DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

June 3, 2013

The Honorable Lamar Alexander
Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, DC 20510

Dear Senator Alexander:

Thank you for your letter concerning some of the most recent outreach efforts the Secretary of Health and Human Services has undertaken to ensure successful implementation of the Affordable Care Act. Secretary Sebelius has asked that I respond on her behalf.

As you know, the Affordable Care Act was signed into law on March 23, 2010, putting in place historic, comprehensive reforms that improve access to affordable health coverage for everyone and protect consumers from abusive insurance company practices. The law allows Americans to make health insurance choices that work for them while guaranteeing access to care for our most vulnerable citizens, and provides new ways to bring down costs and improve quality of care. Access to health coverage is more than a safeguard from hardship that every citizen deserves. It means that instead of foregoing doctors' visits and other preventive measures because of cost, Americans will get the care they need to prevent chronic diseases, improving their health and reducing the burden of illness and disease on individuals, their families, and our health care system. And the security of health coverage not tied to a job means that entrepreneurs will no longer fear striking out on their own to start a small business, helping create jobs and boosting economic growth. In short, coverage expansion in the Affordable Care Act will benefit the nation's personal and economic health.

We appreciate the opportunity to respond to some of the misperceptions about the scope of the Secretary's authority – and responsibility – to work with a wide range of public and private partners who share the President's goal of ensuring that all Americans will have access to quality, affordable health insurance in 2014, and that our implementation of the law succeeds. Congress has neither barred the Department of Health and Human Services (the Department or HHS) from implementing the law nor prohibited the Department from using funds initially authorized by the Affordable Care Act, and the statute remains the law of the land. Our continuing work to implement the law, including but not limited to using public-private partnerships to reach and enroll Americans in health insurance through the Health Insurance Marketplaces, is entirely appropriate and consistent with law. Our private sector partners are not providing services to HHS; they are providing services to Americans seeking health insurance.

More importantly, Secretary Sebelius has the authority under Title XVII of the Public Health Service (PHS) Act to encourage members of the public to support activities surrounding enrollment and non-profit organizations that are helping Americans enroll in health insurance through the Marketplaces. The Secretary can and should encourage private organizations that are, on their own initiative, helping people enroll in health insurance through the exchanges and providing them information and advice on how to access the new coverage options.

Public-Private Partnerships to Advance the Public Health:

As described in more detail below, under the PHS Act, Congress has given the Secretary authority to encourage outside organizations to educate the public about important health care services and to assist in making public health services available on a wider basis. The PHS Act also allows the Secretary to encourage others to provide financial support to organizations working to promote various health care programs. This authority is broader than the authority that Congress typically grants to executive branch officials. In fact, the Secretary has used far less authority than she is permitted by law and her actions have been entirely consistent with those of previous Department Secretaries.

Secretaries of HHS have a long tradition of working with the private sector on public-private initiatives. For example, previous Secretaries from both parties marshaled private sector support to enroll eligible beneficiaries in two important programs that expanded the availability of health insurance – Medicare Part D and the Children's Health Insurance Program. The public education challenges currently facing HHS, as it works to implement the Affordable Care Act, are not dissimilar to those faced by HHS in 2005 during the implementation of Medicare Part D. In order to ensure that Medicare beneficiaries had the information they needed about the new drug benefit, former HHS Secretary Leavitt and Centers for Medicare & Medicaid (CMS) officials launched a large-scale national outreach program in 2005 to carry the Part D message across the country.

Secretary Leavitt developed successful partnerships with a wide range of stakeholders, including hospitals, unions, trade associations, non-profit organizations, universities, faith-based organizations, advocacy groups, pharmacy chains, and pharmaceutical companies, in a far-reaching effort to educate Medicare beneficiaries and their caregivers about the Medicare Part D prescription drug benefits that would become available in 2006. The former Secretary, along with CMS officials, worked closely with numerous corporate partners who distributed promotional material through their own and partners' information channels, sent endorsed mailings to affiliated organizations announcing their partnership on outreach and enrollment, conducted application/enrollment sessions, actively went to hard-to-reach beneficiaries, and provided one-on-one counseling and assistance. Private organizations played crucial roles in the outreach campaign. AARP, for example, committed substantial resources to educating beneficiaries through its local chapters and national media campaigns. Wal-Mart and Humana partnered with HHS to educate their customers about the new benefit. In addition, over 100

organizations participated in the Access to Benefits Coalition to educate Medicare beneficiaries with lower incomes.

Other examples of public-private partnerships include the Centers for Disease Control and Prevention's (CDC) partnerships with Rotary International, the World Health Organization, and UNICEF through the Global Polio Eradication Initiative that now includes the Bill and Melinda Gates Foundation. This successful public-private partnership has helped reduce the number of polio cases worldwide by more than 99.8 percent since 1988. And, just last year, the Secretary and the Attorney General announced the formation of a public-private partnership to prevent health care fraud. The partnership, made up of the federal government, state agencies, private health insurance organizations, and health care anti-fraud groups, is designed to reveal and halt fraud schemes that cut across public and private payers by sharing important information and best practices for fraud prevention among stakeholders.

