



September 12, 2013

VIA FIRST CLASS MAIL

The Honorable Gary Herbert
Utah Governor
Utah State Capitol Complex
350 North State Street, Suite 200
P.O. Box 142220
Salt Lake City, Utah 84114-2220

RE: Potential Liability for Misuse of Federal Grant Funds

*The material provided herein is general information and should not be construed as legal advice. Receipt, review, and action taken independent of this correspondence is neither intended to create, nor does create, an attorney-client relationship between the recipient(s) of this correspondence and/or the Utah Office of the Governor, on the one hand, and Cause of Action, on the other. None of the information contained herein constitutes legal advice and **must not be construed or substituted for the advice of qualified counsel within the appropriate jurisdiction with whom you may choose to consult regarding these or related matters.**¹*

Dear Governor Herbert:

We write on behalf of Cause of Action, a non-profit, nonpartisan government accountability organization that uses investigative, legal and communications tools to educate the public on how government transparency and accountability protect economic opportunity for American taxpayers.

The purpose of this letter is to notify the State of Utah, as well as entities, contractors, subgrantees, subrecipients and subcontractors who are utilized in furtherance of state exchanges,²

¹ Please do not convey to Cause of Action any information you regard as confidential unless and until a formal lawyer-client relationship has been established, as any such information received will not be treated as confidential or privileged. Cause of Action provides this correspondence and the information contained herein solely as a convenience to Utah's Office of the Governor, Office of the Attorney General, Office of the Secretary of State, and any other Utah government offices or related affiliates.

² This would include any future Federal Grants for Navigators, in-person assisters, certified application counselors, exchange enrollment facilitators, and any Federal funding relating to the System for Electronic Rates and Form Filings (SERFF), Enroll UX2014 program and any application programming interface with the Federal Data Services Hub.

regarding potential liabilities that may apply if any of these entities or their agents misuse the taxpayer funds they receive.

On May 9, 2013, the U.S. Department of Health and Human Services (HHS), through the Center for Consumer Information and Insurance Oversight (CCIIO), approved a state-federal alternate arrangement health insurance exchange for Utah.³ Utah will perform only plan management functions for the individual exchange, and the Federal government will perform all other functions.⁴ In an effort to market and promote the Patient Protection and Affordable Care Act (PPACA), the U.S. Department of Health and Human Services (HHS) has authorized navigator, assister, application counselor, and other consumer outreach programs (collectively, “Enrollment Assistance Programs”) with the stated goal of helping citizens enroll in exchange health plans.⁵ On August 14, 2013, thirteen Attorneys General (AG) sent a letter to HHS Secretary Sebelius identifying the lack of programmatic safeguards necessary to protect consumers’ private healthcare data in these Enrollment Assistance Programs.⁶ The AG’s letter specifically noted that consumers would “hand over all their individual data to a minimally screened and virtually unaccountable ‘counselor’” making consumer privacy a “catch-as-catch-can,” and that “without more protections, this is a privacy disaster waiting to happen.”⁷ These concerns are heightened following a recent report from the HHS Office of Inspector General, which notes that the Centers for Medicare and Medicaid Services (CMS) has missed multiple deadlines for analyzing security risks in the Federal Data Services Hub.⁸

Utah received a \$1,000,000 State Planning Grant and a \$1,000,000 Level One Establishment Grant through CCIIO, a subdivision of HHS.⁹ State Planning Grants were issued to assist states with initial planning activities related to implementing a state exchange,¹⁰ including, but not limited to, developing web-based tools for eligibility purposes, funding for

³ Letter from Dir. Gary Cohen to Gov. Herbert (May 10, 2013), *available at* <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/utah-marketplace-letter-5-10-2013-508.pdf>; *see also* The Henry J. Kaiser Family Foundation, *State Exchange Profiles: Utah* (May 21, 2013), *available at* <http://kff.org/health-reform/state-profile/state-exchange-profiles-utah/>.

⁴ *Id.*

⁵ 45 C.F.R. § 155.205 (2012) (Consumer assistance tools and programs of an Exchange); 45 C.F.R. § 155.210 (2012) (Navigator program standards).

⁶ Letter from Patrick Morrisey, Att’y Gen., State of W. Va., *et al.*, to Kathleen Sebelius, Sec’y, U.S. Dep’t of Health & Human Servs. (Aug. 14, 2013) at 2, 5, *available at* https://www.oag.state.tx.us/newspubs/releases/2013/Letter_to_HHS_re_Data_Privacy_final_8_14_13_.pdf.

