

(202) 626-8820

July 24, 2018

**RE: Smith Letter urging HHS to Issue New Section 1303 Regulations**

Dear Member of Congress:

The National Right to Life Committee, the federation of state right-to-life organizations, urges you to support the issuance of new regulations regarding Section 1303 of the Affordable Care Act (ACA) with regards to abortion coverage transparency by signing onto the attached letter from Congressman Chris Smith.

At the time Barack Obama was elected president in 2008, an array of long-established laws, including the Hyde Amendment, had created a nearly uniform policy that federal programs did not pay for abortion or subsidize health plans that included coverage of abortion, with narrow exceptions. Regrettably, provisions of the 2010 Obamacare health law ruptured that longstanding policy. Among other objectionable provisions, the Obamacare law authorized massive federal subsidies to assist many millions of Americans to purchase private health plans that cover abortion on demand. For documentation, please see:

[www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf](http://www.nrlc.org/uploads/ahc/ProtectLifeActDouglasJohnsonTestimony.pdf),  
and [www.nrlc.org/uploads/DvSBA/GenericAffidavitOfDouglasJohnsonNRLC.pdf](http://www.nrlc.org/uploads/DvSBA/GenericAffidavitOfDouglasJohnsonNRLC.pdf).

The Congressional Budget Office has estimated that between 2015 and 2024, \$726 billion will flow from the federal Treasury in direct subsidies for Obamacare health plans. In September, 2014, the Government Accountability Office (GAO) issued a report that confirmed that elective abortion coverage is widespread in federally subsidized plans on the Obamacare exchanges. In the 27 states (plus D.C.) that did not have laws in effect that restrict abortion coverage, over one thousand exchange plans covered abortion, the report found. (See "GAO report confirms elective abortion coverage widespread in Obamacare exchange plans," <http://www.nrlc.org/communications/releases/2014/release091614>.)

Some defenders of the Obamacare in 2010 insisted that this was not really "federal funding" of abortion because a provision in 1303 of Obamacare stated that a "separate payment" would be required to cover the costs of the abortion coverage. National Right to Life and other pro-life groups dismissed this as a mere bookkeeping gimmick that sharply departed from the principles of the Hyde Amendment.

In the years since the enactment of the ACA, it became evident that the Obama Administration disregarded the inadequate measure of segregating funds and sharply departed from the principles of the Hyde Amendment. The Obama Administration issued Section 1303 regulations permitting insurance companies to ignore separate payment requirements which included failing to require insurers to disclose the abortion surcharge from consumers. While a statutory fix, such

**NRLC to U.S. House of Representatives**

**RE: Smith Letter urging HHS to Issue New Section 1303 Regulations**

**Page 2**

as the House-passed No Taxpayer Funding for Abortion Act (H.R. 7), is necessary to remedy the severe problems with the ACA in regard to abortion coverage, there are steps the Trump Administration can take to mitigate ACA's massive expansion of abortion coverage. New regulations surrounding Section 1303 could at least ensure basic transparency is provided to consumers – and inform them when they are paying for abortion coverage they might object to.

The attached letter urges Health and Human Services Secretary Alex Azar to issue new regulations to eliminate secrecy about abortion coverage, allowing consumers to be fully informed about abortion coverage and the surcharges for such coverage on plans sold on the exchanges.

In order to sign on to Congressman Chris Smith's letter to Secretary Azar, notify Rebecca Duberstein at [Rebecca.Duberstein@mail.house.gov](mailto:Rebecca.Duberstein@mail.house.gov) by July 27.

Should you have any questions, please contact us at 202-626-8820, or via e-mail at [federallegislation@nrlc.org](mailto:federallegislation@nrlc.org).

Respectfully,

A handwritten signature in blue ink that reads "Jennifer Popik". The signature is stylized and cursive.

Jennifer Popik, J.D.  
Legislative Director

# New Regs Needed for Abortion Coverage Transparency

## *Sign the Smith Letter*

### Ask HHS to Follow the Letter of the Law and Issue New Section 1303 Regulations

Contact [Rebecca.Duberstein@mail.house.gov](mailto:Rebecca.Duberstein@mail.house.gov) to sign onto the Smith letter by **July 27**.

