national RIGHT TO LIFE committee, inc.

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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, File Code No. RIN 3206-AM85

Dear Ms. Ruediger:

On behalf of the National Right to Life Committee (NRLC), the nationwide federation of state right-to-life organizations, we submit the following comments on the Proposed Rule to amend the Federal Employees Health Benefits program (FEHB) regulations, with respect only to Members of Congress and certain congressional staff. 78 Fed. Reg. 48337 (August 8, 2013)

After careful review of the Proposed Rule, explanatory materials that OPM has circulated to explain the Rule, and public statements by OPM representatives reported in the news media since publication of the Rule, NRLC has reached the following conclusion: OPM – apparently under direction from the White House and perhaps by direct decision of the President – is preparing to violate a 30-year-old law that flatly prohibits OPM from expending any funds whatsoever for "administrative expenses in connection with any health plan . . . which provides any benefits or coverage for abortions . . . [except] where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest."

It is this law (the Smith Amendment) that currently prevents insurance plans for federal employees from including coverage for abortion (with the three exceptions). This prohibition has always been applied to Members of Congress and congressional staff in the same fashion as all other federal employees who enlist in FEHB plans. Until publication of the Proposed Rule, the Administration itself recognized that the effect of the Smith Amendment remained unchanged by enactment of the "Affordable Care Act." See, for example, "Statement of HHS Spokeswoman Jenny Backus on the Pre-Existing Conditions Insurance Plan Policy," July 14, 2010. http://www.hhs.gov/news/press/2010pres/07/20100714d.html

In response to initial objections that the Proposed Rule ignores the Smith Amendment, in public statements in recent weeks OPM personnel have engaged in blatant misdirection, attempting to mislead journalists and others into thinking that the new protests are a reiteration of objections to

the manner in which the new "refundable premium assistance tax credits" will be used to subsidize (for eligible individuals) purchase of private health plans that cover abortion, under the "Affordable Care Act," beginning in 2014. The abortion-related implications of the refundable tax credit (premium subsidy) program is an extremely important issue in its own right – an issue on which NRLC has expressed its views in detail in congressional testimony and elsewhere. *But that issue has nothing whatever to do with the entirely separate abortion-related policy issue presented by the Proposed Rule*. Such attempts at misdirection cannot alter the plain language of the Smith Amendment, nor the consistent understanding and application of the Smith Amendment by OPM for three decades.

For purposes of today's discussion, it simply *does not matter* whether or not "federal funds" will subsidize abortion through the separate refundable tax credits program. We are talking here about the entirely separate and distinct fact that the OPM itself is flatly prohibited by the Smith Amendment from collecting funds *from any sources whatever* and transmitting them to any vendor whatever, or engaging in *any other* administrative functions whatever, "in connection with" any health plans of any type (whether deemed "riders," "segregated" accounts, "supplemental" policies, or whatever), for any federal employees, if those health plans cover abortions (except in cases of life endangerment, rape, and incest). The OPM employees who would perform those functions are paid with funds appropriated through the Financial Services Appropriations bill, and the bill explicitly prohibits the appropriated funds from being expended in such activities.

It is undeniable that under the Proposed Rule, OPM will incur "administrative expenses in connection with . . ." the new plans, many of which will cover elective abortion. It matters not a jot to what extent the abortion component is "segregated" or identified separately from the rest of the coverage in the plan; OPM cannot be part of the circuit in any such scheme involving federal employees. **To comply with the Smith Amendment, OPM must inform all affected Members of Congress and affected congressional staff that, as in the past, with respect to their OPM-facilitated, employer-subsidized health plans, they may only choose among health plans that do not cover abortion (with the three exceptions noted above).**

Members of Congress or congressional staff may, of course, individually go out onto the private insurance market and purchase whatever supplemental plans they want, but OPM cannot have anything to do with such activity, which would be entirely separate from the employer-supported, OPM-facilitated health plans.

In its commentary accompanying the Proposed Rule, OPM states that it "will have no role in 'contracting for' or 'approving' health benefit plans that are offered through the Exchanges," but this is irrelevant, since OPM is going to have to calculate the government contribution for purchase of plans on the Exchange "in the same manner as for other employees and annuitants" [§ 890.501], and execute the actual payments of the government's share of the premiums, among other administrative tasks. Note that §890.501 of the Proposed Rule states that "government contributions and employee withholdings for employees who enroll in a health benefit plan

offered through an Exchange . . . shall be accounted for pursuant to 5 U.S.C. 8909 and such monies shall only be available for payment of premiums, and costs in accordance with 5 U.S.C. 8909(a)(2)."

