HERITAGE ACTION FOR AMERICA

To: Interested Parties
From: Heritage Action for America
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Subject: How Congress Can Stop the Impending Obamacare Bailouts

There is widespread agreement that Obamacare is on the verge of collapse, and while that should prompt calls for full repeal, the reality is that many in Washington are instead contemplating how the law can be propped up. Much of this will play out in 2017 and beyond with a new administration and a new Congress, but some of it will come to a head in the last two months of 2016. In fact, a multi-pronged taxpayer bailout of Obamacare could be in the works. Fortunately, Congress can take three relatively easy steps to stop this from happening. It needs to 1) allow temporary programs to expire as scheduled; 2) reassert current law that has previously been signed by President Obama, and 3) block illegal payments.

1. Allow temporary programs to end as scheduled: Let the Transitional Reinsurance and Temporary Risk Corridors Programs expire.

The first step in stopping the Obamacare bailouts is for Congress to do nothing, and allow the law's Transitional Reinsurance program and Risk Corridors program to expire as scheduled at the end of 2016. When writing Obamacare, Democrats sweetened the deal for large insurance companies by including *temporary* "risk mitigation" provisions to help compensate the insurers for unexpected losses. These programs are known as the **Transitional Reinsurance** program and the **Temporary Risk Corridors** program, and here is what the programs do:

Temporary Reinsurance: Established under Section 1341 of the Patient Protection and Affordable Care Act, the Reinsurance program created a new tax, or "assessment," on all health insurance issuers (insurance companies offering fully insured group plans) and third party administrators on behalf of group health plans (employer-sponsored healthcare plans). The tax requires these two groups to make three years of annual contributions to the Department of Health and Human Services (HHS). HHS, in turn, would redistribute these funds as payments back to insurers who claimed higher than expected losses for covering high risk individuals at an artificially and subsidised lower premium. As Chris Jacobs explains in his Claim-Fact sheet "What Blue Cross Blue Shield Didn't Tell You About Reinsurance," the Reinsurance program:

> "RAISED premiums for the majority of Americans with employer-provided health plans — 175 million in 2014 — so that a select few individuals with Exchange coverage could have slightly lower rates. Raising premiums for some people to lower people for others is "spreading the wealth around," to use Barack Obama's famous phrase…"

The law also clearly required HHS to direct a certain portion of the assessment collections into the United States Treasury. Section 1341 required HHS to collect $10 billion for 2014, $6 billion for 2015, and $4 billion for 2016, for reinsurance payment purposes, and an additional $2 billion for 2014, $2 billion for 2015, and $1 billion for 2016, for the Treasury.

In summary, by the end of 2016, HHS is expected to have collected $20 billion for the purposes of reinsurance payments, and were also statutorily required to have made $5 billion in payments back to the taxpayer through deposits into the Treasury.

Unsurprisingly, HHS collected less than expected in 2014: $9.7 billion instead of $12 billion. Yet, the claims for payment from the insurers for 2014 were only $7.9 billion, which enabled HHS to fully pay all claims and still have $1.7 billion left over (which they should have deposited into the Treasury). However, the situation looks worse for 2015 and 2016. As Ed Haislmaier, an expert in health care policy and markets at The Heritage Foundation, explains in his blog How Lawmakers Can Block Obamacare Bailouts:

> "The architects of Obamacare correctly anticipated that individuals with expensive medical conditions would drop their existing coverage in favor of more heavily subsidized exchange coverage. However, they incorrectly assumed that would be a one-time phenomenon. Thus, they made the reinsurance program temporary (three years), with funding declining after the first year."

The increased claims combined with decreased collections have elicited cries for Congress to proactively extend the program. Haislmaier writes:

> "The idea of extending the reinsurance program is already being floated by Obamacare supports. The authors of a recent Commonwealth Fund paper recommended that 'policymakers should consider extending the ACA's [Affordable Care Act] reinsurance program.' Another prominent Obamacare supporter, Washington and Lee law professor Timothy Jost, offered that same recommendation back in June."

