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, *et al.*,	)	
	)	
Defendants.	)	

EXHIBIT 24

Letter from the Hon. Sylvia M. Burwell to Rep. Fred Upton (June 18, 2014)

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

June 18, 2014

The Honorable Jeff Sessions
United States Senate
Washington, DC 20510

Dear Senator Sessions:

Thank you for your letter requesting information about the Department of Health and Human Services's (HHS) legal authority to make payments in connection with the risk corridors program. The temporary risk corridor provision in the Affordable Care Act is an important safety valve for consumers and insurers as millions of Americans transition to a new coverage in a brand new Marketplace. For consumers, the program will play an important role in mitigating premium increases in the early years as issuers gain more experience in setting their rates for this new program.

Section 1342 of the Affordable Care Act provides for a temporary risk corridors program from 2014 through 2016. The risk corridors program applies to qualified health plans (QHPs), both on and off the Marketplace, and certain substantially similar plans in the individual and small group markets. The temporary risk corridors program protects issuers of QHPs from uncertainty in rate setting from 2014 to 2016 by sharing in gains or losses resulting from inaccurate rate setting.

Modeled after a similar, permanent program established in the Medicare Modernization Act of 2003 for Medicare Part D, the temporary risk corridors program protects against uncertainty issuers face when estimating enrollment and costs resulting from the market reforms. The risk corridors program protects against uncertainty in rate-setting in the first three years of the Marketplace by creating a mechanism for sharing risk between the federal government and issuers of QHPs.

As established in statute, plans participating in the program with allowable costs that are at least three percent less than the plan's target amount will remit charges to HHS, while plans with allowable costs at least three percent higher than the plan's target amount will receive payments from HHS to offset a percentage of those losses. The risk corridors payment or charge amount will be calculated at the issuer level and then pro-rated based on the issuer's percentage of the market enrolled in QHPs, inside or outside the Marketplace, and plans that are substantially the same as a QHP.

In response to your questions regarding the legal analysis to make payments under the risk corridors program, enclosed please find HHS's response to the Government Accountability Office's request for information regarding budget authority available to operate the risk corridors program.

We appreciate your interest in this issue and do not hesitate to contact me if you have any further thoughts or concerns. We are providing the same response to Chairman Fred Upton, co-signer of your letter.

Sincerely,

Sylvia M. Burwell

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

The General Counsel
Washington, D.C. 20201

MAY 20 2014

Julia C. Matta
Assistant General Counsel
for Appropriations Law
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Ms. Matta:

This is in response to your April 15, 2014 letter requesting information regarding budget authority available to operate the risk corridors program established in section 1342 of the Patient Protection and Affordable Care Act (PPACA)[1]. The responses to your questions are set forth below.

1. *Agencies may incur obligations and make expenditures only as permitted by an appropriation. U.S. Const., art. I, § 9, cl. 7; 31 U.S.C. §1341(a)(1); B-300192, Nov. 13, 2002. The making of an appropriation must be expressly stated in law. 31 U.S.C. §1301(d). A direction to an agency to pay funds without a designation of funds to be used for the payment does not make an appropriation. B-114808, Aug. 7. 1979. PPACA section 1342(b)(1) provides that, under some circumstances, HHS "shall pay" specified amounts to participating plans. Does any provision of law, be it PPACA section 1342 or another provision, currently provide HHS with an appropriation necessary to obligate and expend the payments specified in PPACA section 1342(b)(1)? Please explain.*

   Response: Section 1342 of PPACA requires the Secretary of Health and Human Services (HHS) to establish a temporary risk corridors program that provides for the sharing in gains or losses resulting from inaccurate rate setting from 2014 through 2016 between the Federal government and qualified health plans (QHPs). The risk corridors program applies only to participating plans defined to be qualified health plans (QHPs) at 45 CFR 153.500. Section 1342(b)(1) and (2) establishes the payment methodology for the payments in and the payments out, thereby establishing the formula to determine the amounts the QHPs must pay to the Secretary of HHS and the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

