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ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

July 28, 2014

To: Subcommittee on Health Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "Protecting Americans from Illegal Bailouts and Plan Cancellations Under the President's Health Care Law."

On Monday, July 28, 2014, at 3:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Health will hold a hearing titled "Protecting Americans from Illegal Bailouts and Plan Cancellations Under the President's Health Care Law." The majority has indicated that the hearing will focus on three pieces of legislation: H.R. 3522 the Employee Health Care Protection Act, a bill to repeal the Affordable Care Act's (ACA) risk corridor program, and H.R. 4406, the Taxpayer Bailout Protection Act.

I. H.R. 3522 the Employee Health Care Protection Act

H.R. 3522 would permit any health insurance issuer offering coverage in the group market in 2013 to continue to offer that coverage in 2014 and beyond. These insurance policies would not have to comply with the ACA consumer protections that went into effect in 2014.

The legislation would allow insurance companies to discriminate against small businesses if they have an older workforce, more women in their workforce, or if any of their employees or their children have pre-existing health conditions. Under the legislation, these small businesses would face higher premiums and would continue to see their premiums spike year to year if an employee had an accident, developed a chronic health condition, or had a complicated pregnancy.[1]

[1] White House, *The Affordable Care Act Helps Small Businesses* (online at www.whitehouse.gov/sites/default/files/docs/the_aca_helps_small_businesses.pdf).

Under the legislation, group health insurance plans could continue to impose annual limits on coverage, meaning that insurers could cease to provide any coverage after an individual's care reached a certain overall cost. These plans could also continue to impose extensive waiting periods before individuals could enroll in coverage and they could discriminate against workers with lower compensation by offering them lesser health coverage than highly compensated workers.

Many of the ACA's key reforms impacting the group market had already gone into effect for plans sold in 2013. Since 2011, all insurers are required to spend over 80 percent of premiums on patient care rather than excessive profits and administrative costs. Insurers in the large group market are required to spend at least 85 percent of premiums on patient care. All told, these reforms saved consumers more than $4 billion in 2013 and have resulted in nearly $2 billion in rebates directly to consumers.[2]

Even as these key reforms went into effect, health care cost growth was at record lows and the US added 10 million private sector jobs. The non-partisan Congressional Budget Office (CBO) and the CMS Actuary have both found that in recent years Medicare and private health care spending have grown at some of the slowest levels in decades.[3]

In March 2014, the Administration announced a transition policy that would allow small groups who purchased coverage in 2013 to remain in that same coverage into 2016.[4] That coverage would not have to comply with ACA consumer protections going into effect in 2014 but it could not be sold to groups purchasing coverage for the first time or switching coverage.

Critics have also charged that the ACA will lead some employers to terminate employer health insurance coverage because the law's new beneficiary protections will be too costly for businesses. But according to the latest estimates from the CBO while a small percentage of Americans are expected to transfer out of employer sponsored coverage as a result of the ACA, the overall number of Americans receiving employer-based coverage is expected to grow from 156 million in 2014 to 166 million in 2023, and the number of uninsured is expected to fall by 26

[2] Department of Health and Human Services, Centers for Medicare and Medicaid Services, *80/20 Rule Delivers More Value to Consumers in 2013;* Department of Health and Human Services, *Rebates by State and Market* (July 2014) (online at www.cms.gov/cciio/Resources/Forms-Reports-and-Other-Resources/index.html#Medical Loss Ratio).

[3] Executive Office of the President of the United States, *Trends in Health Care Cost Growth and the Role of the Affordable Care Act* (Nov. 2013) (online at www.whitehouse.gov/sites/default/files/docs/healthcostreport_final_noembargo_v2.pdf).

[4] Center for Medicare & Medicaid Services, *Insurance Standards Bulletin Series—Extension of Transitional Policy through October 1, 2016* (Mar. 5, 2014) (online at www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf).

million people.[5] Since Massachusetts enacted health care reforms that were almost identical to those in the ACA, the percentage of employers offering coverage has increased from 72 percent in 2007 to 77 percent in 2010.[6]

II. H.R. 4406 Taxpayer Bailout Protection Act and Risk Corridor Repeal Discussion Draft

A. Background

The ACA contains a number of provisions to help fairly distribute risk across the health insurance system to keep costs low and premiums stable. Risk sharing mechanisms are essential in any functioning insurance system – from flood insurance, to car insurance, to the Medicare prescription drug program. One type of risk sharing used in the ACA and in other insurance systems is risk corridors.

Section 1342 of the ACA creates a three year risk corridor program to allow insurers to share in gains and losses that may result from inaccurate rate setting in the early years of the new health insurance marketplaces. Under the ACA's risk corridor program, CMS will receive payments from insurers offering plans in the marketplaces if their actual cost of medical claims is below their expected cost by more than 3 percent. If an insurers costs are more than 3 percent above expectations, CMS will offset some of that loss.

