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MEMORANDUM January 23, 2014

To: House Energy and Commerce Committee
Attention: Paul Edattel

From: Edward C. Liu, Legislative Attorney [redacted]

Subject: **Funding of Risk Corridor Payments Under ACA § 1342**

This memorandum responds to your request for an analysis of the following two questions concerning the funding of the risk corridor program under § 1342 of the Patient Protection and Affordable Care Act (ACA):

1. Is an appropriation required for payments to qualified health plans under ACA § 1342(b)(1)?
2. Can the amounts received from qualified health plans under ACA § 1342(b)(2) be used to make payments under § 1342(b)(1)?

This memo provides general background information, and may be used to respond to questions by other Members or Congressional staff.

Overview of Risk Corridors

Risk corridors are a method for constraining financial losses (or gains) because costs are greater (or lesser) than what an insurance company estimated. The corridors allow insurance companies and government to share higher-than-expected costs (or profits). Risk corridors have been employed when there is a change in the market which leaves health insurers unsure about the future costs they face, and how to price (or bid) their products.

Section § 1342 of the ACA requires the Secretary of Health and Human Services (HHS) to establish and administer a program of risk corridors for 2014, 2015, and 2016 for qualified health plans[1] (QHPs) offered to individuals and small businesses.[2] Under § 1342(b)(1), if a plan's allowable costs exceed the total premiums received (less administrative costs), the Secretary is required to pay the plan a percentage of the shortfall in premiums. In contrast, under § 1342(b)(2), if a participating plan's allowable costs are

[1] Qualified health plans are plans that provide a comprehensive set of health benefits and comply with all applicable ACA market reforms. Exchange plans must be QHPs, with limited exceptions. QHPs may also be offered in the private market outside of exchanges.

[2] 42 U.S.C. § 18062.

less than the total premiums received (less administrative costs), the plan is required to pay to the Secretary a comparable percentage of the excess premiums received.

Is an appropriation required for payments to qualified health plans under ACA § 1342(b)(1)?

As noted above, the risk corridor program directs payments to be made by the Secretary of HHS to certain insurers that have underestimated their premiums for a given plan year through 2016. However, statutory and constitutional provisions prohibit federal agencies from making payments in the absence of a valid appropriation.[3] Under longstanding GAO interpretations, an appropriation must consist of both a direction to pay and a specified source of funds.[4] While the language of ACA § 1342(b)(1) establishes a directive to the Secretary to make such payments, it does not specify a source from which those payments are to be made.[5] Therefore, § 1342 would not appear to constitute an appropriation of funds for the purposes of risk corridor payments under that section.[6]

It is possible that an appropriation that would cover these payments may arise elsewhere. One potential source would be an appropriation enacted as part of the annual appropriations process. Unfortunately, it is too early to be able to predict whether an annual appropriation exists that would cover these payments. This is because the payments under § 1342 would not be made until FY2015 for which we do not yet have a proposed budget from the President or any pending appropriations bills.

Can the amounts received from qualified health plans under ACA § 1342(b)(2) be used to make payments under § 1342(b)(1)?

In some cases, federal expenditures can be financed through a type of permanent, indefinite appropriation known as a revolving fund. Generally, such expenditures have revenue generating activities and the

[3] 31 U.S.C. § 1342 ("An officer or employee of the United States Government or of the District of Columbia government may not ... make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law"); U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

[4] *See* GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-17 (2004).

[5] "[I]f ... a participating plan's allowable costs for any plan year are more than [specified thresholds] the Secretary shall pay to the plan an amount equal to [the statutory formula]." 42 U.S.C. § 18062(b)(1). It should also be noted that the question of whether an appropriation is available to make these payments is separate from the question of whether insurance plans meet the eligibility requirements for a payment under § 1342(b)(1). A qualified health plan may have a legal claim to the payments by operation of the statutory formula, but that alone does not constitute an appropriation from which that claim may be paid. *See* GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-17 (2004) (citing Comptroller General Decision B-114808, Aug. 7, 1979).

[6] In contrast, the risk corridor payments under the similar Medicare Part D program are funded through a permanent appropriation from the Medicare Prescription Drug Account established in the Federal Supplementary Medical Insurance Trust Fund. 42 U.S.C. § 1860d-16(b)(1)(B).

revenue generated from those activities is placed in a revolving fund which can be used to pay for future revenue generating activities.[7]

An agency may not create a revolving fund absent specific authorizing legislation.[8] In the absence of any specific directions, federal law requires such amounts to be deposited in the General Fund of the Treasury, from which they may be further appropriated by Congress.[9] The necessary elements for a statute to create a revolving fund are:

- It must specify the receipts or collections which the agency is authorized to credit to the fund (user charges, for example).
- It must define the fund's authorized uses, that is, the purpose or purposes for which the funds may be expended.
- It must authorize the agency to use receipts for those purposes without fiscal year limitation. However, as explained above, only receipts and collections that the fund has earned through its operations are available without fiscal year limitation.[10]

Notably for purposes of this memorandum, the amounts received by HHS from plans that have overestimated premiums for a given year are not explicitly designated to be deposited in a revolving account or otherwise made available for outgoing payments under § 1342(b)(1). Therefore, there does not appear to be sufficient statutory language creating a revolving fund that would make amounts received under § 1342(b)(2) available to pay amounts due to eligible plans under § 1342(b)(1).

As with a non-revolving appropriation to cover payments under § 1342(b)(1), a revolving fund can be created in standalone legislation, or in an annual appropriations act.[11] The lack of statutory language creating a revolving fund within § 1342 does not mean that such incoming payments may never be placed in a revolving fund to be used for outgoing payments. Such a revolving fund could be established by Congress at some point in the future, including before the first payments from qualified health plans are due for plan year 2014. Nevertheless, until such time as that legislation is enacted, it does not appear that a revolving fund exists for purposes of receipts and payments under § 1342.

[7] *See* GAO, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-85 (2008).

[8] *Id.* at 12-89 ("[A]gencies have no authority to administratively establish revolving funds.").

[9] 31 U.S.C. § 3302(b). *See* GAO, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-93 (2008) (noting that creation of revolving fund is exception to general rule of 31 U.S.C. § 3302(b)).

[10] *See* GAO, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-90 (2008).

[11] *See* GAO, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-89 (2008).