The Risk Corridor Program: A Funding Issue

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I. INTRODUCTION

Since its implementation, the Affordable Care Act (ACA) has simplified the process for United States residents with preexisting conditions to obtain health insurance coverage. As a result, insurers’ inability to deny coverage to people with preexisting conditions, coupled with tax credits for low and moderate income individuals, drove the increase in insurance coverage amongst these two demographics. Under the ACA, insurance companies must sell policies to everyone, regardless of medical history, thus increasing the likelihood that insurance companies could be stuck footing the bill for unhealthy patients.

In order to ensure that insurance companies would not be stuck footing the bill, the risk corridor program was implemented to protect insurers from the risk of insuring high-risk individuals with preexisting conditions and to

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2. Id.
keep premiums low. This article argues that while the risk corridor program provides the security for insurers to sustain high-risk individuals under the ACA, Congress failed to properly fund the program and therefore, the risk corridor program is unconstitutional. Part II of this article will discuss the risk corridor program, the major players involved, and the program’s current implementation. Part III will examine the arguments regarding why funding for the risk corridor program is unconstitutional without proper Congressional funding. Next, Part IV will explore the arguments for constitutionality in funding the risk corridor program and why these arguments are flawed. Lastly, Part V will discuss the impact the risk corridor program has on the health insurance industry and the possible long-term success or failure of the ACA.

II. THE RISK CORRIDOR PROGRAM AND ITS CURRENT IMPLEMENTATION

The purpose of the federally funded risk corridor program is to shift the costs from insurers who overestimate their risk to insurers who underestimate their risk. The federal government created the risk corridor program as one of the ACA’s mandates; it went into effect in 2014 and will continue through 2016 as a tool to curtail cost uncertainty for health care insurance providers. The risk corridor program’s rules are based on the percentage of the qualified health plan’s “allowable costs” to its “target amount.”

5. THE KAISER FAMILY FOUND., supra note 1, at 4. ("The ACA’s risk adjustment, reinsurance, and risk corridor programs are intended to protect against the negative effects of adverse selections and risk selection, and also work to stabilize premiums, particularly during the initial years of the ACA implementation").


7. Id.

8. Alden J. Bianchi, Premium Stabilization, 2012-17 N.Y.U. Rev. L. Empl. Ben. 17.07 ("Allowable costs for this purpose mean an amount equal to the total medical costs, which include clinical costs, excluding allowable administrative costs (i.e., costs for the administration and operation of the health insurance issuer) paid by the QHP issuer in providing benefits covered by the QHP. Target amount means the amount equal to the total premiums incurred by the QHP, including any premium tax credits or financial assistance from any

The risk corridor program temporarily eases risk between the old and new insurance marketplaces.9 Specifically, the risk corridor program attempts to create a more stable market by limiting the vitality in the individual and small group markets.10 For each year of the risk corridor program, both the federal government and the insurance companies will share the risk of the insurance plans.11 While the risk corridor program started in 2014, the proposed funds will not be collected or paid to the health insurance companies until 2015.12 The government decided to implement this limited time frame because the risk corridors are most appropriate during the first few years of the ACA, when less expenditure data is available.13

III. AN ARGUMENT THAT RISK CORRIDOR FUNDING IS UNCONSTITUTIONAL

Payments made by the Department of Health and Human Services (HHS) to qualified health plans under the ACA require a separate congressional appropriation for those funds.14 The Secretary of HHS is a federal officer governmental program, reduced by allowable administrative costs of the health insurance issuer."

9. AM. ACADEMY OF ACTUARIES, FACT SHEET: RISK SHARING MECHANISMS THE 3Rs (RISK ADJUSTMENT, RISK CORRIDORS, AND REINSURANCE) EXPLAINED 2 ("An objective of risk corridors is to encourage health insurance competition by limiting the risk for insurers entering the exchange market during the early years of implementation. This provision applies to qualified health plans (QHPs) in the individual and small group markets.").

10. AMERICA’S HEALTH INS. PLANS, supra note 5, at 1. See Also, CMS Final Rule, cms.gov 3 ("The overall goal . . . is to provide certainty and protect against adverse selection in the market while stabilizing premiums in the individual and small group markets.").

