

Congress of the United States
Washington, DC 20515

July 17, 2018

The Honorable Alex M. Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Secretary Azar and Administrator Verma:

We write to you with serious concerns regarding the Centers for Medicare & Medicaid Services' (CMS) recent decision to suspend billions of dollars in risk adjustment payments and collections, ostensibly due to a February 2018 ruling in the United States District Court for the District of New Mexico (D.N.M) in the case of *New Mexico Health Connections v. Burwell*. The Administration's decision to suspend these collections and payments, which are required under federal law, appears to be yet another attempt by the Trump Administration to sabotage the nation's health care system for partisan gain. We ask that you take immediate action to reverse this destructive decision that will further destabilize the individual and small group markets that millions of Americans rely on for health insurance. Furthermore, we seek additional information regarding the timing and justification for this questionable decision, as well as the Department's plans to ensure that CMS makes payments in a timely manner to prevent market disruption and increased costs for consumers.

The risk adjustment program is a crucial mechanism for maintaining market stability and supporting the Affordable Care Act's (ACA) protections for individuals with preexisting conditions. Risk adjustment operates to limit "cherry picking" of the healthiest individuals by insurance companies by transferring funds from plans with lower-risk enrollees to plans with higher-risk enrollees. These mandated transfers, which incentivize insurers to compete on value and efficiency rather than seeking to attract the healthiest enrollees, help to control premium costs for consumers seeking coverage through the individual and small group markets. Risk adjustment is a critical component of how the ACA has expanded access to affordable coverage for patients with preexisting conditions, and has been a critical component to the stability and success of the Medicare Advantage and Medicare Part D programs.

The ongoing lawsuit in the D.N.M. involves a challenge to HHS' risk adjustment methodology, brought by New Mexico Health Connections, a health insurance co-operative. On

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February 28, 2018, the district court ruled that HHS' risk adjustment regulations were flawed in one narrow respect: HHS had failed to give a sufficient policy reason justifying its decision to require overall budget neutrality for the program.¹ The court's opinion made clear that nothing in the statute prohibits budget neutrality, and "designing risk adjustment to be budget neutral may be a reasonable policy choice." Furthermore, it noted that HHS in fact provided "sound policy reasons" for its decision in its court filings, and merely failed to articulate those reasons as part of the agency's rulemaking record.²

On July 7, 2018, following a report in the *Wall Street Journal* describing CMS's forthcoming plan to suspend risk adjustment payments and collections,³ CMS issued a press release attributing the suspension of the program to the February 28, 2018 district court ruling.⁴ Administrator Verma stated, "As a result of this litigation, billions of dollars in risk adjustment payments and collections are now on hold. CMS has asked the court to reconsider its ruling, and hopes for a prompt resolution that allows CMS to prevent more adverse impacts on Americans who receive their insurance in the individual and small group markets."⁵

We disagree with the agency's characterization that the suspension of the risk adjustment program is necessary. It is clearly within the agency's power to remedy the issue identified by the district court. The court has made clear that the agency must provide its rationale for requiring the program to be budget neutral. The agency could do so immediately by issuing an Interim Final Rule (IFR), laying out its rationale for requiring budget neutrality for the 2014-2018 plan years, as it has already done for the Notice of Benefit and Payment Parameters for 2019.⁶ Moreover, it is unclear why the agency has not already done so, as the district court's decision was handed down in February, and it is now July.⁷

¹ *New Mexico Health Connections v. Burwell*, No. CIV 16-0878, Memorandum Opinion and Order, dkt. #55 (D.N.M. Feb. 28, 2018).

² *Id.*

³ *Trump Administration Expected to Suspend ACA Program Related to Insurer Payments*, Wall Street Journal (July 6, 2016).

⁴ Centers for Medicare & Medicaid Services, *United States District Court Ruling Puts Risk Adjustment On Hold* (July 7, 2008).

⁵ *Id.*

⁶ Department of Health and Human Services, *Notice of Benefit and Payment Parameters for 2019*, 83 Fed. Reg. 16,954 (Apr. 17, 2018).

