



July 30, 2013

VIA FIRST CLASS MAIL

Ms. Kathleen Keeshen
General Counsel
Covered California
560 J Street, Suite 290
Sacramento, CA 95814

RE: Potential Liability for Misuse of Federal Grants Funds

Dear Ms. Keeshen:

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 protects economic opportunity for American taxpayers. We seek to notify Covered California of potential liabilities that might apply should the taxpayer funds it receives be misused.

As you are aware, Covered California operates as a quasi-governmental organization, specifically an “independent public entity not affiliated with an agency or department.”¹ Covered California’s mission is to offer an easy-to-use marketplace to connect insurers and health care consumers.² California was the first state in the nation to pass legislation creating a health insurance exchange after the enactment of federal health care reform.³ The Department of Health and Human Services (HHS) has authorized the appropriation of \$910,606,370, through the Center for Consumer Information and Insurance Oversight (CCIIO), in the planning and funding of Level I and II Establishment Grants to the state of California (“Grant Funds”).⁴

Compliance with the Terms of the Funding Opportunity Announcement

California’s Governor signed a bill on September 24, 2012, requiring the California Health Benefit Exchange to facilitate voter registration online for any person applying for service or assistance from the exchange.⁵ On its face, this statutory requirement conflicts with the terms of the CCIIO’s Funding Opportunity Announcement (FOA) for Exchange Establishment Grants. In this FOA, HHS limited the use of exchange grant funding to twelve Exchange Activity

¹ The Henry J. Kaiser Family Foundation, *State Exchange Profile: California* (as of Apr. 22, 2013), available at <http://kff.org/health-reform/state-profile/state-exchange-profiles-california/> (last visited Jul. 23, 2013).

² Covered California, *About Us*, available at http://www.coveredca.com/about_us.html (last visited Jul. 23, 2013).

³ Assemb. B. 1602, ch. 661, 2009-10 Reg. Sess. (Ca. 2010) and S.B. 900, ch. 659, 2009-10 Reg. Sess. (Ca. 2010).

⁴ Annie L. Mach and C. Stephen Redhead, *Status of Federal Funding and Implementation of Health Insurance Exchanges*, Cong. Research Serv. (June 19, 2013).

⁵ S.B. 35, 2011-12 Reg. Session (Ca. 2012).

Categories.⁶ Voter registration activity fails to qualify under any of these categories and is wholly unrelated to exchange planning or activity.

Additionally, the FOA prohibits several uses of Grant Funds, including but not limited to, the following: to meet matching requirements of any other Federal program; to cover excessive executive compensation; and, to contract with organizations that have a conflict of interest, such as individuals or companies that sell insurance or insurance-like products, including discount plans.⁷ Covered California is also prohibited from using Grant Funds to improve systems or processes solely related to Medicaid or the Children's Health Insurance Program, or any other State or Federal program's eligibility, particularly as such systems relate to Information Technology.⁸ Navigator grants must be drawn from the operational funds of the Exchange.⁹ The varied and numerous restrictions placed by HHS/CCIIO on the use of Grant Funds may subject Covered California to a significant risk of liability under the False Claims Act (FCA), as well as sanctions imposed by CCIIO Project Officers, such as restrictions on the use of funds and/or termination of the award.¹⁰

Compliance with the Byrd Anti-Lobbying Amendment

Section 1352 of Title 31 of the U.S. Code, the Byrd Amendment, expressly prohibits "the recipient 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]." The U.S. Department of Justice, 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, stated "[t]he Department is committed to investigating all credible allegations of illegal lobbying activity, which strikes at the heart of the democratic process."¹¹

Further, federal regulations require state-created health care exchanges to conduct outreach and education activities that will educate consumers about the exchange and insurance affordability programs to encourage public participation.¹² However, the direct final rule establishing exchanges does not specify the full extent of these outreach and education activities.

⁶ U.S. Dep't of Health and Human Servs., Centers for Medicare and Medicaid Servs., Center for Consumer Information and Insurance Oversight, *Cooperative Agreement to Support the Establishment of the Affordable Care Act's Health Insurance Exchanges*, available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/amended-spring-2012-establishment-foa.pdf>, at 10.

