

**Testimony before the House Judiciary  
Subcommittee on the Constitution and Civil Justice**

**Hearing on “Oversight of the Judgment Fund”**

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Chris Jacobs  
Juniper Research Group

Chairman King, Ranking Member Cohen, and Members of the Subcommittee:

Good morning, and thank you for inviting me to testify. My name is Chris Jacobs, and I am the Founder of Juniper Research Group, a policy and research consulting firm based in Washington. Much of my firm’s work focuses on health care policy, a field in which I have worked for over a decade—including more than six years on Capitol Hill. Given my background and work in health care, I have been asked to testify on the use of the Judgment Fund as it pertains to one particular area: Namely, the ongoing litigation regarding risk corridor payments to insurers under Section 1342 of the Patient Protection and Affordable Care Act (PPACA).

The risk corridor lawsuits provide a good example of a problematic use of the Judgment Fund, and not just due to the sums involved—literally billions of dollars in taxpayer funds are at issue. Any judgments paid out to insurers via the Judgment Fund would undermine the appropriations authority of Congress, in two respects. First, Congress never explicitly appropriated funds to the risk corridor program—either in PPACA or any other statute. Second, once the Obama Administration sent signals indicating a potential desire to use taxpayer dollars to fund risk corridors, notwithstanding the lack of an explicit appropriation, Congress went further, and enacted an express prohibition on such taxpayer funding. Utilizing the Judgment Fund to appropriate through the back door what Congress prohibited through the front door would represent an encroachment by the judiciary and executive on Congress’ foremost legislative power—the “power of the purse.”

Though past precedents and opinions by the Congressional Research Service, Government Accountability Office, and Justice Department Office of Legal Counsel should provide ample justification for the Court of Appeals for the Federal Circuit to deny the risk corridor claims made by insurers when it considers pending appeals of their cases, Congress can take additional action to clarify its prerogatives in this sphere. Specifically, Congress could act to clarify in the risk corridor case, and in any other similar case, that it has “otherwise provided for” funding within the meaning of the Judgment Fund when it has limited or restricted expenditures of funds.

## Background on Risk Corridors

PPACA created risk corridors as one of three programs (the others being reinsurance and risk adjustment) designed to stabilize insurance markets in conjunction with the law's major changes to the individual marketplace. Section 1342 of the law established risk corridors for three years—calendar years 2014, 2015, and 2016. It further prescribed that insurers suffering losses during those years would have a portion of those losses reimbursed, while insurers achieving financial gains during those years would cede a portion of those profits.<sup>1</sup>

Notably, however, the statute did not provide an explicit appropriation for the risk corridor program—either in Section 1342 or elsewhere. While the law directs the Secretary of Health and Human Services (HHS) to establish a risk corridor program,<sup>2</sup> and make payments to insurers,<sup>3</sup> it does not provide a source for those payments.

## History of Risk Corridor Appropriations

The lack of an explicit appropriation for risk corridors was not an unintentional oversight by Congress. The Senate Health, Education, Labor, and Pensions (HELP) Committee included an explicit appropriation for risk corridors in its health care legislation marked up in 2009.<sup>4</sup> Conversely, the Senate Finance Committee's version of the legislation—the precursor to PPACA—included no appropriation for risk corridors.<sup>5</sup> When merging the HELP and Finance Committee bills, Senators relied upon the Finance Committee's version of the risk corridor language—the version with no explicit appropriation.

Likewise, the Medicare Modernization Act's risk corridor program for the Part D prescription drug benefit included an explicit appropriation from the Medicare Prescription Drug Account, an account created by the law as an offshoot of the Medicare

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<sup>1</sup> Under the formulae established in Section 1342(b) of the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148), plans with profit margins between 3 percent and 8 percent pay half their profit margins between those two points into the risk corridor program, while plans with profit margins exceeding 8 percent pay in 2.5 percent of profits (half of their profits between 3 percent and 8 percent), plus 80 percent of any profit above 8 percent. Payments out to insurers work in the inverse manner—insurers with losses below 3 percent absorb the entire loss; those with losses of between 3 and 8 percent will have half their losses over 3 percent repaid; and those with losses exceeding 8 percent will receive 2.5 percent (half of their losses between 3 and 8 percent), plus 80 percent of all losses exceeding 8 percent. 42 U.S.C. 18062(b).

<sup>2</sup> Section 1342(a) of PPACA, 42 U.S.C. 18062(a).

<sup>3</sup> Section 1342(b) of PPACA, 42 U.S.C. 18062(b).

