

United States Senate  
WASHINGTON, D.C.

September 9, 2013

Elaine Kaplan  
Acting Director  
Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415-1000

Dear Acting Director Kaplan:

We are writing to better understand the Office of Personnel Management's (OPM) 2010 decision to grant the U.S. Department of Health and Human Services (HHS) "direct-hire authority" after the passage of the Patient Protection and Affordable Care Act. Direct-hire authority is a legal authority that the OPM can give to Federal agencies for filling vacancies when a critical hiring need or severe shortage of candidates exists. This authority effectively allows Federal agencies to hire, after public notice is given, any qualified applicant without regard to other provisions of law which would otherwise place certain restrictions on the hiring process.<sup>1</sup>

On the date of the passage of the Patient Protection and Affordable Care Act – which became law on March 23, 2010—former OPM director John Berry's sent a letter to Denise Wells, Deputy Assistant Secretary for Human Resources at HHS. The letter states that HHS has the authority "to fill 1,814 mission critical positions at the GS-9 through GS-15 grade levels(or equivalent) as depicted above [in the letter] nationwide. This authority is based on a critical hiring in support of the Health Care Education Affordability Reconciliation Act of 2010." The letter is clear that "this authority will provide HHS with the means to meet hiring needs in support of the Act."

In the interest of protecting taxpayers' dollars and ensuring sound government operations, we have several questions based on OPM's use of direct-hire authority to fill more than 1,800 "mission critical positions" necessary for implementing the health care law. We request OPM's full and timely response to the following issues and related questions within 30 days. Thank you.

Sincerely,



Tom Coburn, M.D.  
U.S. Senator



Richard Burr  
U.S. Senator



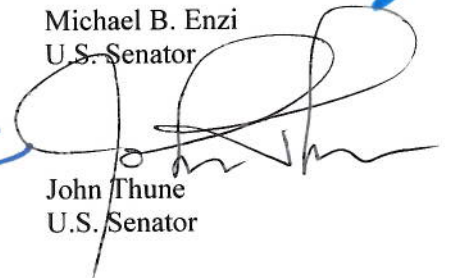
Michael B. Enzi  
U.S. Senator



Charles E. Grassley  
U.S. Senator



Kelly Ayotte  
U.S. Senator



John Thune  
U.S. Senator

<sup>1</sup> 5 U.S.C. 3309-3318, 5 CFR part 211, or 5 CFR part 337, subpart A

## Questions About OPM's Granting HHS Direct-Hire Authority on March 23, 2010

- 1) In Director Berry's letter, he said that OPM anticipated the critical hiring need would exist through September 30, 2010, but that HHS would use regular hiring authorities beyond that timeframe. Furthermore, he said "this authority expires on September 30, 2010."
  - a. Therefore, please confirm that the direct hire authority granted to HHS on March 23, 2010 was terminated on September 30, 2010 and was not renewed or extended.
  - b. Please also confirm whether or not HHS has, since March 23, 2010, requested direct-hire authority for implementing any provision of the Patient Protection and Affordable Care Act or of the Health Care and Education Affordability Reconciliation Act.
  - c. Please detail which other Federal Departments or Agencies may have been granted direct-hire authority by OPM (and, if so, for what period) for purposes of implementing the Patient Protection and Affordable Care Act or the Health Care and Education Affordability Reconciliation Act.
  
- 2) Director Berry's letter explicitly connected the direct-hire authority to implementing provisions of the Health Care and Education Affordability Reconciliation Act (Reconciliation Act). At the time the letter was issued, the Reconciliation Act had not become law. The Reconciliation Act was not signed until a week later on March 30th. Moreover, Director Berry's letter listed provisions of the Patient Protection and Affordable Care Act, which were not amended or otherwise modified by provisions of the Reconciliation Act. For example, the Hospital Wage Index provision requiring HHS to use a particular wage index in 2010 was not amended in the Reconciliation Act.
  - a. Why did OPM's granting of direct-hire authority identify provisions of the newly-passed law (the Patient Protection and Affordable Care Act), when his letter granted authority explicitly related to the Reconciliation Act?
  - b. Were any of the direct-hire authorities used for personnel working on provisions implementing the the Patient Protection and Affordable Care Act? While that was clearly the intent, it would seem to flatly contradict the explicit legal authority OPM outlined.
  
- 3) While OPM's granting of direct-hire authority to agencies can assist federal managers to move quickly in filling positions of critical need, the scope of the allowance in this case is significant. For example, OPM announced this authority would terminate on September 30, 2013 – six months and a week after the authority was granted. The pace of hiring that would be required for HHS to maximize this authority and fill each of those "critical needs" is incredible. *HHS would have to have hired roughly 100 individuals per day during that timeframe.*
  - a. Was every single "critical need" position filled before the authority terminated?
  - b. Please provide a list of when each position was filled.
  
