



Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

August 9, 2013

VIA FIRST CLASS MAIL

The Honorable Janice K. Brewer
Arizona Governor
Executive Tower
1700 West Washington Street
Phoenix, AZ 85007

RE: Potential Liability for Misuse of Federal Grants Funds

Dear Governor Brewer,

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 the State of Arizona (Arizona), as well as entities, contractors, subgrantees, subrecipients and/or subcontractors, utilized in furtherance of federally-facilitated exchanges,¹ of potential liabilities that might apply should the taxpayer funds the state receives be misused.

As you are aware, on November 28, 2012, you informed federal officials that Arizona would default to a federally-facilitated health exchange (FFE), despite exploratory efforts by the Governor's office and legal counsel to establish a state-run exchange.² However, the U.S. Department of Health and Human Services (HHS) has authorized the appropriation of \$30,877,097 combined, through the Center for Consumer Information and Insurance Oversight (CCIIO), in Planning and Level I Establishment Grants (Grant Funds)³ to further secure Information Technology (IT) infrastructure and assist in finalizing plan management functions for Arizona.⁴ Additionally, HHS has projected that Arizona will receive \$947, 880 in Federal funding for the Navigator program, in furtherance of the anticipated starting date of October 1, 2013 for the FFE.⁵

¹ This would include any future federal grants for Navigators, in-person assisters, certified application counselors, and any federal funding relating to the UX2014 program and/or any grants supporting application programming interface with the federal data services hub.

² Letter from Jan Brewer, Governor, State of Arizona, to Kathleen Sebelius, Secretary, U.S. Dep't of Health and Human Services (Nov. 28, 2012), available at http://azgovernor.gov/dms/upload/PR_112812_CohenLetter.pdf.

³ Navigator grants are being administered by HHS's Center for Medicare and Medicaid Services ("CMS"). Those awards are set to be announced by HHS on or about August 15, 2013.

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 See 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 Navigators in Federally-facilitated and State Partnership Exchanges*, 1, 9 (April 9, 2013), available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/2013-navigator-foa-4-9-2013.pdf> (last visited August 7, 2013).

Compliance with the Terms of the Funding Opportunity Announcement

The CCIIO's Funding Opportunity Announcement for Exchange Establishment Grants 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.⁶ Arizona 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.⁷ Inasmuch as Arizona has elected to proceed with a federally-facilitated exchange, future Navigator grants may not be used to cover any pre-award costs, to match any other Federal funds, to provide services, equipment, or support that are the legal responsibility of another party under Federal or State law, to carry out services that are the responsibility of the Exchange, to expend funds related to any activity designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any state government, state legislature or local legislature or legislative body.⁸ The varied and numerous restrictions placed by HHS and the CCIIO on the use of Grant Funds may subject Arizona's subgrantees to a significant risk of liability under the False Claims Act, as well as the state itself to sanctions imposed by CMS and/or CCIIO, such as restrictions on the use of funds and/or termination of the award.⁹ To the extent material misrepresentations are made, criminal charges and fines may also result under 18 U.S.C. § 1001.

Compliance with Anti-Lobbying Byrd Amendment

Section 1352 of Title 31 of the United States Code, the Byrd Amendment, expressly prohibits a 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]." 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."¹⁰ In order to ensure contractors comply

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, 1, 36-37, available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/amended-spring-2012-establishment-foa.pdf>.

⁷ *Id.*; see also 2 C.F.R. pt. 222 (previously OMB Circular A-87) regarding cost allocation.

⁸ This list is not exhaustive. See U.S. Dep't of Health and Human Services, *supra* note 5, at 27.

⁹ 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>.

¹⁰ 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), 1,57, available at <http://www.judiciary.senate.gov/resources/transcripts/upload/061212QFRs-Holder.pdf>.

with existing Federal law, Arizona must prevent any appropriated federal funds from being used for direct or grassroots lobbying for or against any pending legislation.¹¹ It is also true that regarding future Navigators funds awarded in Arizona, “[g]rant recipients may lobby at their own expense if they can segregate federal funds from other financial resources used for that purpose.”¹²