11. AMERICA’S HEALTH INS. PLANS, Id. at 2. ("If the amount a health plan collects in premiums exceeds their medical expenses by a certain amount, the plan will make a payment to the federal government. If premiums fall short of their target, the risk corridor program transfers a portion of this shortfall to the plan.").


14. ENERGY & COMMERCE COMMITTEE, HHS Ignores Rule of Law to Transfer Billions of Dollars to Insurers Through PPACA Risk Corridor Program (2014), available at
who ensures the health and well-being of the nation. An officer or employee of the United States cannot make a payment using federal governmental funds unless Congress issues a specific appropriation. The Government Accountability Office (GAO) interpreted an appropriation to consist of both a direction to pay and the specified source of funds. While the ACA allows the Secretary of HHS to pay directly to the designated insurance companies, the statute does not specify exactly where those payments are to be made from. Therefore, the Secretary of HHS has the discretion to make payments but does not have any money to make the payments with.

It is possible that there is a valid appropriation in a different Congressional statute, such as the annual appropriation process. However, it is too soon to know because the payments for the risk corridor program will not be made until 2015 and there is no proposed presidential budget or any pending appropriation bills at this time. Recently, the GAO found that


16. Antideficiency Act, 31 U.S.C. §1341 (2004) Limitations on Expendings and Obligating Amounts (“An officer or employee of the United States government or the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”).
17. Memorandum from Edward C. Liu, legislative attorney, Congressional Research Service, to House Energy and Commerce Committee (Jan. 23, 2014) available at https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20140123CRSMemo.pdf, see also GOA 1 Principles of Federal Appropriations Law 2-16, 2-17 (2004) available at http://www.gao.gov/assets/210/202437.pdf (“If the statute contains a specific direction to pay and a designation of the funds to be used . . . then this amounts to an appropriation. . . . the designation of a source of funds without a specific direction to pay is also not an appropriation.”).
18. Patient Protection and Affordable Care Act, supra note 3.
19. Id.
HHS might not receive the proper appropriations for funding in 2015.\textsuperscript{22} This is significant because without funding in the presidential budget or an appropriation bill in 2015, the risk corridor program will lack proper funding.

Without a congressional appropriation for the funding of the ACA’s risk corridor program to Secretary of the HHS, the program is simply unconstitutional.\textsuperscript{23} Section 1342 of the ACA provides that under certain circumstances HHS “shall pay” specified amounts to participating plans.\textsuperscript{24} If Congress specified to which source the payments were to be made in Section 1342 of the ACA, then there would have been a valid appropriation of Congressional funds.\textsuperscript{25} However, this distribution and specification did not occur.\textsuperscript{26}

The amounts received from the qualified health plans cannot be used as a revolving fund to make the payments to the qualified health insurers.\textsuperscript{27} A revolving fund is a “fund that conducts continuing cycles of businesslike activity, in which the fund charges for the sale of the products or services and uses the proceeds to finance its spending, usually without requirement of annual appropriations.”\textsuperscript{28} Advocates for the constitutionality of the risk corridor program claim that the program creates a revolving fund with its own collection from the insurers and then administers the money. However, there needs to be direct statutory authority for a federal department to ad-

\textsuperscript{22}. The Healthcare Payer News, The Risk Corridor Funding Paradox, October 2, 2014 (“HHS may not get the appropriations for risk corridor payments in fiscal year 2015—when the agency intends to administer this year’s profit-loss sharing—and yet the payments have still been signed into contract with private insurers”) http://www.healthcarepayernews.com/content/risk-corridor-funding-paradox#.VEqDYmRdWAQ.

\textsuperscript{23}. Liu, supra note 17, at 3.

\textsuperscript{24}. Shultz, supra note 12, at 2.

\textsuperscript{25}. Liu, supra note 17, at 1.

\textsuperscript{26}. Id.