As discussed in detail in the Addendum to this letter of comment, the entire Proposed Rule purports to be based on the basic authorizing statute for the FEHB program – and this claim is necessary, for unless it is based on that authority, then OPM lacks any statutory authority whatever for this scheme or any other continued involvement in facilitating the health coverage of Members of Congress or the affected congressional staff.

Thus, OPM cannot have it both ways. If the new congressional plans fall under the authorization of the statutes dealing with health insurance for federal employees, then the OPM cannot participate in any way in directing funds (from any source) to plans that cover elective abortion, because such participation necessarily conflicts with the Smith Amendment prohibition on expenditure of "administrative expenses in connection with . . ." such a plan. If the new congressional plans are outside the scope of the statutes dealing with health insurance for federal employees, then OPM lacks any authority at all to send government money to the plans purchased by Members of Congress or their employees.

Section 8909(a)(2) specifically states that "expenses for administering" the federal employee health insurance shall be paid "**within the limitations that may be specified annually by Congress.**" That would be equally true, of course, with or without that specific reference. It has been well established, in early litigation concerning the Hyde Amendment to the Labor-HHS Appropriations bill, and in other contexts, that a prohibition on expending appropriated funds for a specific activity amounts to an amendment to any other legal authorities that would otherwise authorize or even mandate that same activity.

If we assume for the sake of this analysis that the scheme contemplated by the Proposed Rule does fall within the lawful authority of OPM to be involved in federal employee health coverage, then these conclusions follow: If OPM transmits an employer contribution and an employee contribution to a health plan that covers abortion (except to save the life of the mother, or in cases of rape and incest), it would be violating the plain language of the Smith Amendment, in the same fashion that it would violate the Smith Amendment for OPM to transmit such a payment for any of the millions of federal employees who will remain within the original FEHB program.

If OPM proceeds on the course indicated – expending funds for administrative expenses in connection with federal employee health plans that cover elective abortions, those involved will be violating the plain language of a valid limitation on appropriations. This would be a lawless act, and in NRLC's view, would implicate the Anti-Deficiency Act, 31 U.S.C. § 1341. The Anti-Deficiency Act is a longstanding federal law that provides, in certain circumstances, civil and criminal liability for expenditure of congressional funds outside the limits set by Congress.

Those who dislike the policy that the Smith Amendment imposes, the President included, are free to urge Congress to repeal it. NRLC will continue to forcefully argue to Congress that federal agencies should not be engaged in any aspect of administering health plans that cover elective abortions, and that therefore the Smith Amendment should be preserved. Lawmakers may vote and be held accountable by constituents for how they vote on that question. That is the system provided by the U.S. Constitution. The Constitution does not confer on any President a retroactive, line-item veto, by which he may arbitrarily nullify specific provisions of duly enacted laws, when he finds those specific provisions inconvenient or offensive to various pressure groups to which he is politically indebted.

Therefore, NRLC urges that the OPM Acting Director inform the White House that she cannot be a party to a blatant violation of law, notwithstanding the pro-abortion pressure groups the White House feels bound to accommodate, and that OPM therefore must exclude from the program any health plan that covers abortion (except where the life of the mother is endangered, or in cases of rape or incest).

Sincerely,

Douglas D. Johnson
Legislative Director

Susan T. Muskett, J.D.
Senior Legislative Counsel

ADDENDUM: BACKGROUND AND ANALYSIS

Since 1983 (except for a brief interruption 1993-95), the appropriations bill that provides all funds for the Office of Personnel Management (OPM), currently the Financial Services appropriations bill, has contained the "Smith Amendment" (after Rep. Christopher Smith, R-NJ), which reads as follows:

> *No funds appropriated by this Act 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. The provision . . . shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.* [Pub. L. No. 112-74, division C, Sections 613-614, which continues to apply to the current fiscal year funding pursuant to Pub. L. No. 113-6, division F, Sec. 1101.

The effect of the Smith Amendment has been consistently recognized both by its proponents and opponents, and until now, consistent in application: It prohibits the OPM from admitting to the Federal Employees Health Benefits (FEHB) program any health plan that covers abortions (other than in the limited circumstances of where the mother's life is at stake, or in cases of rape or incest). Thus, all of the hundreds of private health insurance plans to which various groups of federal employees have access exclude coverage for abortion, unless they choose to cover the three categories of exceptions noted.

