



Office of the General Counsel

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

September 3, 2013

Submitted Electronically

Ms. Chelsea Ruediger
Planning and Policy Analysis
U.S. Office of Personnel Management
Room 2H28
1900 E Street, N.W.
Washington, D.C. 20415

Re: Proposed Regulations on Federal Employees Health Benefits Program, File Code No. RIN 3206-AM85

Dear Ms. Ruediger:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Proposed Rule to amend the Federal Employees Health Benefits Program (“FEHBP”) regulations regarding coverage of Members of Congress and congressional staff. 78 Fed. Reg. 48337 (Aug. 8, 2013).

I. Background

The FEHBP authorizes the federal government to contribute to health plans purchased by federal employees, including Members of Congress and congressional staff. 5 U.S.C. § 8906. Funds for such contributions are appropriated under the annual Financial Services and General Government Appropriations bill. Under an amendment to the bill authored by Congressman Christopher Smith, “No funds ... shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions.” This limitation, which has been in place since 1983 (except for a brief period from 1993 to 1995) and is in effect now, is subject to an exception in cases

of rape or incest, or where the mother's life is endangered. As a result, for many years *no* health plan offered to federal employees has been permitted to cover abortions except under these very limited circumstances.

In the past, federal employees have chosen a health plan from a menu of plans offered by insurers with which OPM has contracted for that purpose. That has now changed as a consequence of the Patient Protection and Affordable Care Act ("ACA"). Section 1312(d)(3)(D) of ACA provides that "Notwithstanding any other provision of law ... the *only* health plans that the Federal Government may make available to Members of Congress and congressional staff ... shall be health plans that are ... created under this Act ... or ... offered through an Exchange established under this Act...." [Emphasis added.]

A number of questions have arisen about the relationship between Section 1312(d)(3)(D) and the existing FEHBP program. One question that has generated considerable publicity is whether the federal government has the statutory authority to *contribute* to the purchase of exchange-participating health plans by Members of Congress and congressional staff. There is understandable concern that the loss of the federal government's contribution would create a serious financial hardship for these stakeholders and affect Congress's ability to retain valued employees.

The Administration has taken the position that the federal government can and will contribute to plans purchased on the exchange by Members of Congress and congressional staff, to the same extent as for other federal employees. The Proposed Rule so provides. The Rule, however, says nothing about the Smith amendment. An accompanying Q&A released by OPM says that "individuals who enroll in Exchange plans will be subject to the same rules established *for others on the Exchange*" (emphasis added), without mention of any limitation with respect to abortion coverage. OPM, "Health Insurance Coverage: Members of Congress and Congressional Staff," p. 3. News reports raise additional questions whether the Administration intends to comply with the Smith amendment in its implementation of the Proposed Rule.¹

¹ *E.g.*, Ricardo Alonso-Zaldivar, "Abortion Coverage for Congress Under Health Law? (Aug. 16, 2013) ("An attempt to fix a problem with the national health care law has created a situation in which members of Congress and their staffers could gain access to abortion coverage"), http://host.madison.com/news/abortion-coverage-for-congress-under-health-law/article_6852d208-8540-56d4-b7b9-0cb5b02e581e.html.

II. Analysis

The FEHBP is the only statutory authority that exists for the federal government’s contribution to health plans purchased by federal employees, and it is the only statutory authority that OPM asserts for the contribution to health plans purchased by Members of Congress and congressional staff. 78 Fed. Reg. at 48339 (proposing revisions to 5 C.F.R. § 890.501, captioned “Government contributions,” and citing relevant statutory provisions governing the FEHBP); 78 Fed. Reg. at 48338 (preamble) (stating that the Proposed Rule has “no impact on the availability to Members of Congress and Congressional Staff Members of the contribution established in 5 U.S.C. 8906”). The Q&A likewise notes that government contributions for plans purchased on the exchange by Members of Congress and congressional staff will be subject to FEHBP contribution rules, which would not be the case if the FEHBP statute did not apply.