\textsuperscript{27}. Id. at 3.

minister a revolving fund.\textsuperscript{29} The ACA does not give direct statutory authority to HHS to run a revolving fund.\textsuperscript{30}

Therefore, the funding of the risk corridor program is unconstitutional through a revolving fund without standalone legislation or in an annual appropriation act.\textsuperscript{31} As is the case with any specific appropriation needed for funding of a program, the same goes for funding a program with a revolving fund.\textsuperscript{32} HHS has no authority to administer a revolving fund without a proper appropriation from Congress and in order for this federal program to have constitutional funding there needs to be a Congressional appropriation in the fiscal year 2015.\textsuperscript{33}

**IV. AN ARGUMENT FOR THE CONSTITUTIONALITY OF FUNDING THE RISK CORRIDORS**

The first argument detailing why the funding for the ACA’s risk corridor program is constitutional rests upon the long-standing federal precedent highlighting how risk corridor programs have been implemented in the past when the market changes, leaving health insurers unsure about the risks they will face in the future and how to price their products.\textsuperscript{34} The funding for these federal programs came from a congressional appropriation.\textsuperscript{35}

The National Flood Insurance Program, the Terrorism Risk Insurance Act of 2002, and the Medicare Part D Drug Plan are examples of how the federal government covered the risk of private insurers in order to make the

\footnotesize{\textsuperscript{29} ROBERT WOOD JOHNSON FOUND., RISK CORRIDORS. THE ACA’S PREMIUM STABILIZATION PROGRAMS ENCOURAGE INSURERS TO PARTICIPATE IN EXCHANGES BY ELIMINATING UNPREDICTABILITY AROUND NEW ENROLLEES 4 (2014), available at http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_118.pdf; see also Liu, supra note 17 (“An agency may not create a revolving fund absent specific authorizing legislation. In the absence of any specific directions, federal law requires such amounts to be deposited in the General Fund of the Treasury, from which they may be further appropriated by Congress.”).}

\footnotesize{\textsuperscript{30} Patient Protection and Affordable Care Act, supra note 3.}

\footnotesize{\textsuperscript{31} Liu, supra note 17, at 3.}

\footnotesize{\textsuperscript{32} Id.}

\footnotesize{\textsuperscript{33} Id.}

\footnotesize{\textsuperscript{34} Id.}

\footnotesize{\textsuperscript{35} Id.}
insurers viable to a changing market.\(^{36}\) Since its implementation, the National Flood Insurance Program has allowed private insurers to offer flood insurance to individuals without the costly risk.\(^{37}\) Furthermore, the Terrorism Risk Insurance Act of 2002 has allowed commercial insurers to offer risky terrorism insurance to private businesses without large premiums.\(^{38}\) In the health care realm, the Centers for Medicare & Medicaid Services (CMS) administers a risk corridor program for Medicare Part D sponsors in order reduce some of the risk in administering this federally funded program.\(^{39}\) The ACA’s risk corridor program is modeled after the risk corridor program for Medicare Part D.\(^{40}\)

All three of these programs include some type of risk sharing from the federal government and some type of specific congressional appropriation of funds for their implementation.\(^{41}\) However, with the risk corridor program there is no specific appropriation from Congress.\(^{42}\) Therefore, the risk corridor program shares similarities with the National Flood Insurance Program, the Terrorism Risk Insurance Act of 2002, and the Medicare Part D Drug Plan only in substantial purpose and not constitutional underpinnings.

The second main argument for constitutionality of the risk corridor program is that HHS has proper legal authority to administer funds to insurers

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\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) America’s Health Ins. Plans, supra note 5, at 2 (“CMS administers a risk corridor program in which Part D sponsors share risk above and below predetermined payment-to-cost ration thresholds established by law. The risk corridors have broadened over time, meaning Part D sponsors are more likely to be at full risk than was true during the initial years of the program.”).

\(^{40}\) Letter from Sylvia M Burwell, The Secretary of Health and Human Services, Department of Health and Human Services to Jeff Session, United States Senator, United States Senate (June 18, 2014), available at http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/letters/20140619HHSResponse.pdf.

\(^{41}\) Jost, supra note 36, at 2.

\(^{42}\) Liu, supra note 17.
through the program because of Section 1342 of the ACA and the CMS Program Management (PM) appropriation for the fiscal year 2014.\textsuperscript{43} There is no dispute that Section 1342 of the ACA grants authority to HHS to establish and administer a temporary risk corridor program beginning in 2014 and going through 2016.\textsuperscript{44} The argument is that the language in Section 1342 itself gives the HHS proper authority to collect these fees from the insurers and then properly fund the program.\textsuperscript{45} Furthermore, the PM for the fiscal year 2014 states, “such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019.”\textsuperscript{46} The argument is that this, in itself, acts as qualified appropriation by Congress for the funding of the program.

