



U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON ENERGY AND COMMERCE

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December 4, 2015

TO: Members, Subcommittee on Oversight and Investigations

FROM: Committee Majority Staff

RE: Hearing entitled “An Overdue Checkup Part II: Examining the ACA's State Insurance Marketplaces.”

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On December 8, 2015, at 10:00 a.m. in 2322 Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled “An Overdue Checkup Part II: Examining the ACA's State Insurance Marketplaces.”

Section 1311 of the Affordable Care Act (ACA) provided funding assistance to the States to help them establish their own health insurance exchanges. The Federal government granted States at least \$5.51 billion toward this effort. By law, the State exchanges were supposed to be self-sustaining—that is, have a funding source other than Federal grant dollars—by January 1, 2015. Despite this multi-billion dollar investment, many are struggling to become self-sustaining. The Department of Health and Human Services (HHS) Office of Inspector General (OIG) alerted the Centers for Medicare and Medicaid Services (CMS) that these faltering State exchanges may be using establishment grants to help cover operational costs. With growing maintenance costs and lower than expected enrollment numbers, States are weighing their options, including shutting down their exchanges and migrating to the Federal system. The Subcommittee is conducting oversight to understand the sustainability challenges State exchanges are facing. The hearing also will examine how Federal establishment grant dollars were spent.

**I. WITNESS**

- Andy Slavitt, Acting Administrator, Centers for Medicare and Medicaid Services

**II. BACKGROUND**

*Section 1311 of the Affordable Care Act*

The Affordable Care Act established a private health insurance marketplace through health insurance exchanges in all 50 States and the District of Columbia.<sup>1</sup> Section 1311 of the

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<sup>1</sup> Patient Protection and Affordable Care Act of 2010, § 1311 (2010).

ACA provides funding assistance to the States to help them plan and establish their marketplaces.<sup>2</sup> According to section 1311, “a State shall use amounts awarded under this subsection for activities (including planning activities) related to establishing an American Health Benefit Exchange.”<sup>3</sup> No grant shall be awarded after January 1, 2015, for the purposes of establishing a State marketplace and a marketplace must be self-sustaining by January 1, 2015.<sup>4</sup> In March 2014, CMS issued guidance that Federal funds may not be used to cover maintenance and operating costs after January 1, 2015.<sup>5</sup> CMS, however, allows establishment grant funds to be used for non-operational costs after January 1, 2015, through No Cost Extensions (NCEs), including the complete design, development, and implementation activities of a marketplace.<sup>6</sup>

To date, over \$5.51 billion in Federal grants have been awarded to States in Federal marketplace grants to States.<sup>7</sup> (See Appendix A, which demonstrates how much Federal grant dollars each State received.) December 2014 was the last month CMS could award establishment grant funding assistance. During that month alone, CMS awarded approximately \$420 million to State-based marketplaces and State partnership marketplaces.<sup>8</sup>

#### April HHS OIG Alert

On April 27, 2015, the HHS OIG alerted Andy Slavitt, Acting Administrator for CMS, that State exchanges may be using Federal establishment grant funds for operational expenses after January 1, 2015, which is prohibited by law.<sup>9</sup> The OIG noted that both in media reports and its review of State exchanges’ budget information, some State exchanges face uncertain operating reviews for 2015 and beyond. Because of this uncertainty, the OIG acknowledged the risk that State exchanges might use establishment grant funds to cover operational costs. The OIG also noted that certain terms in section 1311—such as “operating expense” and “design, development, and implementation expenses”—lacked “meaningful distinction.”<sup>10</sup>

The OIG encouraged CMS to develop and issue clear guidance to State exchanges on the use of establishment grant funds. Specifically, the OIG encouraged CMS to clarify what “constitutes (1) operational costs and (2) design, development, and implementation costs to minimize the marketplaces’ improper use of establishing grant funding.” The OIG further encouraged CMS to review State exchange plans for using establishment grant funds to ensure that CMS’ guidance addresses real-world examples such as call centers, in-person assisters, bank

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The Centers for Medicare and Medicaid Services, FAQs on the Use of 1311 Funds and No Cost Extensions (Mar. 14, 2014).