⁷ *Supra* note 6, at 36-37.

⁸ *Id.*; see also 2 C.F.R. pt. 222 (previously OMB Circular A-87) regarding cost allocation.

⁹ 45 C.F.R. § 155.210(f) (2013); see also Patient Protection and Affordable Care Act, March 23, 2010, Pub. L. 11-148, § 1311(i)(6) (codified as amended at 42 U.S.C. § 18031(i)(6) (2011)).

¹⁰ John E. Dicken (Director, Health Care), General Accounting Office, *Patient Protection and Affordable Care Act—HHS's Process for Awarding and Overseeing Exchange and Rate Review Grants to States*, Report to Congressional Requesters, GAO-13-543, May 31, 2013, available at <http://www.gao.gov/assets/660/654994.pdf>.

¹¹ Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, U.S. Department of Justice, to Hon. Patrick Leahy, Chairman, Senate Judiciary Committee (May 7, 2013), at 57, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/061212QFRs-Holder.pdf>.

¹² 45 C.F.R. § 155.205(e).

In order to ensure that Covered California's employees and contractors comply with existing federal law, any such activities must not include direct or grassroots lobbying with appropriated federal funds for or against any pending legislation.¹³

Compliance with OMB Circular A-133 Requirements

Circular A-133, issued by the Office of Management and Budget (OMB), *Audits of States, Local Governments and Non-Profit Organizations*, requires that all subrecipients of \$500,000 or more in Federal awards during the subrecipient's fiscal year comply with the audit requirements as set forth in OMB Circular A-133. Covered California, or its subgrantees, is a subrecipient of federal funds within the meaning of the term as used in OMB Circular A-133. Under the Circular, Covered California must engage a licensed Certified Public Accountant that meets all standards concerning qualifications, independence, due professional care and quality control as required by *Government Accounting Standards* to conduct an audit in accordance with OMB Circular A-133. Such audit must be completed no later than nine (9) months after the end of its current fiscal year. It must direct the CPA performing said audit to prepare and submit, within the required timeframes, all reports, statements, schedules, summaries, corrective action plans and such other forms, data and information as may be required by OMB Circular A-133. It shall issue a management decision on audit findings, if any, within 6 months after receipt of the audit report, and shall take timely and appropriate corrective actions with respect to any such findings, as may be required by OMB Circular A-133 and shall send copies of such findings and corrective action to the subgrantee and such other entities as may be required by OMB Circular A-133. The failure to comply with the requirements of OMB Circular A-133 may result in suspension of funding and may affect your eligibility for future funding.

Corporate Governance and Internal Best Practices

In addition, California's Insurance Commissioner recently admitted that California's exchange does not have a plan for investigating any complaints that are submitted to enrollment counselors.¹⁴ Absent a more comprehensive strategy to combat fraud, Covered California is at significant risk of reimbursing subcontractors for unlawful activity. Also, Covered California and its subcontractors may face relator claims under the False Claims Act (FCA) if federal funds are misused.¹⁵ Covered California is required to institute procedures to promote compliance with the financial integrity provisions under Section 1313 of the Patient Protection and Affordable Care Act (PPACA), including the requirements related to accounting, reporting, auditing, cooperation with investigators, and application of the FCA.¹⁶ Given the wide-ranging functions and responsibilities of the state exchanges, 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 FCA *qui tam* suits in response.

¹³ 18 U.S.C. § 1913.

¹⁴ Judy Lin, *Fraud Fear Raised in California's Health Exchange*, Associated Press, Jul. 13, 2013, available at <http://www.sacbee.com/2013/07/13/5564401/fraud-fear-raised-in-californias.html> (last modified Jul. 13, 2013).

¹⁵ 31 U.S.C. ch. 37 (Subtitle III), Pub. L. 97-258, § 3729-3733 (Sept. 13, 1982) (codified as amended at 31 U.S.C. §§ 3729-3733 (January 3, 2012)).