In addition, the Foundation for the National Institutes of Health (FNIH), a non-profit organization established by Congress, helps create public-private partnerships to facilitate and accelerate the biomedical research work of the NIH. In September 2012, the FNIH received a donation from the National Football League to fund research into brain injuries. This $30 million donation will help the National Institute for Neurological Disorders and Stroke fund research on traumatic brain injuries that will help sports professionals, members of the military, and the general population, and will accelerate important understanding of brain injuries. Similarly, the CDC Foundation builds bridges between the CDC and the private sector to support health programs around the world. By creating these partnerships, the CDC Foundation has supported more than 600 CDC programs around the world, and has accelerated and expanded the public health initiatives of the CDC and its private partners.

Current Public-Private Partnership Outreach:

The American public deserves timely and accurate information about the health insurance choices they will have when the Health Insurance Marketplaces open on October 1, 2013, including where to go for help enrolling in a plan, and how to apply for tax credits or subsidies for which they may be eligible. Secretary Sebelius has embraced the opportunity to spearhead an extensive outreach campaign to educate the public and enlist private sector partners to ensure that their fellow citizens can obtain needed coverage. Many of these corporate leaders have participated in similar HHS campaigns in the past.

Since January 2013, the Secretary has engaged in an ongoing dialogue with a wide variety of stakeholders through meetings, phone calls, and public statements. This outreach has included faith institutions, patient groups, consumer groups, clinician groups, retail pharmacies, insurers, pharmaceutical companies, hospitals, media companies, telecommunications companies, the restaurant industry, the entertainment industry, the food and beverage industry, charitable foundations, think tanks, state and local government officials, and others who share the Department's goal of ensuring that open enrollment will be successful this fall. HHS's educational efforts have included briefings requested by both Republican and Democratic Members of Congress and their

staff at which we have provided information on enrollment they can share with Members' constituents. In addition, the Secretary has participated in meetings, including those held at the White House, with retail pharmacy representatives, insurance sector leaders, and private foundation leaders, to discuss outreach and enrollment plans. This type of stakeholder outreach is entirely appropriate, and more importantly, expected of the chief Cabinet member charged with ensuring that Americans receive the information they need about the new health insurance opportunities they are entitled to under the law. Those efforts will continue and increase as we get closer to open enrollment this fall.

Enroll America:

We read your letter as focusing on HHS's work with Enroll America as a partner in those efforts. Of course private entities may undertake activities on their own initiative to ensure that Americans enroll in insurance through the Health Insurance Marketplaces. Enroll America is one of the organizations playing a central role in these efforts. It is a non-partisan, non-profit organization founded in 2011 whose mission is to educate Americans about their health insurance options and help those eligible enroll in the health insurance coverage that is right for them, a mission closely aligned with that of HHS. Enroll America's Board of Directors includes representatives of Families USA, the Maryland Citizens' Health Initiative, the National Association of Community Health Centers, Teva Pharmaceuticals USA, Blue Shield of California, Kaiser Permanente, the Catholic Health Association of the United States, and the American Hospital Association. The organization and the members of its board are playing a central organizing role in the private sector's efforts to educate the public, and to ensure a successful enrollment process this fall.

During many of Secretary Sebelius's conversations with interested stakeholders, the Secretary has encouraged them to work with Enroll America. As described in detail below, in two instances involving private organizations that the Department does not regulate, the Secretary asked that the organization consider making a financial contribution to Enroll America. Also, at Enroll America's suggestion, the Secretary urged three other stakeholders to work with Enroll America, but without requesting they provide financial assistance. In each of these instances, and in meetings and public settings involving other stakeholders, the Secretary's objective was to ensure that our private partners would be effective in their own efforts to reach Americans eligible for insurance through the Marketplaces. To that end, she has encouraged the sharing of insights, marketing know-how, and community-based experiences to help non-profits like Enroll America effectively reach and work with Americans seeking health insurance.

Statutory Authority:

The law specifically authorizes the Secretary to ask private entities to consider giving financial support to a third party non-profit organization or to work with private partners whose mission aligns with that of HHS.

As described below, and consistent with the advice of HHS's Office of the General Counsel, the Secretary's outreach was conducted pursuant to her statutory authority under Section 1703 of Title XVII of the Public Health Service Act, which provides as follows:

> "The Secretary is authorized to conduct and support by grant or contract (*and to encourage others to support*) new and innovative programs in health information and health promotion, preventive health services, and education in the appropriate use of health care...." 42 U.S.C. § 300u-2 (emphasis added).

