U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

B-325630

September 30, 2014

The Honorable Jeff Sessions
Ranking Member
Committee on the Budget
United States Senate

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services—Risk Corridors Program*

This responds to your February 7, 2014, request for our opinion regarding the availability of appropriations to make payments to qualified health plans pursuant to section 1342 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, title I, subtitle D, part V, § 1342, 124 Stat. 119, 211, 212 (Mar. 23, 2010), *classified at* 42 U.S.C. § 18062. Section 1342 directs the Department of Health and Human Services (HHS) to establish a temporary risk corridors program to limit the profits and losses of qualified health plans in the individual and small group markets.[1]

In accordance with our regular practice, we contacted HHS to obtain additional factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/lawresources/resources.html. HHS provided us with information and its legal views. Letter from General Counsel, HHS, to Assistant General Counsel for Appropriations Law, GAO (May 20, 2014) (HHS Letter).

[1] The phrase "risk corridors," as used in section 1342, is generally understood to mean a mechanism for limiting an insurer's losses or gains because costs are higher or lower than expected.

BACKGROUND

PPACA required the establishment of American Health Benefit Exchanges (Exchanges) in each state for the purchase of insurance in the individual and small group markets. Pub. L. No. 111-148, §§ 1311(b), 1321(c). Insurers that choose to participate in the Exchanges must meet certain requirements to offer qualified health plans. *See* 45 C.F.R. § 155.1000. Qualified health plans offered through the Exchanges are subject to the risk corridors program. 42 U.S.C. § 1342(a).

The risk corridors program is part of what the Centers for Medicare and Medicaid Services (CMS) refers to as the "premium stabilization programs." CMS, *Premium Stabilization Programs*, *available at* www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/index.html (last visited Sept. 30, 2014). The premium stabilization programs "are designed to provide consumers with affordable health insurance coverage, to reduce incentives for health insurance issuers to avoid enrolling sicker people, and to stabilize premiums in the individual and small group health insurance markets inside and outside the Marketplaces."[2] *Id.*

Generally, insurers set premiums based upon their past experience and anticipated costs related to their pool of enrollees. However, individuals seeking coverage through the Exchanges may have potential health risks that are different than those historically handled by an insurer, resulting in a health plan having higher costs than anticipated. *See* 77 Fed. Reg. 17220, 17221 (Mar. 23, 2012). Because health insurance issuers may be uncertain about the proportion of high-cost enrollees under the new Exchanges, they may include a margin in their pricing to offset the potential expenses of these enrollees, especially during the first few years of the Exchanges. *Id.* at 17221. HHS expects that this uncertainty will decrease as the issuers gain actual claims experience with this new population. *Id*. In order to minimize the possible negative effects of this uncertainty during the initial years of operation of the Exchanges, section 1342 of PPACA directs the Secretary of HHS to operate a temporary risk corridors program. Pub. L. No. 111-148, § 1342(a). This program is intended to protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains for calendar years 2014, 2015, and 2016. 77 Fed. Reg. at 17221.

Section 1342(a) provides that qualified health plans that choose to participate in the Exchanges "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." Pub. L. No. 111-148, § 1342(a). Section 1342(b) sets forth the payment methodology. Under this system, HHS will make payments to qualified health plans experiencing losses above a set amount; conversely, plans realizing gains above a set amount will make payments to HHS. Section 1342(b)(1) provides that "the Secretary shall

[2] CMS uses the term "Marketplaces" to refer to the American Health Benefit Exchanges (Exchanges) required to be established by PPACA.

pay" to the qualified health plan a given amount to compensate for certain losses the plan incurs as a result of its allowable costs exceeding its premiums.[3] *Id.* § 1342(b)(1). Section 1342(b)(2), in contrast, provides that a qualified health plan "shall pay to the Secretary" a given amount to account for certain gains the plan recognizes because the amounts it collects in premiums exceed its allowable costs. *Id.* § 1342(b)(2).

The Secretary of HHS has delegated authority for section 1342 to the CMS Administrator.[4] 76 Fed. Reg. 53903 (Aug. 30, 2011). HHS informed us that as of May 20, 2014, it had not made or received any payments under section 1342. HHS Letter, at 3. HHS intends to begin collections and payments for this purpose in fiscal year (FY) 2015. *Id*.

