

FORTNEY PETE STARK, CALIFORNIA, CHAIRMAN  
SUBCOMMITTEE ON HEALTH

LLOYD DOGGETT, TEXAS  
MIKE THOMPSON, CALIFORNIA  
XAVIER BECERRA, CALIFORNIA  
EARL POMEROY, NORTH DAKOTA  
RON KIND, WISCONSIN  
EARL BLUMENAUER, OREGON  
BILL PASCRELL, JR., NEW JERSEY  
SHELLEY BERKLEY, NEVADA

WALLY HERGER, CALIFORNIA, RANKING MEMBER  
SAM JOHNSON, TEXAS  
PAUL RYAN, WISCONSIN  
DEVIN NUNES, CALIFORNIA  
GINNY BROWN-WAITE, FLORIDA

CHARLES B. RANGEL, NEW YORK, CHAIRMAN  
COMMITTEE ON WAYS AND MEANS

JANICE MAYS, CHIEF COUNSEL AND STAFF DIRECTOR  
CYBELE BJORKLUND, SUBCOMMITTEE STAFF DIRECTOR

JON TRAUB, MINORITY STAFF DIRECTOR  
DAN ELLING, SUBCOMMITTEE MINORITY, STAFF DIRECTOR

**Congress of the United States**  
**U.S. House of Representatives**  
**COMMITTEE ON WAYS AND MEANS**

WASHINGTON, DC 20515

SUBCOMMITTEE ON HEALTH

October 13, 2009

The Honorable Kathleen Sebelius  
Secretary  
Department of Health and Human Services  
200 Independence Ave., S.W.  
Washington, D.C. 20201

Dear Secretary Sebelius,

I am writing to express my concern that the Department's justifications for initiating the investigation into Humana, Inc. are at best shaky and clearly based on assumptions rather than on actual findings. Additionally, it appears that you may be unaware that the Centers for Medicare and Medicaid Service's (CMS) marketing regulations explicitly apply to co-branding organizations, of which AARP is the largest.

In your letter to Ranking Member Camp dated October 2, 2009, you provided three reasons for initiating the investigation into Humana, Inc. First, you take issue with the wording of the envelope, which, according to your letter, could be misleading in that a senior may think the letter included specific plan information. However, you neglect to mention that the letter included very clearly states that the communication is about legislation and includes the disclaimer that choosing to not act on a senior's part, "will not affect your membership in any Humana health plan." You also stated that CMS had a second concern that CMS was "investigating" whether Humana, Inc. used enrollee lists to target education and outreach efforts and a third concern that CMS "needs to ensure" that Humana, Inc. didn't use federal money for these activities. To my knowledge, no evidence has been presented to confirm that the plan violated any of these marketing regulations. However, CMS has proceeded as if the evidence of violations was not only present, but clear and convincing.

In this country we are innocent until proven guilty. CMS should conduct due diligence to confirm whether a regulation was indeed violated and complete all "investigations" before ruling to cut off all plan communications with the seniors they represent. Furthermore, the hundreds of other Medicare plan sponsors, who represent tens of millions of seniors and who have not communicated with their members are now guilty by association, having committed no violation. Yet, they are barred from communicating with their members in this attempt to silence any potential expressions of concern about the Democrats' planned Medicare cuts.

Finally, you wrote that CMS is not investigating AARP's communications because "AARP is not a Medicare contractor," but current CMS guidance in this area states that:

“Co-branding is defined as a relationship between two or more separate legal entities, one of which is an organization that sponsors a Medicare plan. The plan sponsor displays the name(s) or brand(s) of the co-branding entity or entities on its marketing materials to signify a business arrangement.... It is the plan sponsor’s responsibility to ensure that its co-branding partner(s) also adhere(s) to all applicable CMS policies and procedures. The plan sponsor should attest that its co-branding partners were provided with these Marketing Guidelines and that the co-branding partners agree to follow these guidelines with respect to all marketing materials related to the plan sponsor.”<sup>1</sup>

Based on this information it is erroneous to state that AARP is not subject to the same marketing requirements as other Medicare plans.

Additionally, you may be unaware that in 2008 alone AARP received more than \$411 million in royalties from one of their many insurance company business partners so that these companies could use AARP’s lucrative brand name to sell their products.<sup>2</sup> AARP spends millions each year to market these plans, as evidenced by their impressive television advertisement purchases. Your decision to ignore CMS’ regulations governing co-branding organizations and subsequent AARP actions, simply because AARP strategically keeps their name off contracts, is in violation of CMS’ own guidance.<sup>3</sup> CMS’ inaction simply encourages Medicare plans to create shell organizations to manage their member communications and advertisements outside of the purview of CMS. While I understand that AARP has spent millions of dollars to support the Democrats’ agenda, it seems to me that these “spin off” groups are something that the agency should want to avoid.

To this end, I request that you respond in writing clarifying your understanding of the applicability of marketing regulations in light of CMS guidance on this matter. Furthermore, I strongly encourage you to direct CMS to take a more judicious course of action when considering whether or not to initiate an investigation and ban communications. Outside pressure should not outweigh the need to conduct basic fact finding.

Sincerely,



WALLY HERGER  
Ranking Member  
Ways and Means Subcommittee on Health

---

<sup>1</sup> CMS, Pub. 100-16 Medicare Managed Care, “Chapter 3, Medicare Marketing Guidelines,” August 7, 2009, (available online at <http://www.cms.hhs.gov/ManagedCareMarketing/Downloads/R91MCM.pdf>).

<sup>2</sup> AARP, “Consolidated Financial Statements December 31, 2008 and 2007,” March 30, 2009, (available online at [http://assets.aarp.org/www.aarp.org\\_/TopicAreas/annual\\_reports/assets/AARPConsolidatedFinancialStatements.pdf](http://assets.aarp.org/www.aarp.org_/TopicAreas/annual_reports/assets/AARPConsolidatedFinancialStatements.pdf))

<sup>3</sup> CMS, Pub. 100-16 Medicare Managed Care, “Chapter 3, Medicare Marketing Guidelines,” August 7, 2009, (available online at <http://www.cms.hhs.gov/ManagedCareMarketing/Downloads/R91MCM.pdf>).