



## Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

### **LEGAL ANALYSIS OF THE PROVISIONS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AND CORRESPONDING EXECUTIVE ORDER REGARDING ABORTION FUNDING AND CONSCIENCE PROTECTION**

The purpose of this legal memorandum is to identify the problems of the recently-passed Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (“PPACA” or “the Act”), in relation to abortion funding and conscience protection, and then to assess whether (and if so, how) the corresponding Executive Order of March 24, 2010, corrects those problems. Although we wish it were otherwise, we must conclude that PPACA poses serious problems in these two areas, and that the Executive Order does not correct those problems.

#### **I. PPACA Violates Both Principles of the Hyde Amendment, and the Accompanying Executive Order Does Not Correct Those Problems**

There are two parts to the Hyde Amendment. *See* Omnibus Appropriations Act, 2010, Div. D, tit. V, § 507. The first says no appropriated federal funds can be used for elective abortions.<sup>1</sup> *Id.* § 507(a). The second says no such funds can be used to pay for health insurance coverage that includes such abortions. *Id.* § 507(b). PPACA violates both parts of this policy, and the Executive Order does not rectify those violations.

As to the first Hyde principle, the Executive Order states that the Act “maintains” the Hyde restrictions, but the Act appears to do so only in two specific contexts, and otherwise does not. As a result, federal funds that PPACA appropriates anywhere else, including, at a minimum, Community Health Centers, are unrestricted by Hyde and so must be used to pay for abortions. Thus, the stated purpose of this provision of the Executive Order is commendable, but the provision is ineffective apart from the two particular contexts where Hyde-like statutory protections actually apply.

As to the second principle, the Order ensures strict enforcement of the accounting mechanism that the Senate bill employed in lieu of a ban on federal funding of insurance plans covering abortion. Thus, this part of the Order implements an actual provision of the Act, and so is legally valid, but the underlying provision itself violates the second Hyde principle.

---

<sup>1</sup> Throughout this memo, the phrase “elective abortion” will be used to refer to abortions that have long been ineligible for federal funding in major health programs—that is, all abortions except for cases of rape, incest, or danger to the life of the mother. The term is used here as shorthand for a longstanding federal policy, not as an expression of a medical or moral judgment.

## A. PPACA's Direct Federal Funding of Abortion

Courts have held that when Congress authorizes the provision of comprehensive health services, it *must* pay for “medically necessary abortions,”<sup>2</sup> *except* insofar as Congress expressly excludes abortion funding. *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 637-38 (6<sup>th</sup> Cir. 1996) (holding that a state’s refusal to pay for “medically necessary” abortions for which federal funding is not expressly barred by Congress violates Medicaid’s general requirement that the state provide medically necessary services).

This question originally arose in the context of Medicaid in the 1970s. In the years before the Hyde Amendment was first enacted by Congress in 1976, Medicaid was required to pay for about 300,000 abortions a year. “Because abortion fits within many of the mandatory care categories, including ‘family planning,’ ‘outpatient services,’ ‘inpatient services,’ and ‘physicians’ services,’ Medicaid covered medically necessary abortions between 1973 and 1976,” even though the Medicaid statute itself never used the word “abortion.” *Engler*, 73 F.3d at 636. If broad language of this type were not read as mandating payment for abortion, there would have been no need for Congress to include the Hyde Amendment in the Labor/HHS appropriations bill each year for the last 34 years.

