proposed to be administered by CMS but financed outside of the Part A Trust Fund.</p> <p>7/ Includes legislative proposal to fully fund the Risk Corridors Program, including exempting the program from sequestration.</p> <p>8/ Total net proposed law outlays equal current law outlays plus the impact of proposed legislation and offsetting receipts. Includes Trust Fund outlays for the Office of Medicare Hearings and Appeals for Fiscal Years 2017-2019.</p>				

The Centers for Medicare & Medicaid Services supports innovative approaches to improve quality, accessibility, and affordability.

The Fiscal Year (FY) 2019 Budget estimate for the Centers for Medicare & Medicaid Services (CMS) is \$1.1 trillion in mandatory and discretionary outlays, a net increase of \$53.3 billion from FY 2018. This level finances Medicare, Medicaid, the Children's Health Insurance Program (CHIP), other health insurance programs, program integrity efforts, and operating costs. CMS's legislative package promotes fiscal

responsibility, increases state flexibility, builds on the recent repeal of the onerous individual mandate to provide real health care choices to Americans, reforms graduate medical education, and curbs the practice of defensive medicine. In total, the Budget proposes targeted savings of \$632.0 billion in CMS mandatory programs over the next decade.

Exhibit B



MBS:ABKlein

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February 20, 2018

Mr. Peter R. Marksteiner
Clerk, U.S. Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

RE: *Moda Health Plan, Inc. v. United States*, No. 17-1994

Dear Mr. Marksteiner:

Oral argument in this case was heard on January 10, 2018. We respectfully submit this response to plaintiff's letter of February 16, 2018, which argued a recent HHS budget document supported its position. That budget document reflected an accounting treatment that was used by the agency during the initial administration of the risk-corridors program. The program periods for collecting funds have concluded and HHS has made accounting adjustments to reflect that termination. These accounting adjustments reflect that it does not have unfunded obligations under the program, and HHS' Budget in Brief has been adjusted to reflect that. The language on which plaintiff relied does not appear in the revised budget document, which is available at <https://www.hhs.gov/sites/default/files/fy-2019-budget-in-brief.pdf>.

In any event, the agency's accounting methodology has no bearing on the legal issue before the Court. As discussed in our brief, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." Gov. Br. 45 (quoting GAO, *Principles of Federal Appropriations Law* (Vol. II) at 7-8 (3d ed. 2004)); *see also* Gov. Br. 43-45.

Sincerely,

/s/ Alisa B. Klein

Alisa B. Klein
Counsel for Appellant