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# United States Senate

COMMITTEE ON FINANCE  
WASHINGTON, DC 20510-6200

CHRIS CAMPBELL, STAFF DIRECTOR  
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March 8, 2016

The Honorable Sylvia Mathews Burwell  
Secretary  
U.S. Department of Health & Human Services  
330 Independence Avenue, SW  
Washington, DC 20201

The Honorable Jacob Lew  
Secretary  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20229

Dear Secretary Burwell and Secretary Lew:

As you know, ObamaCare established three risk mitigation programs to protect health insurers against the law's onerous costs.<sup>1</sup> One of these programs is the Transitional Reinsurance Program, created under Section 1341 of ObamaCare, which Congress created to limit the insurance industry's exposure to high cost care.<sup>2</sup>

Americans are already familiar with another program created by ObamaCare aimed at protecting insurers from losing money, the risk corridor program. Along with our colleagues, we have been successful in protecting the American taxpayer from having to bailout insurers to the tune of approximately \$2.5 billion dollars because of this flawed law. Now, we are again disappointed with the Administration's willingness to unlawfully direct money to health insurers at taxpayers' expense.

Under the statute, the reinsurance program directs the Secretary of the Department of Health and Human Services (HHS) to collect \$20 billion in "reinsurance contributions" from the insurance industry by the following amounts: \$10 billion in 2014, \$6 billion in 2015, and \$4 billion in 2016. These funds are then redistributed to insurance issuers who enroll high-risk individuals.

Over the same period, the statute specifies that HHS shall collect \$5 billion in contributions to be deposited into the United States Treasury. The language of the statute makes clear that these payments are not to be used to bail out insurance industry losses. The statute goes on to make

<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, (2010)

<sup>2</sup> *Id.*, § 1341

clear that these contributions “*shall be deposited into the general fund of the Treasury of the United States and may not be used for the program established under this section.*”<sup>3</sup> The statute could not be clearer that these funds are not part of the reinsurance program, but rather an offset to the enormous expense ObamaCare erroneously places on taxpayers and the U.S. Treasury.

However, in May of 2014, HHS issued regulations that contradict the statute. Under these regulations, should total contributions fall short of approximately \$8 billion, insurance companies would get the entire amount collected and taxpayers would get zero.<sup>4</sup> Rather than following the language of the law, which makes clear that these dollars “may not be used for the program,” the new HHS regulation states that the Secretary “will not allocate reinsurance collections to... the U.S. Treasury until the” insurance companies are bailed out to the full amount allowed.<sup>5</sup>

This is unacceptable. The statute in question is unambiguous, and the HHS regulation and recent practice violates its clear directive. Supporting this position, the nonpartisan Congressional Research Service, in a recent memorandum to the House Committees on Ways and Means and Energy and Commerce, found that “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....”<sup>6</sup>

To assist us in better understanding how HHS came to this position, notwithstanding the clear language of the statute, please provide the following information and documents by no later than Friday, March 18, 2016:

For Secretary Burwell:

1. Does HHS plan to change allocations for 2016 in a manner that would make the U.S. Treasury whole for the diversions described above?
2. Which HHS officials were responsible for or had input into, Section E, Part 153 of the Section 1341 regulation? This should include not only the principle drafters but a list of offices and officials who had any role in advising or commenting on the substance of that Section.
3. Which federal offices outside of HHS advised or commented on Section E, Part 153 of the Section 1341 regulation?
4. Provide all documents dated from March 11 to May 27, 2014, regarding Subsection E, Part 153 of the Section 1341 regulation. This includes memorandum and correspondence within HHS and to or from other federal offices.

For Secretary Lew:

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<sup>3</sup> *Id* (emphasis added).

<sup>4</sup> Department of Health and Human Services, “Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond,” *79 Federal Register* 30258-30259, May 27, 2014.

<sup>5</sup> *79 Federal Register* 30258 (2014).

<sup>6</sup> Congressional Research Service Memorandum: Information on the ACA Transitional Reinsurance Program, February 23, 2016.

5. Did HHS seek Treasury's opinion on this issue? If so, when did HHS seek that opinion and what opinion was provided?
6. What is Treasury's current position regarding the funds it is due under Section 1341?
7. Does Treasury plan to recoup these funds?

Thank you in advance for your prompt response to this request. Please number your responses according to the corresponding question and respond no later than Friday, March 25, 2016. If you have any questions, please contact me at [redacted]

Sincerely,



Orrin G. Hatch  
Chairman  
Committee on Finance



Marco Rubio  
United States Senator  
Florida