In the more than thirty years since, courts have repeatedly and consistently interpreted statutory language that describes relatively broad categories of medical services to compel—not just *allow*, but *compel*—abortion funding. *See, e.g., Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 427 (5<sup>th</sup> Cir. 1995), *cert. denied*, 517 U.S. 1104 (1996); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497, 502-03 (8<sup>th</sup> Cir. 1995), *rev’d in part on other grounds*, 516 U.S. 474 (1996); *Hern v. Beye*, 57 F.3d 906, 910-13 (10<sup>th</sup> Cir.), *cert. denied*, 516 U.S. 1011 (1995). *See also Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980) (holding that the Hyde Amendment substantively modified the Medicaid Act so that a state’s refusal to pay for Hyde-eligible abortions violated the Act); *Hodgson v. Bd. of County Com’rs*, 614 F.2d 601, 608 (8<sup>th</sup> Cir. 1980) (holding that a state’s refusal to pay for Hyde-eligible abortions was not based on a uniform standard of medical need as required by the Medicaid statute); *Zbaraz v. Quern*, 596 F.2d 196, 199 (7<sup>th</sup> Cir. 1979) (holding that a state’s refusal to pay for Hyde-eligible abortions was “unreasonable” and “inconsistent with the objectives of the [Medicaid] Act” in violation of the Act), *cert. denied*, 448 U.S. 907 (1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126, 134 (1<sup>st</sup> Cir.) (same), *cert. denied*, 441 U.S. 952 (1979).<sup>3</sup>

In this jurisprudential context, PPACA has created two specific statutory bans on the direct funding of abortion with federal taxpayer dollars appropriated under the Act. First, PPACA provides for grants to school-based health centers, and at the same time defines those centers so that they “do[] not perform abortion services.” PPACA, § 4101. Second, PPACA

---

<sup>2</sup> In the abortion context, “health” is construed broadly to include any abortion undertaken for physical, emotional, psychological, familial, or age-related reasons relevant to the well being of the patient. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In light of this broad definition, virtually any abortion a physician is willing to perform is deemed “medically necessary.” *See* JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 12 (1979).

<sup>3</sup> We find these legal precedents regrettable, and hope that they will eventually be reversed. But in the meantime, we can neither pretend they are not there nor minimize their impact.

prohibits the use of tax credits and cost-sharing reduction payments to pay for elective abortions in the health insurance exchanges. *Id.*, § 1303(b)(2). But this leaves all remaining federal funds appropriated under the Act without Hyde restrictions—which means that those funds *must* be used to pay for abortions where the statutory language describing the services is broad enough to encompass abortion.<sup>4</sup>

For example, PPACA appropriates billions of dollars for Community Health Centers (CHCs). CHCs provide primary health services, including “health services related to family medicine, internal medicine, . . . obstetrics, or gynecology that are furnished by physicians,” and “family planning services.” 42 U.S.C. § 254b. Thus, the statutory terms that describe the services provided by the CHC program are as broad as the terms used in the Medicaid statute, and in the case of “family planning services,” the terms are identical. Therefore, by virtue of the same reasoning applicable to the Medicaid statute, courts are highly likely to conclude that the CHC program *must* provide tax-funded abortions unless Congress attaches to the CHC funds a Hyde-type limitation. And because PPACA appropriates CHC funds without including a Hyde-type limitation in that appropriation, those funds *must* be used for abortions.

CHCs have existed for a long time, and so far they have not provided abortions except in the narrow range of cases where Hyde has authorized them (rape, incest, and threat to maternal life). But that is precisely because all of their federal funding, at least so far, appears to have been made through annual appropriations bills that included the Hyde Amendment. The problem with PPACA is that it makes a *separate* appropriation of billions of dollars for CHCs *without* including Hyde Amendment language to cover that appropriation. By its very terms, the Hyde Amendment only applies to appropriations to which the Amendment is attached. Omnibus Appropriations Act, 2010, Div. D, tit. V, § 507 (a) & (b) (stating that “[n]one of the funds appropriated in *this* Act . . . shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion) (emphasis added).<sup>5</sup>

The Secretary of HHS wrote recently that HHS regulations exclude federal funding of abortions in CHCs, subject to life-of-the-mother, rape, and incest exceptions. We agree that the HHS regulations she cites are perfectly valid as to funds that Congress appropriated specifically subject to the annual Hyde restriction. But those regulations rely for their statutory authority—

---

<sup>4</sup> Given the length and complexity of the Act, we cannot exclude the possibility that PPACA contains other particular exclusions of abortion funding in areas where that funding might otherwise be mandated. But this uncertainty only underscores the need to have a prohibition on such funding that covers the entire Act.