<sup>4</sup> Section 3106 of the Affordable Health Choices Act (S. 1679, 111<sup>th</sup> Congress), as reported by the Senate HELP Committee, established the Community Health Insurance Option. Section 3106(c)(1)(A) created a Health Benefit Plan Start-Up Fund “to provide loans for the initial operations of a Community Health Insurance Option.” Section 3106(c)(1)(B) appropriated “out of any moneys in the Treasury not otherwise appropriated an amount necessary as requested by the Secretary of Health and Human Services to,” among other things, “make payments under” the risk corridor program created in Section 3106(c)(3).

<sup>5</sup> Section 2214 of America's Healthy Future Act (S. 1796, 111<sup>th</sup> Congress), as reported by the Senate Finance Committee, created a risk corridor program substantially similar to (except for date changes) that created in PPACA. Section 2214 did not include an appropriation for risk corridors.

Supplementary Medical Insurance Trust Fund.<sup>6</sup> While PPACA specifically states that its risk corridor program “shall be based on the program for regional participating provider organizations under” Medicare Part D, unlike that program, it does not include an appropriation for its operations.<sup>7</sup>

As the Exchanges began operations in 2014, Congress, noting the lack of an express appropriation for risk corridors in PPACA, questioned the source of the statutory authority for HHS to spend money on the program. On February 7, 2014, then-House Energy and Commerce Committee Chairman Fred Upton (R-MI) and then-Senate Budget Committee Ranking Member Jeff Sessions (R-AL) wrote to Comptroller General Gene Dodaro requesting a legal opinion from the Government Accountability Office (GAO) about the availability of an appropriation for the risk corridors program.<sup>8</sup>

In response to inquiries from GAO, HHS replied with a letter stating the Department’s opinion that, while risk corridors did not receive an explicit appropriation in PPACA, the statute requires the Department to establish, manage, and make payments to insurers as part of the risk corridor program. Because risk corridors provide special benefits to insurers by stabilizing the marketplace, HHS argued, risk corridor payments amount to user fees, and the Department could utilize an existing appropriation—the Centers for Medicare and Medicaid Services’ (CMS) Program Management account—to make payments.<sup>9</sup> GAO ultimately accepted the Department’s reasoning, stating the Department had appropriation authority under the existing appropriation for the CMS Program Management account to spend user fees.<sup>10</sup>

The GAO ruling came after Health and Human Services had sent a series of mixed messages regarding the implementation of the risk corridor program. In March 2013, the Department released a final rule noting that “the risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under Section 1342 of” PPACA.<sup>11</sup> However, one year later, on

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<sup>6</sup> Section 101(a) of the Medicare Modernization Act (P.L. 108-173) created a program of risk corridors at Section 1860D—15(e) of the Social Security Act, 42 U.S.C. 1395w—115(e). Section 101(a) of the MMA also created a Medicare Prescription Drug Account within the Medicare Supplementary Medical Insurance Trust Fund at Section 1860D—16 of the Social Security Act, 42 U.S.C. 1395w—116. Section 1860D—16(c)(3) of the Social Security Act, 42 U.S.C. 1395w—116(c)(3), “authorized to be appropriated, out of any moneys of the Treasury not otherwise appropriated,” amounts necessary to fund the Account. Section 1860D—16(b)(1)(B), 42 U.S.C. 1395w—116(b)(1)(B), authorized the use of Account funds to make payments under Section 1860D—15, the section which established the Part D risk corridor program.

<sup>7</sup> Section 1342(a) of PPACA, 42 U.S.C. 18062(a).

<sup>8</sup> Letter from House Energy and Commerce Committee Chairman Fred Upton and Senate Budget Committee Ranking Member Jeff Sessions to Comptroller General Gene Dodaro, February 7, 2014.

<sup>9</sup> Letter from Department of Health and Human Services General Counsel William Schultz to Government Accountability Office Assistant General Counsel Julie Matta, May 20, 2014.

<sup>10</sup> Government Accountability Office legal decision B-325630, *Department of Health and Human Services—Risk Corridor Program*, September 30, 2014, <http://www.gao.gov/assets/670/666299.pdf>.

<sup>11</sup> Department of Health and Human Services, final rule on “Notice of Benefit and Payment Parameters for 2014,” *Federal Register* March 11, 2013, <https://www.gpo.gov/fdsys/pkg/FR-2013-03-11/pdf/2013-04902.pdf>, p. 15473.

