

Congress of the United States
Washington, DC 20515

March 23, 2016

Mr. Andy Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Mr. Slavitt:

The Administration's plan to spend \$7.7 billion in 2016 on Transitional Reinsurance payments to health insurance companies violates the law. The amount in question includes funds that are explicitly prohibited from being used for these payments. Any payments made that have not been appropriated for such purpose violate the Anti-Deficiency Act. We demand you cease all unlawful payments to health insurance companies under the Transitional Reinsurance program and immediately submit all diverted funds to the Treasury as dictated by statute.

The Transitional Reinsurance Program, established by Section 1341 of the Patient Protection and Affordable Care Act (PPACA), is funded by a fee imposed on every individual enrolled in health coverage.¹ In addition to the amounts needed to make Transitional Reinsurance payments to health insurers, the statute requires the Centers for Medicare and Medicaid Services (CMS) collect an additional \$5 billion (\$2 billion for 2014, \$2 billion for 2015 and \$1 billion for 2016)² that “**shall be deposited into the general fund of the Treasury** of the United States and **may not be used** for the [Transitional Reinsurance] program.”³ Rather, the funding is intended to be used for deficit reduction.

Despite the clear statutory prohibition, on February 12, 2016, CMS confirmed that \$2 billion for 2014 and nearly \$1.5 billion for 2015 would in fact be diverted from the Treasury to make reinsurance payments to insurance companies.⁴ In doing so, the Administration effectively announced it would stiff taxpayers, diverting the dollars required to be deposited into the Treasury instead to health insurance companies in the form of more generous payments. If CMS continues this pattern, up to \$1 billion more will be taken from taxpayers to bailout health insurance companies in 2016.

CMS' action is a clear violation of federal law. The statute does not provide CMS with any discretion over whether it can prioritize health insurers over taxpayers. An analysis by the non-partisan Congressional Research Service (CRS), concluded that “the statute **unambiguously states**” each reinsurance contribution must contain an amount that reflects its “proportionate

¹ 42 U.S.C. § 18061(b)(3).

² 42 U.S.C. § 18061(b)(3)(iv).

³ 42 U.S.C. § 18061(b)(4) (emphasis added).

⁴ Centers for Medicare and Medicaid Services, The Transitional Reinsurance Program's Contribution Collections for the 2015 Benefit Year (Feb. 12, 2016).

share” of the Treasury contribution.⁵ Furthermore, CRS’s analysis raised serious legal questions about your agency’s actions writing “[i]nsofar as CMS’ interpretation allows an 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).**”⁶

To date, the Administration has not provided a satisfactory explanation for these illegal actions. When asked about the legal basis for diverting these funds at a February 24, 2016, hearing before the Energy and Commerce Committee, Department of Health and Human Services (HHS) Secretary Sylvia Burwell provided no legal justification for these payments.⁷ This questioning followed a still unanswered letter sent to HHS on February 9, 2016, by the Ways and Means Committee requesting documents outlining the agency’s legal analysis on the issue.⁸

In addition to its stunning disregard for the clear language of the PPACA, CMS’s decision to loot billions from the Treasury to pay off insurance companies demonstrates an offensive lack of respect for the rule of law and the American taxpayer. Moreover, it is indicative of a disturbing pattern of illegal payments to insurance companies made in an attempt to prevent their exit from the failing and unstable Obamacare exchanges. This latest payoff comes on top of the estimated \$7.17 billion—and counting—in unlawful payments made to insurance companies under Obamacare’s cost sharing reduction program.

As CRS noted, the portion of the Reinsurance contribution that is allocated to the Treasury contribution must be deposited within the general fund of the Treasury as soon as practicable. Given that the statute unambiguously prohibits this portion from being used to make payments for the Reinsurance Program, any official who spends this taxpayer money violates the Anti-Deficiency Act. As a result, CMS should immediately cease all illegal payments consistent with the law and submit them to the Treasury without delay.

Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce



Kevin Brady
Chairman
Committee on Ways and Means

⁵ Paulette C. Morgan and Edward C. Liu, Congressional Research Service, Information on the Transitional Reinsurance Program (Feb. 23, 2016).

⁶ *Id.*

⁷ *Examining the FY 2016 HHS Budget, Before the H. Comm. on Energy and Commerce, Subcomm. on Health*, 114th Cong. (Testimony of Sylvia Mathews Burwell, Secretary, Department of Health and Human Services, Feb. 24, 2016).

⁸ Letter from Kevin Brady, Peter J. Roskam, and Pat Tiberi, to Sylvia Mathews Burwell, Secretary, Department of Health and Human Services (Feb. 9, 2016).

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cc: The Honorable Frank J. Pallone, Jr., Ranking Member
Committee on Energy and Commerce

The Honorable Sandy Levin, Ranking Member
Committee on Ways and Means