United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

November 7, 2013

VIA ELECTRONIC TRANSMISSION

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Eric H. Holder, Jr.
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Secretary Sebelius and Attorney General Holder:

I am alarmed at indications that the Administration may try to exempt the Patient Protection and Affordable Care Act (PPACA) from certain federal anti-fraud provisions. PPACA provides for billions of dollars in subsidies to be paid directly to insurance companies. These taxpayer dollars should be subject to the full arsenal of civil and criminal anti-fraud protections provided by Congress.

On October 30, 2013, Secretary Sebelius sent a letter to Representative Jim McDermott regarding whether qualified health plans (QHPs) are considered federal health care programs under § 1128B of the Social Security Act. Secretary Sebelius's letter stated that the Department of Health and Human Services (HHS) does not consider QHPs, other programs related to the federally-facilitated and subsidized marketplace, and other programs under Title I of PPACA to be federal health care programs. She further stated that this conclusion was based upon consultation with the Department of Justice (DOJ).

According to § 1128B, a "federal health care program" is "any plan or program that provides health benefits, *whether directly, through insurance, or otherwise*, which is funded directly, in whole *or in part*, by the United States Government."[1] As you know, private health care providers offering QFPs to individuals qualifying for federal health care subsidies under PPACA will receive such funds directly from the federal government.

Section 1128B provides criminal penalties for false claims and kickbacks in federal health care programs.[2] Further, as part of PPACA, Congress altered § 1128B to provide that a claim resulting from a violation of the section constitutes a violation of

[1] 42 U.S.C. 1320a-7b(f)(1) (2013) (emphasis added).
[2] 42 U.S.C. 1320a-7b (2013).

the False Claims Act, which includes civil liability.[3] The False Claims Act has been one of the federal government's strongest tools for recovering federal taxpayer dollars. Congress' intent to treat kickbacks under PPACA as False Claims Act violations is clear. It cannot lawfully be nullified by the stroke of a pen through an administrative exemption.

If this nullification were allowed to stand, HHS would be removing a vital tool to investigate and prosecute fraud. It undermines public confidence that the government is serious about protecting American taxpayer dollars from fraud, waste and abuse. Intentionally attempting to strip away these vital protections by administrative fiat is extremely disturbing.

I commented at yesterday's hearing that QHPs seem the same as Medicare Advantage, which is protected by the same anti-fraud laws. Secretary Sebelius responded that Medicare Advantage is a "private insurance plan where federal dollars are paid directly out of the Medicare trust fund to the Medicare Advantage plans," while purchasers of QFPs are "individuals who are paying premiums to a private plan on the marketplace." Secretary Sebelius asserted that as the basis for concluding that the two programs are "very different." However, both Medicare Advantage and QHPs involve individuals paying premiums to a private health care plan. Both also involve those same private health care plans receiving direct payment of federal taxpayer dollars.

Further, despite the claim that programs related to the federally-facilitated marketplace are not considered by HHS to be federal health care programs, the Centers for Medicare & Medicaid Services released guidance two days ago stating that HHS "has broad authority to regulate the Federal and State Marketplaces." This further suggests that QHPs are not that different from other federal health care programs such as Medicare Advantage, over which HHS also has broad regulatory authority.

In order to better understand the basis for your assertion that these programs are not federal health care programs, please respond to the following:

1. When was this decision finalized?

2. Please produce all internal memoranda or advisory opinions from either Department regarding this issue.

3. Please produce all records of communications regarding this issue, including internal Department communications, communications between your Departments, and other communications internal or external to the federal government.

4. Who at HHS made the final decision on this issue?

[3] 42 U.S.C. 1320a-7b(g) (2013).

5. Who at DOJ made the final decision on DOJ's position on this issue?

6. Was the HHS Inspector General consulted before finalizing this decision?

7. Was this decision approved by the Office of Management and Budget (OMB)?

8. Will the Justice Department decline to intervene in *qui tam* suits because of the HHS decision if those suits allege false claims made in connection with (a) QHPs, (b) other programs related to the federally-facilitated marketplace, or (c) other programs under Title I of PPACA?

9. Will the Justice Department decline to intervene in *qui tam* suits because of the HHS decision if those suits which allege a violation of § 1128's anti-kickback provisions in connection with (a) QHPs, (b) other programs related to the federally-facilitated marketplace, or (c) other programs under Title I of PPACA?

Please respond to these questions by November 13, 2013. Further, please provide a briefing for my staff with the attorneys from each of your Departments who reviewed this decision. Secretary Sebelius already promised to do so at yesterday's hearing.

Should you have any questions regarding this letter, please contact Tristan Leavitt, Erika Long, or Rodney Whitlock. I look forward to your prompt response.

Sincerely,

Charles E. Grassley
Ranking Member