March 11, 2014, HHS reversed its position, announcing the Department's intent to implement the risk corridor program in a three-year, budget-neutral manner.<sup>12</sup>

Subsequent to the GAO ruling, and possibly in response to the varying statements from HHS, Congress enacted in December 2014 appropriations language prohibiting any transfers to the CMS Program Management account to fund shortfalls in the risk corridor program.<sup>13</sup> The explanatory statement of managers accompanying the legislation, noting the March 2014 statement by HHS pledging to implement risk corridors in a budget neutral manner, stated that Congress added the new statutory language "to prevent the CMS Program Management account from being used to support risk corridor payments."<sup>14</sup> This language was again included in appropriations legislation in December 2015, and remains in effect today.<sup>15</sup>

### **Losses Lead to Lawsuits**

The risk corridor program has incurred significant losses for 2014 and 2015. On October 1, 2015, CMS revealed that insurers paid \$387 million into the program, but requested \$2.87 billion. As a result of both these losses and the statutory prohibition on the use of additional taxpayer funds, insurers making claims for 2014 received only 12.6 cents on the dollar for their claims that year.<sup>16</sup>

Risk corridor losses continued into 2015. Last September, without disclosing specific dollar amounts, CMS revealed that "all 2015 benefit year collections [i.e., payments into the risk corridor program] will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments."<sup>17</sup>

In November, CMS revealed that risk corridor losses for 2015 increased when compared to 2014. Insurers requested a total of \$5.9 billion from the program, while paying only \$95 million into risk corridors—all of which went to pay some of the remaining

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<sup>12</sup> Department of Health and Human Services, final rule on "Notice of Benefit and Payment Parameters for 2015," *Federal Register* March 11, 2014, <https://www.gpo.gov/fdsys/pkg/FR-2014-03-11/pdf/2014-05052.pdf>, p. 13829.

<sup>13</sup> Consolidated and Further Continuing Appropriations Act, 2015, P.L. 113-235, Division G, Title II, Section 227.

<sup>14</sup> Explanatory Statement of Managers regarding Consolidated and Further Continuing Appropriations Act, 2015, *Congressional Record* December 11, 2014, p. H9838.

<sup>15</sup> Consolidated Appropriations Act, 2016, P.L. 114-113, Division H, Title II, Section 225.

<sup>16</sup> Centers for Medicare and Medicaid Services, memorandum regarding "Risk Corridors Proration Rate for 2014," October 1, 2015, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf>.

<sup>17</sup> Centers for Medicare and Medicaid Services, memorandum regarding "Risk Corridors Payments for 2015," September 9, 2016, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF>.

2014 claims.<sup>18</sup> To date risk corridors face a combined \$8.3 billion shortfall for 2014 and 2015—approximately \$2.4 billion in unpaid 2014 claims, plus the full \$5.9 billion in unpaid 2015 claims. Once losses for 2016 are added in, total losses for the program’s three-year duration will very likely exceed \$10 billion, and could exceed \$15 billion.

Due to the risk corridor program losses, several insurers have filed suit in the Court of Federal Claims, seeking payment via the Judgment Fund of outstanding risk corridor claims they allege are owed. Thus far, two cases have proceeded to judgment. On November 10, 2016, Judge Charles Lettow dismissed all claims filed by Land of Lincoln Mutual Health Insurance Company, an insurance co-operative created by PPACA that shut down operations in July 2016.<sup>19</sup> Notably, Judge Lettow did not dismiss the case for lack of ripeness, but on the merits of the case themselves. He considered HHS’ decision to implement the program in a budget-neutral manner reasonable, using the tests in *Chevron v. Natural Resources Defense Council*, and concluded that neither an explicit nor implicit contract existed between HHS and Land of Lincoln.<sup>20</sup>

Conversely, on February 9, 2017, Judge Thomas Wheeler granted summary judgment in favor of Moda Health Plan, an Oregon health insurer, on its risk corridor claims.<sup>21</sup> Judge Wheeler held that PPACA “requires annual payments to insurers, and that Congress did not design the risk corridors program to be budget-neutral. The Government is therefore liable for Moda’s full risk corridors payments” under the law.<sup>22</sup> And, *contra* Judge Lettow, Judge Wheeler concluded that an implied contract existed between HHS and Moda, which also granted the insurer right to payment.<sup>23</sup>

### **Congress “Otherwise Provided For” Risk Corridor Claims**

The question of whether or not insurers have a lawful claim on the United States government is separate and distinct from the question of whether or not the Judgment Fund can be utilized to pay those claims. CMS, on behalf of the Department of Health and Human Services, has made clear its views regarding the former question. In announcing its results for risk corridors for 2015, the agency stated that the unpaid balances for each year represented “an obligation of the United States Government for which full payment is required,” and that “HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.”<sup>24</sup>

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<sup>18</sup> Centers for Medicare and Medicaid Services, memorandum regarding “Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year,” <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf>.

