



September 10, 2013

VIA FIRST CLASS MAIL

The Honorable Vincent C. Gray
Executive Office of the Mayor
1350 Pennsylvania Avenue, NW
Suite 316
Washington, D.C. 20004

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 District of Columbia Office of the Mayor, 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 Mayor Gray:

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 District of Columbia, as well as entities, contractors, subgrantees, subrecipients and subcontractors who are utilized in furtherance of

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 the District of Columbia's Office of the Mayor, Office of the Attorney General and Corporation Counsel, and any other District of Columbia government offices or related affiliates.

state, entity or territory exchanges,² regarding potential liabilities that may apply if any of these entities or their agents misuse the taxpayer funds they receive.

On December 20, 2011, the District of Columbia City Council approved a bill establishing the District of Columbia Health Benefit Exchange Authority (now DC Health Link), and in late January 2012, you signed the legislation into law.³ 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.⁴ On August 14, 2013, thirteen Attorneys General (AG) sent a letter to HHS Secretary Kathleen Sebelius identifying the lack of programmatic safeguards necessary to protect consumers' private healthcare data in these Enrollment Assistance Programs.⁵ 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."⁶ 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.⁷

The District of Columbia received a \$1,000,000 State Planning Grant, a \$8,200,716 Level One Establishment Grant, and a \$72,985,333 Level Two Establishment Grant through the Center for Consumer Information and Insurance Oversight (CCIIO), a subdivision of HHS.⁸ The Planning Grant was issued to assist states, and the District, with initial planning activities related

² This would include any future Federal Grants for Navigators, in-person assisters, certified application counselors, and any Federal funding relating to the DC Access System (DCAS), Enroll UX2014 program and any application programming interface with the Federal Data Services Hub.

³ See D.C. Act 19-269, Enrolled Original, Health Benefit Exchange Authority Establishment Act for the District of Columbia (January 17, 2012), available at <http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1889092> (last visited Sept. 6, 2013); see also District of Columbia Health Benefit Exchange Authority, DC Health Link, <http://hbx.dc.gov/> (last visited Sept. 6, 2013); The Henry J. Kaiser Family Foundation, *State Exchange Profiles: District of Columbia* (July 12, 2013), available at <http://kff.org/health-reform/state-profile/state-exchange-profiles-district-of-columbia/>.

⁴ 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).

⁵ Letter from Patrick Morrissey, 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.

⁶ *Id.*, at 2, 5.

⁷ 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>.

⁸ U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *District of Columbia Affordable Insurance Exchange Grants Awards List*, [hereinafter *D.C. Grants List*], available at <http://www.cms.gov/ccio/Resources/Marketplace-Grants/dc.html> (last visited Sept. 6, 2013); Annie L. Mach and C. Stephen Redhead, *Status of Federal Funding for State Implementation of Health Insurance Exchanges*, Congressional Research Service (June 19, 2013), at 6, available at <http://www.fas.org/sgp/crs/misc/R43066.pdf>.

to implementing a state exchange.⁹ These Federal Grants were issued to assist the District of Columbia in identifying existing and needed Information Technology (IT) systems, to integrate and fund IT systems across the District, and to fund outreach and marketing of the District of Columbia exchange under PPACA.¹⁰ The District of Columbia's Level I and Level II Establishment Grant funding will be utilized to fund the Navigator program,¹¹ in-person assisters, application counselors and other outreach functions in furtherance of the anticipated October 1, 2013 District of Columbia exchange start date. Entities within the District of Columbia also received five awards from HHS's Health Resources and Services Administration (HRSA) totaling \$506,057 for health center outreach and enrollment assistance under the PPACA.¹² In light of these allocated funds provided by HHS, Cause of Action writes to identify potential liability pitfalls the District of Columbia may face when an individual or entity connected to a District of Columbia 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.¹³ 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.¹⁴

The District of Columbia and entities within the District which are awarded Navigator and/or HRSA PPACA Enrollment Grants will also be subject to other Federal restrictions. Neither the Navigator and HRSA Grant Funds nor State Planning and Establishment Grant

⁹ 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.

¹⁰ See *D.C. Grants List*, *supra* note 8 (receiving \$1,000,000 on Sept. 30, 2010 (Planning); \$8,200,716 on Aug. 12, 2011 (Level I); and, \$72,985,333 on Sept. 27, 2012 (Level II)).

¹¹ 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).

¹² U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., District of Columbia: Health Center Outreach & Enrollment Assistance, available at <http://www.hrsa.gov/about/news/2013tables/outreachandenrollment/dc.html> (last visited Sept. 6, 2013).

¹³ *State Planning Grant Funding Announcement*, *supra* note 9, 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>.

¹⁴ *State Planning Grant Funding Announcement*, *supra* note 9, at 17; *Establishment Grant Funding Announcement*, *supra* note 13, at 36-37; see also 2 C.F.R. pt. 225 (2013) regarding cost allocations.

Funds may be used to cover pre-award costs, to match other Federal Funds, to carry out services that are the 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.¹⁵ The numerous restrictions HHS and CCIIO have placed on the use of Grant Funds may subject the District of Columbia and its Exchange contractors, subcontractors, subgrantees and subrecipients to a significant risk of liability under the False Claims Act, and subject the District 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.¹⁶ 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.¹⁷

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].”¹⁸ 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.”¹⁹ To ensure that contractors, subcontractors, subgrantees, and subrecipients comply with Federal law, the District of Columbia bears responsibility for preventing any appropriated Federal Funds from being used for any form of lobbying—direct or grassroots—regarding pending legislation.²⁰

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

¹⁵ This list is not exhaustive. *See also Establishment Grant Funding Announcement, supra* note 13, at 36-37.

