

STATEMENT OF JIM TOZZI<sup>1</sup>  
BEFORE  
THE CMS PROGRAM AND OVERSIGHT COMMITTEE ( PAOC )  
MARCH 17, 2010

I am Jim Tozzi with the Center for Regulatory Effectiveness.

PAOC Committee Members Have Insisted That CMS Release Its Financial Standards For The Competitive Bidding Program

I attended the previous PAOC meeting and observed that a number of PAOC members asked CMS to release the financial standards that bidders must meet in order to participate in the competitive bidding program.

This morning I witnessed a similar event; PAOC members requested that CMS disclose the aforementioned financial standards.

I also witnessed the CMS response this morning—“give us a concrete proposal”.

Well CMS, CRE has provided you with nine pages of concrete—we furnished you with a petition that detailed the statutory requirements which compel release of the financial standards.

I have served on advisory committees for years and at one time I was in a position where I had to approve the establishment of advisory committees—I know how to write a petition. It is time for CMS to release the algorithm and the thresholds used in the financial tests.

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<sup>1</sup> Former Assistant Director White House Office of Management and Budget

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### Stop the Competitive Bidding Program Until the Financial Standards Are Released

We filed the petition in November and I appreciate the enormity of the decision to release the financial standards. However since the statute states that no bids can be awarded unless the bidders meet the financial standards “specified” by the Secretary, it is imperative that the Competitive Bidding program be delayed until the Secretary releases the aforementioned financial standards.

We have worked with CMS on a number of issues and I can understand the need for a timely venting of the issue—I have been there myself. However lack of a response is no excuse for proceeding with a program which violates the law.

### The Record Supports Release of the Financial Standards

In the course of commenting on proposed rules associated with the competitive bidding program, a number of respondents stated that:

- (1) Failure to disclose the financial standards would give CMS the ability to arbitrarily choose the winning, and thus the losing, bids and bidders.
- (2) If CMS disclosed the financial standards, a number of firms might decide not to participate in an extended regulatory process at a high cost because they have no chance of winning.

### The Conflicting Directives of the Obama Administration

CMS continually states that it is working under a directive of the President and his staff to implement a competitive bidding program.

I would like to advise CMS that President Obama has also issued one of the most comprehensive directives compelling agencies to work in an open and transparent manner through his open government program.

Releasing the financial standards is required not only by the underlying statute but by a directive of the President of the United States!

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CRE has been a strong supporter of this program and its support has been documented by the White House on its website.

When then is CMS giving 100% compliance to one of the President's directives and 0% compliance to another?

### The Domination of PAOC By CMS

I would like to devote a few minutes to commenting on the operation of PAOC.

First, why is CMS the co-chair? In fact, why is it even on the committee? In my dealing with large organizations, I have not encountered the need for Congress to pass a law to direct subordinates, in this case CMS, to speak to their superiors, the Secretary of HHS.

The more likely event, and the norm for federal advisory committees, is for non-federal experts to provide advice to an agency head.

Second, I would also like to remind members of the Committee that the POAC statute explicitly states that the committee must provide CMS with its views on financial standards. How can PAOC give advice on standards that it has not seen? Strange is this world of CMS Land.

Of all the possible charges to give PAOC, the Congress focused on PAOC review of the financial standards.

Why? Because Congress recognized that the financial standards can be abused.

This morning, I was pleased that several members of PAOC addressed the need for CMS to release its financial standards. However, a large number of Committee members remained silent—silence is hardly a way for you to meet your legal obligation to provide advice.

Third, and to that end, I encourage the Committee to write reports to the Secretary, copies of which will be included in the administrative record and are very helpful to outside watchdogs such as CRE.

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I must say that as of this date, PAOC is long on talk and short on reports.

However, even in the event PAOC were to prepare a report to the Secretary, in that CMS serves as a co-chair, it could block any report going to the Secretary—thus the need to dethrone CMS.

Failure to eliminate CMS as co-chair will result in the Secretary receiving only that advice from PAOC which is agreeable to CMS because as I mentioned above, CMS, in its role as co-chair, could veto reports going to the Secretary.

Not to remove CMS as co-chair of the Committee is to argue that Congress passed a statute which restricts advice given to an agency head from an outside group to only that advice which is agreeable to agency staff.

Thank you.