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Congress of the United States
House of Representatives
Washington, DC 20515-2204

September 29, 2009

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Daniel R. Levinson
Inspector General
Office of Inspector General
U. S. Department of Health and Human Services
Room 5541 Cohen Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Inspector General Levinson,

One of the most important responsibilities of an Inspector General is to investigate allegations of misconduct by Administration officials, particularly when it involves possible inappropriate use of official authorities for political purposes. I therefore request a formal investigation into recent and unprecedented regulatory actions the Centers for Medicare and Medicaid Services (CMS) has taken against Humana and then more broadly applied to all Medicare Advantage (MA) health insurance plans.^{1, 2}

Currently, Congress is debating a number of proposals to change the health care system – all of which would impact the Medicare program. Leading Democrat bills in the House and Senate included as much as \$500 billion in cuts to Medicare, including \$156 billion in cuts to the Medicare Advantage program.³ On multiple occasions and in public remarks President Obama has endorsed these cuts to the nation's senior health care program.⁴

These dramatic cuts will negatively impact seniors' health care benefits in Medicare. CBO stated that the policy contained in H.R. 3200, the House Democrats' health care bill, "could lead many plans to limit the benefits they offer, raise their premiums, or withdraw from the program."⁵ CBO also predicts that H.R. 3200 will result in 3 million seniors currently enrolled in MA losing their coverage.⁶ The Medicare Payment Advisory Commission, (MedPAC) has

¹ Teresa DeCaro of CMS, letter to Gail Miller of Humana, Inc., September 18, 2009, (available online at <http://www.finance.senate.gov/press/Bpress/2009press/prb092109a.pdf>).

² Center for Drug and Health Plan Choice Memorandum to All Medicare Advantage Organizations, Medicare Advantage-Prescription Drug Organizations, Cost Based Organizations and Demonstration Plans, *Misleading and Confusing Plan Communications to Enrollees*, September 21, 2009.

³ Congressional Budget Office, Score of H.R. 3200, July 17, 2009, (available online at <http://www.cbo.gov/ftpdocs/104xx/doc10464/hr3200.pdf>).

⁴ Laura Meckler, "Obama Outlines \$313 Billion in New Health Cost Cuts", Wall St. Journal, June 13, 2009, (available online at <http://online.wsj.com/article/SB124485885782111927.html>).

⁵ Congressional Budget Office, Budget Options Volume I: Health Care, December, 2008, (available online at <http://www.cbo.gov/ftpdocs/99xx/doc9925/12-18-HealthOptions.pdf>).

⁶ Congressional Budget Office, conversation with staff, September 9, 2009.

found that these types of changes to MA payments will result in 1 in 5 seniors no longer having access to an MA plan. Additionally, MedPAC projected that benefits for seniors who are still able to enroll in MA will be reduced by \$252 a year.⁷

Humana's letter to beneficiaries mirrors these facts; yet, CMS has inexplicably deemed Humana's communications as "misleading and confusing".⁸ In addition to contradicting the facts set forth by the non-partisan, independent CBO and MedPAC, CMS' actions also reverses longstanding agency policy. CMS' predecessor, the Health Care Financing Administration (HCFA), in 1997 recognized that, "it may be difficult for a reviewer to ascertain whether or not the information about legislation is accurate and without a slant or unrevealed self-interest." In spite of the difficulties that may arise in determining the accuracy of statements about legislation, HCFA determined that, "we believe prohibiting [the sharing of] such information would violate basic freedom of speech and other constitutional rights of the Medicare beneficiary as a citizen."⁹

President Obama has made signing into law health care reform his top domestic priority and has declared that it must be accomplished this year. In conjunction with the Department of Health and Human Services (HHS), his administration has launched a health reform website and issued reports on the impact of health reform on small businesses, the economy, and seniors amongst others. President Obama has made numerous speeches and press availabilities on the topic of health reform.¹⁰ On September 9, 2009 President Obama told a joint session of Congress, "But know this: I will not waste time with those who have made the calculation that it's better politics to kill this plan than to improve it. If you misrepresent what's in this plan, we will call you out."¹¹

Republicans and Democrats place high priority of health care reform. However, I am concerned that CMS' actions related to MA plans represent a misguided effort to make good on the President's promise to call out those who speak in opposition to his plan. Additionally, a September 21, 2009 press release from the office of Senator Max Baucus stated, "the CMS investigation into the beneficiary letter was prompted by a Baucus request for the agency to review the insurance company's tactics last week."¹² These facts and the timeline of events create at least the impression of political influence overruling standing Agency policy and the specific facts.

