

Congress of the United States
Washington, DC 20510

May 16, 2013

The Honorable Gene Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Comptroller General Dodaro:

We are writing to request that the Government Accountability Office (GAO) conduct an audit of the facts related to Department of Health and Human Services (HHS) Secretary Sebelius' solicitation of funds for a private sector entity that she is working with to implement the Patient Protection and Affordable Care Act (PPACA). The Secretary's actions show an apparent disregard for constitutional principles and may violate the Antideficiency Act, the prohibition against augmenting congressional appropriations, and executive branch ethics laws.

Various news outlets have reported that Secretary Sebelius has asked individuals in the private sector to make large financial donations to Enroll America, a nonprofit organization run by a former White House aide, to support HHS' implementation of PPACA. An HHS spokesman even explained to the *Washington Post* that HHS is intentionally taking these actions because Congress did not provide additional appropriations, "We requested additional money ... but we didn't receive any additional funding for the exchanges. So we've had to come up with a Plan B."¹

The Appropriations Clause is arguably the single most important curb in the Constitution on executive branch power. Article I of the Constitution gives Congress alone the power of the purse. This means a federal agency is dependent on Congress for its funding, and it is up to Congress to make important policy choices about whether or not to provide funds for a particular program and to fix that level of funding or set terms and conditions on its use.

The Antideficiency Act enforces these principles and generally prohibits entering into contracts or obligations or accepting voluntary services for the United States in excess of available appropriations. Depending on the relationship between the Secretary and Enroll America, the level of control exercised by the administration, and the nature of the activities the organization is engaged in, HHS may be creating obligations or accepting services in violation of the Antideficiency Act.

¹ "Budget request denied, Sebelius turns to health executives to finance Obamacare," *Washington Post*, May 10, 2013.

It also appears that the Secretary's actions may be in violation of the "rule against augmentation of appropriations," which GAO describes as meant to "prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity."² This includes a prohibition on certain voluntary services in 31 U.S.C. §1342 and the restriction of the use of appropriated funds to their intended purposes in 31 U.S.C. §1301(a). As one recent GAO decision stated, "a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations."³

The Secretary's actions also may be in violation of federal ethics rules against fundraising from regulated entities. For example, Office of Government Ethics Rule §2635.808 prohibits fundraising in an official's private capacity from any person or entity that is seeking official action by that official's agency, that does business or seeks to do business with the agency, or has interests that may be substantially affected by performance or nonperformance of the official's duties. The Washington Post reported that the Secretary was fundraising from "health industry executives," which may be prohibited sources under the ethics rules.

In public statements, an HHS spokesman has claimed that the Public Health Service Act (PHSA) authorizes the Secretary to engage in these efforts in her official capacity. Section 2635.808(b) of the ethics rules allows an employee to fundraise in an official capacity but only if in accordance with a specific authorization to do so. However, the possibly relevant sections of the PHSA, 42 U.S.C. §§300u-1, 2, or 3, only provide—and in a parenthetical at that—for the Secretary to "encourage others to support" efforts in health information and health promotion, preventive health services, and education in the appropriate use of health care. Fundraising by the Secretary in her official capacity for a specific organization that exists to promote the President's health care law and that is controlled significantly by entities that have a vested interest in the law's implementation is a farfetched interpretation of this statute. This is especially true given that the agency is citing a parenthetical reference in a thirty plus year old statute that has not to our knowledge previously been interpreted to authorize this sort of activity.

As we examine this matter carefully we request that GAO focus on the facts of the matter to inform our deliberative process on what steps Congress should pursue to protect the prerogative of the legislative branch. Accordingly, we are writing to request that GAO gather the facts surrounding Secretary Sebelius' actions and provide a detailed report on them. Among other things, we would like GAO to provide the following information as part of the report:

- 1) A list of all outside entities that HHS is soliciting funds on behalf of for purposes of assisting HHS in the implementation of PPACA.

² GAO-06-382SP Appropriations Law Vol II, page 6-162.

³ B-300248, Jan. 15, 2004.

- 2) A description of the degree to which HHS and Enroll America (or other outside entities) are coordinating efforts on PPACA implementation, including a summary of relevant correspondence and the number of meetings as well as a description (or copy where available) of any written or oral agreements between or among them.
- 3) A list of HHS personnel and their positions who have been involved with fundraising for outside entities to support PPACA as well as whether any other federal government personnel outside HHS have been soliciting funds.
- 4) A description of the government resources, including email, travel, telephones, government employee time, etc. used for fundraising on behalf of Enroll America or other entities and the costs (estimated or actual) incurred in doing so.
- 5) A list of all individuals (and their affiliations) that the Secretary or her subordinates contacted or addressed in order to fund Enroll America (or any other outside entity).
- 6) A description of the specific request(s) made to those individuals or entities that Secretary Sebelius or her subordinates contacted, including whether HHS specifically requested donations for Enroll America or any other outside entity and the amounts requested.
- 7) A description of any commitments or offers made by HHS to those individuals or entities that were contacted, including whether HHS specifically offered any benefit or threatened any punishment in exchange for donating or not donating to Enroll America.
- 8) Whether Secretary Sebelius or other HHS personnel were aware of the results of their solicitations of funds and/or whether Enroll America reported to HHS about their financial activities, donors or amounts donated, and if so what those reports showed and how HHS used that information/those reports.
- 9) Information about whether the Secretary and her subordinates received clearance for this activity from the designated agency ethics official, the Office of Government Ethics, and/or the General Counsel of HHS, the Department of Justice, and/or the White House and, if so, when that clearance was received as well as a copy of any ethics opinion(s).
- 10) Information about whether HHS has ever used the provisions of the Public Health Services Act relied upon for this activity to solicit donations for outside private entities before and the scope of that activity, if any.
- 11) A list of amounts and specific accounts for all transfers made by the Secretary or her subordinates to fund PPACA implementation at HHS since March 23, 2010 and whether any funds have been received from other government agencies or donations received from the private sector to support HHS implementation of the Act.

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Thank you for your attention to this matter.

Sincerely,



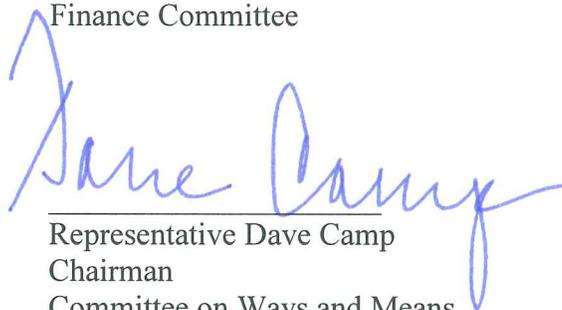
Senator Lamar Alexander
Ranking Member
Health, Education, Labor and
Pensions Committee



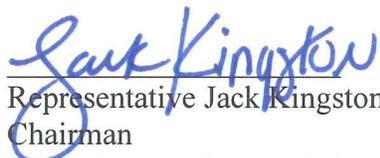
Senator Orrin Hatch
Ranking Member
Finance Committee



Representative Fred Upton
Chairman
Committee on Energy & Commerce



Representative Dave Camp
Chairman
Committee on Ways and Means



Representative Jack Kingston
Chairman
Committee on Appropriations
Subcommittee on Labor, Health and Human
Services, Education, and Related Agencies