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Was Kathleen Sebelius's™ support of Obamacare legal? Our Neil McPhie, Esq. discusses with Government Executive

Did Sebelius Break the Law in Soliciting Support for Obamacare?

By Charles S. Clark

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Two weeks after Health and Human Services Secretary Kathleen Sebelius resigned, a new audit has revived a year-old debate over whether she violated laws or ethics rules in drumming up private support for enrolling more Americans in health insurance exchanges. The Government Accountability Office on Monday released a fact-finding review of Sebelius's 2013 contacts with five organizations to encourage them to back the nonprofit Enroll America's ground-game actions to encourage the uninsured to sign up for the exchanges. The report was requested last May by House and Senate Republicans, who also sought a probe from the HHS inspector general (which decided not to do a report). Sebelius's "activities call into question whether appropriations and ethics laws are being followed," wrote Sens. Lamar Alexander, R-Tenn., and Orrin Hatch, R-Utah. "The Antideficiency Act prohibits entering into contracts or obligations or accepting voluntary services for the United States in excess of available appropriations. And the Office of Government Ethics Rule §2635.808 prohibits fundraising in an official's private capacity from any person or entity that is regulated by that official's agency." But GAO's fact-finding report steered clear of conclusions on the legality of Sebelius' actions, focusing on what meetings took place, when, and for what purpose. "Specifically, the secretary requested financial support for Enroll

America from the Robert Wood Johnson Foundation and H&R Block; and nonfinancial support, such as technical assistance, from Ascension Health, Johnson & Johnson," and the Kaiser Foundation Health Plans and Kaiser Foundation Hospitals, GAO said. Sebelius had obtained guidance from the HHS general counsel before the contact, auditors noted, and the only call that could have been linked to a later financial contribution to Enroll America was her conversation with the Robert Wood Johnson chief executive. Months after Sebelius' January 2013 call, the foundation, GAO was told, made two grants, a \$3 million grant in April 2013 for operational support and a \$10 million challenge grant in May 2013, through which the foundation agreed to match donations that other sources made to Enroll America. "During this call, according to HHS, the secretary encouraged RWJF to continue providing financial support to Enroll America," GAO wrote. "During the call, according to the RWJF representative, the secretary encouraged RWJF to continue its commitment to enrollment in health care coverage. However, RWJF did not recall the secretary specifically mentioning Enroll America or making a direct request for financial support." Its representative said "the decisions to make these two grants were not made in response to the Secretary's call." Asked for comment, HHS spokeswoman Erin Shields Britt said in an email to Government Executive

," "As we have said, including in communications to Congress as early as June of last year, according to the Public Health Service Act, the secretary is authorized to support (and encourage others to support) programs and private nonprofit entities working in programs related to health information and health promotion, preventive health services, and education in the appropriate use of health care." Since 1976," she continued, "Title XVII of the Public Health Service Act has authorized HHS officials to work with public and private partners to advance the public health. Public-private partnerships are used by HHS secretaries to pursue health care fraud initiatives; ensure that vaccines and antibiotics are widely available; advance biomedical research; and fight cancer, heart disease, polio and traumatic brain injuries. The previous administration applauded the use of public-private partnerships to launch the Medicare prescription drug program and enroll children in the Children's Health Insurance Program." At least one of the senators who requested the study remains critical of Sebelius, but stopped short of accusing her of violating the law. "GAO has

now confirmed that the secretary of Health and Human Services opted to solicit and receive funds from five health care organizations to help pay for the President's \$2.6 trillion health spending law," said Hatch's press secretary, Aaron Forbes. "Senator Hatch believes these actions are of questionable merit and presented an unnecessary and disconcerting appearance of a conflict of interest. The senator hopes the next HHS secretary will use this information to make better choices." A spokesman for Rep. Jack Kingston, R-Ga., one of the lawmakers who requested the GAO study, said, "This report on the secretary's fundraising for Obamacare fits in to a pattern of abuses of government office to pursue political ends. The person in charge of the government takeover of health care should not be asking CEOs to bankroll a partisan marketing campaign, period." Sebelius may not be on solid legal ground, according to Neil McPhie, a law partner at Tully Rinckey PLLC who was a President George W. Bush appointee to a seven-year term as the Merit System Protection Board's vice chairman. "Sections 1703 and 1704 of the Public Health Service Act authorize the secretary to support, by grant or contract, preventive health services and education on appropriate use of healthcare," he told Government Executive

. "But if you drill down to the specific authorization in the enumerated sections, you'll find she is indeed authorized for a number of things, but nowhere does it say she can solicit money." McPhie said GAO could have elaborated more on the law. Rules promulgated by the Office of Government Ethics state "clearly" that an official cannot use government time or property to benefit herself or an entity, he said. For example, the executive can't use his government position to endorse an organization, or a nonprofit's products or people. "One may not use nonpublic government information to further private interests of themselves or others," McPhie added. "The context matters because a less important employee would get in trouble for this sort of thing," he said. "What is remarkable here is that ethics rules apply with more rigor with political appointees, so seems to me the secretary crossed the line in a number of respects." McPhie said he found it "troubling that HHS disregarded so clearly some basic ethics issues, for which a not-so-important employee could lose job. I'm not sure whether they turned a blind eye or felt they were above the law," he said. "But someone at HHS should have asked, 'What about this?'"