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Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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FACSIMILE (202) 225-3974
MINORITY (202) 225-6051
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LAWRENCE J. BRADY
STAFF DIRECTOR

August 1, 2012

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20515

Dear Madam Secretary:

The Committee on Oversight and Government Reform is continuing oversight of the Department of Health and Human Services' (HHS) implementation of the Patent Protection and Affordable Care Act (PPACA). In particular, the Committee is concerned about HHS's Medicare Advantage Quality Bonus Payment Demonstration (Demonstration).¹ The Medicare Payment Advisory Commission (MedPAC) strongly criticized the Demonstration in January 2011, three months before the final specifications of the Demonstration were announced.² MedPAC was concerned that the Demonstration was too large, too costly, and failed to reward better-performing Medicare Advantage plans.

During the past six months, the Government Accountability Office (GAO) has raised many of the same policy criticisms and additional legal questions about the Demonstration.³ GAO experts concluded the Demonstration is so flawed that evaluators will be unable to determine whether its bonus scheme is an effective tool for improving Medicare Advantage plan quality or efficiency.⁴ In particular, GAO emphasized that the Demonstration lacked an appropriate control group and primarily used data from before the Demonstration was finalized to reward Medicare Advantage plans.⁵ GAO concluded the Demonstration was so flawed that it took unprecedented action and called on you to cancel the Demonstration. Unfortunately, HHS rejected GAO's recommendation and has continued the program unaltered.⁶

¹ 75 Fed. Reg. 71190, 71220 (Nov. 22, 2010).

² MedPAC letter to Donald Berwick, CMS Administrator (January 6, 2011).

³ Gov't Accountability Office, *Medicare Advantage: Quality Bonus Payment Demonstration Undermined by High Estimated Costs and Design Shortcomings*, GAO-12-409R (Mar. 21, 2012) [hereinafter GAO Report]; see also Letter from Lynn H. Gibson, Gen. Counsel, Gov't Accountability Office, to Honorable Kathleen Sebelius, Sec'y of Health & Human Servs. (July 11, 2012) [hereinafter GAO Letter].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Under Section 402(a)(1)(A) of the Social Security Act, the Secretary of HHS possesses the authority to implement demonstrations that test whether changes in payment methodologies increase the efficiency and economy of Medicare services through the creation of additional incentives.⁷ However, GAO experts testified at the Committee's July 25, 2012, hearing that you acted outside of your legal authority by authorizing the Demonstration because it demonstrates nothing of value and fails to create additional incentives for Medicare Advantage plans to improve quality.⁸ Moreover, the size and timing of the Demonstration raises questions about possible political motivations behind the decision to implement the Demonstration.

On October 15, 2012, Medicare Advantage's open enrollment period begins. Under PPACA, Medicare Advantage plans would experience a \$200 billion cut over the next decade, with the cuts scheduled to begin in 2012.⁹ According to the July 25, 2012, hearing testimony, without the Demonstration, seniors would have had fewer plan options, less benefits, and higher premiums if PPACA's cuts to Medicare Advantage had been allowed to take effect.¹⁰ Rather than allowing PPACA cuts to Medicare Advantage right before this year's election, you made the decision to conduct a short-term demonstration that would offset 71% of PPACA's Medicare Advantage cuts scheduled during the 2012 election cycle.¹¹ Although GAO did not speculate about your motivations for this unprecedented demonstration, the Committee is concerned that the only plausible explanation is that, realizing the political danger of the law's large cuts to Medicare Advantage during an election year, you decided to utilize a loophole in the Social Security Act to implement a temporary bandage that would cover up PPACA's large cuts to the 13 million seniors enrolled in Medicare Advantage.¹²

In addition to the Committee's concerns about the political motivations behind the Demonstration, Jonathan Blum, the Director of the Center for Medicare at the Centers for Medicare and Medicaid Services (CMS), testified at our hearing¹³ that there is no limit to the HHS Secretary's authority to conduct demonstrations under Section 402(a)(1)(A). Mr. Blum's testimony is at odds with GAO's view that the HHS Secretary's authority under Section 402 is *not* unlimited.¹⁴ According to Mr. Blum's testimony at the Committee's hearing:

- The Secretary of HHS can spend an unlimited amount under your demonstration authority without Congressional appropriation or authorization.
- The Secretary of HHS can easily waive a demonstration from your Department's explicit rules stating demonstrations must be budget neutral.