<sup>5</sup> The Hyde Amendment covers not just “funds appropriated in this Act,” but also “funds in any trust fund to which funds are appropriated in this Act.” Omnibus Appropriations Act, 2010, Div. D, tit. V, § 507. Based on the latter, some may argue that PPACA appropriations may not be used for abortions in CHCs if they are commingled in a trust fund that is already Hyde-restricted. But PPACA does not place CHC funds into such an existing trust fund. Rather, PPACA creates a *new* fund into which its new appropriations shall be placed. PPACA, § 10503 (“It is the purpose of this section to establish a Community Health Center Fund (referred to in this section as the ‘CHC fund’) . . . There is authorized to be appropriated, and there is appropriated, out of any monies in the Treasury not otherwise appropriated, to the CHC Fund” specified amounts to be used for CHCs). *See also* Executive Order, § 3 (noting that PPACA creates new CHC fund within HHS). Thus, the PPACA-appropriated funds are “untainted” by any existing Hyde limitation on the fund into which they are appropriated, and must therefore still be spent on abortions.

and their validity—on the annual Hyde Amendment. Because that annual Hyde Amendment does not apply to PPACA appropriations for CHCs, and because that section of PPACA does not have Hyde language of its own, the regulations are highly likely to be found unenforceable as to these PPACA-appropriated funds.

Indeed, the fact that the HHS regulations currently call for abortions to be provided in the CHC program in cases when the mother’s life is endangered (42 C.F.R. § 50.304), and in cases of rape or incest (42 C.F.R. § 50.306), is an implicit acknowledgment that abortions are generally within the range of services that CHCs provide, subject only to such limitations as Congress has imposed through the Hyde Amendment. The problem is that PPACA makes an appropriation to the CHC program *without* an accompanying Hyde Amendment, thereby depriving the regulations of any statutory basis as applied to the funds that PPACA appropriates for CHCs.

In sum, the combination of (a) the statutory mandate that CHCs currently have to provide comprehensive health services, and (b) the absence of any Hyde limitation on the funds that PPACA appropriates for CHCs, means that (c) courts are highly likely to read PPACA to require the funding of abortions at CHCs in the absence of a statutory correction.

#### **B. PPACA’s Federal Funding of Plans That Cover Abortion**

Section 1303 of the Act limits the direct use of a federal tax credit specifically to fund abortion coverage in qualified health plans. It attempts to segregate funds within health plans in order to keep federal funds distinct from other funds used directly for abortions. But under Section 1303, the tax credits are still used to pay overall premiums for health plans covering elective abortions. This violates the principle reflected in the second part of the Hyde Amendment, which forbids use of federal funds for any part of a health benefits package that covers elective abortions. Omnibus Appropriations Act, 2010, Div. D, tit. V, § 507(b). Notably, this same principle is enforced in other federal insurance programs, such as the Federal Employees Health Benefit Program. *Id.*, Div. C, tit. VI, § 613.

This part of PPACA would also impose a serious burden on the consciences of millions of Americans. Any family having to buy such a subsidized plan—for example, because its coverage or provider network are necessary to meet the family’s health needs—will be forced by the Act to provide a separate payment, on a regular basis, solely to pay for other enrollees’ abortions. The Act specifies that a plan including elective abortions “shall” obtain this fee from every enrollee, allowing no accommodation for conscientious objection. PPACA, § 1303(b)(2)(B). Thus, even if this mechanism succeeds in preventing taxpayers from being forced to pay for abortions *through their federal taxes*, it does so at the cost of forcing them to pay for abortions *directly from their own pockets*.

#### **C. The Executive Order Cannot Fix PPACA’s Abortion Funding Problems**

It is the constitutional duty of the President and the Executive Branch to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3, cls. 4. The legislative authority, however, is reserved to Congress and the Legislative Branch. *See id.* art. I. Correspondingly, in

his actions to enforce the law, such as issuing an Executive Order,<sup>6</sup> the President may not amend or otherwise contradict the legislative mandates expressed by Congress in the form of statutory law. See *Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172, 188-89 (1999). See also *The Confiscation Cases*, 87 U.S. 92, 112-13 (1873) (“No power was ever vested in the President to repeal an act of Congress.”). Finally, it is the Judicial Branch, not the Executive Branch, that has the final word on what the law means. See U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

As discussed above, the courts have (regrettably but consistently) determined that statutes broadly funding medical services *require* the funding of abortion, unless another applicable statutory provision expressly says otherwise. PPACA provides for funding of just such a broad range of services. And because the annual Hyde Amendment does not apply to the section of PPACA dealing with CHCs, and that section of PPACA does not contain relevant Hyde-like language of its own, courts will almost certainly read PPACA as intended by Congress to require—not just *allow*, but *require*—the funding of abortions with the taxpayer dollars PPACA appropriates for CHCs.