Not only did the reinsurance program fail to stabilize the market, HHS has failed to pay a penny of the required $5 billion in deposits to the Treasury despite having $1.7 billion in leftover collections from 2014. **Extending the program won't ensure taxpayers recoup their losses; instead, it will allow the large insurance companies to make additional claims - claims that are growing larger year after year.** As mentioned, in 2014, insurance companies made claims of $7.9 billion under the Reinsurance program. But in 2015, their claims jumped by 81 percent to $14.3 billion. At the same time, the collections are less than expected - **so taxpayers will be on the hook to make up the ever-growing difference**. To prevent additional, and higher than expected, payouts at the expense of taxpayers, Congress must simply allow the program to expire as scheduled.

Temporary Risk Corridors: Another centralized-planning risk mitigation scheme, the Risk Corridors program was established under section 1342 of the ACA. According to Chris Jacobs in National Review:

> "From 2014 through 2016, the risk-corridor program is designed to minimize large insurer losses, as well as large insurer profits. Initially, the administration claimed risk corridors would be implemented in a budget-neutral manner — that is, outgoing payments to insurers with losses would equal incoming payments from insurers with gains. But the healthcare.gov catastrophe, coupled with policy changes unilaterally made in the fall of 2013, caused the Centers for Medicare and Medicaid Services (CMS) to float the idea of using taxpayer funds in risk corridors to offset insurer losses — in other words, bail them out."

Additionally, as explained in a coalition letter signed by Heritage Action and over 50 other conservative groups calling on Congress to block Obamacare bailouts:

> "Although current law prohibits the use of fiscal year 2016 appropriated funds to supplement the Risk Corridor Program, the Obama administration announced that it will seek to end the prohibition and open the risk corridor bailout spigot."

Again, it should be unsurprising that the Risk Corridors program is failing. In fiscal year 2014, insurers with losses submitted $2.87 billion in claims. However, because of Obamacare's failure, HHS only collected $362 million from insurers with gains. HHS plans to make up the difference by robbing the taxpayers to pay the insurance companies. To prevent this type of behavior, Congress included an amendment in recent year-end funding legislation to prevent any such explicit payments. Now Congress must simply allow the Risk Corridors program to expire as scheduled. No legislative action is needed on this front *unless the Obama Administration unilaterally extends either of these programs through executive action*.

2. Reassert current law that has previously been signed by President Obama: Require HHS to repay the $5 billion they owe taxpayers but have instead given to insurers.

As previously mentioned, the transitional reinsurance program statutorily requires HHS to deposit a total of $5 billion into the Treasury by 2016. To date, they haven't paid the taxpayers back a single penny. Instead, they have illegally prioritized payments to the insurance companies. Both the GAO and CRS have found this a clear violation of Section 1341 of the ACA. GAO writes that:

> "we conclude that HHS lacks authority to ignore the statute's directive to deposit amounts from collections under the transitional reinsurance program in the Treasury and instead make deposits to the Treasury only if its collections reach the amounts for

> reinsurance payments specified in section 1341. **This prioritization of collections for payments to issuers over payments to the Treasury is not authorized**."

After the GAO ruling, Heritage Foundation budget expert, Paul Winfree issued a statement saying:

> "[T]he administration has been illegally stiffing the American taxpayer in order to prop up the crumbling Obamacare system. The administration's choosing to spend this money illegally should be met with the full force of Congressional inquiries and thorough examination. ... This is just another example of the Obama administration's willingness to do almost anything, even break the law, to bolster the crown jewel of President Obama's legacy – Obamacare."

This clear and flagrant violation of Obamacare is why Sen. Sasse and Rep. Walker introduced the Taxpayers Before Insurers Act (S. 2803 / H.R. 5904). Their bill would penalize HHS for illegally prioritizing payments to insurers by reducing HHS' general departmental management fund by 50 percent until the Secretary of HHS pays the full amount taxpayers are owed.

Heritage Action has endorsed the Taxpayers Before Insurers Act as a first step toward recovering what HHS owes the taxpayers. However, given the Obama Administration's violation of their own law, Congress should also either pass legislation restating the original language of Section 1341, along with a strict implementation timeline and additional penalties for non-compliance, or include similar language in any year-end legislation. This should be an winning issues for Congressional Republicans and Democrats alike: prioritizing the taxpayer over insurance companies by simply restating existing law that President Obama has already signed.

3. Block Any Illegal Payments: Stop the Obama Administration from making any backdoor or illegal payments to insurers for claims from either of these programs, whether from the Judgement Fund or other funding streams.