⁷ *Id.*, at 2, 5.

⁸ Letter from Sen. Mitch McConnell, Ranking Member, U.S. Sen., to Marilyn Tavenner, Adm’r, Ctrs. for Medicare & Medicaid Servs. (Aug. 12, 2013), *available at* <http://cnsnews.com/sites/default/files/documents/McConnell%20letter%20to%20CMS.pdf>.

⁹ U.S. Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Utah Affordable Insurance Exchange Grants Awards List*, [hereinafter *Utah Grants List*], *available at* <http://www.cms.gov/ccio/Resources/Marketplace-Grants/ut.html> (last visited Sept. 12, 2013).

¹⁰ U.S. Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *State Planning & Establishment Grants for the Affordable Care Act’s Exchanges* (July 29, 2010) [hereinafter *State Planning Grant Funding Announcement*], *available at* http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/exchange_planning_grant_foa.pdf; *see also Utah Grants List*, *supra* note 9.

current and additional staff, identifying necessary Information Technology (IT) systems, and laying the foundation for the development of a fully functioning state health insurance exchange in Utah.¹¹ Utah's Level I Establishment Grant funding will be utilized to fund the Navigator program,¹² IT systems across the state, in-person assisters, application counselors and other outreach functions in furtherance of the anticipated October 1, 2013 state-federal alternate arrangement exchange start date. Utah also received \$806,046 in additional Navigator Grant funding from CMS,¹³ and Utah entities received eleven awards from HHS's Health Resources and Services Administration (HRSA) totaling \$1,374,648 for health center outreach and enrollment assistance under the PPACA.¹⁴ In light of these allocated funds provided by HHS, Cause of Action writes to identify potential liability pitfalls Utah may face when an individual or entity connected to a state exchange makes fraudulent claims.

Compliance Risks Associated with the Terms of the Funding Opportunity Announcement

Any entity receiving Grant Funds through CCIIO is restricted in its use of the funds. As CCIIO's Funding Opportunity Announcement for State Planning and Establishment Grants provides, Grant Funds may not be used, for example, toward any other Federal program requirements, to cover certain executive compensation, or to cover costs associated with providing direct services to individuals.¹⁵ States receiving CCIIO Grant Funds are also prohibited from using such funds to improve information technology systems or processes solely related to Medicaid or the Children's Health Insurance Program, or any other state or Federal program's eligibility for such programs.¹⁶

The State of Utah and entities within the state that are awarded Navigator Grants and/or HRSA PPACA enrollment Grants will also be subject to other Federal restrictions. Neither the Navigator, HRSA Grant Funds nor the State Planning and Establishment Grant Funds may be used to cover pre-award costs, to match other Federal Funds, to carry out services that are the

¹¹ See *Utah Grants List*, *supra* note 9 (receiving \$1,000,000 on Sept. 30, 2010 (Planning); and, \$1,000,000 on February 15, 2013 (Level I)).

¹² Under 45 C.F.R. § 155.210, each exchange must establish a Navigator program to assist people with healthcare enrollment. State agencies may serve as Navigators. 45 C.F.R. § 155.210(c).

¹³ Ctrs. for Medicare and Medicaid Servs., *Navigator Grant Recipients* (Aug. 15, 2013), available at <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/navigator-list-8-15-2013.pdf>.

¹⁴ U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., Utah: Health Center Outreach & Enrollment Assistance, available at <http://www.hrsa.gov/about/news/2013tables/outreachandenrollment/ut.html> (last visited Sept. 12, 2013).

¹⁵ *State Planning Grant Funding Announcement*, *supra* note 10, at 17; see also U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Cooperative Agreement to Support the Establishment of the Affordable Care Act's Health Insurance Exchanges*, 1, 36-37 (Nov. 30, 2012) [hereinafter *Establishment Grant Funding Announcement*], available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/amended-spring-2012-establishment-foa.pdf>.

