

United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR
GABRIELLE A. BATKIN, MINORITY STAFF DIRECTOR

September 16, 2015

Mr. Andrew Slavitt
Acting Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Acting Administrator Slavitt:

The Committee on Homeland Security and Governmental Affairs is conducting oversight of the disbursement of federal funds used to establish, manage, and maintain state health care exchanges under the Affordable Care Act (ACA). Recent reports have highlighted serious problems with a number of states that received great sums of federal taxpayer dollars through the ACA to establish and maintain their exchanges.¹ I ask for your help in better understanding the full financial background of the failed exchanges in order to prevent further waste of taxpayer dollars.

After the passage of the ACA, thirteen states and the District of Columbia chose to set up their own health care exchanges.² The Centers for Medicare and Medicaid Services (CMS) funded the establishment and early operation of their independent exchanges.³ As of May 2014, the Kaiser Family Foundation had calculated that the federal government had approved \$4.698 billion for states since 2011 to help them determine whether to create their own exchanges and to assist them in doing so.⁴ Another calculation, from the Americans for Tax Reform, estimates that the federal government has spent in excess of \$5.37 billion in grants for states to assist in establishing state exchanges.⁵

Due to a litany of technical problems and low-enrollment numbers at the state-run exchanges, the burden of providing those states with a health care marketplace shifted back to

¹ See generally Charles Ornstein, *Epic Fail: Where Four State Health Exchanges Went Wrong*, PROPUBLICA, Feb. 6, 2014, <http://www.propublica.org/article/epic-fail-where-four-state-health-exchanges-went-wrong>; see also Ricardo Alonso-Zaldivar, *State Obamacare Exchanges Struggling with High Costs and Disappointing Enrollment*, CNS NEWS, July 26, 2015, <http://www.cnsnews.com/news/article/state-obamacare-exchanges-struggling-high-costs-and-disappointing-enrollment>.

² See *State Health Insurance Marketplace Types, 2015*, Kaiser Family Foundation, <http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types>.

³ See *Total Health Insurance Exchange Grants*, Kaiser Family Foundation, <http://kff.org/health-reform/state-indicator/total-exchange-grants>.

⁴ See Kyle Cheney & Jennifer Haberkorn, *\$474M for 4 Failed ACA Exchanges*, POLITICO, May 11, 2014, <http://www.politico.com/story/2014/05/obamacare-cost-failed-exchanges-106535>.

⁵ See Alexander Hendrie, *Taxpayers Shell Out \$5.4 Billion for State Obamacare Websites*, AMERICANS FOR TAX REFORM, Apr. 2, 2015, <https://www.atr.org/taxpayers-shell-out-54-billion-state-obamacare-websites>.

the federal government.⁶ Not only is the federal system now forced to absorb increased responsibilities, it appears that millions of federal taxpayer dollars have been wasted on state programs that proved too complex or unpopular.⁷ For example, CMS awarded \$118 million to the state of Maryland for its failed state-run exchange, and nearly \$250 million of federal funds to the state of Oregon for the same purpose.⁸ State exchanges in Nevada, Massachusetts, Minnesota, Vermont, and Hawaii all suffered similar large-scale problems.⁹

As state exchange failures continued, the federal government has awarded additional grants to states in order for them to fix their exchanges or to transition back to the federal marketplace.¹⁰ In the aftermath of the Supreme Court's opinion in *King v. Burwell* upholding the use of federal tax subsidies for all states regardless of whether they established their own exchange or use the federal government's exchange,¹¹ there are concerns that states that established failed state exchanges will now migrate over to the federal exchange. As the states with failed exchanges potentially migrate over to the federal exchange, I am concerned that the billions of taxpayer dollars that were spent to establish these exchanges will have been wasted. Already, we have seen Nevada, Oregon, and Massachusetts taken steps to dismantle their state exchanges and to join the federal exchange.¹² As more states potentially follow suit, it is crucial that the federal funds spent to establish and maintain the now-defunct exchanges is properly accounted for and recovered wherever possible.

