DRAFT HOUSE OVERSIGHT TESTIMONY ON RISK CORRIDORS

Chairman Jordan, Ranking Member Cartwright, and members of the Committee: thank you for inviting me here today to discuss an issue that our committee has identified with the risk corridor program in the President's health law.

As you know, President Obama's health law created a risk corridor program in an effort to mitigate risk for the private companies that participate in the federally-controlled health insurance market. Risk corridors function by having the government limit the profits or losses that a company can incur.

The government collects a portion of the profits if a company makes money and pays off a portion of the losses if a company loses money.

But, under our constitutional system of government, HHS must receive an appropriation from Congress before it can make payments to insurance plans that lose money. It seems quite clear that the health law left funding of the risk corridor program up to a future Congress by declining to appropriate money for the program as part of the original health law.

According to our own Congressional Research Service (CRS), "under longstanding GAO interpretations, an appropriation must consist of both a direction to pay and a specified source of funds." Nothing in the law meets these requirements. This interpretation flows from the plain language of Article I, Section 9, Clause 7 of the Constitution, which states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Already this year, CRS has twice issued this statement, approving the GAO interpretation.

Since Obamacare does not specify a source of funding for the risk corridor program, the law and the Constitution leave the task of appropriating that money exclusively to Congress.

Yet, it appears that HHS intends to make risk corridor payments without congressional appropriation. Without an explicit appropriation, any money spent on this program would be an illegal transfer of funds. This is bedrock constitutional law, as you know.

Different from Medicare Part D

It has been suggested that the Obamacare risk corridor program is the same as the risk corridor program for Medicare Part D. This is plainly false.

The legislation establishing Medicare Part D stated that payments would come from a specific, newly created account within the Federal Supplementary Medical Insurance Trust Fund. It included a mandatory appropriation for that purpose. President Obama's health law contains no such language.

Why this matters

The President's FY2015 budget requests the authority to collect and spend money from "authorized user fees." HHS would also apparently use that authority as justification to redistribute money collected from profitable insurance plans.

This would give HHS unchecked discretion over these funds, creating a multi-billion-dollar slush fund.

On the other hand, if there are not enough profitable plans paying into the risk corridor program, HHS could raid other programs within CMS program management to fund a shortfall.

If Congress does not either provide a funding source through appropriations or grant the Administration new authority to shift funds around, then any risk corridor payments that HHS makes would be illegal. Should the Administration persist in doing so, it would be subject to prosecution under the Antideficiency Act.

The implementation of the President's health law has been marked by a series of unilateral actions that undermine public confidence and the constitutional rule of law. This is part of a larger pattern of executive branch lawlessness and unilateralism that has caused great unease throughout the nation. Sadly, the Senate Democrat majority has failed to defend Congress' constitutional prerogatives. The House, by contrast, is to be applauded for its defense of the Constitution, as exemplified by this hearing today. I would urge lawmakers in both parties to act in defense of Congress and the authorities delegated to it by the Constitution.