The Smith amendment is explicit: “No funds” appropriated in the Financial Services and General Government Appropriations bill “shall be available to pay for an abortion, or the administrative expenses in connection with *any* health plan under the Federal employees health benefits program which provides any benefits or coverage for abortion.” [Emphasis added.] By its terms, the amendment is not limited to any particular category of plans, but applies to contributions to *any* plan, regardless of where it is offered or purchased. Thus, the fact that Members of Congress and congressional staff will now, pursuant to Section 1312(d)(3)(D) of ACA, select a plan from the exchange instead of from a menu of plans offered by insurers with which OPM has contracted, does not affect the continued applicability of the Smith amendment. ACA itself does not authorize any contribution of funds for health plans for federal employees.² Only the FEHBP does, and the subsidies authorized by the FEHBP statute are all appropriated through the Financial Services bill. Hence, the Smith amendment applies.

² Section 1312(d)(3)(D) of ACA provides that the federal government may make only exchange-participating plans “available” to Members of Congress and congressional staff; it does not authorize *contributions* to such plans. Earlier iterations of Section 1312(d)(3)(D), and proposed post-ACA amendments to Section 1321(d)(3)(D), would have authorized *contributions*, but none of these provisions was enacted into law. See Robert E. Moffit, Edmund F. Haislmaier, & Joseph A. Morris, *Congress in the Obamacare Trap: No Easy Escape* (Aug. 2, 2013) (recounting the legislative history of Section 1312(d)(3)(D)), <http://www.heritage.org/research/reports/2013/08/congress-in-the-obamacare-trap-no-easy-escape>.

Finally, even if a plausible argument could be made that ACA (a) independently authorizes contributions to health plans purchased by the federal government, and (b) trumps the limitations set out in the Smith amendment – an argument that is flawed on both counts – contributions by the federal government to health plans that cover elective abortions would run afoul of the Administration’s own assurances, both before and after ACA’s enactment, that ACA would not be construed to authorize such contributions. The President has repeatedly assured Congress and the American people that current restrictions on abortion funding would not be reversed, or weakened in their application, by ACA. Such assurances played a major role in securing final passage of the bill,³ and were formalized in an Executive Order issued by the President. *See* Executive Order 13535, “Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act,” 75 Fed. Reg. 15599 (Mar. 24, 2010).⁴

The Administration cannot have it both ways. If Congress has authorized federal contributions to exchange-participating health plans purchased by Members of Congress and congressional staff, as the Administration maintains – that is, if the provisions of the FEHBP statute pertaining to federal contributions apply to them, as the Proposed Rule insists – then the corresponding limitations set forth in the Smith amendment apply to those plans, just as they do to any other plan purchased by any other federal employee.⁵

³ Just a few months before passage of the final bill, President Obama said, “I laid out a very simple principle, which is this is a health care bill, not an abortion bill. And we’re not looking to change what is the principle that has been in place for a very long time, which is federal dollars are not used to subsidize abortions.” Jake Tapper, *et al.*, “Obama: ‘This is a Health Care Bill, Not an Abortion Bill’” (Nov. 9, 2009), <http://abcnews.go.com/Politics/abc-news-exclusive-obama-jobs-health-care-ft/story?id=9033559>.

⁴ As we have explained at length in other contexts, E.O. 13535 appears to be ineffective in adding any valid legal restrictions on abortion funding that do not already exist in ACA itself. *See* USCCB Office of General Counsel, “Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection” (Mar. 25, 2010), <http://www.usccb.org/about/general-counsel/upload/Healthcare-EO-Memo.pdf>. Nonetheless, the point remains that E.O. 13535 represents one of many instances of the Administration’s providing public assurance that ACA would not compromise existing restrictions on federal funding of abortion.

⁵ Some argue that, by virtue of Section 1312(d)(3)(D), the federal government has no statutory authority to make contributions to plans purchased by Members of Congress and congressional staff. *See* Moffit *et al.*, *Congress in the Obamacare Trap: No Easy Escape*. We take no position on that legal issue. Our point is only that if the federal government has the authority to make such contributions, as it claims it does, that is only by virtue of the FEHBP statute. Therefore, the Smith amendment necessarily applies to those contributions.

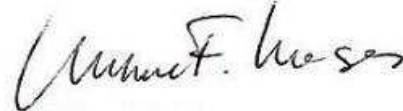
III. Conclusion

For the reasons noted above, the Rule should be modified to state expressly that, consistent with the Smith amendment, no federal funds shall be contributed for the purchase, by Members of Congress or congressional staff, of health plans that cover abortions (subject to the exception noted above for rape, incest, or maternal life endangerment), or for any administrative expenses involved in making such plans available.

Respectfully submitted,



Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel



Michael F. Moses
Associate General Counsel