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MEMORANDUM January 5, 2016

To: Senator Marco Rubio
[redacted]

From: [redacted] Legislative Attorneys, American Law Division

Subject: **Lawsuits to Recover Payments under the Risk Corridors Program of the Affordable Care Act**

You have requested an analysis of whether a health insurance issuer[1] that offers a qualified health plan could potentially bring a lawsuit under the Tucker Act[2] to recover certain amounts that may be owed to the issuer under the risk corridors program, as created under the Affordable Care Act (ACA).[3] You have also asked whether an insurer would be able to receive payments in excess of the current appropriation. This memorandum provides a brief summary of the risk corridors program, addresses jurisdictional issues under the Tucker Act[4] and then, assuming that such a suit is successful, whether appropriated funds are available to satisfy the judgment.

Background

As part of ACA's intended goal of improving accessibility to health coverage, the act provides for the establishment of "exchanges," structured marketplaces for the sale and purchase of health insurance. ACA requires that plans offered through an exchange be qualified health plans (QHPs). In general, to be a QHP, a plan must offer an essential health benefits package and meet certain standards related to marketing, choice of providers, and plan networks.[5] Additionally, QHPs must participate in a risk corridors program established under § 1342 of the ACA.[6] Generally, the program seeks to mitigate the effects of mistakes the insurers may make when trying to predict the appropriate amount of premium to charge. If an insurer's

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[1] A health insurance issuer is defined as an insurance company, insurance service, or insurance organization that is licensed to engage in the business of insurance in a state and which is subject to state law that regulates insurance. 42 U.S.C. §300gg-91(b)(2). Issuers will hereinafter be referred to in this memorandum as "insurers" or "health insurers."

[2] 28 U.S.C. § 1491.

[3] Section 1342 of P.L. 111-148 (codified at 42 U.S.C. § 18062).

[4] It is important to note that this memorandum only provides an analysis of whether the Tucker Act could allow a health insurer to file suit against the United States; it does not address the merits of such a suit and whether the U.S. could be liable for paying insurers certain amounts based upon the requirements of the risk corridor program. Liability under the risk corridor program would depend on the facts and circumstances of a particular case.

[5] For more information on the requirements for QHPs in health insurance exchanges, *see* CRS Report R43854, *Overview of Private Health Insurance Provisions in the Patient Protection and Affordable Care Act (ACA)*, by Annie L. Mach and Namrata K. Uberoi. It may be noted that QHPs can be offered both inside the health insurance exchanges and outside the exchanges on the private health insurance market. *See* 42 U.S.C. § 18021.

[6] 42 U.S.C. § 18062.

costs exceed the amount of premiums collected, they may be entitled to a payment from HHS. In contrast, if an insurer's costs are less than the premiums collected, the insurer is required to make a payment *to* HHS. In annual appropriations acts, Congress has also effectively limited the funds appropriated for payments to insurers under the risk corridors program to the amounts received from insurers under the program.[7] On October 1, 2015, the Secretary announced that receipts from insurers that had overestimated their premiums ($362 million) fell short of the amount needed to pay insurers that had underestimated their premiums ($2.87 billion).[8] As a result, HHS indicated that the shortfall would "result in a proration rate of 12.6 percent" for payments to insurers.[9] The next section of this memorandum addresses whether an insurer that received a prorated payment would have a cause of action under the Tucker Act to seek recovery of the full payment under the risk corridors program.

The Tucker Act and Risk Corridors under ACA

Under the common law doctrine of sovereign immunity, the United States may not be sued without its consent, and the existence of consent is necessary for a court's jurisdiction.[10] According to the Supreme Court, the federal government provides this consent only when Congress unequivocally expresses its intention to waive the government's sovereign immunity in statutory text.[11] The Tucker Act is an example of such a waiver, and it gives the U.S. Court of Claims jurisdiction to render judgment over certain specified claims against the United States that are founded on, among other things, "acts of Congress."[12]

Not all claims alleging violations of federal law may be brought under the Tucker Act.[13] As the Federal Circuit has pointed out, "[i]n order to come within the jurisdictional reach and waiver of the Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages."[14] One way that such a right may be created is through a "money mandating statute."[15] If a reviewing court determines that a money mandating statute exists, the jurisdictional requirement of the Tucker Act is satisfied, and it may then examine the merits of a plaintiff's claim. Otherwise, if the court determines that a statute is not money-mandating, the court may lack jurisdiction to hear the case, and the claim may be dismissed.