¹⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-543, PATIENT PROTECTION AND AFFORDABLE CARE ACT—HHS’S PROCESS FOR AWARDED AND OVERSEEING EXCHANGE AND RATE REVIEW GRANTS TO STATES (May 31, 2013), *available at* <http://www.gao.gov/assets/660/654994.pdf>.

¹⁷ *See* Letter from Patrick Morrissey, *supra* note 5, at 6.

¹⁸ 31 U.S.C. § 1352 (2012).

¹⁹ 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>.

²⁰ 18 U.S.C. § 1913 (2012).

(OMB) Circular A-133, *Audits of States, Local Governments and Non-Profit Organizations*.²¹ 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.²² Any Federal award recipient who contracts with a for-profit subrecipient is further responsible for the for-profit subrecipient's compliance.²³ Such contract must describe the applicable compliance requirements and the for-profit subrecipient's compliance obligations.²⁴

The Federal award recipient must select an auditor to conduct the audit.²⁵ Upon assessing the Federal award recipient's financial statements, internal controls, and compliance, the auditor will issue a report describing its findings.²⁶ 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.²⁷ 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.²⁸ Because the District of Columbia 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.²⁹

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*.³⁰ This includes adequately documenting all costs associated with administering the Grant Funds.³¹ Recipients must submit a Certificate of Cost Allocation Plan³² and a Certificate of Indirect Costs,³³ certifying they are in conformance with this OMB Circular.³⁴ If

²¹ 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-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.

²² OMB CIRCULAR A-133, *supra* note 21, § 300.

²³ *Id.* § 210(e).

²⁴ *Id.*

²⁵ *Id.* §§ 105, 200, 500.

²⁶ *Id.* §§ 500, 505, 510.

²⁷ *Id.* § 315.

²⁸ 31 U.S.C. § 7502(h) (2012); OMB CIRCULAR A-133, *supra* note 21, § 320(d).

²⁹ 31 U.S.C. §§ 7501 (2012) *et seq.*

³⁰ 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.

³¹ OMB Circular A-87, *supra* note 30, at 9 (Attachment A, ¶ C(1) (Basic Guidelines)).

³² *Id.* at 45 (Attachment C).

³³ *Id.* at 56 (Attachment E).

³⁴ *Id.* at 12 (Attachment A).

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 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, or in this case the District, which has received Federal Grant Funds to establish an exchange may be subject to this regulation if it has contracted with commercial organizations.

The District of Columbia's health insurance exchange is subject to this OMB Circular and will remain so for the duration of this project. Furthermore, because the District of Columbia received (and has not returned) Federal Grant Funds under State Planning and Establishment Grants, the District 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 District 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.³⁵ 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.³⁶ Federal law similarly bars anyone from knowingly presenting false claims to any Federal government representative.³⁷ The Fraud Enforcement and Recovery Act of 2009 (FERA)³⁸ 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";³⁹ (2) FERA eliminated the False Claim Act's "presentation" requirements;⁴⁰ (3) the False Claim Act's intent requirement was eliminated, such that all that is necessary for liability to attach is that such a statement has a "natural tendency to influence, or is capable of influencing the payment or receipt of money or property."⁴¹ The False Claim Act's conspiracy provisions have also been expanded to include conspiracies to violate other provisions of the False Claims Act.⁴² The FERA amendments also establish an express "materiality" requirement,⁴³ as well as "reverse false claims" and overpayment "retention" liability.⁴⁴ Additionally, the District of Columbia'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

³⁵ 31 U.S.C. §§ 3729- 33 (2012).

³⁶ 18 U.S.C. § 1001 (2012).

³⁷ 18 U.S.C. § 287 (2012).

³⁸ Pub. L. 111-21, S. 386, 123 Stat. 1616 (2009).

³⁹ 31 U.S.C. § 3729(b)(2) (2012).

⁴⁰ *Id.*

⁴¹ *Id.* at § 3729(b)(4).

⁴² *Id.* at § 3729(b)(4); §§ 3729(a)(1)(C) and (b)(1-4).

⁴³ *Id.* at § 3729(a)(1)(C); *see supra*, note 41.

⁴⁴ 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).

\$5,500 per occurrence, plus treble damages.⁴⁵ The District of Columbia should also evaluate its False Claims Act law(s), if applicable.

The District of Columbia 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.⁴⁶ 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, the District of Columbia may face liability of its own and is 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.⁴⁷ Given the significant taxpayer funds involved and the wide-ranging functions and responsibilities of the District of Columbia as a state-run 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 the District of Columbia, 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://www.oig.hss.gov/fraud/hotline>.

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

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

⁴⁵ 31 U.S.C. § 3729(a) (2012).

⁴⁶ *Establishment Grant Funding Announcement*, *supra* note 13, at 52-53.

⁴⁷ 31 U.S.C. §§ 3729-33 (2012).

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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
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. Eleanor Holmes Norton
Hon. 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. Irving B. Nathan, Attorney General and ,Corporation Counsel, District of Columbia
Hon. William P. White, Commissioner for the District of Columbia Department of Insurance, Securities and Banking