



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

September 12, 2016

TO: Members, Subcommittee on Health and, Subcommittee on Oversight and Investigations

FROM: Committee Majority Staff

RE: Hearing entitled “The Affordable Care Act on Shaky Ground: Outlook and Oversight.”

On Wednesday, September 14, 2016, at 10:00 a.m. in HVC-210, the Subcommittee on Health and the Subcommittee on Oversight and Investigations will hold a joint hearing entitled “The Affordable Care Act on Shaky Ground: Outlook and Oversight.” The Subcommittees will hear testimony from the U.S. Department of Health and Human Services (HHS), the HHS Office of the Inspector General (OIG), and the U.S. Government Accountability Office (GAO) about the implementation of the Patient Protection and Affordable Care Act (PPACA).

I. WITNESSES

- Andy Slavitt, Acting Administrator, Center for Medicare and Medicaid Services (CMS);
- Gloria L. Jarmon, Deputy Inspector General for Audit Services, Office of Audit Services, Office of Inspector General, U.S. Department of Health and Human Services; and
- Seto J. Bagdoyan, Director, Forensic Audits and Investigative Service, U.S. Government Accountability Office.

II. BACKGROUND

a. The Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed PPACA into law.¹ The PPACA created health care insurance exchanges, a new framework for individuals to purchase health care insurance.

Since the first open enrollment period, in October 2013, the exchanges have faced challenges, including much lower-than-expected enrollment, unpredictable operational costs, and insurers dropping out of the exchanges. In 2010, the Congressional Budget Office (CBO)

¹ Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (2010).

projected that as many as 21 million individuals would enroll in coverage through the ACA-created exchanges by the end of 2016.² Yet today, this number is poised to come in at roughly half of this estimate. Additionally, UnitedHealth, Humana, and Aetna have made public their intentions to end their exchange plan offerings in markets across the country. As a result, as many as one-third of counties nationwide are likely to only have one ACA-compliant insurer for benefit year 2017, significantly limiting patient choice.³

Although the PPACA authorized all 50 states and the District of Columbia to establish their own “state-based” exchanges (SBE), only 16 states and the District of Columbia elected to do so. HHS, through its authority in Section 1311 to award grants to states establishing SBEs, awarded \$4.6 billion dollars to establish SBEs in those sixteen states and the District of Columbia. Of the seventeen original state-based exchanges, four have closed and use the federal IT platform, healthcare.gov.⁴

Section 1322 of the PPACA established the Consumer Operated and Oriented Plan (CO-OP) program. A CO-OP is a non-profit health insurance organization that is directed by its customers, and sells individual and small business health insurance plans through the exchanges established by PPACA. The law authorized the Secretary of HHS to award taxpayer-backed loans to establish CO-OPs, and HHS ultimately awarded \$2.4 billion dollars to create 24 CO-OPs operating in twenty-three states. In the last three years, sixteen CO-OPs have closed down, leaving only seven CO-OPs operating currently.⁵

b. Reports and Investigations Show Problems with PPACA Programs

HHS tasked CMS with the responsibility of implementing and managing many of the costly programs, like SBEs and CO-OPs, established under the law. Reports by non-partisan government entities highlight some of the significant challenges faced by CMS while implementing the PPACA.

GAO has conducted numerous audits of both the federal and state-based exchanges. Recently, the GAO issued a report examining the 2014 plan concentration of enrollees in the newly established exchanges. GAO has recently concluded undercover testing to examine the accuracy of eligibility verification on the federal and state-based exchanges for benefit years 2015 and 2016. These reports will be made available to members of Congress and their staffs prior to the hearing.

² Congressional Budget Office. Cost Estimate for H.R. 4872, the Reconciliation Act of 2010. March 2010. <https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf>

³ Preliminary Data on Insurer Exits and Entrants in 2017 Affordable Care Act Marketplaces. Cox, Cynthia, and Semanskee, Ashley. August 28, 2010. <http://kff.org/health-reform/issue-brief/preliminary-data-on-insurer-exits-and-entrants-in-2017-affordable-care-act-marketplaces/>

⁴ A fifth state-based exchange, Kentucky, has announced its intention to close starting in 2017.

⁵ One CO-OP in Vermont closed down before it sold a single health plan. While CMS awarded this Vermont CO-OP millions of taxpayer-backed loans, it failed to receive approval from state regulators to sell insurance in the state of Vermont.