<sup>19</sup> *Land of Lincoln Mutual Health Insurance Company v. United States*, Court of Federal Claims No. 16-744C, ruling of Judge Charles Lettow, November 10, 2016, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0744-47-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0744-47-0).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Moda Health Plan v. United States*, Court of Federal Claims No. 16-649C, ruling of Judge Thomas Wheeler, February 9, 2017, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2016cv0649-23-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2016cv0649-23-0).

<sup>22</sup> *Ibid.*, p. 2.

<sup>23</sup> *Ibid.*, pp. 34-39.

<sup>24</sup> CMS, “Risk Corridors Payments for 2015.”

But because insurers seek risk corridor payments from the Judgment Fund, that fund's permanent appropriation is available only in cases where payment is "not otherwise provided for" by Congress.<sup>25</sup> GAO, in its *Principles of Federal Appropriations Law*, describes such circumstances in detail:

Payment is otherwise provided for when another appropriation or fund is legally available to satisfy the judgment....Whether payment is otherwise provided for is a question of legal availability rather than actual funding status. In other words, if payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available. The agency's only recourse in this situation is to seek additional appropriations from Congress, as it would have to do in any other deficiency situation.<sup>26</sup>

In this circumstance, GAO ruled in September 2014 that payments from insurers for risk corridors represented "user fees" that could be retained in the CMS Program Management account, and spent from same using existing appropriation authority. However, the prohibition on transferring taxpayer dollars to supplement those user fees prevents CMS from spending any additional funds on risk corridor claims other than those paid into the program by insurers themselves.

Given the fact pattern in this case, the non-partisan Congressional Research Service concluded that the Judgment Fund may not be available to insurers:

Based on the existence of an appropriation for the risk corridor payments, it appears that Congress would have "otherwise provided for" any judgments awarding payments under that program to a plaintiff. As a result, the Judgment Fund would not appear to be available to pay for such judgments under current law. This would appear to be the case even if the amounts available in the "Program Management" account had been exhausted. In such a circumstance, it appears that any payment to satisfy a judgment secured by plaintiffs seeking recovery of damages owed under the risk corridors program would need to wait until such funds were made available by Congress.<sup>27</sup>

Because the appropriations power rightly lies with Congress, the Judgment Fund cannot supersede the legislature's decision regarding a program's funding, or lack of funding. Congress chose not to provide the risk corridor program with an explicit appropriation; it further chose explicitly to prohibit transfers of taxpayer funds into the program. To allow

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<sup>25</sup> 31 U.S.C. 1304(a)(1).

<sup>26</sup> Government Accountability Office, 3 *Principles of Federal Appropriations Law* 14-39, <http://www.gao.gov/assets/210/203470.pdf>.

<sup>27</sup> Congressional Research Service, memo to Sen. Marco Rubio on the risk corridor program, January 5, 2016, [http://www.rubio.senate.gov/public/\\_cache/files/1dc92ef8-c340-4cfd-95c0-67369a557f1e/2AA5EF8F125279800BFABC8B8BA37072.05.24.2016-crs-rubio-memo-risk-corridors-1-5-16-1-redacted.pdf](http://www.rubio.senate.gov/public/_cache/files/1dc92ef8-c340-4cfd-95c0-67369a557f1e/2AA5EF8F125279800BFABC8B8BA37072.05.24.2016-crs-rubio-memo-risk-corridors-1-5-16-1-redacted.pdf).

the Judgment Fund to pay insurers' risk corridor claims would be to utilize an appropriation after Congress has explicitly declined to do so.

The Justice Department's Office of Legal Counsel (OLC) has previously upheld the same principle that an agency's inability to fund judgments does not automatically open the Judgment Fund up to claims:

The Judgment Fund does not become available simply because an agency may have insufficient funds at a particular time to pay a judgment. If the agency lacks sufficient funds to pay a judgment, but possesses statutory authority to make the payment, its recourse is to seek funds from Congress. Thus, if another appropriation or fund is legally available to pay a judgment or settlement, payment is "otherwise provided for" and the Judgment Fund is not available.<sup>28</sup>

The OLC memo reinforces the opinions of both CRS and the GAO: The Judgment Fund is a payer of last resort, rather than a payer of first instance. Where Congress has provided another source of funding, the Judgment Fund should not be utilized to pay judgments or settlements. Congress' directives in setting limits on appropriations to the risk corridor program make clear that it has "otherwise provided for" risk corridor claims—therefore, the Judgment Fund should not apply.