DISCUSSION

At issue here is whether appropriations are available to the Secretary of HHS to make the payments specified in section 1342(b)(1). Agencies may incur obligations and make expenditures only as permitted by an appropriation. U.S. Const., art. I, § 9, cl. 7; 31 U.S.C. § 1341(a)(1); B-300192, Nov. 13, 2002, at 5. Appropriations may be provided through annual appropriations acts as well as through permanent legislation. *See, e.g.*, 63 Comp. Gen. 331 (1984). The making of an appropriation must be expressly stated in law. 31 U.S.C. § 1301(d). It is not enough for a statute to simply require an agency to make a payment. B-114808, Aug. 7, 1979. Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1). In such cases, we next determine whether there are other appropriations available to an agency for this purpose.

CMS Program Management Appropriation

We first examined the availability of the CMS Program Management (PM) appropriation for FY 2014, which provides:

> "For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and *other*

[3] The payments required under section 1342(b) are calculated based upon the ratio of the allowable costs of the plan to the "target amount" of the plan. This target amount "is an amount equal to the total premiums (including any premium subsidies under any governmental program) reduced by the administrative costs of the plan." Pub. L. No. 111-148, § 1342(c)(2).

[4] In the same delegation of authority, the Secretary delegated several responsibilities established by PPACA to CMS, including authorities vested in the Secretary by certain provisions of titles I, II, and X of PPACA. 76 Fed. Reg. 53903.

> *responsibilities of the Centers for Medicare and Medicaid Services*, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; *and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019*."

Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (Jan. 17, 2014) (emphasis added).

When interpreting any statute, we begin by looking to the language of the statute itself. B-316533, July 31, 2008, at 5. The CMS PM appropriation is available for the expenses that CMS incurs to carry out its responsibilities. The CMS PM appropriation for FY 2014 provided funds for carrying out a list of enumerated statutes, as well as "other responsibilities of [CMS]." Pub. L. No. 113-176, 128 Stat. at 374. Under the purpose statute, 31 U.S.C. § 1301(a), appropriated funds may be used only to achieve the objects for which they were appropriated. However, we do not read the purpose statute to require that every item of expenditure be specified in an appropriations act. B-323449, Aug. 14, 2012, at 4. Further, we have long held that existing agency appropriations that generally cover the type of expenditure involved are available for expenses of new or additional duties imposed by proper legal authority. *See, e.g.,* B-290011, Mar. 25, 2002; 15 Comp. Gen. 167 (1935). Section 1342(b)(1) directs the Secretary to make payments to qualified health plans, but that section neither designates nor identifies a source of funds. The CMS PM appropriation for FY 2014 made funds available to CMS to carry out its responsibilities, which, with the enactment of section 1342, include the risk corridors program. Consequently, the CMS PM appropriation for FY 2014 would have been available for making the payments pursuant to section 1342(b)(1).

Amounts Collected Under Section 1342

In addition to the general lump sum of $3.6 billion, the CMS PM appropriation for FY 2014 provides that "such sums as may be collected from authorized user fees … shall be credited to this account and remain available until September 30, 2019." Pub. L. No. 113-176, 128 Stat. at 374. This language includes amounts collected from qualified health plans pursuant to section 1342(b)(2).

A user fee (often referred to as a user charge) is defined as "[a] fee assessed to users for goods or services provided by the federal government."[5] GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 100. User fees "apply to federal programs or activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public." *Glossary*, at 100. *See also Analytical Perspectives, Budget of the United States Government for Fiscal Year 2015*, ch. 13, "Offsetting Collections and Offsetting Receipts," at 192 (defining user charges as fees, charges, or assessments "levied on individuals or organizations directly benefiting from . . . a Government program or activity, where the payers do not represent a broad segment of the public").

The Supreme Court and GAO have recognized OMB Circular No. A-25[6] as guidance for agencies administering user fee programs. *See Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 349–351 (1974); B-307319, Aug. 23, 2007, at 9. OMB Circular No. A-25 defines what constitutes a special benefit and provides some examples. Specifically:

> "[A] special benefit will be considered to accrue . . . when a Government service: (a) enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public (e.g., receiving a patent, insurance, or guarantee provision, or a license to carry on a specific activity or business or various kinds of public land use); or (b) *provides business stability or contributes to public confidence in the business activity of the beneficiary* (e.g., insuring deposits in commercial banks)."