   As section 1342 of PPACA requires the Secretary to establish and administer the risk corridors program and requires the Secretary to collect payments from and make payments to certain QHPs, section 1342 authorizes the collection and payment of user fees to and from

[1] Pub. L. No. 111-148, §1342, 124 Stat. 119, 211-212 (Mar.23, 2010), codified at 42 U.S.C. § 18062.

the QHPs. QHPs enjoy a special benefit resulting from the operation of the risk corridors program, in that the fees charged are ultimately utilized to balance risks among the QHPs, thus promoting stability in this sector of the market. This is consistent with OMB Circular A-25[2], which is intended to provide guidance to agencies regarding their assessment of user fees pursuant to 31 U.S.C. § 9701 and other statutes. Further, we view it as consistent with the definition of user fees as set forth in OMB's Fiscal Year 2015, *Analytical Perspectives*[3] and GAO's *Glossary of Terms Used in the Federal Budget Process*[4].

Section 1342 of PPACA requires the collection and payment of risk corridor user fees. The Centers for Medicare & Medicaid Services (CMS) Program Management (PM) appropriation for fiscal year 2014[5], which states ". . .such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019: . . .", appropriates the section 1342 user fees. Together, section 1342

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[2] "General policy: A user charge, as described below, will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. When the imposition of user charges is prohibited or restricted by existing law, agencies will review activities periodically and recommend legislative changes when appropriate. Section 7 gives guidance on drafting legislation to implement user charges.

a. Special benefits

1. Determining when special benefits exist. When a service (or privilege) provides special benefits to an identifiable recipient beyond those that accrue to the general public, a charge will be imposed (to recover the full cost to the Federal Government for providing the special benefit, or the market price). For example, a special benefit will be considered to accrue and a user charge will be imposed when a Government service:

(a) enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); or

(b) provides business stability or contributes to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks); or . . ." Office of Mgmt. & Budget, Exec. Office of the President, OMB Cir. A-25, User Charges, section 6(1)(a)-(b)(2010).

[3] "In this chapter, user charges refer to fees, charges, and assessment levied on individuals or organizations directly benefiting from or subject to regulation by a Government program or activity, where the payers do not represent a broad segment of the public as those who pay taxes." Fiscal Year 2015 Analytical Perspectives, Budget of the U.S. Government, Office of Management and Budget, p. 192. Available on the Internet at
http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/spec.pdf.

[4] "A fee assessed to users for goods or services provided by the federal government. User fees generally apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public. U.S. Government Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* (2005), p. 100.

[5] Consolidated Appropriations Act, 2014, Div. H, Pub. L.113-76 (2014).

of PPACA and the CMS PM appropriation allows for the collection, retention, obligation and expenditure of the section 1342 user fees until September 30, 2019.

2. *PPACA section 1342(b)(2) provides that, under some circumstances, HHS will receive payments from participating plans. Absent specific statutory authority, agencies must deposit money for the government into the Treasury without deduction for any charge or claim, and such deposits are available for obligation and expenditure only as permitted by an appropriation. 31 U.S.C. §3302(b); B-271894, July 24, 1987; 22 Comp. Dec. 379 (1916). May HHS obligate and expend amounts that participating plans pay to HHS under PPACA section 1342(b)(2)? If so, please explain the statutory authority that permits HHS to obligate and expend these amounts and the permissible purposes of such obligations and expenditures.*

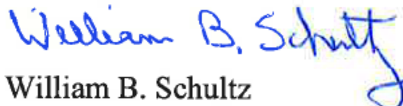
   Response: The CMS PM appropriation permits HHS to collect, retain, obligate, and expend the user fees in a manner consistent with section 1342.

3. *Has HHS made or received any payments under PPACA section 1342? If so, please explain the amount and source of any payments made or the amount and disposition of any payments received.*

   Response: To date, HHS has not made or received any payments under section 1342 of PPACA. HHS intends to begin collections and payments in fiscal year 2015 pursuant to continued CMS PM user fee authority.

Thank you for the opportunity to provide the Department's views on this matter.

Sincerely,



William B. Schultz
General Counsel