No action of the Executive Branch—no regulation of HHS, no Executive Order of the President—can either amend the statutory language of PPACA, or run afoul of the construction that courts will give to that language. Accordingly, if the President were to issue an Executive Order (and perhaps subsequent regulations) that purported to *forbid* the use of PPACA funds for abortions at CHCs, in a context where statutory terms like those describing the scope of CHC services have long been read by courts to *require* the use of the funds for that purpose, the Executive Order would almost certainly be struck down as exceeding the President’s authority. This judicial action would most likely occur as a result of test-case litigation, brought by advocates for abortion funding at whatever time they consider most politically advantageous.

#### **D. The Executive Order Does Not Purport to Fix PPACA’s Abortion Funding Problems**

Apparently cognizant of the constitutional prohibition on the Executive Branch’s exercising legislative power, the Executive Order does not describe itself as creating any new restrictions with regard to abortion. Instead, the Order only purports to describe what the Act already provides, and to enforce those existing provisions. The main problem is that two of the operative provisions of the Order misdescribe what PPACA actually does. Correspondingly, the enforcement of those provisions in accordance with the Order’s misdescription is highly likely to be held invalid as exceeding the President’s authority, if challenged in court. Two other provisions of the Order do accurately describe features of PPACA, and so do not suffer from the problem of invalidity. But they suffer from a different problem instead—though legally valid, those provisions fail to meet the standard of the Hyde Amendment regarding the ban on funding

---

<sup>6</sup> The President’s power, if any, to issue an executive order “‘must stem either from an act of Congress or from the Constitution itself.’” *Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172, 188-89 (1999) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). Here, there is no question of the President’s exercising his inherent authority under the Constitution (*e.g.*, as Commander in Chief of the military), so any authority to issue an executive order would have to arise from—and be consistent with—the language of the statute.

plans that cover abortion, mirroring the failure of the statute itself in this regard. Thus, none of the provisions of the Order represent valid fixes to those shortcomings of PPACA.

First, the Executive Order says that “[t]he Act maintains current Hyde Amendment restrictions.” Executive Order, § 1. If “maintains” means simply that PPACA does not repeal the annual Hyde Amendment that covers most HHS appropriations, then the statement is true but obvious and irrelevant under PPACA. But if “maintains” means that PPACA includes the Hyde restrictions and applies them to its own appropriations for CHCs, then the statement is false, except in the two specified areas described above. Therefore, PPACA appropriations for CHCs are still not subject to a Hyde restriction and must be used to pay for abortions. This is no fix.

Second, the Executive Order says that “[e]xisting law prohibits these [community health] centers from using Federal funds to provide abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), as a result of both the Hyde Amendment and longstanding regulations containing the Hyde language.” Executive Order, § 3. But once again, the annual Hyde Amendment does not cover PPACA appropriations for CHCs, and the HHS regulations are based exclusively on that inapplicable Amendment. So although *annual* appropriations for CHCs are restricted by Hyde in the way described in the order, *PPACA* appropriations for CHCs are not. Therefore, to the extent the Executive Order suggests that existing law would subject PPACA funds to annual Hyde restrictions, it is inaccurate. And any enforcement based on that inaccurate account of the law would be invalidated in court.

