



August 20, 2013

VIA FIRST CLASS MAIL

The Honorable John Kasich
Ohio Governor
Office of the Governor
Riffe Center, 30th Floor
77 South High Street
Columbus, OH, 43215

RE: Potential Liability for Misuse of Federal Grant Funds

Dear Governor Kasich:

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. We seek to notify the State of Ohio, as well as entities, contractors, subgrantees, subrecipients and subcontractors who are utilized in furtherance of federally-facilitated exchanges,¹ of potential liabilities that might apply if any of these entities or their agents misuses the taxpayer funds it receives.

As you are aware, on November 16, 2012, you informed federal officials that Ohio would default to a federally-facilitated health insurance exchange, but that the state would retain control over its insurance industry and Medicaid eligibility determinations.² Nevertheless, Ohio received a \$1,000,000 Planning Grant through the Centers for Medicare and Medicaid Services and the Center for Consumer Information and Insurance Oversight (CCIIO), both subdivisions of the Department of Health and Human Services (HHS).³ The Planning Grant was issued to assist

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

² Fact Sheet, Office of Ohio Governor, Ohio Says No to an Obamacare Health Exchange, *available at* <http://governor.ohio.gov/exchange.aspx> (last visited Aug. 16, 2013); *see also* The Henry J. Kaiser Family Foundation, *State Exchange Profiles: Ohio* (as of Feb. 12, 2013), *available at* <http://kff.org/health-reform/state-profile/state-exchange-profiles-ohio/>.

³ U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Ohio Affordable Insurance Exchange Grants Awards List*, *available at* <http://www.cms.gov/ccio/Resources/Marketplace-Grants/oh.html> (last visited Aug. 15, 2013).

states with initial planning activities related to implementing a state exchange.⁴ Additionally, HHS announced on August 15, 2013, that entities in Ohio will receive \$3,043,868 in federal funding for the Navigator program⁵ in furtherance of the anticipated start date of October 1, 2013 for the federally-facilitated exchange.⁶

Compliance Risks Associated with the Terms of the Funding Opportunity Announcement

Any entity receiving grant funds through CCIIO is restricted in how it may use the funds. As CCIIO's Funding Opportunity Announcement for State Planning and Establishment Grants states, grant funds may not be used for meeting matching requirements of any other federal program, covering excessive executive compensation, or covering costs to provide direct services to individuals.⁷ States receiving CCIIO Grant Funds are also prohibited from using these 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.⁸

As a recipient of a Planning Grant, Ohio is restricted in how it uses this funding. When Ohio entities receive Navigator Grants, these Grant Funds will also be subject to federal restrictions. Neither the Navigator Grant Funds nor the Planning Grant Funds may 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 Congress or any state government, state legislature or local legislature or legislative body.⁹ The varied and numerous restrictions placed by HHS and the CCIIO on the use of Grant Funds may subject Ohio's contractors,

⁴ 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.

⁵ 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).

⁶ See U.S. Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, *Cooperative Agreement to Support Navigators in Federally-facilitated and State Partnership Exchanges*, 1, 9 (Apr. 9, 2013) [hereinafter *Navigator Grant Funding Announcement*], available at <http://www.cms.gov/CCIIO/Resources/Funding-Opportunities/Downloads/2013-navigator-foa-4-9-2013.pdf>.

Navigator Grants are being administered by HHS's Center for Medicare and Medicaid Services. CMS announced the anticipated Navigator Grant recipients on August 15, 2013. See <http://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/navigator-list-8-15-2013.pdf> (last visited Aug. 15, 2013).

⁷ *State Planning Grant Funding Announcement*, *supra* note 4 at 17.

⁸ *Id.*; see also 2 C.F.R. pt. 225 regarding cost allocations.

⁹ This list is not exhaustive. See also *Navigator Grant Funding Announcement*, *supra* note 6, at 27; 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>.

subcontractors, subgrantees, and subrecipients to a significant risk of liability under the False Claims Act, as well as the state itself to sanctions imposed by Centers for Medicare and Medicaid Services and/or CCIIO, such as restrictions on the use of funds and/or termination of the award.¹⁰ To the extent material misrepresentations are made, criminal charges and fines may also result under 18 U.S.C. § 1001.

Compliance with the Byrd Anti-Lobbying Amendment

Section 1352 of Title 31 of the United States Code, the Byrd Anti-Lobbying 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].”¹¹ 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.”¹² To ensure that contractors, subcontractors, subgrantees, and subrecipients comply with federal law, Ohio must prevent any appropriated federal funds from being used for any form of lobbying—direct or grassroots—for or against any pending legislation.¹³ Finally, it is also true regarding future recipients of Navigator Grants in Ohio that “[g]rant recipients may lobby at their own expense if they can segregate federal funds from other financial resources used for that purpose.”¹⁴

Compliance with Audit Requirements of OMB Circular A-133

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*.¹⁵ The federal award recipient must identify all federal awards it receives and expends, must establish and maintain internal controls to ensure it is managing the federal award programs in compliance with all laws, must prepare regular financial statements, must ensure audits are

¹⁰ 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>.

¹¹ 31 U.S.C. § 1352 (2012).

¹² 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>.

¹³ 18 U.S.C. § 1913.

¹⁴ U.S. Dep’t of Health & Human Servs., *supra* note 4, at 27.

