COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

February 9, 2016

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

Dear Secretary Burwell:

Based on a recent report from the nonpartisan Congressional Research Service, it appears that the Administration has illegally diverted funds from the U.S. Treasury to fund the Transitional Reinsurance Program established by the Patient Protection and Affordable Care Act (ACA). Not only is this diversion inconsistent with past policies promulgated by the Administration but it is incompatible with clear Congressional instructions contained within the ACA. We ask that HHS immediately submit to the Treasury all diverted funds. Additionally, to assist the House Ways and Means Committee in understanding the Administration's funding decision, we are requesting that you provide documents related to this program.

The Reinsurance program, established by Section 1341 of the ACA, is one of the law's three risk mitigation programs, collectively referred to as the "3Rs."[1] The program was intended to provide payments to insurers whose enrollees incurred high claims costs during the first three years of the law's implementation. The Reinsurance program is funded by a reinsurance fee from all health insurers based on a methodology established by the Secretary of Health and Human Services (HHS). Cumulatively, the Reinsurance program is supposed to collect approximately \$25 billion, \$20 billion of which was intended to fund insurers' reinsurance claims.[2] The remaining \$5 billion was intended to be deposited in the U.S. Treasury to offset other ACA spending.[3]

Congress stated its intent regarding the remaining \$5 billion explicitly:

> Notwithstanding the preceding sentence, any contribution amounts described in paragraph (3)(B)(iv) [describing the \$5 billion Treasury contribution] shall be deposited

[1] The 3Rs are codified at 42 U.S.C. § 18061, 18062 and 18063.

[2] 42 U.S.C. § 18061(b)(3)(B)(ii) and (iii). The statute also allows the Reinsurance entity to collect unspecified amounts to cover administrative costs.

[3] 42 U.S.C. § 18061(b)(3)(B)(iv). Section 1102 of the ACA established the Early Retiree Reinsurance Program and appropriated \$5 billion to fund the program. The \$5 billion contribution to the Treasury was likely intended to offset this spending.

> into the general fund of the Treasury of the United States and *may not be used for the program established under this section.*[4]

HHS had originally interpreted this provision as a requirement to divide the contributions received into a reinsurance program portion for insurers, a portion for deposit into the Treasury, and a portion to be used to offset administrative costs.[5] According to past CMS regulations, the allocations for each dollar received in calendar years 2014 and 2015 were to be as follows:

	2014	**2015**
Reinsurance	83.2%	74.8%
Treasury	16.6%	24.9%
Administrative costs	0.2%	0.3%

However, in May 2014, the Administration inexplicably reversed course from policies they had finalized less than three months before. Buried in more than a hundred pages of regulations, HHS stated they would allocate the first $10 billion received in 2014 to reinsurance payments to insurers. Only after that target was reached would they allocate any additional funds received to the Treasury and to administrative costs.[6] HHS also confirmed that the same policy would be in effect for 2015, as well.[7] According to the rule:

> We will not allocate reinsurance collections to administrative expenses or the U.S. Treasury until the reinsurance payment pool for a benefit year is funded. Thus, if our reinsurance collections fall short of our estimates for a particular benefit year, we will allocate reinsurance contributions collected first to the reinsurance payment pool, with any remaining amounts being then allocated to administrative expenses and the U.S. Treasury, on a pro rata basis.[8]

Not only is this action inconsistent with the Administration's own previously published policy, it violates Congress's express instructions. The statute clearly states that funds allocated to the Treasury cannot be used for making reinsurance payments to insurers.[9] The non-partisan Congressional Research Service (CRS) confirmed that "the statute appears to speak directly to the question of whether the U.S. Treasury contribution must be taken from each issuer's contribution. Section 1341(b)(4) requires contribution amounts described in (3)(B)(iv) to be

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[4] 42 U.S.C. § 18061(b)(4) (emphasis added).
[5] *See e.g.* Department of Health and Human Services, HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13777 (Mar. 11, 2014).
[6] Department of Health and Human Services, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30252 (May 27, 2014).
[7] *Id.*
[8] *Id.*
[9] 42 U.S.C. § 18061(b)(4).

deposited in the U.S. Treasury, and (3)(B)(iv) describes a proportionate share of the aggregate U.S. Treasury contribution, reflected in 'each issuer's contribution.'"[10]

Looking at the question of whether the statute allowed HHS to prioritize payments to the reinsurance fund over payments to the Treasury, CRS concluded:

> [I]nsofar as CMS' interpretation allows the entire contribution of an issuer in any given year to be used only for reinsurance payments, such that no part of it is allocated for the U.S. Treasury contribution, then that would appear to be in conflict with a plain reading of § 1341(b)(4). Because the statute unambiguously states that "each issuer's contribution" contain an amount that reflects "its proportionate share" of the U.S. Treasury contribution, and that these amounts should be deposited in the General Fund of the U.S. Treasury, a contrary agency interpretation would not be entitled to deference under *Chevron*.[11]

CMS' illegal actions are especially significant as the Administration significantly missed its collection target in 2014, collecting only $9.7 billion of the $12.02 billion target.[12] Based on HHS' previous allocation methodology, more than $1.6 billion dollars that should have been sent to the Treasury was instead diverted to insurers under the Reinsurance program. To the extent that subsequent collections miss projections, billions more in taxpayer dollars may also be diverted.

In some circumstances, Congress delegates discretion to agencies to implement laws. However, when Congress withholds discretion, as was the case here, agencies are bound to carry out the law as written or seek the assistance of Congress to change it. To the extent that collected reinsurance contributions are insufficient to pay all claims, it is up to Congress, not the Administration, to decide whether or not to provide further appropriations.

To assist the Committees, please provide the following no later than February 23, 2016:

1. All documents related to the Department's decision to divert Treasury payments to fund the Transitional Reinsurance program.

2. All documents related to the Department's establishment of the national reinsurance contribution rates, including but not limited to, any decisions related to which types of health coverage are subject to reinsurance contributions.

Additionally, please make relevant staff available to brief the Committees no later than February 23, 2016.

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[10] Paulette C. Morgan and Edward C. Liu, Congressional Research Service, Memorandum to the Committee on Ways & Means regarding Information on the ACA Transitional Reinsurance Program (Jan. 14, 2016) (on file with Committee).
[11] *Id.*
[12] Centers for Medicare and Medicaid Services, Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2014 Benefit Year (June 30, 2015).

If you have any questions about this matter, please contact Committee staff at (202) 225-5522.

Sincerely,

Kevin Brady
Chairman

Peter J. Roskam
Chairman
Subcommittee on Oversight

Patrick Tiberi

Pat Tiberi
Chairman
Subcommittee on Health

cc: The Honorable Sander Levin, Ranking Member

The Honorable John Lewis, Ranking Member, Subcommittee on Oversight

The Honorable Jim McDermott, Ranking Member, Subcommittee on Health