Third, the Executive Order states that PPACA “specifically prohibits the use of tax credits and cost-sharing reduction payments to pay for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered) in the health insurance exchanges....” Executive Order, § 2. This is an accurate description of the Act as far as it goes, *see* PPACA, § 1303(b)(2), but adds nothing to the enforcement of this limitation. Moreover, PPACA does *not* prohibit the federal funding of abortion anywhere else among its own appropriations, with the exception of school-based health centers. PPACA § 4101. Nor does the Act prohibit—indeed, it explicitly permits—tax-credits and cost-sharing reduction payments to be made for *insurance policies* that include abortion, in violation of the second principle of the Hyde Amendment. PPACA, § 1303(a)(2). And the Executive Order does nothing to fix these shortcomings of the statute—nor could it, for if it did, it would involve an intrusion of the Executive Branch into the legislative power.

Fourth and finally, the Order states that PPACA “imposes strict payment and accounting requirements to ensure that Federal funds are not used for abortion services....” Executive Order, § 2. Again, this does correspond with the language of the statute. PPACA, § 1303(b)(2). But those statutory requirements were added to the Act in lieu of a flat ban on the use of federal funds to pay for *insurance policies* that include abortion. Accordingly, this provision of the Executive Order is legally valid, but it reinforces a provision that falls short of the second Hyde principle.

## **II. PPACA Omits Key Conscience Protections, and the Accompanying Executive Order Does Not Correct That Problem**

Federal law provides certain conscience protections in health care that cover both abortion and other morally controversial “services.” Unsurprisingly, the Act does not repeal those existing protections. The Act does, however, impose some new mandates that represent *new* threats to conscience without providing corresponding protection against *those* threats. The Executive Order claims that PPACA does not repeal certain existing federal conscience protections, a matter that no one disputes. Neither the Act nor the Order applies those existing conscience protections to the new appropriations of the Act. The Order also declines to enhance conscience protection in areas in which the President probably has the discretion to do so.

### **A. Conscience Protections Missing from PPACA**

To its credit, PPACA has three conscience provisions. The first provides that no qualified health plan can be required to cover abortion services as part of its essential benefits. PPACA, § 1303(b)(1). The second provides that no plan that participates in the exchange may discriminate against a health care facility or provider because of its unwillingness to provide, pay for, provide coverage of, or refer for abortion. *Id.*, § 1303(b)(4). The third forbids the federal government, or any state or local government or health care provider receiving appropriated funds, from discriminating against an individual or institutional health care entity because it declines to participate in assisted suicide, mercy killing, or euthanasia. *Id.*, § 1553.

At the same time, the Act has several serious deficiencies with respect to conscience protection. First, PPACA does not include the Weldon Amendment, a rider to the annual HHS/Labor appropriations bill that forbids the federal government, or any state or local government receiving appropriated funds, from discriminating against any health care entity based on its refusal to participate in abortion. Thus, unlike PPACA’s non-discrimination provision (described in the preceding paragraph), which restrains *plans* from discriminating on the basis of a refusal to participate in abortion, the omission of the Weldon Amendment means that PPACA does not restrain *government* from discriminating on that basis. A Weldon-type provision, along with a provision fully paralleling the Hyde Amendment on abortion funding, was approved by the House in November, but rejected in the final Senate bill that the House has now passed.

A second omission in PPACA concerns conscience protection outside the abortion context for stakeholders in the health insurance marketplace. Until now, insurers have been free under federal law to accommodate purchasers or plan sponsors who have moral or religious objections to certain services—if the insurers want the business of a purchaser or sponsor, they accommodate the requests of those customers not to buy coverage for services they consider objectionable. PPACA changes that by imposing new mandates to cover certain services as “essential benefits,” including certain specified categories such as “ambulatory patient services,” “prescription drugs,” and “preventive” services. Within these categories, PPACA confers upon the Secretary of HHS the authority to define what specific services plans must cover, PPACA, § 1302(b), except that “essential benefits” may not include abortion. *Id.*, § 1303(b)(1)(A). Thus, for example, if the Secretary mandates coverage of drugs or services other than abortion that still run afoul of the moral or religious convictions of an insurer, purchaser, or plan sponsor, the

statute provides those stakeholders with no exemption that might accommodate their conscientious objection. As a result, they will be forced to offer or purchase the objectionable coverage.

Third, because the Act gives the Executive Branch some authority to regulate the selection of providers by health plans, PPACA, *see, e.g.*, § 1311(c), these plans may also be newly required to exclude providers because they have a conscientious objection to particular procedures.

