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## Obama Administration May Use Obscure Fund to Pay Billions to ACA Insurers

*By: Amy Goldstein*

The Obama administration is maneuvering to pay health insurers billions of dollars the government owes under the Affordable Care Act, through a move that could circumvent Congress and help shore up the president's signature legislative achievement before he leaves office.

Justice Department officials have privately told several health plans suing over the unpaid money that they are eager to negotiate a broad settlement, which could end up offering payments to about 175 health plans selling coverage on ACA marketplaces, according to insurance executives and lawyers familiar with the talks.

The payments most likely would draw from an obscure Treasury Department fund intended to cover federal legal claims, the executives and lawyers said. This approach would get around a recent congressional ban on the use of Health and Human Services money to pay the insurers.

The start of negotiations came amid an exodus of health plans from the insurance exchanges that are at the heart of the law. More than 10 million Americans have gained coverage through the marketplaces since they opened in 2014.

But many insurers are losing money on their new customers, who tend to be relatively sick and expensive to treat. As a result, some smaller plans have been driven out of business and a few major ones are defecting from exchanges for the coming year.

The administration's efforts reflect the partisan thorns that still surround the sprawling law a half-dozen years after its passage. The payouts that officials want to salvage were part of an ACA strategy to help the marketplaces flourish early on. But Republican opponents in Congress branded them an insurance industry "bailout" and restricted the use of HHS funds.

A settlement probably would rely on Treasury's Judgment Fund, a 1950s creation that is allowed as much money as it needs to satisfy valid claims against the government. The fund's website shows that it has been used for a few hundred claims against HHS in the past decade. Taken together, they amounted to about \$18 million — a fraction of what the insurers are owed.

In the administration's waning months, officials are continuing their upbeat portrayal of all aspects of the law. Behind the scenes, they think that making these payments to insurers — \$2.5 billion for 2014 and an as-yet-undisclosed sum for 2015 — is crucial to the exchanges' well-being.

"It's a legacy item for the White House," said Dan Mendelson, president of the health consulting firm Avalere and an adviser on the payout effort. "It's more than just a lawsuit. It's really about the future . . . and stability of these markets."

GOP lawmakers are already beginning to cry foul. "It's an end run on the clear . . . intent of Congress," said Rep. H. Morgan Griffith (Va.).

The money in question involves one of three strategies to help coax insurers into the marketplaces by promising to cushion them from unexpectedly high expenses for their new customers. This particular strategy, known as "risk corridors," was for the marketplaces' first three years, when it was unclear how many people would sign up and how much medical care they would use.

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The idea, patterned after a similar arrangement for health plans that sell Medicare drug benefits, is to balance out insurers' costs by requiring those with unexpectedly low expenses to pay into a fund that would be used to compensate companies with unexpectedly high expenses. The program originally was not supposed to pay for itself, but two years ago the Republican-led Congress restricted HHS from using any of its other money for that purpose.

The risk corridors started in 2014. The crunch became apparent last fall, when federal health officials [announced](#) that they faced an enormous gap because so many more health plans incurred high expenses for their ACA customers than low ones. For that reason, HHS made less than \$400 million in 2014 risk-corridor payments — just 12.6 percent of \$2.9 billion it owed overall.

Beyond the 175 insurers owed money for the first year, health officials have not said how many need to be paid for 2015, how much they are due or how much money is available. But in a five-paragraph memo this month, HHS's Centers for Medicare and Medicaid Services said any money that is available will be put toward what the government still owes for 2014.

The risk corridor payments are "an obligation of the federal government," acting administrator Andy Slavitt told a recent House hearing.

The shortfall has contributed to the collapse of most of the 23 nonprofit, consumer-oriented health plans created under the ACA, forcing several hundred thousand people to find new coverage. Just six co-ops remain. Four of them, including two that have closed, are among the seven insurers suing the government for lack of payment.

[\[\\$1.2 billion in loans to ACA co-ops may be a loss\]](#)

CMS spokesman Aaron Albright referred questions to the Justice Department. Justice spokeswoman Nicole Navas declined to confirm the settlement talks because the litigation is pending.

One health plan executive, whose attorney has spoken with Justice officials, said the department is trying to reach an agreement with suing insurers in the next two weeks on what percentage of the remaining \$2.5 billion would be paid out. At that point, the same offer would be made to every other insurer owed money. A judge would need to approve the arrangement, according to the executive, who spoke about the pending litigation on the condition of anonymity.

Stephen Swedlow, a lawyer for Health Republic Insurance in Oregon, a co-op that was forced to close early this year, said he is preparing a settlement proposal to send to Justice. Said Health Republic chief executive Dawn Bonder: "I don't think DOJ is making a secret that they would like [the lawsuits] to go away."

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