¹⁶ *State Planning Grant Funding Announcement*, *supra* note 10, at 17; *Establishment Grant Funding Announcement*, *supra* note 15, at 36-37; see also 2 C.F.R. pt. 225 (2013) regarding cost allocations.

responsibility of the Exchange, or to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before any Federal, state or local legislature or legislative body.¹⁷ The numerous restrictions HHS and CCIIO have placed on the use of Grant Funds may subject Utah and its exchange contractors, subcontractors, subgrantees and subrecipients to a significant risk of liability under the False Claims Act, and subject the State of Utah to sanctions imposed by the Centers for Medicare and Medicaid Services and/or CCIIO, such as restrictions on the use of funds and/or termination of the awards.¹⁸ In the event material misrepresentations are made, criminal charges and fines may also be imposed under 18 U.S.C. §1001 (2012). If HHS fails to specifically articulate applicable privacy and security requirements for monitoring Enrollment Assistance Programs, there may be considerable uncertainty as to who could be liable if an Enrollment Assistance Program harms a consumer.¹⁹

Compliance with the Byrd Anti-Lobbying Amendment

Section 1352 of Title 31 of the United States Code, the Byrd Anti-Lobbying Amendment, expressly prohibits recipients “of a Federal contract, grant, loan, or cooperative agreement” from using appropriated funds to “influenc[e] or attempt[] to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress” in connection with specified “Federal action[s].”²⁰ In response to a Senate inquiry concerning HHS Grant Funding under the Centers for Disease Control and Prevention’s Communities Putting Prevention to Work program, the U.S. Department of Justice stated “[t]he Department is committed to investigating all credible allegations of illegal lobbying activity, which strikes at the heart of the democratic process.”²¹ To ensure that contractors, subcontractors, subgrantees, and subrecipients comply with Federal law, Utah bears responsibility for preventing any appropriated Federal Funds from being used for any form of lobbying—direct or grassroots—regarding pending legislation.²²

Compliance with OMB Circular A-133’s Audit Requirements

Any recipient or subrecipient of \$500,000 or more in Federal awards during a single fiscal year must comply with the audit requirements of the Office of Management and Budget’s (OMB) Circular A-133, *Audits of States, Local Governments and Non-Profit Organizations*.²³

¹⁷ This list is not exhaustive. See also *Establishment Grant Funding Announcement*, *supra* note 15, at 36-37.

¹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-543, PATIENT PROTECTION AND AFFORDABLE CARE ACT—HHS’S PROCESS FOR AWARDING AND OVERSEEING EXCHANGE AND RATE REVIEW GRANTS TO STATES (May 31, 2013), available at <http://www.gao.gov/assets/660/654994.pdf>.

¹⁹ See Letter from Patrick Morrissey, *supra* note 6, at 6.

²⁰ 31 U.S.C. § 1352 (2012).

²¹ Letter from Peter J. Kadzik, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (May 7, 2013), 1, 57, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/061212QFRs-Holder.pdf>.

²² 18 U.S.C. § 1913 (2012).

²³ The Single Audit Act, as amended, applies to non-Federal governmental units, including subrecipients, which receive Federal awards of \$500,000 or more. See 31 U.S.C. § 7502 (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR No. A-133, AUDITS OF STATES, LOCAL GOVERNMENTS, AND NON-

The Federal award recipient(s) must identify all Federal awards it receives and expends, establish and maintain internal controls to ensure it is managing the Federal award programs in compliance with all applicable laws, prepare regular financial statements, ensure audits are conducted at the required intervals, and take corrective action on any audit findings.²⁴ Any Federal award recipient who contracts with a for-profit subrecipient is further responsible for the for-profit subrecipient's compliance.²⁵ Such contract must describe the applicable compliance requirements and the for-profit subrecipient's compliance obligations.²⁶

The Federal award recipient must select an auditor to conduct the audit.²⁷ Upon assessing the Federal award recipient's financial statements, internal controls, and compliance, the auditor will issue a report describing its findings.²⁸ The Federal award recipient is then responsible "for follow-up and corrective action on all audit findings," and must prepare a corrective action plan to address any problems identified by the audit.²⁹ Finally, the Federal award recipient must submit to the OMB's Federal clearinghouse a reporting package that includes its financial statements, schedule of expenditures of Federal awards, corrective action plan, and the auditor's reports.³⁰ Because Utah received at least \$500,000 in Grant Funds, it must adhere to these requirements. Failure to comply with OMB Circular A-133 may result in suspension of Federal funding and may affect eligibility for future funding.³¹