## **Judgment Fund Settlements**

Even though past precedent suggests the Judgment Fund should not apply to the risk corridor cases, a position echoed by at least one judge's ruling on the matter, the Obama Administration prior to leaving office showed a strong desire to settle insurer lawsuits seeking payment for risk corridor claims using Judgment Fund dollars. In its September 9, 2016 memo declaring risk corridor claims an obligation of the United States government, CMS also acknowledged the pending cases regarding risk corridors, and stated that "we are open to discussing resolution of those claims. We are willing to begin such discussions at any time."<sup>29</sup> That language not only solicited insurers suing over risk corridors to seek settlements from the Administration, it also served as an open invitation for other insurers not currently suing the United States to do so—in the hope of achieving a settlement from the executive.

Contemporaneous press reports last fall indicated that the Obama Administration sought to use the Judgment Fund as the source of funding to pay out risk corridor claims. Specifically, the *Washington Post* reported advanced stages of negotiations regarding a settlement of over \$2.5 billion—many times more than the \$18 million in successful Judgment Fund claims made against HHS in the past decade—with over 175 insurers, paid

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<sup>28</sup> Justice Department Office of Legal Counsel, "Appropriate Source for Payment of Judgment and Settlements in *United States v. Winstar Corp.*," July 22, 1998, *Opinions of the Office of Legal Counsel in Volume 22*, <https://www.justice.gov/sites/default/files/olc/opinions/1998/07/31/op-olc-v022-p0141.pdf>, p. 153.

<sup>29</sup> CMS, "Risk Corridors Payments for 2015."

using the Judgment Fund “to get around a recent congressional ban on the use of Health and Human Services money to pay the insurers.”<sup>30</sup>

When testifying before a House Energy and Commerce subcommittee hearing on September 14, 2016, then-CMS Acting Administrator Andy Slavitt declined to state the potential source of funds for the settlements his agency had referenced in the memo released the preceding week.<sup>31</sup> Subsequent to that hearing, Energy and Commerce requested additional documents and details from CMS regarding the matter; that request is still pending.<sup>32</sup>

Even prior to this past fall, the Obama Administration showed a strong inclination to accommodate insurer requests for additional taxpayer funds. A 2014 House Oversight and Government Reform Committee investigative report revealed significant lobbying by insurers regarding both PPACA’s risk corridors and reinsurance programs.<sup>33</sup> Specifically, contacts by insurance industry executives to White House Senior Advisor Valerie Jarrett during the spring of 2014 asking for more generous terms for the risk corridor program yielded changes to the program formula—raising the profit floor from three percent to five percent—in ways that increased payments to insurers, and obligations to the federal government.<sup>34</sup>

Regardless of the Administration’s desire to accommodate insurers, as evidenced by its prior behavior regarding risk corridors, past precedent indicates that the Judgment Fund should not be accessible to pay either claims or settlements regarding risk corridors. A prior OLC memo indicates that “the appropriate source of funds for a settled case is identical to the appropriate source of funds should a judgment in that case be entered against the government.”<sup>35</sup> If a judgment cannot come from the Judgment Fund—and CRS, in noting that Congress has “otherwise provided for” risk corridor claims, believes it cannot—then neither can a settlement come from the Fund.

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<sup>30</sup> Amy Goldstein, “Obama Administration May Use Obscure Fund to Pay Billions to ACA Insurers,” *Washington Post* September 29, 2016, [https://www.washingtonpost.com/national/health-science/obama-administration-may-use-obscure-fund-to-pay-billions-to-aca-insurers/2016/09/29/64a22ea4-81bc-11e6-b002-307601806392\\_story.html?utm\\_term=.361888177f81](https://www.washingtonpost.com/national/health-science/obama-administration-may-use-obscure-fund-to-pay-billions-to-aca-insurers/2016/09/29/64a22ea4-81bc-11e6-b002-307601806392_story.html?utm_term=.361888177f81).

<sup>31</sup> Testimony of CMS Acting Administrator Andy Slavitt before House Energy and Commerce Health Subcommittee Hearing on “The Affordable Care Act on Shaky Ground: Outlook and Oversight,” September 14, 2016, <http://docs.house.gov/meetings/IF/IF02/20160914/105306/HHRG-114-IF02-Transcript-20160914.pdf>, pp. 84-89.

