

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

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<http://oversight.house.gov>

November 2, 2017

The Honorable Eric D. Hargan
Acting Secretary
Department of Health and Human Services
330 C Street SW
Washington, DC 20416

Dear Mr. Hargan:

The Committee is examining cost sharing reduction (CSR) payments to health insurers under the Patient Protection and Affordable Care Act (ACA). We seek related records from the Department.¹

The ACA principally relies on premium tax credits to lessen health insurance costs for low-income taxpayers who purchase qualified health plans through the marketplace.² In addition, the ACA provides for CSR benefits to certain low-income insureds enrolled in silver-tier plans, receiving advanced premium tax credits, and earning between 100 and 250 percent of the federal poverty level, and also authorizes direct reimbursements to insurers for offsetting out-of-pocket expenses incurred in providing such benefits.³ As of February, the total enrollment in the exchanges was 10.3 million, of which 8.7 million enrollees (84 percent) received advanced premium tax credits and 5.8 million (57 percent) are enrolled in plans providing CSR benefits.⁴ While subsidizing premium tax credits may cost taxpayers nearly \$38 billion this year, CSR payments to insurers are set to cost \$7 billion.⁵

While Congress amended 31 U.S.C. § 1324—an existing permanent appropriation exclusively used for tax refunds and enumerated tax credits—to provide funding for the PTC program, it did not amend § 1324 to appropriate funding for CSR payments to insurers, nor did it

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1402, 124 Stat. 220 (2010).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat. 213 (2010).

³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1402, 124 Stat. 220 (2010).

⁴ CTRS. FOR MEDICARE AND MEDICAID SERVICES, U.S. DEP'T OF HEALTH & HUMAN SERV., 2017 EFFECTUATED ENROLLMENT SNAPSHOT (2017).

⁵ CONG. BUDGET OFFICE, FEDERAL SUBSIDIES FOR HEALTH INSURANCE COVERAGE ESTABLISHED BY THE AFFORDABLE CARE ACT: TABLE 2 (2017), <https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf>. See also The Henry J. Kaiser Family Foundation, *Estimated Total Premium Tax Credits Received by Marketplace Enrollees* (Feb. 2017), <http://www.kff.org/health-reform/state-indicator/average-monthly-advance-premium-tax-credit-aptc/>.

appropriate such funding elsewhere.⁶ The prior administration nonetheless unilaterally funded the CSR payments without constitutional or statutory authority.⁷ Beginning January 2014, and continuing on a monthly basis thereafter, CSR reimbursements were paid to insurers without any appropriation by Congress.⁸ To date, the Executive Branch has issued nearly \$15 billion in unappropriated CSR payments to insurers.⁹

In 2014, the House of Representatives filed suit against the Secretaries of the Departments of Health and Human Services and Treasury alleging CSR reimbursements by the Executive Branch unconstitutionally usurped Congress's exclusive power of the purse in violation of the Appropriations Clause, among other causes of action.¹⁰ On May 12, 2016, the United States District Court for the District of Columbia ruled in the House's favor, finding the Secretaries violated Article I, Section 9, Clause 7 of the Constitution.¹¹ The court held, "Congress is the only source for such an appropriation, and no public money can be spent without one."¹² The court explained the law "unambiguously appropriates money for ... [the] premium tax credits but *not for [CSR] reimbursements to insurers*. Such an appropriation cannot be inferred [from Congress's enactment of the ACA]."¹³ The previous administration appealed the decision, and the appeal is currently being held in abeyance.

Meanwhile, the current Administration continued funding the CSR payments to insurers on a monthly basis until October 13, 2017, when the President announced ending the payments.¹⁴ In a statement, the White House said, "The bailout of insurance companies through these unlawful payments is yet another example of how the previous administration abused taxpayer

⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401, 124 Stat 213 (2010) (amending 31 U.S.C. § 1324(b)(2) by adding "36B," the ACA Section 1401 refundable tax credit, to the list of tax credits available to be paid from the permanent appropriation); *see also*, Memorandum from U.S. Dep't of the Treasury to the Office of Management and Budget (Jul. 31, 2012) ("[T]here is currently no appropriation to Treasury or to anyone else, for purposes of the cost-sharing payments.").

⁷ After reporting that the CSR payments to insurers would be subject to sequester, the Office of Management and Budget (OMB) reversed position and issued a memorandum to justify adding CSR payments to the permanent appropriation for tax credits, and the Department of Treasury followed up with its own memorandum directing the Internal Revenue Service to begin administering CSR payments. *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173 (D.D.C. 2016).

⁸ *Burwell*, 130 F. Supp. 3d at 11-12.

⁹ Brian Blase, *Large Bailout For ObamaCare Insurers May Be Coming*, FORBES, Sept. 11, 2016, <https://www.forbes.com/sites/theapothecary/2016/09/11/large-bailout-for-obamacare-insurers-may-be-coming/>.

¹⁰ *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016); *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 81 (D.D.C. 2015); *see also* U.S. CONST. art. I, sec. 9, cl. 7.

¹¹ *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016).

¹² *Burwell*, 185 F. Supp. 3d at 165; *see also Burwell*, 130 F. Supp. 3d at 71.