Compliance with OMB Circular A-87's Cost Principles

State and local entities that receive Federal funding must allocate their expenditures in accordance with OMB Circular A-87, *Costs Principles for State, Local, and Indian Tribal Governments*.³² This includes adequately documenting all costs associated with administering the Grant Funds.³³ Recipients must submit a Certificate of Cost Allocation Plan³⁴ and a Certificate of Indirect Costs,³⁵ certifying they are in conformance with this OMB Circular.³⁶ If the recipient submits a false certification, it may be subject for treble damage liability under the False Claims Act. Also, any Federal award recipient that contracts with a commercial organization is subject to the cost principles and procedures of 48 C.F.R. part 31.2. Like OMB

PROFIT ORGANIZATIONS at Subpart B, §§ 200(a), 210(a) (June 26, 2007) [hereinafter OMB CIRCULAR A-133], available at http://www.whitehouse.gov/sites/default/files/omb/assets/a133/a133_revised_2007.pdf.

²⁴ OMB CIRCULAR A-133, *supra* note 23, § 300.

²⁵ *Id.* § 210(e).

²⁶ *Id.*

²⁷ *Id.* §§ 105, 200, 500.

²⁸ *Id.* §§ 500, 505, 510.

²⁹ *Id.* § 315.

³⁰ 31 U.S.C. § 7502(h) (2012); OMB CIRCULAR A-133, *supra* note 23, § 320(d).

³¹ 31 U.S.C. §§ 7501 (2012) *et seq.*

³² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-87, COST PRINCIPLES FOR STATE, LOCAL, AND INDIAN TRIBAL GOVERNMENTS at 5 (Attachment A, ¶ A(3) (Application)) (May 10, 2004) [hereinafter OMB CIRCULAR A-87], available at http://www.whitehouse.gov/omb/circulars_a087_2004.

³³ OMB Circular A-87, *supra* note 32, at 9 (Attachment A, ¶ C(1) (Basic Guidelines)).

³⁴ *Id.* at 45 (Attachment C).

³⁵ *Id.* at 56 (Attachment E).

³⁶ *Id.* at 12 (Attachment A).

Circular A-87, these regulations dictate how a Federal award recipient is allowed to expend funds when contracting with a commercial organization. Specifically, any state that has received Federal Grant Funds to establish an exchange may be subject to this regulation if it has contracted with commercial organizations.

Utah's health insurance exchange is not currently subject to this OMB Circular. However, Utah's State and Level I Grant Funds are subject to this Circular. Moreover, to the extent Utah decides to transition to a state-based exchange, all Federal Funds received for that purpose will be subject to OMB Circular A-87. Furthermore, because Utah received (and has not returned) Federal Grant Funds under State Planning and Establishment Grants, the state may be subject to the cost allocation principles and procedures of 48 C.F.R. part 31.2. Violation of these requirements may subject the State of Utah to penalties under 48 C.F.R. §52.242-3.

False Claims Act, Corporate Governance, and Internal Best Practices

Providing false information to the Federal government is strictly illegal under the Federal False Claims Act.³⁷ All persons are forbidden from knowingly or willfully falsifying or concealing a material fact, making materially false or fraudulent representations, or using any false writings or documents known to be materially fictitious.³⁸ Federal law similarly bars anyone from knowingly presenting false claims to any Federal government representative.³⁹ The Fraud Enforcement and Recovery Act of 2009 (FERA)⁴⁰ substantively amended the False Claims Act in the following areas: (1) FERA expanded the scope of the False Claims Act in re-defining a "claim";⁴¹ (2) FERA eliminated the False Claims Act's "presentation" requirements;⁴² (3) the False Claims Act's intent requirement was eliminated, such that all that is necessary for liability to attach is that such statement has a "natural tendency to influence, or is capable of influencing the payment or receipt of money or property."⁴³ The False Claims Act's conspiracy provisions have also been expanded to include conspiracies to violate other provisions of the False Claims Act.⁴⁴ The FERA amendments also establish an express "materiality" requirement,⁴⁵ as well as "reverse false claims" and overpayment "retention" liability.⁴⁶ Additionally, Utah's subcontractors may face relator claims under the False Claims Act if the subcontractor misuses Federal Funds. Liability for violations under the False Claims Act starts at \$5,500 per

³⁷ 31 U.S.C. §§ 3729- 33 (2012).

³⁸ 18 U.S.C. § 1001 (2012).

³⁹ 18 U.S.C. § 287 (2012).

⁴⁰ Pub. L. 111-21, S. 386, 123 Stat. 1616 (2009).

⁴¹ 31 U.S.C. § 3729(b)(2) (2012).

