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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

September 27, 2012

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue
Washington D.C. 20515

Dear Madam Secretary:

The Committee on Oversight and Government Reform is continuing its oversight of the Department of Health and Human Services' (HHS) Medicare Advantage Quality Bonus Payment Demonstration.¹ On July 25, 2012, the Committee held a hearing on the Demonstration.² At the hearing, the Committee heard from two Government Accountability Office (GAO) experts, James Cosgrove and Edda Emmanuelli-Perez, who discussed the significant flaws in the bonus payment demonstration. Mr. Cosgrove and Ms. Emmanuelli-Perez concluded that because of its significant design flaws, HHS officials should cancel the Demonstration.³ This is highly significant as it is the first Medicare demonstration project that GAO ever recommended cancelling.⁴

After the Committee's hearing on the Demonstration, we sent you a letter on August 1, 2012, asking for more detailed information about the Demonstration.⁵ We requested a response by August 13, 2012, but six weeks later we still have not received one. You have also not provided a sufficient response to the Committee's first letter from May 23, 2012, detailing our significant concerns with the Demonstration.⁶ Attached, you will find a copy of our August 1, 2012, letter. Please produce the requested documents and information by 5:00 p.m. on October 5, 2012. If the Department continues to ignore the Committee's request, we will consider the use of compulsory process.

¹ 75 Fed. Reg. 71190, 71220 (Nov. 22, 2010).

² *GAO Report: The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project*: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012) [hereinafter Committee Hearing].

³ *Id.*

⁴ *Id.*

⁵ Darrell Issa, Chairman of the Committee on Oversight and Government Reform, and James Lankford, Chairman, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, letter to Kathleen Sebelius, HHS Secretary (August 1, 2012).

⁶ Darrell Issa, Chairman of the Committee on Oversight and Government Reform, letter to Kathleen Sebelius, HHS Secretary (May 23, 2012).

The Honorable Kathleen Sebelius
September 27, 2012
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When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

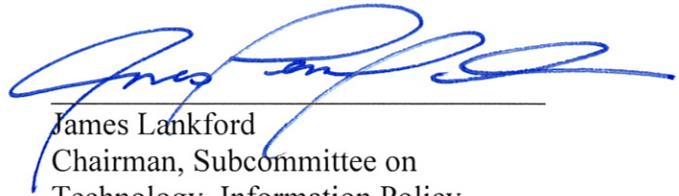
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

If you have any questions about this request, please contact Brian Blase with the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



James Lankford
Chairman, Subcommittee on
Technology, Information Policy,
Intergovernmental Relations and
Procurement Reform

Enclosure

cc: The Honorable Elijah Cummings, Ranking Minority Member

The Honorable Gerald E. Connolly, Ranking Minority Member
Subcommittee on Technology, Information Policy, Intergovernmental Relations and
Procurement Reform

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August 1, 2012

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20515

Dear Madam Secretary:

The Committee on Oversight and Government Reform is continuing oversight of the Department of Health and Human Services' (HHS) implementation of the Patent Protection and Affordable Care Act (PPACA). In particular, the Committee is concerned about HHS's Medicare Advantage Quality Bonus Payment Demonstration (Demonstration).¹ The Medicare Payment Advisory Commission (MedPAC) strongly criticized the Demonstration in January 2011, three months before the final specifications of the Demonstration were announced.² MedPAC was concerned that the Demonstration was too large, too costly, and failed to reward better-performing Medicare Advantage plans.

During the past six months, the Government Accountability Office (GAO) has raised many of the same policy criticisms and additional legal questions about the Demonstration.³ GAO experts concluded the Demonstration is so flawed that evaluators will be unable to determine whether its bonus scheme is an effective tool for improving Medicare Advantage plan quality or efficiency.⁴ In particular, GAO emphasized that the Demonstration lacked an appropriate control group and primarily used data from before the Demonstration was finalized to reward Medicare Advantage plans.⁵ GAO concluded the Demonstration was so flawed that it took unprecedented action and called on you to cancel the Demonstration. Unfortunately, HHS rejected GAO's recommendation and has continued the program unaltered.⁶

¹ 75 Fed. Reg. 71190, 71220 (Nov. 22, 2010).

² MedPAC letter to Donald Berwick, CMS Administrator (January 6, 2011).

³ Gov't Accountability Office, *Medicare Advantage: Quality Bonus Payment Demonstration Undermined by High Estimated Costs and Design Shortcomings*, GAO-12-409R (Mar. 21, 2012) [hereinafter GAO Report]; see also Letter from Lynn H. Gibson, Gen. Counsel, Gov't Accountability Office, to Honorable Kathleen Sebelius, Sec'y of Health & Human Servs. (July 11, 2012) [hereinafter GAO Letter].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Under Section 402(a)(1)(A) of the Social Security Act, the Secretary of HHS possesses the authority to implement demonstrations that test whether changes in payment methodologies increase the efficiency and economy of Medicare services through the creation of additional incentives.⁷ However, GAO experts testified at the Committee's July 25, 2012, hearing that you acted outside of your legal authority by authorizing the Demonstration because it demonstrates nothing of value and fails to create additional incentives for Medicare Advantage plans to improve quality.⁸ Moreover, the size and timing of the Demonstration raises questions about possible political motivations behind the decision to implement the Demonstration.