⁷ 42 U.S.C. § 1395b-1(a)(1)(A).

⁸ *GAO Report: The Obama Administration's \$8 Billion Extralegal Healthcare Spending Project*: Hearing Before the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2012) [hereinafter Committee Hearing].

⁹ Congressional Budget Office, *Preliminary Analysis of the President's Budget for 2012* (March 18, 2011).

¹⁰ Committee Hearing, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ GAO Letter, *supra* note 2.

- The Secretary of HHS can effectively change the law through your demonstration authority. In this case, you effectively amended PPACA without Congressional authorization.
- The Secretary of HHS can implement a demonstration without obtaining an independent, non-partisan statistical analysis of the demonstration, despite a mandate that you do so under Section 402(b) of the Social Security Act.

You have rejected both GAO's and Med-Pac's criticism of this project's design.¹⁵ You have ignored internal CMS and Office of Management and Budget (OMB) policies that demonstrations must be budget neutral and that they require independent statistical experts' approval.¹⁶ In essence, you have unilaterally decided to spend \$8.3 billion on the Medicare program without Congressional appropriation – an amount greater than all previous 85 Medicare demonstration projects combined.¹⁷ Since you have profoundly rejected the established requirement that Medicare demonstrations are budget neutral and Mr. Blum has confirmed that there is no limit to what you can spend on a demonstration, the Committee is concerned that you may continue to abuse this authority to increase the deficit and re-write the law to preserve the self-interest of this Administration. Moreover, the Committee is concerned about the precedent this reckless Demonstration sets for future Secretaries.

Do you agree with Mr. Blum that there is no limit to what you may spend through this authority?

To facilitate the Committee's oversight of your authority to implement demonstration projects under Section 402(a)(1)(A) of the Social Security Act and this particular Demonstration, the Committee requests that the Department produce the following documents, in electronic format, for the time period March 23, 2010, to the present:

1. All documents and communications referring or relating to limits on what the Secretary of HHS can spend on demonstration projects under Section 402(a)(1)(A) of the Social Security Act?
2. All documents and communications referring or relating to the decision to exempt this Demonstration from CMS's own budget neutrality rules.
3. All documents and communications referring or relating to Section 402(b)'s requirement that CMS obtain the evaluation of a statistical expert for demonstration projects.
4. All documents and communications referring or relating to the decision to implement this Demonstration as a three-year project that ends the MA on December 31, 2014.

¹⁵ Committee Hearing, *supra* note 8.

¹⁶ *Id.*

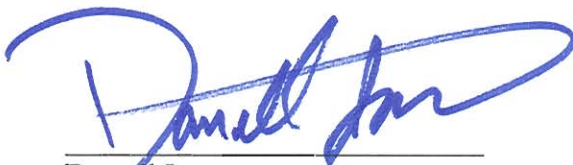
¹⁷ *Id.*

5. The documents you submitted to the Committee on July 25, 2012, are not fully compliant with the May 23, 2012, written request.¹⁸ Since your submission included only two emails from August 2010, there clearly remains substantial communications between CMS, HHS, MedPAC, OMB, and health insurance companies that you and your agency have chosen not to disclose. Therefore, please provide all documents and communications between and among any executive branch employees that refer or relate to the Demonstration from March 23, 2010, to the present.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on August 13, 2012. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about the Committee's request.

If you have any questions about this request, please contact Brian Blase with the Committee at 202-225-5074. Thank you for your attention to this matter.



Darrell Issa
Chairman

Sincerely,



James Lankford
Chairman, Subcommittee on
Technology, Information Policy,
Intergovernmental Relations and
Procurement Reform

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Gerald E. Connolly, Ranking Minority Member
Subcommittee on Technology, Information Policy, Intergovernmental Relations
and Procurement Reform

¹⁸ Darrell Issa, Chairman of the Committee on Oversight and Government Reform, letter to Kathleen Sebelius, HHS Secretary (May 23, 2012).

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.