It is clear that HHS would like to find some way to funnel billions in taxpayer dollars to the insurance companies participating in Obamacare. Not only has HHS prioritized payments to insurers over deposits to the Treasury under the Reinsurance program, it has floated the idea of using taxpayer dollars to cover the Risk Corridors claims and essentially invited the insurance companies to sue them - which the insurance companies did.

Now Congress must be on the lookout for any settlement between the Obama Administration and the insurance companies, which could be accompanied by a multi-billion payment from the Judgement Fund.

Writing on the Obama administration's "willing[ness] to use the Judgment Fund to settle insurers lawsuits against the government" the Daily Signal's Melissa Quinn explained that a Congressional Research Service (CRS) memo sent to Senator Rubio in January clearly said the administration is not legally allowed to use the Judgment Fund to award payments to insurers who filed suit. Quinn continued:

> "Congress, the memo concluded, would have to appropriate additional funds for 'any payment to satisfy a judgment secured by plaintiffs seeking recovery of amounts owed under the risk corridors program.'
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> "In a separate memo to Barrasso, the Congressional Research Service said that even if the insurance companies won their case, either insurers would need to pay additional money into the risk corridor program or Congress would need to appropriate additional money for companies involved in the litigation to recover additional funds.
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> "'Consequently, it would be inappropriate for the Judgment Fund to be used to settle any litigation stemming from the risk corridor program,' the letter from Barrasso, Lee, Rubio, and Sasse continues."

The editorial boards at both the Wall Street Journal and National Review agree, with National Review writing:

> "Because President Obama is prohibited by law from making risk-corridor payments out of general funds, he is simply knuckling under to the insurance industry's lawsuit without a fight and planning to fund this bailout out of funds set aside for legal settlements. This is dishonest, like practically everything about Obamacare, and it is probably illegal, like more than a few things about Obamacare, the ill-considered opinion of John Roberts notwithstanding. Republicans have sent the secretary of Health and Human Services a letter insisting that using judgment funds for a backdoor risk-corridor bailout is flatly illegal."

Given these developments, Congress should take legislative action before the end of the year to cut off access to any funding stream, like the Judgement Fund, that HHS may try to use to funnel money to the insurers, beyond what they have collected from the insurers themselves, for claims made under either of these risk mitigation programs.

Conclusion

In summary, Congress must 1) allow the Transitional Reinsurance and Temporary Risk Corridors programs to expire, thereby ending the failed risk mitigation schemes that have put the American taxpayer on the hook for propping up fiscally irresponsible decisions by insurance companies. Congress should also 2) force HHS to pay taxpayers the $5 billion they owe through unmet Treasury deposits as required by law and confirmed by CRS and GAO. Finally, Congress must also 3) explicitly and proactively block the Obama Administration from using the

Judgement Fund to settle with insurance companies who are demanding billions in (what should have been expected) losses for wilfully participating in Obamacare.

As Heritage Foundation's President, former Senator Jim DeMint, recently wrote in the Baltimore Sun:

> "Back in 2010, Obamacare was like the Titanic heading off on her maiden voyage. Critics warned people not to hop aboard, that disaster was inevitable. But the president, his allies in Congress and lots of big insurance companies assured everyone that, even though they couldn't see the blueprints, they had, in fact, designed an unsinkable ship of government-run health care.
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> "Now, billions of dollars and 17 failed co-ops later, the captain and crew of USS Obamacare are demanding that everyone stay below-deck and continue bailing out their sinking ship and the insurance companies taking on more and more red ink in Obamacare exchanges.
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> "Congress shouldn't oblige them. It's time to hit the lifeboats."

For the sake of the American taxpayer, Congress absolutely shouldn't oblige them. **Instead, lawmakers must make sure that not a single penny more is wasted in a doomed effort to bailout President Obama's lasting legacy: The inevitable collapse of his signature achievement.** As Republicans continue to wage a long war for full repeal, ensuring the end of the taxpayer-backed risk mitigation programs and blocking illegal payments to prop up Obamacare is the next battle to be won - and because the law is on their side - it is very winnable. **Some may argue that all Congress needs to is let this play out in the courts, but that ignores the clear and achievable legislative action Congress can take - actions that would strengthen the case of the already-filed amicus brief by the House.** Once Congress secures the end of these bailouts, it can then fulfill the mandate to repeal Obamacare and start over with patient-centered reforms to the health care system.