The discussion draft before the Committee would repeal the ACA risk corridors. If enacted, the legislation would destabilize the health insurance marketplaces, raise premiums, and likely increase federal outlays for advanced premium tax credits. Earlier proposals to repeal the risk corridors have received widespread condemnation from consumer groups as well as the

[5] Congressional Budget Office, *April 2014 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage* (online at www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf)

[6] Massachusetts Division of Health Care Finance and Policy, *Health Care in Massachusetts: Key Indicators* (July 2011) (online at www.mass.gov/chia/docs/r/pubs/11/2011-key-indicators-february.pdf).

actuarial and business community.[7] These proposals have also been criticized by fierce critics of the ACA such as the American Action Forum and Avik Roy.[8]

H.R. 4406 would require the Secretary to limit payments to health plans through the risk corridor program to the amount of payments received by CMS in a calendar year. CMS has already indicated that payments will be reduced pro-rata to equal receipts in a given year. However, CMS has indicated that "risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner" and that "the unlikely event of a shortfall for the 2015 program year…HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations."[9] As a result, H.R. 4406 could undercut CMS's ability to effectively implement the program.

In February 2014, the Congressional Budget Office (CBO) estimated that CMS would collect $8 billion more from insurers through the risk corridor program than it would pay out. However, in March 2014, CMS issued a final regulation indicating that it would implement the program in a budget neutral manner. In its subsequent estimate, CBO stated, "CBO believes that the Administration has sufficient flexibility to ensure that payments to insurers will approximately equal payments from insurers to the federal government, and thus that the program will have no net budgetary effect over the three years of its operation."[10]

B. Risk Corridors in ACA and Medicare Part D

The ACA's risk corridors were modeled after the risk corridors the Republican authors of the Medicare Modernization Act included in Medicare Part D. Republican leaders including Speaker John Boehner and Senate Minority Leader Mitch McConnell both voted for Medicare

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[7] *See, e.g.,* Letter from Bruce Josten, Executive Vice President, Chamber of Commerce of the Members of the United States Congress (Feb. 4, 2014); Sam Baker, National Journal, *Insurers Up in Arms Over GOP's New Obamacare Attack* (Feb. 10, 2014) (online at www.nationaljournal.com/magazine/insurers-up-in-arms-over-gop-s-new-obamacare-attack-20140210); Edwin Park, Center on Budget and Policy Priorities, *Repealing Health Reform's Risk Corridors Would Boost Deficits and Premiums* (Feb. 04, 2014) (online at http://www.offthechartsblog.org/repealing-health-reforms-risk-corridors-would-boost-deficits-and-premiums/); AHIP Coverage, *What They Are Saying On The 3Rs: From The Right & Left* (Feb. 4, 2014) (online at www.ahipcoverage.com/2014/02/04/what-they-are-saying-on-the-3rs-from-the-right-left/).

[8] AHIP Coverage, *What They Are Saying On The 3Rs: From the Right & Left* (Feb. 4, 2014) (online at www.ahipcoverage.com/2014/02/04/what-they-are-saying-on-the-3rs-from-the-right-left/).

[9] U.S. Department of Health and Human Services, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, Final Rule, 79 Fed. Reg. 101 (May 16, 2014)

[10] Congressional Budget Office, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014* (Apr. 2014) (online at www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf).

Part D have praised the program extensively. When the law first took effect, Sen. Chuck Grassley (R-Iowa) described the Part D risk corridors as one of the "incentives that the secretary can use" to get the new plans started "in a strong way," and the Bush administration highlighted the risk corridors as a strategy to "insure against higher than expected drug costs."[11]

The central differences between the Medicare Part D and ACA risk corridors are the length and generosity of the programs. The Medicare Part D risk corridors are permanent where the ACA's will only last through 2016. Additionally, the Part D risk corridors were more protective against health insurer losses than those in the ACA, reimbursing insurers for 75 percent of losses between 2.5 percent and 5 percent, where the ACA reimburses for only 50 percent of losses between 3 percent and 8 percent.[12]

C. Legal and Budgetary Issues

In January of 2014, in response to a request from Committee Republicans, the Congressional Research Service (CRS) provided a memorandum addressing the funding of the ACA risk corridor program. The memorandum expresses CRS's view that section 1342 of the ACA does not constitute an appropriation of funds for the risk corridor program and does not create a revolving fund for the purposes of receipts and payments under the program.[13]

The Department of Health and Human Services has provided the Committee with specific answers to questions about its legal interpretation of section 1342 of the ACA. The Department stated: "section 1342 authorizes the collection and payment of user fees to and from QHPs. QHPs enjoy a special benefit resulting from the operation of the risk corridors program…this is consistent with OMB Circular A-25...OMB's Fiscal Year 2015, Analytical Perspectives and GAO's Glossary of Terms Used in the Federal Budget Process." While the Department's 2014 did not specifically list the risk corridor program as a user fee program, the CMS program management appropriation covers the risk corridor user fees.[14] The letters from HHS Secretary Burwell and the HHS General Counsel are attached to this memorandum.

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[11] Representative Henry Waxman et al., Politico Magazine, *The Latest Lie About Obamacare* (Feb. 04, 2014) (online at www.politico.com/magazine/story/2014/02/gop-risk-corridor-lie-obamacare-103129.html#.U808UeNdXTo).

[12] Risk Corridors: ACA vs. Part D, in charts , The Incidental Economist (Jan. 28, 2014) (online at http://theincidentaleconomist.com/wordpress/risk-corridors-aca-vs-part-d-in-charts/)

[13] Congressional Research Service, *Funding of Risk Corridor Payments Under ACA § 1342* (Jan. 23, 2014) (online at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20140123CRSMemo.pdf).

[14] Letter from General Counsel William B. Shultz, Department of Health & Human Services, to Julia C. Matta, Assistant General Counsel for Appropriations Law, U.S. Government Accountability Office (May 20, 2014).

III. WITNESSES

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