⁴² *Id.*

⁴³ *Id.* at § 3729(b)(4).

⁴⁴ *Id.* at § 3729(b)(4); §§ 3729(a)(1)(C) and (b)(1-4).

⁴⁵ *Id.* at § 3729(a)(1)(C); *see supra*, note 43.

⁴⁶ 31 U.S.C. § 3729(a)(7); § 3729(b)(3); 73 Fed. Reg. 67,064, 67,091 (Nov. 12, 2008) (amending 48 C.F.R. § 9-406-2(b)(1)(vi)(C); 42 U.S.C. 1320a-7b(a)(3).

occurrence, plus treble damages.⁴⁷ Utah should also evaluate its state False Claims Act law(s), if applicable.

States must also institute procedures to promote compliance with the financial integrity provisions of section 1313 of the PPACA, including requirements related to accounting, reporting, auditing, cooperating with investigators, and adhering to the False Claims Act.⁴⁸ A comprehensive strategy to combat fraud will hedge against False Claims Act liabilities and ensure maximal compliance with other laws and regulations.

Absent a comprehensive strategy to combat fraud as required by PPACA §1313, Utah may face liability of its own and may be at significant risk of reimbursing subcontractors for unlawful activity who may also face relator claims under the False Claims Act if Federal Funds are misused.⁴⁹ Given the significant taxpayer funds involved and the wide-ranging functions and responsibilities of Utah as a state-federal alternate arrangement exchange, it is increasingly plausible that health insurers and subcontractors may misrepresent their credentials and that there will be ample opportunity for vigilant whistleblowers to file False Claims Act *qui tam* suits in response.

In conclusion, you may wish to evaluate whether Utah, its contractors, subcontractors, subgrantees and subrecipients have the oversight capability to ensure that Federal Funds are used in a transparent, accountable, and legally compliant manner. You must promptly refer to the HHS Office of Inspector General any credible evidence that a principal, employee, agent, contractor, subrecipient, subcontractor or other person or entity has submitted a false claim under the False Claims Act, or has committed a criminal or civil violation pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving those funds. The HHS Office of Inspector General can be reached at <http://ww.oig.hhs.gov/fraud/hotline>.

If you have any questions regarding this letter, please contact me at 202-499-4232.

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

cc: Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary
Hon. Charles Grassley, Ranking Member, Senate Committee on the Judiciary
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance
Hon. Tom Harkin, Chairman, Senate Committee on Health, Education, Labor and Pensions

⁴⁷ 31 U.S.C. § 3729(a) (2012).

⁴⁸ *Establishment Grant Funding Announcement*, *supra* note 15, at 52-53.

⁴⁹ 31 U.S.C. §§ 3729-33 (2012).

Hon. Lamar Alexander, Ranking Member, Senate Committee on Health, Education,
Labor, and Pensions
Hon. Johnny Isakson, Vice Chairman, Senate Select Committee on Ethics
Hon. Darrell Issa, Chairman, House Committee on Oversight and Government Reform
Hon. Fred Upton, Chairman, House Committee on Energy and Commerce
Hon. Elijah Cummings, Ranking Member, House Committee on Oversight and
Government Reform
Hon. Roy Blunt, Ranking Member, Senate Subcommittee on Agriculture, Rural
Development, Food & Drug Administration, Senate Committee on Appropriations
Hon. Michael Enzi, Ranking Member, Senate Subcommittee on Children and Families,
Senate Committee on Health, Education, Labor and Pensions
Hon. Kelly Ayotte, Senate Committee on Homeland Security and Governmental Affairs
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance
Hon. Mike Lee, Senate Committee on the Judiciary, Ranking Member, Subcommittee on
Antitrust, Competition Policy and Consumer Rights
Hon. Jason Chaffetz, House Committee on Oversight and Government Reform,
Chairman, Subcommittee on National Security
Hon. Rob Bishop, House Committee Natural Resources, Chairman, Subcommittee on
Public Lands and Environmental Regulation
Hon. Chris Stewart, House Committee on Science, Space and Technology,
Chairman, Subcommittee on the Environment
Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services
Daniel Levinson, Inspector General, U.S. Department of Health and Human Services
Peter Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs,
U.S. Department of Justice
Hon. John Swallow, Attorney General, State of Utah
Hon. Greg Bell, Lt. Governor, State of Utah
Hon. Todd E. Kiser, Insurance Commissioner, State of Utah
Department of Insurance