⁷ MedPAC, *MIPPA MA Payment Report*, public meeting April 8, 2009, (available online at <http://www.medpac.gov/transcripts/MA%20pay%20rpt%204%2009%20final.pdf>).

⁸ Teresa DeCaro of CMS, letter to Gail Miller of Humana, Inc., September 18, 2009, (available online at <http://www.finance.senate.gov/press/Bpress/2009press/prb092109a.pdf>).

⁹ Bruce Merlin Fried of HCFA's Center for Health Plans and Providers, letter to Wendy Krasner of McDermott, Will & Emery, July 10, 1997.

¹⁰ Speeches, press releases and reports available at <http://www.healthreform.gov/index.html>.

¹¹ Remarks by the President to a Joint Session of Congress on Health Care, September 9, 2009, (available online at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/).

¹² Senator Max Baucus, *At Baucus' Urging, CMS Cracks Down On Insurance Company Scare Tactics*, press release, September 21, 2009, (available online at <http://finance.senate.gov/press/Bpress/2009press/prb092109.pdf>).

Given the overwhelming evidence supporting the accuracy of Humana's communications and agency precedent, I wrote, on September 22, 2009, to Acting Administrator of CMS Charlene Frizzera requesting that CMS suspend its gag order and provide in writing by September 28, 2009 an explanation of its enforcement activities (letters enclosed).¹³ CMS let the deadline pass without once contacting me or my office. While this is a short time frame, Congress is actively legislating on health care reform and considering changes to the Medicare Advantage program. Time is of the essence, as it is likely that one or both of the Chambers of Congress will consider legislation implementing cuts to Medicare Advantage within the next few weeks. A standing order from CMS prohibiting accurate communications by MA plans to their members about the effects of the proposed legislation is effectively robbing millions of citizens of their constitutional right to make their representatives in Congress know their views about legislative proposals. A reversal of CMS' action several months from now would not afford seniors the opportunity to make their voices heard in a timely manner. Any Agency action to rectify this inappropriate gag order after Congress has considered health care reform is effectively meaningless.

Considering this time frame, CMS' failure to respond to me in a timely fashion and the gravity of the matters at hand, I respectfully request that the Office of Inspector General immediately begin an investigation into the Agency's actions to determine whether or not proper protocols were followed and what role, if any, political influence played in the Agency's decision making. Attached is a timeline of known events related to the CMS investigation of Humana and the subsequent gag order issued by the Agency. However, a number of matters remain opaque to Congress. To that end, I request that you investigate the following matters:

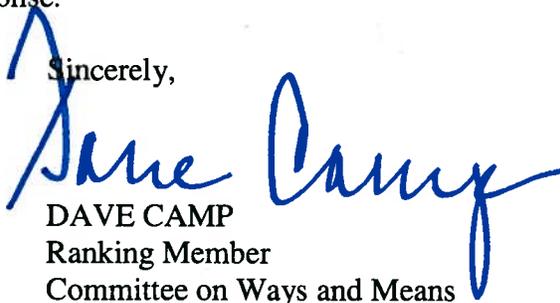
1. Who in HHS, outside of the Medicare Drug and Health Plan Contract Administration Group, was aware of the Humana mailing, CMS' investigation, and the subsequent gag order?
2. How did the Humana mailing come to the attention of the Medicare Drug and Health Plan Contract Administration Group? When did CMS or HHS first become aware of the mailing and how did they become aware of it?
3. Did any CMS officials discuss with HHS or White House staff the gag order on all Medicare Advantage plans prior to its issuance? If so, who were the officials involved and what was the timeline and content of those conversations?
4. Was standard protocol for reviewing MA marketing materials followed before the acting administrator issued the gag order on Humana, opened an investigation into Humana, and applied the gag order to all MA plans? If not, why not?

¹³ Representative Dave Camp, letter to Acting Administrator Frizzera, September 22, 2009, (available online at <http://republicans.waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=145980>).