July 27, 2018

The Honorable Alex Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Dear Secretary Azar,

The 2010 enactment of the Affordable Care Act (ACA) broke with the longstanding safeguards of the Hyde Amendment, which for over 40 years has protected taxpayers from paying for abortion and health insurance plans that include abortion. Since that time, the House has acted on four separate occasions to pass the No Taxpayer Funding for Abortion Act (H.R. 7) to remedy the severe problems with the ACA in regard to abortion coverage. Until this statutory protection is enacted into law, there are steps the Administration can take to mitigate ACA's unprecedented expansion of abortion coverage. **We urge you to issue new regulations regarding Section 1303 as soon as possible.**

Contrary to the Hyde Amendment, ACA's Section 1303 created separate abortion accounting and transparency requirements. Section 1303 of the ACA requires that when federal subsidies are paid toward the purchase of a qualified health plan that includes coverage of elective abortion:

- the health insurance issuer must not use the subsidy amounts to pay for any elective abortion,
- must "collect from each enrollee in the plan" a "separate payment" of not less than \$1 per month for any elective abortions covered,
- and must deposit these separate elective abortion payments into "a separate account that consists solely of such payments and that is used exclusively to pay" for elective abortions.

The statute even gives the example where "in the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit."<sup>1</sup> The ACA is absolutely clear: a "separate payment" must be collected when qualified health plans cover abortion.

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<sup>1</sup> 42 USC 18023 (a)(2)(B)

Underscoring the plain legislative meaning of the text, then-Senator Ben Nelson (D-NE) described how the process would work during legislative debate surrounding Section 1303. He said *“...the insurance company must bill you separately, and you must pay separately from your own personal funds—perhaps a credit card transaction, your separate personal check, or automatic withdrawal from your bank account— for that abortion coverage. Now, let me say that again. You have to write two checks: one for the basic policy and one for the additional coverage for abortion....”*<sup>2</sup>

The Obama administration failed to enforce Section 1303 and undermined the segregation of funds requirements through permissive regulations. A 2014 report by the Government Accountability Office found that many insurers were ignoring the requirements of Section 1303.<sup>3</sup> While we welcomed CMS’s October 2017 guidance regarding enforcement of ACA Section 1303, meaningful enforcement requires new regulations.<sup>4</sup> As long as enforcement is tied to the existing Obama-era regulations for Section 1303, it will remain sorely deficient.

Current regulations define compliance with Section 1303 in a number of ways that negate the clear meaning of the statute’s phrase, “separate payment.”<sup>5</sup> For example, issuers may send a “notice *at or soon after the time of enrollment* that the monthly invoice or bill will include a *separate charge* for such services,” though it is not required to be noticed on the monthly invoice itself, or issuers may send a monthly invoice or bill that “*separately itemizes*” the abortion surcharge (emphasis added). Further the rule explains that the issuer is not required to separately identify the abortion surcharge, and the surcharge can be collected in a single transaction rather than collected separately. Therefore, according to current regulations, there is no meaningful requirement for the collection of a separate payment for the plan’s abortion services, making the abortion surcharge all but invisible.

HHS should issue new regulations that align with the clear meaning and legislative history of Section 1303 of ACA and its requirement for a truly “separate payment,” and provide ample mechanisms for enforcement. The new regulations should also clarify that *all* qualified health plans that cover elective abortion must provide notice of such coverage to consumers at the time of enrollment. This will provide more transparency to consumers, many who are unwittingly purchasing plans that include abortion coverage. No person should have to pay for abortion coverage that they don’t want.

Sincerely,

CHRISTOPHER H. SMITH  
Member of Congress

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<sup>2</sup> 155 Cong. Rec. S14134 (Dec. 24, 2009) <http://www.gpo.gov/fdsys/pkg/CREC-2009-12-24/pdf/CREC-2009-12-24-pt1-PgS14134-2.pdf#page=1>

<sup>3</sup> <https://www.gao.gov/assets/670/665800.pdf>, page 3, footnote 8

<sup>4</sup> <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Section-1303-Bulletin-10-6-2017-FINAL-508.pdf>

<sup>5</sup> 80 CFR 10750, 10840-10841 <https://www.gpo.gov/fdsys/pkg/FR-2015-02-27/pdf/2015-03751.pdf>