The Supreme Court has articulated that for purposes of the Tucker Act, a money mandating statute is one that "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained,'"[16] and must be "reasonably amenable to the reading that it mandates a right of recovery in damages." [17] Applying these standards, the Federal Circuit has found that:

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[7] P.L. 113-235 at § 227 (for FY2015), P.L. 114-113 at § 225 (for FY2016).

[8] https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf.

[9] *Id.*

[10] United States v. Mitchell, 463 U.S. 206, 212 (1983) (citing United States v. Sherwood, 312 U.S. 584, 586 (1941); 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3654, pp. 156-157 (1976)). *See also* Federal Housing Administration v. Burr, 309 U.S. 242, 244 (1940).

[11] United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992).

[12] 28 U.S.C. § 1491. The Tucker Act states in relevant part: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States...." 28 U.S.C. § 1491(a)(1).

[13] S*ee Mitchell*, 463 U.S. at 216.

[14] *See Fisher*, 402 F.3d 1167, 1172 (Fed. Cir. 2005); United States v. Testan, 424 U.S. 392 (1976) ("The Tucker Act is ... only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.").

[15] *See generally* Moore's Federal Practice, Civil 105.25.

[16] *Testan*, *supra*, at 400, quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Fed. Cir.1967). As the *Eastport*
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> Congress provided [for] damage remedies where the statutory text leaves the government no discretion over payment of claimed funds. But Tucker Act jurisdiction is not limited to such narrow statutory entitlements. Certain discretionary schemes also support claims within the Court of Federal Claims jurisdiction. These include statutes: (1) that provide "clear standards for paying" money to recipients; (2) that state the "precise amounts" that must be paid; or (3) as interpreted, compel payment on satisfaction of certain conditions. In short, if the court determines that a discretionary source of law meets one of the three requirements set forth above, that source will be deemed to meet the fair interpretation standard and is therefore money mandating for purposes of this court's jurisdiction under the Tucker Act.[18]

Turning to the risk corridors program, if a health insurer offering a QHP files suit against the United States to recover amounts it failed to receive under the program because of an insufficient congressional appropriation, a reviewing court may examine whether it has jurisdiction to hear the case and relatedly, whether section 1342 of ACA, which creates the program, is a money mandating statute. This section states that the Secretary of Health and Human Services (HHS) "shall" establish and administer a program of risk corridors, and QHPs offered in the individual and small group insurance markets "shall participate" in the program.[19] Further, in addressing the payment methodology under the program, if a plan's allowable costs exceed the total premiums received (less administrative costs), this section indicates that the Secretary "shall" pay the plan a percentage of the shortfall in premiums.[20] The Federal Circuit has recognized that use of the word 'shall' generally makes a statute money-mandating,[21] and it is possible that based on this statutory language, a reviewing court may find that the Secretary has little discretion in establishing the program and "clear standards" for making payments to applicable QHPs. Further, while it may be relevant that the federal government has some discretion in determining which health insurers participate in exchanges and which QHPs are offered, plans participating in the risk corridors program are generally those that have been certified by the Secretary or a state entity, and this may be seen as an instance of "compelling payment based on satisfaction of certain conditions."

One case that may be considered instructive is *Greenlee v. U.S.*,[22] which addressed whether a county could sue the federal government to recover certain promised amounts under the Payment In Lieu of Taxes Act (PILT). In general, the PILT compensates local governments for the loss of tax revenue due to the presence of non-taxable land within their jurisdictions, and it specifies that the Secretary of the Interior "shall" make annual payments to eligible local governments based on certain formulas.[23] In *Greenlee*, a county in eastern Arizona did not receive full payment under the PILT formula because it was determined that Congress did not appropriate necessary funding. In examining whether the county could sue the federal government for monetary damages, the court found that based on the use of the term "shall" in the Act and the "detailed mechanism" for calculating the payments under the statute, the PILT

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decision noted, the substantive source of law may grant a right to recover damages either "expressly or by implication." *Id.* at 1007. *See also* Meyers v. United States, 96 Fed. Cl. 34, 45 (Fed. Cl. 2010) ("In general, a statute will be deemed to be a money-mandating source of law if it compels the government to make a payment to an identified party or group.").