⁷ In fact, the plaintiff in *New Mexico Health Connections v. Burwell* makes exactly this point in one of its filings: "The court's opinion does not require HHS to change the risk adjustment formula, but rather to examine its approach and articulate a legitimate justification if HHS wishes to re-adopt the same regulations. If HHS could readily justify the policies it has followed for the past several years, then there was no reason that HHS could not have commenced a new rulemaking proceeding shortly after this Court issued its judgment to remedy the deficiencies in the administrative record...As the Court did not require any changes to the agency's formula if a proper justification were put forth, any disruptive effect flows solely from the agency's apparent unwillingness to engage in the task that the Court set for it – a purely self-inflicted wound." *New Mexico Health Connections v. Burwell*, No. CIV 16-0878, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Alter or Amend Judgment Pursuant to Rule 59(E), dkt. #63 (D.N.M. Feb. 28, 2018).

The suspension of the risk adjustment program is prompting concerns that insurers will leave the market and increase premiums for consumers. As the agency's own risk adjustment report illustrates, suspending the program will result in major financial windfalls for some companies with healthier than average enrollees, such as Oscar Health, and will result in huge and unexpected losses for others.⁸ These losses could result in increased premiums, and insurers pulling out of the market. Following the announcement that CMS would suspend the program, America's Health Insurance Plans stated that the decision "will have serious consequences for millions of consumers who get their coverage through small businesses or buy coverage on their own. It will create more market uncertainty and increase premiums for many health plans—putting a heavier burden on small businesses and consumers, while reducing coverage options."⁹

We urge you to take immediate action to remedy the agency's failure to address the court's decision in *New Mexico Health Connections v. Burwell* by laying out the agency's rationale for the risk adjustment methodology in an IFR and to stop playing politics with people's health care. Failure to do so will result in additional uncertainty, market instability, and higher premiums for working families. Additionally, we request that you respond to the following questions by July 30, 2018:

1. Who at CMS and/or HHS was primarily responsible for the decision to seek a reconsideration of the district court's decision rather than seek a stay or simply address the court's concern through an IFR and allow the risk adjustment program to continue to operate? When was this decision made? Please provide a list of all personnel involved in making the decision.
 - a. Did anyone at the White House or Executive Office of the President provide input in this decision? If so, please provide a list of all personnel involved in the decision.
 - b. Please provide all documents and communications related to the decision to suspend the risk adjustment program.
2. What plans, if any, do CMS and/or HHS have in place to ensure that risk adjustment payments to insurers are not unnecessarily delayed?
 - a. Does CMS intend to issue an IFR to ensure the continuation of the risk adjustment program? If so, when does CMS anticipate issuing the IFR?
 - b. Why have CMS and HHS thus far failed to promulgate an IFR explaining the agency's rationale for the risk adjustment methodology given that the court's

⁸ Centers for Medicare & Medicaid Services, *Summary Report on Permanent Risk Adjustment Transfers For the 2017 Benefit Year* (July 9, 2018).

⁹ America's Health Insurance Plans, *AHIP Statement on the Freeze of Risk Adjustment Payments for the Individual and Small Group Markets* (July 7, 2018).

decision in *New Mexico Health Connections* was handed down on February 28, 2018, and doing so would achieve the outcome the government seeks in court?

3. Please provide any and all analyses conducted by CMS and/or HHS to determine the impact that the indefinite suspension of the risk adjustment program will have on premiums and market stability in the individual and small group markets.

Thank you for your prompt attention to this matter. Should you have any questions, please contact Una Lee of the Democratic Staff of the House Committee on Energy and Commerce at (202) 225-3641, Melanie Egorin of the Democratic Staff of the House Committee on Ways and Means at (202) 225-4021, Udochi Onwubiko of the Democratic Staff of the House Committee on Education and the Workforce at (202) 225-3725, Peter Gartrell of the Democratic Staff of the Senate Committee on Finance at (202) 224-4515, or Colin Goldfinch of the Democratic Staff of the Senate Committee on Health, Education, Labor, and Pensions at (202) 224-7675.

Sincerely,



Frank Pallone, Jr.
Ranking Member
House Committee on Energy
and Commerce



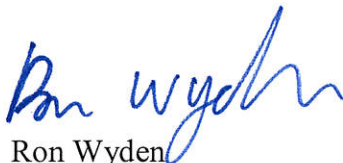
Richard E. Neal
Ranking Member
House Committee on Ways
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Robert C. "Bobby" Scott
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Committee on Education
and the Workforce



Patty Murray
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Ron Wyden
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