- 4) OPM guidance to agencies specifies that applicants must meet all qualification requirements prior to appointment when using direct-hire authority. The guidance explains, "at the time of appointment, the appointing official must ensure the individual selected meets all requirements of the position, including age, citizenship, medical, nepotism (employment of relatives), qualifications (experience, education and license/certification), and suitability requirements."<sup>2</sup>
  - a. Please outline what steps, policies, procedures, or guidance OPM would expect HHS to adhere to in implementing the above requirement.
  - b. Please detail the average time period—outside of this authority—between posting the following positions at HHS and these positions being filled:
    - i. Social Science Analyst/Specialist

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<sup>2</sup> <http://www.opm.gov/policy-data-oversight/hiring-authorities/direct-hire-authority/#url=Fact-Sheet>

- ii. Administrative and Program Specialist
- iii. Program Analyst/Management Analyst
- iv. Grants Management Analyst
- v. Information Technology Specialist

- 5) A nearby chart, excerpted from OPM Director Berry's letter, outlines the 1,814 positions that HHS had a "critical need" to fill to implement the health law.
- a. Please provide a breakdown of which positions were filled, at what General Scale pay level, in what offices, agencies, and other subdivisions of HHS.
  - b. Please provide a breakdown of how many of those individuals who filled jobs remain in the same job currently.
  - c. Please provide the average time period required to fill the jobs that were filled.
  - d. Please explain why there was a "critical need" for HHS to waive provisions of federal hiring law to hire 90 dental officers to implement the health care law.

(1) *Identification of the positions that must be filled.* HHS has a critical need to fill 1,814 positions this fiscal year to implement the Act, as described below:

Title	Series/Grade Level	Positions
Social Science Analyst/Specialist	GS-101-9/15	59
Health Insurance Specialist	GS-107-9/15	350
Administrative and Program Specialist	GS-301-9/15	55
Program Analyst/Management Analyst	GS-343-9/15	235
Accountant	GS-510-9/15	40
Dental Officer	GS-680-11/14	90
Public Health Advisor/Analyst	GS-685-9/14	291
Consumer Safety Officer	GS-696-9/13	261
Grants Management Specialist	GS-1101-9/15	92
Criminal Investigator	GS-1811-9/13	50
Information Technology Specialist	GS-2210-9/15	291
<b>Total:</b>		<b>1814</b>

- 6) Given the multitude of provisions, deadlines, and requirements in the Patient Protection and Affordable Care Act and the Health Care and Education Affordability Reconciliation Act, it is not entirely surprising that OPM granted HHS direct-hire authority to implement provisions of the law. However, given the large number of positions identified to be filled in such a short time-frame, we would like to better understand OPM's granting of this authority in the context of the precedence.
- a. Therefore, please provide a list of each of the times OPM may have granted any Federal department or agency direct-hire authority for purposes of a "critical hiring need" since January 1, 2000. Please detail
    - i. the number of positions authorized
    - ii. the time period the authority was operative
    - iii. the reason identified for OPM's granting of such authority.
- 7) Clearly, one of the top priorities of hiring federal employees is ensuring that selected individuals' conduct meets high ethical standards and in no way jeopardizes the public trust. This is especially relevant in the "critical need" positions identified in Director Berry's letter, since many of the positions outlined require handling sensitive financial or taxpayer information. For example, clearly the individuals filling the roles of the 40 accountants, 50 criminal investigators, and 291 information technology specialists identified would likely have significant professional responsibilities. We note that Director Berry suggested HHS "take particular care in conducting pre-employment background investigations to ensure candidates are suitable for Federal

employment, may be credentialed in accordance with Government-wide credentialing standards and can hold a security clearance at the appropriate level (if required for the particular position).”

- a. Please confirm whether or not each of the individuals hired to fill a “critical need” position was subject to a background check prior to their hire. Were those background checks identical to the background checks of comparable employees outside of the direct-hire authority?
  - b. Please detail the number of individuals hired to fill a “critical need” position who have been granted security clearances of any kind. Are those security clearances identical to the security clearances of comparable employees outside of the direct-hire authority?
- 8) A direct-hire authority enables an agency to hire, after public notice is given, any qualified applicant without regard to the provisions of Federal law and regulation otherwise govern and guide the hiring process. Under normal hiring circumstances, OPM’s primary one-stop-portal of federal job vacancies is USAJobs.gov.
- a. However, given the different circumstances, under direct-hire authority, please confirm if the “critical need” positions were posted on USAJobs.gov after they were announced.
  - b. What other methods did OPM or HHS use, other than USAJobs.gov, to make the public aware of the “critical need” positions?
  - c. What methods did OPM or HHS use to identify candidates for the “critical need” positions?
- 9) A review of the 2010 General Schedule pay scale shows that most of the “critical need” positions would have an accompanying salary starting between \$51,630 (GS-9, Step 1) and \$123,785 (GS-15, Step 1) per year in the Washington, DC metro area.<sup>3</sup>
- a. Please provide a list of the localities for each position.
  - b. Please explain the rationale for why various positions were listed at a particular GS pay level.

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<sup>3</sup> <http://archive.opm.gov/oca/10tables/indexqs.asp>