This express authority has been available since 1976 and provides to the Secretary broad authority beyond that available to other government officials. The legislative history of Title XVII makes clear that the statute was meant to further a "complementary national public and private strategy to improve consumer health education and promotion" (S. Rep. 94-330 at 25), and to establish a "large-scale program of public and private support" (Id. at 26). When it enacted the authority, Congress recognized that "the needs and problems are so major and complex that progress will depend upon a major long-term commitment by both the public and private sectors of society. It is to meld such efforts, provide for a focal point for the Nation's multiple but disparate health education and promotion activities, improve the health status of Americans, design a mechanism by which we may establish a national health education and promotion strategy, that [Title XVII] has been proposed." Id. at 25. Section 1703 thus authorizes the Secretary to encourage members of the public (including but not limited to entities regulated by HHS) to support private organizations working to inform American consumers about their forthcoming health care options, including through financial support if they so choose.

In addition, section 1704 of the PHS Act provides as follows:

> "The Secretary is authorized to conduct and support by grant or contract (*and encourage others to support*) such activities as may be required to make information respecting health information and health promotion, preventive health services, and education in the appropriate use of health care available to the consumers of medical care, providers of such care, schools, and others who are or should be informed respecting such matters." 42 U.S.C. § 300u-3 (emphasis added).

Section 1704 expressly permits the Secretary to encourage outside organizations to support activities regarding enrollment of "consumers of medical care." The Secretary's activities pursuant to these sections do not raise issues under the Anti-Deficiency Act (ADA), which bars augmentation of federal appropriations.

Moreover, the federal ethics regulations – known as the "Standards of Ethical Conduct for Employees of the Executive Branch," and which are cited for the proposition that fundraising is permitted only if no official title is used and funds are not requested from a subordinate or from someone who has or seeks business with the employee's agency – do not apply to official fundraising efforts conducted by a federal agency acting through its officials.

As the title of the ethics standards denotes, the cited rules apply to the personal fundraising activities of individual employees conducted for their personal benefit or that of their favored charities. The federal ethics regulations in fact contemplate "official fundraising" using official title, where authorized by law, and do not purport to dictate the ethical parameters under which agencies may act. The relevant section, 5 C.F.R. § 2635.808(b), provides that "an employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official capacity, an employee may use his official title, position and authority." The PHS Act provides the Secretary this authority.

As we have stated publicly, the Secretary has made two requests for financial contributions to Enroll America in the exercise of her Title XVII authority. Both discussions, which were initiated at the suggestion of Enroll America and are described below, focused on steps these organizations could take to help Americans become informed about and access affordable health care coverage.

Robert Wood Johnson Foundation (RWJF). RWJF is the United States' largest philanthropy devoted exclusively to health and health care. The foundation's mission is to improve the health and health care of all Americans. Its State Health Reform Assistance Network produces reports, toolkits, and other resources to help states develop effective outreach to help consumers navigate the process of enrolling through the new marketplaces. During a telephone call on January 29, 2013, Secretary Sebelius spoke with the President of RWJF about outreach and enrollment. The Secretary thanked RWJF for its previous financial support for Enroll America and encouraged RWJF to continue providing significant financial support for the organization's efforts.

H&R Block. The Secretary had a telephone conversation with H&R Block, a tax preparation company, on April 29, 2013, to discuss the shared goal of educating Americans about the value of health insurance, and the fact that a number of outside organizations are committed to raising awareness and promoting enrollment in health insurance through the Health Insurance Marketplaces, including Enroll America. Consistent with her Title XVII authority, the Secretary described Enroll America's role in coordinating private sector outreach, and asked if H&R Block would be willing to make a financial contribution to Enroll America.

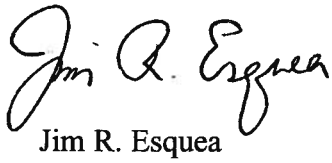
With respect to other discussions the Secretary has had with stakeholders that focused on Enroll America's outreach efforts, and which are the subject of your letter, the Secretary has applauded the organization publicly and in private conversations numerous times and urged others to support its important work in a number of ways outside of financial contributions. The Secretary has publicly described Enroll America as a valuable partner in HHS's efforts to reach Americans who will need information about their health insurance coverage options this fall.

In addition to the Secretary's public statements of support, over the last few months, at Enroll America's suggestion, she has made telephone calls to three other organizations – Kaiser Permanente, Johnson & Johnson, and Ascension Health – to ask that these corporate leaders support Enroll America's work through their own public expressions of support, and by providing the organization technical support and advice. Enroll America provided HHS's external affairs staff with potential talking points for the telephone calls to Ascension Health and Kaiser Permanente that included requests for financial contributions to Enroll America. However, the Enroll America talking points were not given to or used by the Secretary, and she did not request financial contributions from these entities, although, as explained above, financial assistance requests were well within the scope of her legal authority. Although the Secretary did not make such a request, we understand that Enroll America has received a financial contribution from at least one of these entities.

The Secretary is proud to be working with these and other industry leaders in the effort to ensure that eligible Americans are given the tools and information they need to enroll in newly available coverage this fall.

We hope the foregoing information about the Secretary's authority, and outreach telephone calls and meetings addresses your concerns. We look forward to working with you.

Sincerely,



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