5. Did any CMS, HHS, or White House employees discuss how Humana's letter to seniors about health care reform might impact seniors' support for legislation supported by President Obama and being considered in Congress?
6. Did CMS or HHS employees feel undue pressure from the White House or Congressional Members or staff to quickly initiate an investigation into Humana and institute a gag order in light of Congressional consideration of health care reform proposals?
7. Did CMS review the broad gag order on all Medicare Advantage plans in light of previous guidance to plans on communications about legislation?
8. Did the Office of General Counsel review CMS' prohibition on all communications from plans to Medicare enrollees regarding health care reform to determine if it violated constitutionally protected rights and communications?
9. Were any AARP communications with Medicare enrollees submitted by AARP to CMS for review to determine compliance with Medicare Advantage marketing regulations?
10. Did the Medicare Drug and Health Plan Contract Administration Group ever request a copy of AARP's post-Labor Day direct mailing regarding health care reform and Medicare?
11. Upon press reports of similar communications sent by AARP, did CMS, HHS, or White House employees discuss whether to review those materials or apply the same regulatory standards due to the group's role in supporting health care reform? If so, what decisions were made and why?

Your cooperation and investigation will be critical to ensure Congress understands the role political influence played in CMS's regulatory actions. More importantly, you could be pivotal in preserving seniors' constitutional rights to be heard on matters of great importance. I look forward to your prompt response.

Sincerely,



DAVE CAMP
Ranking Member
Committee on Ways and Means

Timeline of known events related to Humana investigation and subsequent gag order:

- August-September, 2009** Humana sends Medicare Advantage enrollees a letter regarding proposed legislation that would cut Medicare Advantage.¹⁴
- September 1, 2009** USA Today publishes a story about AARP's campaign on health care reform, which includes the following, "A post-Labor Day direct-mail blast — 8 million letters will be sent — addressing concerns about health care and Medicare."¹⁵
- September 16, 2009** Huffington Post publishes a blog article about Humana's Medicare Advantage mailer and includes a copy of the letter.¹⁶
- September 18, 2009** CMS' Medicare Drug and Health Plan Contract Administration Group writes Humana, Inc. informing them that CMS was investigating their communications and instructing them to end all mailings to beneficiaries and any related materials from their website.¹⁷
- September 21, 2009** CMS' Center for Drug and Health Plan Choice issues a memorandum to all Medicare Advantage plans, "to immediately discontinue all such mailings to beneficiaries and to remove any related materials directed to Medicare enrollees from your websites."¹⁸
- Senator Max Baucus issues a press release stating that, "the CMS investigation into the beneficiary letter was prompted by a Baucus request for the agency to review the insurance company's tactics last week."¹⁹
- September 22, 2009** Ranking Member Camp writes Acting Administrator Frizzera asking for an immediate suspension of the gag order and an explanation of enforcement actions.²⁰

¹⁴ Humana, Inc., conversation with staff, September 23, 2009.

¹⁵ Mimi Hall, *AARP Raises its Voice in Health Care Debate*, USA Today, September 2, 2009, (available online at http://www.usatoday.com/news/health/2009-09-01-seniors-AARP-health-care-debate_N.htm).

¹⁶ Dawn Teo, *Humana Mailer Targets Elderly, Claims Medicare Benefits to be Cut*, Huffington Post, September 16, 2009, (available online at http://www.huffingtonpost.com/dawn-teo/humana-mailer-targets-eld_b_289421.html).

¹⁷ Teresa DeCaro of CMS, letter to Gail Miller of Humana, Inc., September 18, 2009, (available online at <http://www.finance.senate.gov/press/Bpress/2009press/prb092109a.pdf>).

¹⁸ Center for Drug and Health Plan Choice Memorandum to All Medicare Advantage Organizations, Medicare Advantage-Prescription Drug Organizations, Cost Based Organizations and Demonstration Plans, *Misleading and Confusing Plan Communications to Enrollees*, September 21, 2009.

¹⁹ Senator Max Baucus, *At Baucus' Urging, CMS Cracks Down On Insurance Company Scare Tactics*, press release, September 21, 2009, (available online at <http://finance.senate.gov/press/Bpress/2009press/prb092109.pdf>).

²⁰ Representative Dave Camp, letter to Acting Administrator Frizzera, September 22, 2009, (available online at <http://republicans.waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=145980>).

September 23, 2009

Ranking Member Camp writes Acting Administrator Frizzera asking that CMS immediately provide any and all document and communications with regard to initiating an investigation into Humana or censoring any other Medicare Advantage plan CMS staff had with the President, his staff, White House Office of Health Reform, and Secretary Sebelius and her staff.²¹

²¹ Representative Dave Camp, letter to Acting Administrator Frizzera, September 23, 2009, (available online at <http://republicans.waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=146112>).