While the PM appropriation would have been available for fiscal year 2014, HHS intends to begin collections and payments to the private insurers under the risk corridor program in 2015.\textsuperscript{47} However, for funds to be available for this purpose, PM for fiscal year 2015 must contain similar language to PM for fiscal year 2014.\textsuperscript{48} This has not occurred to date and most likely will not occur without a cooperating Congress.\textsuperscript{49} Therefore, PM appropriation to HHS for the fiscal year 2014 cannot be used as a proper funding for the risk corridor program because HHS is going to distribute the payment to the insurers in 2015 and there has not been a PM appropriation for fiscal

\textsuperscript{43} Schultz, supra note 12.

\textsuperscript{44} Patient Protection and Affordable Care Act, supra note 3, ("The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan’s aggregate premiums.").

\textsuperscript{45} Schultz, supra note 12, at 2.

\textsuperscript{46} Id.


\textsuperscript{48} Id.

\textsuperscript{49} Id.
While the necessary funding has not been properly secured for the risk corridor program, it would be an unwise decision for Congress to revoke the program at this point in the implementation of the ACA. Revocation of the risk corridor program would raise questions of the trustworthiness of the federal government, put private insurers at much higher risk, and increase dramatically the cost to the federal government.

The federal government has entered into contracts with private insurers promising the safety net of the risk corridor program. The private insurers have relied on these governmental promises in setting their premiums and if not honored the insurers could file suit against the federal government under the Fifth Amendment. In not honoring the contract with private insurers, the government puts the insurers at tremendous risk and could possibly face liability due to its actions.

The risk corridor program is an essential part of the ACA’s success and an essential part of making health insurance affordable for all citizens, whether wealthy or poor. Therefore, the risk corridor program should not


51. See AM. ACADEMY OF ACTUARIES, supra note 7 (“Any changes to these provisions should be made with careful consideration of these interrelationships and the impact of how revisions could affect insurer risks, insurance availability, and insurance premiums”).

52. Jost, supra note 36, at 5 (“Removing the back-stop of the risk corridor program would put private insurers at much higher risk, possibly leading to insolvencies that would need to be covered at great expense by the state and federal governments. It would certainly lead to fewer insurers participating in the exchanges in 2015, and to higher premiums.”).

53. Jost, supra note 50 (“the failure of the United States to honor its commitment to private insurers under the risk corridor program could be an unconstitutional taking, prohibited by the Fifth Amendment, as contractual rights are property rights for purposes of the Fifth Amendment.”).

54. Id.

55. Id.

56. John Tozzi, Obamacare’s ‘Bailout’ Could Earn Billions for the Government,
be revoked due to its importance to the health care system in the United States and Congress should provide the proper constitutional funding. This would entail Congress passing a specific appropriation for the risk corridor program in 2015, the year that collections and payments are to be made by the Secretary of HHS to private insurance companies.

VI. CONCLUSION

The funding for the ACA risk corridor program is unconstitutional because Congress has not provided a specific appropriation for the funding of the program either through direct appropriation or delegation of the ability to run a revolving fund to HHS. Although the funding for this program is unconstitutional, it should not be revoked. Revocation of the risk corridor program would be tremendously detrimental to the implementation of the ACA and incredibly disastrous for low and middle-income citizens attempting to obtain insurance coverage. Therefore, Congress should vote to provide the proper funding for the risk corridor program through an appropriation in 2015. This would provide the constitutional authority for a program that is vitally important for the creation of a new healthcare system in the United States.

Bloomberg Businessweek (February 4, 2014) http://www.businessweek.com/articles/2014-02-04/obamacares-bailout-could-earn-billions-for-the-government (“It encourages them to offer plans in the exchanges, knowing that their losses will be limited if the people they enroll turn out to be much costlier—i.e., sicker—than anticipated. And it removes insurers’ incentives to recruit only the healthiest people.”).