Given that the federal government has already spent nearly \$4.7 billion to establish state exchanges, the prospect that state exchanges will continue to fail, or that states will migrate to the federal exchange raises concerns about the potential further waste of taxpayer funds. As such, to ensure that CMS is appropriately stewarding taxpayer funds, I ask that you please provide the following information and documents:

1. What criteria does CMS use to evaluate the eligibility of a state to transition from a state exchange to the federal exchange? Can any state transition back to the federal exchange? Please provide any relevant memoranda or documents articulating CMS policy.
2. Has CMS allocated or does CMS intend to allocate additional federal funds to assist states in operating state exchanges or fixing their existing exchange systems? If so, please list the state, the amount for each state, and the source of funding.

⁶ Cheney, *supra* note 4.

⁷ *Id.*

⁸ *Id.*; see also Grace-Marie Turner, *Oregon's Failed ObamaCare Exchange is a Warning for Other States*, FORBES, Mar. 31, 2015, <http://www.forbes.com/sites/gracemarieturner/2015/03/31/oregons-failed-obamacare-exchange-is-a-warning-for-other-states>.

⁹ See Peter Suderman, *Obamacare's Failed State Exchanges*, REASON, Feb. 27, 2014, <http://reason.com/archives/2014/02/27/obamacares-failed-state-exchanges>.

¹⁰ Cheney, *supra* note 4.

¹¹ *King v. Burwell*, 576 U.S. __ (2015).

¹² See Kyle Cheney, *Nevada the Latest to Scrap Exchange*, POLITICO, May 30, 2014, <http://www.politico.com/story/2014/05/nevada-end-obamacare-exchange-healthcare-brian-sandoval-106897.html>.

3. Has CMS allocated or does CMS intend to allocate federal funds to transition states back into the federal exchange? If so, please itemize the amount of federal dollars that CMS has spent or will spend on each state, and the source of funds for such a transition.
4. Which CMS official approves the allocation of federal funding for state exchanges to transfer to the federal exchange?
5. Has CMS conducted any analysis to determine the costs and benefits of transitioning individual state exchanges back to the federal exchange? Please provide the analysis, including, but not limited to, memoranda or documents articulating the analysis.
6. Has CMS taken any steps to recoup or claw back federal grant funds allocated to states with now-defunct state exchanges? Please explain how much taxpayer money the federal government has recouped from states and please explain how much each individual state with a defunct exchange has repaid the federal government.
7. The Massachusetts state exchange has recently been served a Department of Justice subpoena for records and documents dating back to 2010:¹³
 - a. Is CMS coordinating with the Justice Department in its investigation into the Massachusetts state health care exchange? Please explain.
 - b. If Massachusetts is found to have violated federal law in the establishment or management of its health care exchange, does CMS intend to recapture federal funds used in the establishment and management of the exchange? Please explain.
8. In the future, if a state decides to transition from a state-based exchange to the federal exchange, does CMS intend to recapture the federal funds given to the state for the establishment and management of the state-based exchange? Please explain.

Please provide this material as soon as possible but no later than 5:00 p.m. on September 30, 2015.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and

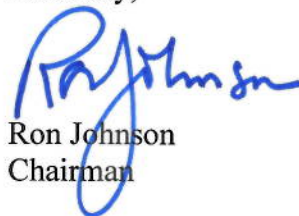
¹³ See Felice J. Freyer, *US Attorney Subpoenas Records Related to Health Connector*, BOSTON GLOBE, May 7, 2015, <https://www.bostonglobe.com/metro/2015/05/07/attorney-subpoenas-records-related-mass-health-connector-dating-back/q9UUTbxEH5JAdYtKRQW2NJ/story.html>.

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effectiveness of all agencies and departments of the Government.”¹⁴ Additionally, S. Res. 73 (114th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of Government with particular references to the operations and management of Federal regulatory policies and programs.”¹⁵ For purposes of this request, please refer to the instructions and definitions contained in the enclosure.

If you have any questions about this request, please contact Kyle Brosnan of the Committee staff at (202) 224-4751. Thank you again for your assistance in this matter.

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Thomas R. Carper
Ranking Member

Enclosure

¹⁴ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹⁵ S. Res. 73 § 12, 114th Cong. (2015).