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-133.¹³ Any of Arizona’s subgrantees is a subrecipient of federal funds within the meaning of the term as used in OMB Circular A-133. Under the Circular, a licensed Certified Public Accountant that meets all standards concerning qualifications, independence, due professional care and quality control is 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 who performs the 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. The reporting entity and/or the State shall issue a management decision on audit findings, if any, within six (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 such entities as may be required by OMB Circular A-133. Arizona must also establish requirements to ensure compliance by for-profit subrecipients, as necessary, describing applicable compliance requirements and the for-profit subrecipient’s compliance responsibility. 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.¹⁴

Compliance with OMB Circular A-87 Requirements

Circular A-87, issued by the Office of Management and Budget (OMB), *Costs Principles for State, Local, and Indian Tribal Governments*, establishes principles and standards to provide a uniform approach for determining allowable costs and to promote efficiency between governmental units and the Federal Government. These principles will be applied by all Federal agencies in determining costs incurred by governmental units under Federal awards (including subawards) except those with (1) publicly-financed educational institutions subject to OMB Circular A-21, and (2) programs administered by publicly-owned hospitals and other providers of medical care that are subject to requirements promulgated by the sponsoring Federal agencies.

¹¹ 18 U.S.C. § 1913.

¹² U.S. Dep’t of Health and Human Services, *supra* note 5, at 27.

¹³ The Single Audit Act, as amended, requires each reporting entity that expends \$500,000 or more in federal awards, grants and other assistance, in a fiscal year to obtain an annual audit, including an audit of the entity’s financial statements and a schedule of the expenditure of federal awards, as well as a review of internal controls. *See* 31 U.S.C. §§ 7501 et seq.

¹⁴ *Id.* at 31 U.S.C. §§ 7501 et seq.

However, this Circular does apply to all central department/agency costs that are billed to those educational institutions, hospitals, and other providers of medical services by other State and local government department and agencies. All subawards are subject to those Federal cost principles applicable to the particular organization concerned, whether a different OMB Circular or the cost principles of a particular Federal awarding agency.¹⁵

Corporate Governance and Internal Best Practices

Absent a comprehensive strategy to combat fraud, Arizona is at significant risk of reimbursing subcontractors for unlawful activity. Also, Arizona's subcontractors may face relator claims under the False Claims Act if federal funds are misused.¹⁶ Liability for violations under the False Claims Act is at least \$5,000, plus treble punitive damages given the fraudulent action.¹⁷ Arizona is required to institute procedures to promote compliance with the financial integrity provisions under section 1313 of the Affordable Care Act, including the requirements related to accounting, reporting, auditing, cooperation with investigators, and application of the False Claims Act.¹⁸ Given the wide-ranging functions and responsibilities of Arizona as an FFE State and the significant taxpayer funds involved, 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. Providing false information to the Government is strictly illegal under additional Federal statutes. It bears repeating that anyone is 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.¹⁹ Federal law similarly bars anyone from presenting any knowingly false claim to any person or officer in the civil, military or naval service of the United States, or to any corresponding department or agency.²⁰ Federal Acquisition Rules permit the government to reduce the price of a contract or grant if the head of the contracting activity or designee identifies a violation of subsections 27(a)-(c) of the Office of Federal Procurement Policy Act.²¹

Please consider whether Arizona, and concomitant contractors, subcontractors, subgrantees and/or subrecipients, 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.hss.gov/fraud/hotline/>.

¹⁵ 2 C.F.R. § 225 (appendix A).

¹⁶ 31 U.S.C. §§ 3729-3733 (2012).

¹⁷ 31 U.S.C. § 3729(a).

¹⁸ U.S. Dep't of Health and Human Services, *supra* note 5, at 52-53.

¹⁹ 18 U.S.C. § 1001.

²⁰ 18 U.S.C. § 287.

²¹ 48 C.F.R. § 52.203-11.

If you have any questions regarding this letter, please contact me at 202-499-4232.²²

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

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. John McCain, Ranking Member of the Senate Committee on Armed Services
Hon. Jeff Flake
Hon. Trent Franks, House Judiciary Committee, Chairman, Subcommittee on the
Constitution and Civil Justice
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. Tom Horne, Attorney General, State of Arizona
Hon. Ken Bennett, Secretary of State, State of Arizona
Germaine Marks, Director of Insurance, State of Arizona

²² This letter is not intended to create, and does not create, an attorney-client relationship between you or the Arizona 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 the Office of the Governor, the Office of the Attorney General, and the Office of the Secretary of State of the State of Arizona. 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.