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ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

March 14, 2011

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
The Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

Pursuant to Rules X and XI of the United States House of Representatives, the Committee on Energy and Commerce is examining the improper inclusion of a proposal to encourage end-of-life planning in a Medicare regulation in the fall of 2010. As *The New York Times* explained on January 4, 2011, the inclusion of this regulation was clearly an attempt to subvert the democratic process:

“Although the health care bill signed into law in March did not mention end-of-life planning, the topic was included in a huge Medicare regulation setting payment rates for thousands of physician services. The final regulation was published in the Federal Register in late November. The proposed rule, published for public comment in July, did not include advance care planning.”

On March 3, 2011, during your appearance before the Energy and Commerce Committee Subcommittee on Health, you freely admitted your role in this controversy, telling Representative Gingrey that you made the decision to publish this regulation without notice or public comment. That decision is at odds with the testimony of Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs, who told the Energy and Commerce Committee Subcommittee on Oversight and Investigations in January 2011 that the American people deserve to see the content of rules before they are finalized, and that no one had the authority to insert the end-of-life planning proposal in such a manner.

We are very disturbed by your actions. It is clear that end-of-life regulations would not make it through Congress or survive a public debate during the rulemaking process, and were thus dropped into the final rule without allowing the public any opportunity to comment. The

secrecy surrounding their inclusion in the final rule indicates that this was a political maneuver designed to avoid public scrutiny and comment.¹

The Patient Protection and Affordable Care Act (PPACA) grants you enormous powers over the American health care system never before wielded by the Secretary of the Department of Health and Human Services. This incident demonstrates why we are concerned about that power: if a regulation based on a proposal that could not be enacted through the legislative process can be inserted into a final rule without a chance for any public comment, then there appear to be no limits to the power delegated to you as Secretary under the PPACA.

Because you have openly admitted your role in this controversy, we write to you to ask that your designee be made available to brief Committee staff on this issue during the week of March 21-25. We hope to learn what the Department's internal discussions were regarding this provision, and to learn how the proposal was surreptitiously inserted and what can be done in the future to guarantee that the Administration will not attempt to usurp Congressional prerogatives.

If you have any questions regarding this request, please contact Committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman



Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations



Joseph R. Pitts
Chairman
Subcommittee on Health



Phil Gingrey
Member

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Frank Pallone, Jr., Ranking Member
Subcommittee on Health

¹ *The New York Times* reported on December 25, 2010, that the office of Representative Earl Blumenauer of Oregon said in an e-mail in early November: "While we are very happy with the result, we won't be shouting it from the rooftops because we aren't out of the woods yet... We would ask that you not broadcast this accomplishment out to any of your lists... The longer this goes unnoticed, the better our chances of keeping it." On January 4, 2011, *The New York Times* reported: "While administration officials cited procedural reasons for changing the rule, it was clear the political concerns were also a factor."