[17] United States v. White Mt. Apache Tribe, 537 U.S. 465, 472-73 (2003).

[18] Meyers, 96 Fed. Cl. at 45 (Fed. Cl. 2010).

[19] 42 U.S.C. § 18062(a).

[20] 42 U.S.C. § 18062(b)(1).

[21] *See* Agwiak v. United States, 347 F.3d 1375, 1380 (Fed. Cir. 2003)(" We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating.").

[22] Greenlee County v. United States, 487 F.3d 871 (Fed. Cir. 2007).

[23] 31 U.S.C. § 6901 et seq.

was "reasonably amenable to a reading that it is money mandating" and thus conferred jurisdiction on the Court of Claims.[24]

Finally, it may be noted that jurisdiction under the Tucker Act may also be based upon an express or implied contract with the United States. While health insurers do not specifically negotiate contracts with HHS regarding the risk corridors program, ACA and its implementing regulations provide that in order for an insurer to offer a QHP in an exchange, insurers must submit an application for each plan and go through a certification process.[25] As noted above, these plans must meet a number of standards, including participation in the risk corridors program. Insurers are also required to sign certain agreements with HHS.[26] Assuming a reviewing court were to determine that there is a contractual relationship between HHS and health insurers with respect to offering qualified health plans in an exchange, it seems possible that the court could also conclude that it has jurisdiction pursuant to the Tucker Act to determine whether the federal government breached this contract by failing to provide certain specified amounts under the risk corridors program.

Availability of Appropriations to Pay Judgments

Assuming for the sake of argument that insurers have a valid cause of action and are successful on the merits of their claims against the government, the next question will be whether Congress has appropriated funds to pay those judgments. The U.S. Constitution states that no funds shall be drawn from the Treasury without an appropriation of such funds made by law.[27] Based on this clause, the Supreme Court has held that a judgment entered against the government must still have a valid appropriation of federal funds before it can be paid.[28]

One potential source of payment for litigation awards against the government is the Judgment Fund, a permanent indefinite appropriation enacted by Congress.[29] The Judgment Fund is generally available to pay final judgments from the Court of Claims or another federal court, for which payment is "not otherwise provided" by Congress.[30]

GAO and the Office of Legal Counsel have previously opined that whether Congress has otherwise provided for payment of a judgment depends upon whether an appropriation or fund other than the

[24] Greenlee, 487 F.3d at 877. It may be noted that after finding that plaintiff county could bring an action under the Tucker Act, the court in *Greenlee* then turned to the merits of the case and found that because the PILT specified that funds would be "available only as provided in appropriations laws," the government's liability was capped by the amounts appropriated by Congress. *Id*. at 877-80.

[25] For a description of the process with respect to federally facilitated health insurance exchanges, *see generally* Letter from Department of Health and Human Services, Center for Consumer Information and Insurance Oversight, Centers for Medicare and Medicaid Services (Dec. 23, 2015), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Draft-2017-Letter-to-Issuers-12-23-2015_508.pdf.

[26] *See e.g.*, Agreement between Qualified Health Plan and Issuer and the Centers for Medicare and Medicaid Services, *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/qhp-issuer-agreement.pdf.

[27] U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law").

[28] OPM v. Richmond, 496 U.S. 414, 424-5 (1990) (citing Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850) ("If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the Treasury Department, the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now. *The difficulty in the way is the want of any appropriation by Congress to pay this claim.* It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.") (emphasis added)).

[29] 31 U.S.C. § 1304.

[30] 31 U.S.C. § 1304(a)(1).