<sup>32</sup> Letter from House Energy and Commerce Committee Chairman Fred Upton *et al.* to Health and Human Services Secretary Sylvia Burwell regarding risk corridor settlements, September 20, 2016, <https://energycommerce.house.gov/news-center/letters/letter-hhs-regarding-risk-corridors-program>.

<sup>33</sup> House Oversight and Government Reform Committee, staff report on “Obamacare’s Taxpayer Bailout of Health Insurers and the White House’s Involvement to Increase Bailout Size,” July 28, 2014, <http://oversight.house.gov/wp-content/uploads/2014/07/WH-Involvement-in-ObamaCare-Taxpayer-Bailout-with-Appendix.pdf>.

<sup>34</sup> *Ibid.*, pp. 22-29.

<sup>35</sup> OLC, “Appropriate Source of Payment,” p. 141.

Given these developments, in October 2016 the Office of the House Counsel, using authority previously granted by the House, moved to file an *amicus curiae* brief in one of the risk corridor cases, that filed by Health Republic.<sup>36</sup> The House filing, which made arguments on the merits of the case that the Justice Department had not raised, did so precisely to protect Congress' institutional prerogative and appropriations power—a power Congress expressed first when failing to fund risk corridors in the first place, and a second, more emphatic time when imposing additional restrictions on taxpayer funding to risk corridors.<sup>37</sup> The House filing made clear its stake in the risk corridor dispute:

Allegedly in light of a non-existent 'litigation risk,' HHS recently took the extraordinary step of urging insurers to enter into settlement agreements with the United States in order to receive payment on their meritless claims. In other words, HHS is trying to force the U.S. Treasury to disburse billions of dollars of taxpayer funds to insurance companies, even though DOJ [Department of Justice] has convincingly demonstrated that HHS has no legal obligation (and no legal right) to pay these sums. The House strongly disagrees with this scheme to subvert Congressional intent by engineering a massive giveaway of taxpayer money.<sup>38</sup>

The *amicus* filing illustrates the way in which the executive can through settlements—or, for that matter, failing vigorously to defend a suit against the United States—undermine the intent of Congress by utilizing the Judgment Fund appropriation to finance payments the legislature has otherwise denied.

## Conclusion

Both the statute and existing past precedent warrant the dismissal of the risk corridor claims by the Court of Appeals for the Federal Circuit. Congress spoke clearly on the issue of risk corridor funding twice: First when failing to provide an explicit appropriation in PPACA itself; and second when enacting an explicit prohibition on taxpayer funding. Opinions from Congressional Research Service, Government Accountability Office, and Office of Legal Counsel all support the belief that, in taking these actions, Congress has “otherwise provided for” risk corridor funding, therefore prohibiting the use of the Judgment Fund. It defies belief that, having explicitly prohibited the use of taxpayer dollars through one avenue (the CMS Program Management account), the federal

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<sup>36</sup> H.Res. 676 of the 113<sup>th</sup> Congress gave the Speaker the authority “to initiate or intervene in one or more civil actions on behalf of the House...regarding the failure of the President, the head of any department or agency, or any other officer or employee of the executive branch, to act in a manner consistent with that official’s duties under the Constitution and the laws of the United States with respect to implementation of any provision of” PPACA. Section 2(f)(2)(C) of H.Res. 5, the opening day rules package for the 114<sup>th</sup> Congress, extended this authority for the duration of the 114<sup>th</sup> Congress.

<sup>37</sup> Motion for Leave to File *Amicus Curiae* on behalf of the United States House of Representatives, *Health Republic Insurance Company v. United States*, October 14, 2016, <http://www.speaker.gov/sites/speaker.house.gov/files/documents/2016.10.13%20-%20Motion%20-%20Amicus%20Brief.pdf?Source=GovD>.

<sup>38</sup> *Ibid.*, p. 2.

government should pay billions of dollars in claims to insurers via the back door route of the Judgment Fund.

However, in the interests of good government, Congress may wish to clarify that, in both the risk corridor cases and any similar case, lawmakers enacting a limitation or restriction on the use of funds should constitute “otherwise provid[ing] for” that program as it relates to the Judgment Fund. Such legislation would codify current practice and precedent, and preserve Congress’ appropriations power by preventing the executive and/or the courts from awarding judgments or settlements using the Judgment Fund where Congress has clearly spoken.

Thank you for the opportunity to testify this morning. I look forward to your questions.