Fourth, while PPACA provides for the non-preemption of federal conscience laws, there is an apparent tension between the heading of that provision and its text. The heading says PPACA has no effect on federal laws *regarding abortion*. The text itself, however, contains no such limitation and simply says that PPACA has no effect on federal laws regarding “conscience protection.” PPACA, § 1303(c)(2)(A)(i). Thus, the heading of that provision should be changed to clarify Congress’s intent that PPACA has no effect on federal conscience laws, whether or not they pertain to abortion.

Fifth, while PPACA provides for the non-preemption of some state laws regarding abortion, PPACA, § 1303(c)(1), there is no comparable provision with respect to state conscience laws. The failure to include such a provision places those state conscience laws at risk.

#### **B. The Executive Order Only Describes Conscience Protections Apart from PPACA That Are Not Repealed and the Insufficient Protections Within PPACA**

The Executive Order says that the Church Amendment (42 U.S.C. § 300a-7) “remains intact.” Executive Order, § 1. But the Church Amendment is not incorporated as part of PPACA, and the bare fact that the Amendment is not repealed by PPACA is obvious and irrelevant to the Act. The Church Amendment does not preserve or address at all the freedom to accommodate religious objections in the health *insurance* context. Instead the Church Amendment pertains only to the objections of *providers*, particularly to providing abortion and sterilization and, in HHS-funded or -administered programs, certain other services. The Church Amendment therefore provides no relief from the new conscience problems created by PPACA, and the Executive Order’s reference to its continued existence and applicability in other contexts is superfluous.

The Executive Order also says that the Weldon Amendment “remains intact.” Executive Order, § 1. The fact that Weldon has not been repealed is, once again, unsurprising and irrelevant to the enforcement of PPACA. The Weldon Amendment, like the Hyde Amendment, is a rider to annual appropriations bills, and it still applies to those programs funded by the annual appropriations to which the Amendment is attached. *See* Pub. L. No. 111-8, § 508(d)(1). The new Act, of course, does not overturn Weldon in the separate contexts where it already applies. The problem remains that the text of Weldon is not incorporated into PPACA, and so its protections do not apply to PPACA.

The Executive Order says that “new protections” in PPACA “prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.” Executive Order, § 1. It is true that the Act prohibits health plans that participate in the Exchange from discriminating against health care facilities and providers based on their unwillingness to do any of those things, and this is a valuable though limited protection. PPACA, § 1303(b)(4). But on this point, the Executive Order adds nothing that is not already in the Act.

**C. The Executive Order Could Have Enhanced Some Conscience Protections but Did Not Do So**

Unfortunately, the Executive Order does not strengthen the protection of conscience rights in those areas in which the President has some discretion to do so. Specifically, because PPACA expressly delegates to the Secretary of HHS the authority to define “essential benefits” in health plans, the Order could have directed the Secretary, in defining those benefits, to permit accommodations for religious and moral objections to those new mandates. The Order could also have made clear that the Executive Branch interprets Section 1303(c)(2)(A)(i) of the Act to secure the full range of conscience protections, even outside the abortion context—that is, so that the statute’s plain language, rather than its heading, prevails when it is actually applied. But the Order did neither of these things.

**III. Conclusion**

In sum, the Executive Order cannot and does not fix the statutory problems of direct funding of abortion at CHCs, and of funding insurance plans that cover abortions; it cannot and does not make up for the absence of conscience protections that are missing from the statute; and it does not strengthen the conscience protections that are there, though it could have in certain limited ways. Where the Order purports to fix a shortcoming of the Act in these areas, it is highly likely to be legally invalid; and where the Order is highly likely to be legally valid, it does nothing to fix those shortcomings.

Thus, the shortcomings of the Act remain, and correspondingly, the need for fixes remains. Only Congress, with the consent of the President, has the legal authority to make those fixes. Congress and the President should act promptly to do so; they should not await courts’ likely invalidation of the few provisions of the Executive Order that even purport to be fixes.

March 25, 2010

Anthony Picarello  
General Counsel

Michael Moses  
Associate General Counsel