¹³ *Burwell*, 185 F. Supp. 3d at 171 ("Nothing in Section 1402 prescribes a 'periodic and timely payment process ... [n]or does Section 1402 condition the insurers' obligations to reduce cost sharing on the receipt of offsetting payments.") (emphasis added); *see also Burwell*, 130 F. Supp. 3d at 59.

¹⁴ *See, e.g.*, Dan Mangan, *Aetna CEO Bertolini Says Obamacare's 'Biggest Problem' Is That It's Not Fully Funded by Government*, CNBC, May 2, 2017, <https://www.cnbc.com/2017/05/02/aetna-ceo-obamacares-biggest-problem-is-that-its-not-fully-funded.html>.

dollars and skirted the law to prop up a broken system.”¹⁵ Prior to the Administration’s announcement, these payments were set to cost \$10 billion for the 2018 benefit year and \$45 billion over the next four years.¹⁶

The constitutionality of these payments has been at the forefront of national debate concerning the ACA and insurers’ incentives to remain in the market. In its Form 10-Q filing with the SEC after the May 2016 court ruling, Aetna cited the ruling as a potential material risk.¹⁷ Anthem’s CEO described CSR reimbursement payments as a source of uncertainty, claiming Anthem would “evaluate appropriate adjustments to our filing” if the company did not have certainty over CSR payments.¹⁸ Similarly, in Humana’s Form 10-Q filed in May 2017, the company stated, “limiting funding of cost-sharing subsidies ... creates uncertainty for our business.”¹⁹ In April 2017, Centene’s filing stated, “changes to [cost-sharing reduction payments to insurers] ... could materially and adversely affect our business and financial position.”²⁰

The Committee has questions about considerations for CSR payments, particularly in anticipation of developments in the ACA marketplace. To assist the Committee in better understanding your department’s function in relation to insurers having received monthly CSR payments, please provide the following documents and information:

1. The number of enrollees in receipt of CSR benefits and the number of enrollees who have received premium tax credits since January 1, 2014, and the average associated costs to the federal government for those beneficiaries on a monthly basis, with a differentiation between CSR payments to insurers and premium tax credits.
2. All documents referring or relating to the methodology used to calculate and transmit monthly CSR payments to insurers, including collection reconciliation processes and recoupment of misallocated funding to insurers and CSR subsidies to individuals.
3. A written description of and all submissions, addendums, and re-adjudications of CSR claims made by insurers since advance payments began in January 2014, including but not limited to actual CSR payments provided for all insurers.

¹⁵ White House says it can’t lawfully pay Obamacare subsidies, REUTERS, OCT. 12, 2017, available at <https://www.reuters.com/article/us-usa-healthcare-trump/white-house-says-it-cant-lawfully-pay-obamacare-subsidies-idUS-for-obamacare-insurKBN1CH24C>.

¹⁶ CONG. BUDGET OFFICE, THE EFFECTS OF TERMINATING PAYMENTS FOR COST-SHARING REDUCTIONS (2017).

¹⁷ AETNA INC., FORM 10-Q, QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 (Mar. 31, 2017).

¹⁸ E.g., Bertha Coombs, *Anthem Could Bolt from Obamacare Exchange if Subsidies Are Cut*, CNBC, Apr. 26, 2017, <https://www.cnbc.com/2017/04/26/anthem-could-bolt-from-obamacare-exchange-if-subsidies-are-cut.html>.

¹⁹ HUMANA INC., FORM 10-Q, QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 at 37 (June 30, 2017).

²⁰ CENTENE CORPORATION, FORM 10-Q, QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15 (D) OF THE SECURITIES EXCHANGE ACT OF 1934 at 31 (April 14, 2017).

The Honorable Eric D. Hargan

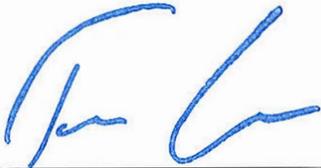
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4. All documents including communications with any agent of a state department of insurance, insurer, or federal officials referring or relating to the review of CSR payments to insurers since January 1, 2014.
5. All documents and communications referring or relating to Section V "Termination," Subsection B of the 2017 Qualifying Health Plan Issuer (QHPI) agreements.

Provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on November 16, 2017. An attachment to this letter provides additional instructions for responding to the Committee's request. In addition, please arrange to brief Committee staff on this matter after producing the requested documents and information.

Thank you for your attention to this matter. Please contact Sarah Vance of the Committee staff at (202) 225-5074 with any questions about this request.



Trey Gowdy

Sincerely,



Jim Jordan
Subcommittee on Healthcare,
Benefits, and Administrative Rules

Enclosure

cc: The Honorable Elijah E. Cummings

The Honorable Raja Krishnamoorthi
Subcommittee on Healthcare, Benefits, and Administrative Rules

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered 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.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
115TH CONGRESS**

NOTICE OF APPEARANCE OF COUNSEL

Counsel submitting: _____

Bar number: _____ **State/District of admission:** _____

Attorney for: _____

Address: _____

Telephone: (_____) _____ - _____

Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for _____ in (select one):

All matters before the Committee

The following matters (describe the scope of representation):

All further notice and copies of papers and other material relevant to this action should be directed to and served upon:

Attorney's name: _____

Attorney's email address: _____

Firm name (where applicable): _____

Complete Mailing Address: _____

I agree to notify the Committee within 1 business day of any change in representation.

Signature of Attorney

Date