United States Senate

WASHINGTON, DC 20510

March 18, 2004

Honorable David M. Walker
Comptroller General of the United States
General Accounting Office
441 G Street NW
Washington, DC 20548

Dear Comptroller General Walker:

As you may have read in recent press reports, the chief actuary of the Medicare system, Richard S. Foster, an employee of the Department of Health and Human Services (HHS), was threatened with termination of employment by Thomas A. Scully, the former head of the Center for Medicare and Medicaid Services (CMS), if Mr. Foster disclosed to Congress cost estimates for the then-pending Medicare prescription drug bill. Mr. Scully has admitted to the media that he blocked Mr. Foster from providing at least one cost estimate to Congress in June 2003.[1] Moreover, Mr. Foster has indicated that he provided estimates to others in the Administration who may have participated in the effort to suppress the information.

We believe that this activity constitutes a clear violation of Pub. L. No. 108-199, Div. F, Tit. VI, § 618[2], and we seek your legal determination on the matter.

The above referenced law states:

> "No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who –
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> (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at

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[1] Tony Pugh, "Medicare Cost Expert Muzzled; Actuary Told Not to Give Higher Estimate in 03," Knight-Ridder, March 12, 2004

[2] The prior fiscal year appropriations law contains the identical provision. *See* P. Law. No. 108-7, Div. J, § 620. Sec. 7211. *See also* 5 U.S.C. § 7211, which states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee;"

We believe that the activity in question at HHS squarely fits the description of prohibited conduct. In the instant case, Mr. Foster claims that he was prevented, by way of threats from his superiors, from communicating with Congress on a matter directly pertaining to his employment duties and the agency itself.

In this case, the suppressed information was no small matter. Mr. Foster was prevented from informing Congress that it was poised to take action that would result in a cost to the Treasury of almost $150 billion more than Congress understood.

The HHS Inspector General has commenced a factual investigation of this matter and we hope to learn from that investigation which members of the Administration knew about or encouraged Mr. Scully's actions. We are requesting from you a legal determination if the conduct in question, which Mr. Scully has admitted took place on at least one occasion and which higher-level Administration officials have not denied, violates the above-referenced appropriations law or any other Federal law. In addition to a determination as to the legality of the conduct at issue, we also seek guidance on what form of redress would be appropriate in this case.

We look forward to your answer to these critical questions.

Sincerely,

Frank R. Lautenberg

Tom Harkin

Jack Reed

Jim F. Kerry

Patrick Leahy Debbie Stabenow

Tim Johnson Mark Pryor

Maria Cantwell J. Lieberman

Carl Levin Paul Sarbanes

Barbara A. Mikulski Charles Schumer

John Edwards Hillary Rodham Clinton