The HHS OIG has issued three reports regarding the outlook and financial stability of the health care insurance CO-OPs created under the law. Most recently, the HHS OIG audited CMS' method to keep struggling CO-OPs afloat by converting start-up loans into surplus notes, which created the appearance that the CO-OPs had more capital than they actually did.⁶ Unlike start-up loans, CO-OPs could report surplus notes as capital rather than debt. Four of the twelve CO-OPs that converted loans failed within six months of the conversion. This audit found that CMS did not properly document the potential impact of the loan conversions on the federal government's ability to recover the loan payments if CO-OPs failed.

The HHS OIG has also conducted several notable audits concerning the federal funding allotted to establish the federal and state-based exchanges. In April 2015, the HHS OIG issued an "Early Alert" notifying CMS that SBEs could be using federal establishment grants for operational costs, in violation of federal law.⁷ This alert prompted the Committee's own investigation into the matter. HHS OIG also found that several SBEs improperly allocated Medicaid dollars for SBE expenses.

In addition to the work conducted by the OIG and the GAO, the Committee has conducted its own investigations into CMS' implementation of both the SBEs and the CO-OP program. Following the HHS OIG alert that indicated SBEs may have misspent federal establishment grants, and the closures of some SBEs, the Subcommittee on Oversight and Investigations convened a hearing on September 29, 2015, entitled "An Overdue Checkup: Examining the ACA's State Insurance Marketplaces."⁸ This hearing featured testimony from leaders of six SBEs, and examined struggles and challenges that SBEs faced to become financially sustainable. Following this hearing, on October 14, 2015, the Committee wrote letters to all seventeen SBEs, requesting information and documents.⁹ The Committee convened a second hearing on December 8, 2015, at which CMS Acting Administrator Slavitt testified about CMS' oversight and management of the seventeen state-based exchanges.¹⁰

After the high-profile failure of twelve CO-OPs in late 2015, the Committee convened a hearing on November 5, 2015, titled "Examining the Costly Failures of ObamaCare's CO-OP Insurance Loans."¹¹ At the hearing, the Committee sought to understand the reasons why the CO-OPs failed, CMS' process to recover loans awarded to CO-OPs, and the effectiveness of CMS' oversight mechanisms to monitor CO-OPs. Following the hearing, the Committee sent a

⁶OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERV., A-05-16-00019, CONVERSIONS OF STARTUP LOANS INTO SURPLUS NOTES BY CONSUMER OPERATED AND ORIENTED PLANS WERE ALLOWABLE BUT NOT ALWAYS EFFECTIVE (Aug. 2016) available at <https://oig.hhs.gov/oas/reports/region5/51600019.pdf>

⁷OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERV., EARLY ALERT: WITHOUT CLEARER GUIDANCE, MARKETPLACES MAY USE FEDERAL FUNDING ASSISTANCE WITHOUT OPERATIONAL COSTS WHEN PROHIBITED BY LAW (Apr. 28, 2015) available at <https://oig.hhs.gov/oas/reports/region1/11402509.pdf>

⁸ H. Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations, *An Overdue Checkup: Examining the ACA's State Insurance Marketplaces*, 114th Cong. (Sept. 29, 2015).

⁹ See, e.g., Letter from Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Jeffrey Kissel, Executive Director, Hawaii Health Connector, (Oct. 14, 2015).

¹⁰ H. Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations, *An Overdue Checkup Part II: Examining the ACA's State Insurance Marketplaces*, 114th Cong. (Dec. 8, 2015).

¹¹ H. Comm. on Energy & Commerce, Subcomm. on Oversight & Investigations, *Examining the Costly Failures of Obamacare's CO-OP Insurance Loans*, 114th Cong. (Nov. 5, 2015).

letter to CMS Acting Administrator Slavitt on November 24, 2015, requesting additional information and documents regarding the CO-OP program.¹² To gain a better understanding of the functioning of this program, on May 16, 2016, the Committee also requested information and documents from each of the eleven CO-OPs then in existence.¹³

III. ISSUES

The following issues will be examined at the hearing:

- The current state of the implementation of the PPACA;
- The findings of oversight work conducted by the GAO, HHS OIG, and the Committee;
- The stability of the current exchange markets;
- Steps taken by CMS to enhance oversight of the SBE and CO-OP programs; and
- Solutions that aim to help patients receive more choice at a fair cost.

IV. STAFF CONTACTS

If you have any questions regarding the hearing, please contact Adam Buckalew, Emily Felder, or Brittany Havens at (202) 225-2927.

¹² Letter from Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Andrew Slavitt, Acting Administrator, Centers for Medicare & Medicaid Serv. (Nov. 24, 2015).

¹³ *See, e.g.*, Letter from Hon. Fred Upton, Chairman, H. Comm. on Energy & Commerce, to Cathy Mahaffey, Chief Executive Office, Common Ground Healthcare Cooperative (May 16, 2016).