¹⁶ *Supra* note 6, at 52-53.

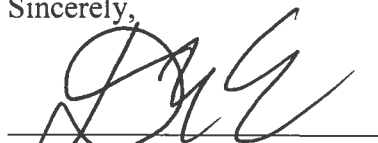
State exchanges have an added responsibility to share certain financial information online, such as required regulatory fees or payments, administrative costs of the exchange, and monies lost to waste, fraud, and abuse.¹⁷ However, an *Associated Press* review of the 17 states that have opted for state-run marketplaces indicates that Covered California was given the most restrictive powers by the State Legislature to limit publicly available information. This includes concealing terms of all contracts for twelve months and concealing indefinitely the amounts paid by the Exchange to any subcontractor.¹⁸ While the California Senate has approved a bill to ease these restrictions, contracts with health insurance plans would still be withheld for twelve months and the payments in those contracts would be withheld for four years.¹⁹ Limiting public access to this kind of information inherently heightens Covered California's risk of using or allocating federal funds in wasteful or fraudulent ways.

Please consider whether Covered California has the oversight capability to ensure federal funds are used in a transparent, accountable and legally compliant manner.

You must promptly refer to HHS Office of Inspector General any credible evidence that a principal, employee, agent, contractor, subrecipient, subcontractor or other person has submitted a false claim under the False Claims Act or has committed a criminal or civil violation of laws 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://www.oig.hhs.gov/fraud/hotline/>.

If you have any questions regarding this letter, please contact me at 202-499-4232.²⁰

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

¹⁷ 45 C.F.R. § 155.205(b)(2)(i-v).

¹⁸ Michael R. Blood, *AP Exclusive: Calif. Exchange Board Granted Secrecy*, Associated Press, May 9, 2013, available at <http://bigstory.ap.org/article/ap-exclusive-calif-exchange-granted-secrecy>.

¹⁹ *Calif. bill would cut exchange secrecy*, KCRA, Jul. 8, 2013, available at <http://www.kcra.com/news/calif-bill-would-cut-health-exchange-secrecy/-/11797728/20889132/-/dpf2r4z/-/index.html>.

²⁰ This letter is not intended to create, and does not create, an attorney-client relationship between you or the California Office of the Governor and Cause of Action. Cause of Action is providing this letter and the information contained herein only as a convenience to Covered California and the California Office of the Governor. It does not constitute legal advice and **MUST NOT** be used as a substitute for the advice of a qualified and independent attorney. Please consult proper counsel in your jurisdiction.

cc: Hon. Patrick Leahy, Chairman, Senate Judiciary Committee
Hon. Charles Grassley, Ranking Member, Senate Judiciary Committee
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance
Hon. Lamar Alexander, Ranking Member, Senate Committee on Health, Education,
Labor, and Pensions
Hon. Roy Blunt, Senate Committee on Appropriations
Hon. Michael Enzi, Ranking Member, Senate Subcommittee on Children and Families,
Senate Committee on Health, Education, Labor and Pensions
Hon. Johnny Isakson, Vice Chairman, Senate Select Committee on Ethics
Hon. Richard Burr, Ranking Member, Senate Committee on Veterans Affairs
Hon. Kelly Ayotte
Hon. Darrell Issa, Chairman, House Committee on Oversight and Government Reform
Hon. Fred Upton, Chairman, House Committee on Energy and Commerce
Hon. Timothy Murphy
Hon. Joseph Pitts, Chairman, House Subcommittee on Health, House Committee on
Energy and Commerce
Hon. Elijah Cummings, Ranking Member, House Committee on Oversight and
Government Reform
Hon. Kathleen Sebelius, Secretary, U.S. Dep't of Health & Human Services
Daniel Levinson, Inspector General, U.S. Dep't of Health & Human Services
Peter Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs,
U.S. Dep't of Justice
Hon. Edmund G. Brown, Jr., Governor of the State of California
Hon. Kamala Harris, Attorney General of the State of California