

United States Senate

WASHINGTON, DC 20510

October 18, 2016

Sheryl Morrow
Commissioner
Bureau of the Fiscal Service
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220

Dear Commissioner Morrow:

A number of health insurers have sued the federal government for failure to pay what the insurers believe they are owed from the “risk corridors” program created under the Affordable Care Act (ACA). We write to express our concern over recent reports that the Administration may be encouraging health insurers to settle lawsuits through payments from the Judgment Fund, which was set up to pay final money judgments and awards against the United States when another source of funds has not otherwise been provided by Congress.

The ACA created three distinct programs to encourage health insurer participation in the new health insurance markets by promising to mitigate the risk they would assume for insuring a population with largely unknown medical costs. One of these programs, the risk corridors program, is a temporary mechanism created under the guise of alleviating effects of miscalculated premiums by limiting losses and gains to insurers through a revolving fund. The monies available for the program are those remitted by insurance carriers with gains, to be distributed to those with losses. According to the Department of Health and Human Services (HHS), Section 1342 of the ACA authorized the collection and payment of user fees for this purpose¹. HHS also released guidance indicating that the risk corridors program would be implemented in a budget neutral manner over three years rather than annually².

HHS has received no additional funds from Congress to make payment in full if the gains for some insurers are not sufficient to cover losses of others. In 2015, HHS announced that insurers sought \$2.87 billion in risk corridors payments, while HHS only expected to collect \$0.36 billion. As a result of the lack of remittances from HHS, some health insurers have sued the federal government despite the fact that collections and payments of user fees have only been implemented for one year.

¹ GAO, Department of Health and Human Services – Risk Corridors Program, B-325630. September 30, 2014. <http://www.gao.gov/assets/670/666299.pdf>

² HHS, Risk Corridors and Budget Neutrality. April 11, 2014. <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf>

On September 9, 2016, HHS issued a memo on risk corridors payments for 2015, which indicated that HHS was aware of the lawsuits filed against the federal government, and encouraged “discussing [a] resolution to those claims.”³ Subsequent published reports have stated that “The Obama administration is maneuvering to pay health insurers billions of dollars the government owes under the Affordable Care Act, through a move that could circumvent Congress.”⁴ These same reports speculate that the Administration may be inclined to try to settle those lawsuits through payments from the Judgment Fund. We are deeply concerned about this attempt to circumvent the clear, unmistakable will of the Congress.

It is our understanding that payments from the Judgment Fund may only be made if certain conditions are met. The Judgment Fund may not be used to pay an award or judgment if another *source* of funds is legally available to make that payment. In the case of the risk corridors program, the Government Accountability Office (GAO) prepared a legal analysis which determined that “receipts from insurers to the Centers for Medicare and Medicaid Services (CMS) under the risk corridors program are ‘user fees’ which may be retained in the agency’s ‘Program Management’ account, typically provided in the Labor-HHS-Education Appropriations Act.”⁵ Furthermore, and according to an independent, nonpartisan analysis by the Congressional Research Services (CRS), because Congress limited the funding available for the risk corridors program to user fees, and chose not to make additional appropriations for the program, “the Judgment Fund would not appear to be available to pay for such judgments under current law.”⁶

According to a description of the Judgment Fund available on your website:

“Where payment of an award has been otherwise provided for by another source of funds, the fact that there may be insufficient funds to cover the award in that other account does not make the Judgment Fund available. In that instance, the agency to whom the other source of funds belongs must ask Congress for supplemental funding.”⁷

It would appear that because there are insufficient funds in the risk corridors program, HHS will need to request additional funding from Congress rather than encouraging a settlement through questionable use of the Judgment Fund. Use of the Judgment Fund to pay any settlement associated with litigation related to the risk corridors program would amount to a circumvention of Congress’s sole authority to appropriate hard earned taxpayer resources.

³ HHS, Risk Corridors Payments for 2015. September 9, 2016. <https://www.cms.gov/CCHO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF>

⁴ Goldstein, Amy. “Obama administration may use obscure fund to pay billions to ACA insurers,” *Washington Post*. September 29, 2016. https://www.washingtonpost.com/national/health-science/obama-administration-may-use-obscure-fund-to-pay-billions-to-aca-insurers/2016/09/29/64a22ea4-81bc-11e6-b002-307601806392_story.html

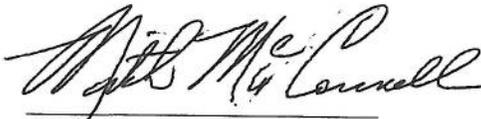
⁵ GAO, Department of Health and Human Services – Risk Corridors Program, B-325630. September 30, 2014. <http://www.gao.gov/assets/670/666299.pdf>

⁶ CRS, Lawsuits to Recover Payments under the Risk Corridors Program of the Affordable Care Act. January 5, 2016. http://www.rubio.senate.gov/public/_cache/files/1dc92ef8-c340-4efd-95e0-67369a5571e2AA5EF8F125279800BFABC8B8BA37072_05_24_2016-crs-rubio-memo-risk-corridors-1-5-16-1-redacted.pdf

⁷ Bureau of the Fiscal Service, Judgment Fund Background. <https://www.fiscal.treasury.gov/sservices.gov/pub/jdgtund/background.htm>

Given your position as Commissioner of the Bureau of Fiscal Service, we respectfully request that you consider these facts, the independent analysis of GAO and CRS, and the actions of Congress to expressly prohibit additional funds for the risk corridors program beyond what is collected through user fees before considering whether or not to certify payment from the Judgment Fund.

Sincerely,



Mitch McConnell
Senate Majority Leader



Orrin G. Hatch
Chairman
Senate Finance Committee