On October 15, 2012, Medicare Advantage's open enrollment period begins. Under PPACA, Medicare Advantage plans would experience a \$200 billion cut over the next decade, with the cuts scheduled to begin in 2012.⁹ According to the July 25, 2012, hearing testimony, without the Demonstration, seniors would have had fewer plan options, less benefits, and higher premiums if PPACA's cuts to Medicare Advantage had been allowed to take effect.¹⁰ Rather than allowing PPACA cuts to Medicare Advantage right before this year's election, you made the decision to conduct a short-term demonstration that would offset 71% of PPACA's Medicare Advantage cuts scheduled during the 2012 election cycle.¹¹ Although GAO did not speculate about your motivations for this unprecedented demonstration, the Committee is concerned that the only plausible explanation is that, realizing the political danger of the law's large cuts to Medicare Advantage during an election year, you decided to utilize a loophole in the Social Security Act to implement a temporary bandage that would cover up PPACA's large cuts to the 13 million seniors enrolled in Medicare Advantage.¹²

In addition to the Committee's concerns about the political motivations behind the Demonstration, Jonathan Blum, the Director of the Center for Medicare at the Centers for Medicare and Medicaid Services (CMS), testified at our hearing¹³ that there is no limit to the HHS Secretary's authority to conduct demonstrations under Section 402(a)(1)(A). Mr. Blum's testimony is at odds with GAO's view that the HHS Secretary's authority under Section 402 is *not* unlimited.¹⁴ According to Mr. Blum's testimony at the Committee's hearing:

- The Secretary of HHS can spend an unlimited amount under your demonstration authority without Congressional appropriation or authorization.
- The Secretary of HHS can easily waive a demonstration from your Department's explicit rules stating demonstrations must be budget neutral.

⁷ 42 U.S.C. § 1395b-1(a)(1)(A).

⁸ *GAO Report: The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project*; Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012) [hereinafter Committee Hearing].

⁹ Congressional Budget Office, *Preliminary Analysis of the President's Budget for 2012* (March 18, 2011).

¹⁰ Committee Hearing, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ GAO Letter, *supra* note 2.

- The Secretary of HHS can effectively change the law through your demonstration authority. In this case, you effectively amended PPACA without Congressional authorization.
- The Secretary of HHS can implement a demonstration without obtaining an independent, non-partisan statistical analysis of the demonstration, despite a mandate that you do so under Section 402(b) of the Social Security Act.

You have rejected both GAO's and Med-Pac's criticism of this project's design.¹⁵ You have ignored internal CMS and Office of Management and Budget (OMB) policies that demonstrations must be budget neutral and that they require independent statistical experts' approval.¹⁶ In essence, you have unilaterally decided to spend \$8.3 billion on the Medicare program without Congressional appropriation – an amount greater than all previous 85 Medicare demonstration projects combined.¹⁷ Since you have profoundly rejected the established requirement that Medicare demonstrations are budget neutral and Mr. Blum has confirmed that there is no limit to what you can spend on a demonstration, the Committee is concerned that you may continue to abuse this authority to increase the deficit and re-write the law to preserve the self-interest of this Administration. Moreover, the Committee is concerned about the precedent this reckless Demonstration sets for future Secretaries.

Do you agree with Mr. Blum that there is no limit to what you may spend through this authority?

To facilitate the Committee's oversight of your authority to implement demonstration projects under Section 402(a)(1)(A) of the Social Security Act and this particular Demonstration, the Committee requests that the Department produce the following documents, in electronic format, for the time period March 23, 2010, to the present:

1. All documents and communications referring or relating to limits on what the Secretary of HHS can spend on demonstration projects under Section 402(a)(1)(A) of the Social Security Act?
2. All documents and communications referring or relating to the decision to exempt this Demonstration from CMS's own budget neutrality rules.
3. All documents and communications referring or relating to Section 402(b)'s requirement that CMS obtain the evaluation of a statistical expert for demonstration projects.
4. All documents and communications referring or relating to the decision to implement this Demonstration as a three-year project that ends the MA on December 31, 2014.

¹⁵ Committee Hearing, *supra* note 8.

¹⁶ *Id.*

¹⁷ *Id.*

5. The documents you submitted to the Committee on July 25, 2012, are not fully compliant with the May 23, 2012, written request.¹⁸ Since your submission included only two emails from August 2010, there clearly remains substantial communications between CMS, HHS, MedPAC, OMB, and health insurance companies that you and your agency have chosen not to disclose. Therefore, please provide all documents and communications between and among any executive branch employees that refer or relate to the Demonstration from March 23, 2010, to the present.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on August 13, 2012. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about the Committee's request.

If you have any questions about this request, please contact Brian Blase with the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



James Lankford
Chairman, Subcommittee on
Technology, Information Policy,
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Procurement Reform

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Gerald E. Connolly, Ranking Minority Member
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¹⁸ Darrell Issa, Chairman of the Committee on Oversight and Government Reform, letter to Kathleen Sebelius, HHS Secretary (May 23, 2012).