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Gov’t Accountability Office, State Health Insurance Marketplaces: CMS Should Improve Oversight of State Information Technology Projects (GAO-15-527) (September 2015), <http://www.gao.gov/assets/680/672565.pdf>.

<sup>8</sup> Early Alert: Without Clearer Guidance, Marketplaces Might Use Federal Funding Assistance for Operational Costs When Prohibited by Law (A-01-14-02509) (Apr. 27, 2015), <http://oig.hhs.gov/oas/reports/region1/11402509.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

fees and printing and postage expenses. Lastly, the OIG encouraged CMS to actually monitor the State exchanges' use of establishment grant funds.<sup>11</sup>

On June 8, 2015, CMS issued guidance intended to clarify how States can use establishment grant funds.<sup>12</sup> According to its guidance, States are permitted to use establishment grant funds for designing, developing, and testing information technology functions, setting up Federally compliant financial and program audit policies and procedures, outreach and education to boost enrollment, call center activities, and long-term capital planning. States also can use these funds to cover costs indirectly supporting establishment work such as salaries. Unallowable costs include, but are not limited to, rent, hardware/software maintenance and operations, telecommunications, and call center operations that do not constitute establishment activities.<sup>13</sup> The guidance did not provide real-world examples to help clarify what constitutes operational costs.

### III. STATE EXCHANGES

The ACA grants HHS the authority to fund establishment grants to States setting up “State-based” exchanges to sell health insurance.<sup>14</sup> For States that did not establish exchanges, the ACA directs HHS to establish a “Federally facilitated” exchange within that State. HHS also developed two additional exchange models—“Federally-supported” and “State-partnership”—where States and the Federal government share responsibilities for the operation of those exchanges.

Thirteen States currently run and operate their own health care insurance exchanges. These “State-based” exchanges were initially funded by Federal establishment grants, and consumers in these States apply for and enroll in coverage through websites established and maintained by the States. These States are also responsible for performing all exchange functions, including health insurance plan management and consumer assistance and outreach. Four additional States originally set up State-based exchanges, but later switched to the Federal technology platform after each State was unable to maintain its exchange for various reasons. These States—Oregon, Hawaii, Nevada, and New Mexico—are known as “Federally-supported” exchanges, and perform all exchange functions. Consumers in these States, however, apply for and enroll in coverage through healthcare.gov.

Over half of the States did not elect to establish a State exchange. Instead, HHS set up “Federally-facilitated” exchanges in each of those 27 states. In these exchanges, HHS performs all of the exchange functions, and consumers apply for and enroll in coverage through healthcare.gov. Lastly, seven States participate in “State-partnership” exchanges, where States administer in-person consumer assistance functions and HHS performs the remaining exchange

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<sup>11</sup> *Id.*

<sup>12</sup> The Centers for Medicare and Medicaid Services, FAQs on the Clarification of the Use of 1311 Funds for Establishment Activities (June 8, 2015).

<sup>13</sup> *Id.*

<sup>14</sup> Patient Protection and Affordable Care Act of 2010, § 1311 (2010).

functions. Consumers in these States also apply for and enroll in coverage through healthcare.gov.

#### **IV. ISSUES**

The following issues are expected to be examined at the hearing:

- Are State exchanges on track to becoming self-sustaining?
- What are CMS' oversight mechanisms to monitor how States spend establishment grant dollars?
- Do States have remaining Federal establishment grant dollars? How does CMS ensure that States do not spend the dollars on operational costs?
- If a State exchange chooses to abandon its infrastructure and instead use the Healthcare.gov platform, what steps must a State exchange take before CMS permits the State to use Healthcare.gov?

#### **V. STAFF CONTACTS**

If you have any questions regarding this hearing, please contact Jessica Donlon, Emily Felder, or Brittany Havens of the Committee staff at (202) 225-2927.

**APPENDIX A**

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