¹⁵ 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; 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.

conducted at the required intervals, and must take corrective action on any audit findings.¹⁶ Any federal award recipient who contracts with a for-profit subrecipient is responsible for the for-profit subrecipient's compliance.¹⁷ The contract must describe the applicable compliance requirements and the for-profit subrecipient's compliance obligations.¹⁸

The federal award recipient must select an auditor to conduct the audit.¹⁹ Upon assessing the federal award recipient's financial statements, internal controls, and compliance, the auditor will issue a report describing its findings.²⁰ 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 the problems identified by the audit.²¹ 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.²² If Ohio receives at least \$500,000 in grant funds, including Navigator Grants, 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.²³

Compliance with Cost Principles of OMB Circular A-87

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*.²⁴ These recipients must adequately document their costs, the costs must be reasonable and in conformance with this OMB Circular as well as federal and state laws, and similar costs must be treated consistently.²⁵ Recipients must submit a Certificate of Cost Allocation Plan²⁶ and a Certificate of Indirect Costs,²⁷ certifying they are in conformance with this OMB Circular.²⁸ If the recipient submits a false certification, it may be subject to treble damages under the False Claims Act, which is further explained in the next section. Relatedly, 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. Any state that has received federal grant funds to establish an

¹⁶ OMB CIRCULAR A-133, *supra* note 15, § 300.

¹⁷ *Id.* § 210(e).

¹⁸ *Id.*

¹⁹ *Id.* §§ 105, 200, 500.

²⁰ *Id.* §§ 500, 505, 510.

²¹ *Id.* § 315.

²² 31 U.S.C. § 7502(h); OMB CIRCULAR A-133 § 320(d).

²³ 31 U.S.C. §§ 7501 *et seq.*

²⁴ 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.

²⁵ *Id.* at 9 (Attachment A, ¶ C(1) (Basic Guidelines)).

²⁶ *Id.* at 45 (Attachment C).

²⁷ *Id.* at 56 (Attachment E).

²⁸ *Id.* at 12 (Attachment A).

exchange—even if it is currently a federally-facilitated-exchange state—may be subject to this regulation if it has contracted with commercial organizations.

Because it is operated exclusively by the federal government, Ohio’s federally-facilitated exchange is not subject to this OMB Circular. However, if Ohio elects to transition to a state-run or a partnership exchange and receives federal funding for the project, it would be subject to the cost allocation requirements of this OMB Circular.²⁹ Furthermore, because Ohio received a federal Planning Grant to assist with initial planning activities related to implementing a state exchange, it 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 to penalties under 48 C.F.R. § 52.242-3.

False Claims Act, Corporate Governance, and Internal Best Practices

Providing false information to the Government is strictly illegal under the False Claims Act.³⁰ 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.³¹ Federal law similarly bars anyone from knowingly presenting false claims to any person or officer of the United States government or to any corresponding department or agency.³² A state employee may face liability under the False Claims Act if he misuses federal funds and falsely certifies that he properly used the funds. Further, if two or more parties enter into an unlawful agreement to submit a false claim to the federal government and they commit an overt act in furtherance of that agreement, they may be found liable of conspiracy under the False Claims Act.³³ Additionally, a state’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 is at least \$5,000, plus treble damages.³⁴

States must institute procedures to promote compliance with the financial integrity provisions of section 1313 of the Patient Protection and Affordable Care Act (PPACA), including requirements related to accounting, reporting, auditing, cooperation with investigators, and application of the False Claims Act.³⁵ 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, Ohio 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

²⁹ *Id.* at 5 (Attachment A. ¶ A(3) (Application)).

³⁰ 31 U.S.C. §§ 3729-33.

³¹ 18 U.S.C. § 1001.

³² 18 U.S.C. § 287.

³³ 31 U.S.C. § 3729(a)(1)(C).

³⁴ 31 U.S.C. § 3729(a).

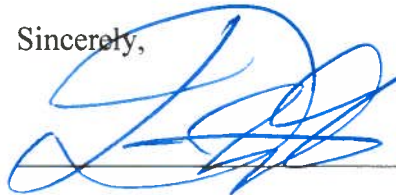
³⁵ *Establishment Grant Funding Announcement*, *supra* note 9, at 52-53.

misused.³⁶ Given the significant taxpayer funds involved and the wide-ranging functions and responsibilities of Ohio as a federally-facilitated-exchange state, 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.

Please consider whether Ohio, its contractors, subcontractors, subgrantees and subrecipients have 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 or entity 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://ww.oig.hss.gov/fraud/hotline/>.

If you have any questions regarding this letter, please contact me at 202-499-4232.³⁷

Sincerely,



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

cc: Hon. John Boehner, Speaker of the House
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. Robert Portman, Ranking Member, Subcommittee on Fiscal Responsibility and Economic Growth, Senate Committee on Finance
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

³⁶ 31 U.S.C. §§ 3729-33.

³⁷ This letter is not intended to create, and does not create, an attorney-client relationship between you or the Ohio 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 Ohio. 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.

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. Sherrod Brown, Chairman, House Subcommittee on Financial Institutions and Consumer Protection, Senate Committee on Banking, Housing, and Urban Affairs

Hon. Kelly Ayotte, Senate Committee on Homeland Security & Governmental Affairs

Hon. Jim Jordan, Chairman, House Subcommittee on Economic Growth, Job Creation, and Regulatory Affairs, House Committee on Oversight and Government Reform

Hon. Michael Turner, Member, House Subcommittee on Government Operations, House Committee on Oversight and Government Reform

Hon. Patrick Tiberi, Chairman, House Subcommittee on Select Revenue Measures, House Committee on Ways and Means

Hon. David Joyce, Member, House Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, House Committee on Appropriations

Hon. James Renacci, Member, House Subcommittee on Social Security, House Committee on Ways and Means

Hon. Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services

Hon. Daniel Levinson, Inspector General, U.S. Department of Health & Human Services

Hon. Peter Kadzik, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice

Hon. Mike DeWine, Attorney General, State of Ohio

Hon. Jon A. Husted, Secretary of State, State of Ohio

Hon. Mary Taylor, Lt. Governor and Director of Ohio Department of Insurance Commissioner, State of Ohio