Judgment Fund is "legally available to satisfy the judgment."[31] Furthermore, if a source of funds is legally available, then Congress has "otherwise provided" for payment of the judgment, even if that alternative source has insufficient funds to actually satisfy the judgment.[32]

For example, in *County of Suffolk*, *New York v. Sebelius*,[33] plaintiffs argued that they were owed additional funding under the Ryan White HIV/AIDS Program, which provides grants for individuals and families affected by HIV or AIDS.[34] Specifically, the plaintiffs argued that their funding under the program had been reduced because they were inappropriately classified by HHS, and they sued seeking to correct the classification and restore their correct funding levels. Ultimately, the United States Court of Appeals for the Second Circuit held that the plaintiffs were likely to be successful on the merits of their classification argument.[35] However, resolving the plaintiffs' claims for recovery of prior-years' funding was complicated by the fact that all the appropriated funds had been expended to other grantees. When the plaintiffs argued that their recovery could come from the Judgment Fund, the Second Circuit disagreed and held that the recovery was "otherwise provided for" through the legal availability of the appropriation for the Ryan White HIV/AIDS Program, even though the balance of the appropriation was insufficient.[36] In this situation, GAO has opined that "[t]he 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."[37]

On September 30, 2014, the Government Accountability Office (GAO) determined that receipts from insurers to the Centers for Medicare and Medicaid Services (CMS) under the risk corridors program are "user fees" which may be retained in the agency's "Program Management" account, typically provided in the annual Labor-HHS-Education Appropriations Act.[38] Further, GAO opined that this account constituted an appropriation that could be used to fund risk corridors payments to insurers that underestimated premiums. As noted above, the use of the "Program Management" account for risk corridor payments was affirmed for FY2015 when Congress placed new restrictions on the use of the "Program Management" account by explicitly stating that amounts transferred to it from sources may not be used to make risk corridors payments, effectively limiting the availability of funds for payments to the amount received as "user fees" under the program, as discussed further below.[39] For FY2016, a similar provision has been included in § 225 of H.R. 2029, the FY2016 Consolidated Appropriations Act.

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.

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[31] GAO, 3 Principles of Federal Appropriations Law 14-39.

[32] *Id.*

[33] County of Suffolk, N.Y. v. Sebelius, 605 F.3d 135 (2010).

[34] For more information on this program, see CRS Report R44282, *The Ryan White HIV/AIDS Program: Overview and Impact of the Affordable Care Act*, by Judith A. Johnson and Elayne J. Heisler.

[35] County of Suffolk, N.Y. v. Sebelius, 605 F.3d at 139.

[36] *Id.* at 143 ("Where, as here, '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.'") (citing GAO, 3 Principles of Federal Appropriations Law 14-39). *See also* 66 Comp. Gen. 157, 160 (Dec. 18, 1986) ("the application of the 'otherwise provided for' concept turns on the question of legal availability of the appropriation rather than sufficiency of funds.").

[37] GAO, 3 Principles of Federal Appropriations Law 14-39. *See also* 22 Op. O.L.C. 141 (July 22, 1998) ("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.").

[38] GAO, *Department of Health and Human Services – Risk Corridors Program*, B-325630 (Sept. 30, 2014).

[39] P.L. 113-235 at § 227.

This would appear to be the case even if the amounts available in the "Program Management" account had been exhausted.[40] In such a circumstance, it appears that any payment to satisfy a judgment secured by plaintiffs seeking recovery of amounts owed under the risk corridors program would need to wait until such funds were made available by Congress.[41]

[40] On October 1, 2015, the Secretary announced that charges from insurers that had over-estimated their premiums ($362 million) fall short of the amount needed to pay insurers that had under-estimated their premiums ($2.87 billion). "At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent." https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf.

[41] The lack of a funding source with which to pay a judgment does not affect the jurisdiction of the Court of Claims to hear a suit under the Tucker Act. Slattery v. U.S., 635 F.3d 1298 (Fed. Cir. 2011) ("the source of a government agency's funds, including funds to pay judgments incurred by agency actions, does not control whether there is jurisdiction of a claim within the subject matter assigned to the court by the Tucker Act.").