OMB Cir. No. A-25, at § 6a (emphasis added).

Insurers may choose to offer plans in the Exchanges and in doing so, must offer qualified health plans as defined by 45 C.F.R. § 153.500. The risk corridors program applies only to this specific group of qualified health plans offered through the Exchanges. Accordingly, if an insurer chooses not to offer coverage through the Exchanges, then it is not subject to the risk corridors program established by

---

[5] Agencies have general statutory authority to charge fees under the Independent Offices Appropriations Act of 1952, codified at 31 U.S.C. § 9701, commonly known as the User Charge Statute, to offset the government's provision of a "service or thing of value." The User Charge Statute does not authorize a federal agency to retain and obligate collected fees. B-307319, Aug. 23, 2007. However, the User Charge Statute does not supersede more specific statutes providing for the setting, collection, and/or use of user fees, such as section 1342(b)(2). 31 U.S.C. § 9701(c).

[6] OMB Circular No. A-25, *User Charges* (July 8, 1993).

section 1342. When an insurer offers qualified health plans through the Exchanges, the risk corridors program provides these plans with a special benefit—specifically, the program provides business stability by balancing risks among the qualified health plans. 77 Fed. Reg. 17220, 17221 (Mar. 23, 2012). When a qualified health plan makes a payment under section 1342(b)(2), it is paying for the certainty that any potential losses related to its participation in the Exchanges are limited to a certain amount, thus minimizing risk and maximizing business stability for the plan. Pursuant to OMB guidance, therefore, payments under the risk corridors program are properly characterized as user fees.

Section 1342(b)(2) directs the Secretary to collect certain amounts from qualified health plans. The CMS PM appropriation for FY 2014 appropriated funds including "such sums as may be collected from authorized user fees." Consequently, any amounts collected in FY 2014 pursuant to section 1342(b)(2) would have been available, along with the general CMS PM lump-sum appropriation, for making the payments pursuant to section 1342(b)(1).[7]

Appropriations acts, by their nature, are considered nonpermanent legislation. B-319414, June 9, 2010. Language appropriating funds for "other responsibilities of the Centers for Medicare and Medicaid Services" would need to be included in the CMS PM appropriation for FY 2015 in order for it to be available for payments to qualified health plans under section 1342(b)(1). Similarly, language appropriating "such sums as may be collected from authorized user fees" would need to be included in the CMS PM appropriation for FY 2015 in order for any amounts CMS collects in FY 2015 pursuant to section 1342(b)(2) to be available to CMS for making the payments pursuant to section 1342(b)(1).[8]

In accordance with our regular practice, we asked HHS for its legal views regarding the availability of appropriations to make payments to qualified health plans pursuant to section 1342(b)(1). While HHS did not identify the PM appropriation's lump sum as available, HHS asserted that section 1342 "authorizes the collection and payment of user fees to and from the [qualified health plans]" and that the CMS PM appropriation for FY 2014 would have appropriated these user fees. HHS Letter, at 1-2. HHS's description of the amounts collected as user fees is consistent with our conclusion.

---

[7] HHS informed us that it intends to begin collections and payments for this purpose in FY 2015. HHS Letter, at 3.

[8] The terms and conditions of the CMS PM appropriation for FY 2014 continue during the pendency of the Continuing Appropriations Resolution, 2015. Pub. L. No. 113-76, 128 Stat. at 374, *as carried forward by* Pub. L. No. 113-164, div. A, §§ 101(a)(8), 103, __Stat. __ (Sept. 19, 2014).

CONCLUSION

Section 1342 of PPACA directs the Secretary of HHS to collect from and make payments to qualified health plans. The CMS PM appropriation for FY 2014 would have been available to CMS to make the payments specified in section 1342(b)(1). The CMS PM appropriation for FY 2014 also would have appropriated to CMS user fees collected pursuant to section 1342(b)(2) in FY 2014. HHS stated that it intends to begin collections and payments under section 1342 in FY 2015. However, as discussed above, for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014.

If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853 or Julie Matta, Assistant General Counsel, at (202) 512-4023.

Susan A. Poling
General Counsel