Statutory law [5 U.S.C. § 8906(f)] stipulates that the funding for the government's contribution towards federal employee health benefits is to be paid by each employing agency from its respective appropriation. In most cases these funds do not flow through the Financial Services appropriations bill, which funds the OPM, but this is irrelevant to the operation of the Smith Amendment, because OPM administers the health insurance program for federal employees, as well as the Employees Health Benefits Fund [5 U.S.C. § 8909], from which the payments to plans are made. Since the Smith Amendment bars the use of OPM's appropriated funds for "administrative expenses in connection with" any plan that covers elective abortion, the Smith Amendment flatly bars OPM from contracting with or otherwise facilitating purchase of any plans that cover abortion beyond the three exceptions. The language has operated in this fashion whenever it has been law, since the 1980s, and its meaning has never been seriously disputed. (See, for example, OPM letter of Nov. 22, 1983 to "All Carriers"; OPM Benefits Administration Letter of Nov. 29, 1995 at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/1995/95-223.pdf ; and Statement of HHS Spokeswoman Jenny Backus on the Pre-Existing Condition Insurance Plan Policy, July 14, 2010, http://www.hhs.gov/news/press/2010pres/07/20100714d.html)

Yet, the August 7 "Questions and Answers" released by OPM gives no evidence that OPM currently intends to continue to enforce the Smith Amendment as required by law with respect to these new congressional plans – indeed, the document strongly implies otherwise, as it does not

mention any restriction on the purchase of abortion-covering plans, but rather states that "the individuals who enroll in Exchange plans will be subject to the same rules established for others on the Exchanges." In law, there is an additional "rule" with respect to federal employees, because the OPM is involved, and the OPM is bound to comply with the Smith Amendment.

Moreover, OPM spokespersons quoted in subsequent press accounts have pretended that the issue is one of whether "federal funds" will be paying for abortion coverage under Obamacare. That is an entirely separate issue. It is crystal clear that under the Proposed Rule, funds appropriated to OPM through the Financial Services appropriations bill will be expended for administrative expenses to collect funds (from the affected federal employees and their employer) and direct them to the sellers of the chosen insurance plans. **OPM can no more perform these functions without expending appropriated funds than it can engage in this rulemaking exercise without expending federal funds. What other agencies may do depends on the authorizations and limitations that apply to those agencies – but OPM, from the director (or acting director) on down, must obey the duly enacted provisions of the Financial Services Appropriations bill.**

NEW REQUIREMENT IMPOSED BY PPACA

The "Patient Protection and Affordable Care Act" (PPACA, "Obamacare") establishes a new requirement pertaining to the purchase of health care by Members of Congress and congressional staff. The provision is PPACA Section 1312(d)(3)(D). It states: "Notwithstanding any other provision of law . . . the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are – (1) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act)."

It is the understanding of some commentators that the effect of this provision was to remove members of Congress and their staffs entirely from the purview of the federal employees health benefits statutes, and place them in the situation of members of the general public who would be required to purchase health insurance in the new exchanges. However, as implementation of the provision approached, some of those affected objected that they would thereby lose the contribution provided by their employing agencies towards their premiums, which is up to 75% of the cost of coverage under an FEHB plan. Moreover, members of Congress, and most if not all of the affected staffpersons, have incomes too high to qualify for the premium subsidies available to many others under the PPACA. According to press reports, some prominent congressional backers of the PPACA, including House Democratic Leader Nancy Pelosi and "Senate Democrats," intervened with the Obama Administration and with President Obama personally to prevent implementation of a straightforward construction of the new statutory language that would have removed members of Congress and their staffs entirely from coverage of the federal employees' health statutes and the government premium contributions that go with that coverage.

NRLC COMMENT ON PROPOSED RULE AND SMITH AMT, 7

According to press reports, President Obama personally intervened in the matter. Whatever the details of the process, on August 7, 2013, OPM issued a Proposed Rule that purports to implement this statutory requirement, along with a Benefits Administration Letter, a Factsheet, and a Questions and Answers document. These documents assert that Members of Congress and certain congressional staffpersons will continue to receive the government contributions towards the purchase of their new health plans, purchased on the exchanges. The new rulemaking will apply only to employees "in the official office of a Member of Congress," whether in D.C. or elsewhere. Each Member's office will make the determination of which employees fall within "the official office," since some employees are paid through a hybrid of personal office and committee salaries. The new scheme takes effect on January 1, 2014.

The Proposed Rule is predicated on an interpretation of the PPACA language that does not require Members and their staffs to leave the federal health insurance authorized by Chapter 89 of Title 5, but rather requires them to choose a plan on an exchange while concurrently remaining under the authority of the federal employee health insurance statutes.

NRLC takes *no position* on the broader issue of whether it is legal for the federal government to continue to contribute to the health plan premiums of Members of Congress and congressional staff, an issue that is outside of NRLC's policy purview, and irrelevant to our objections. The Smith Amendment flatly prohibits OPM from expending agency funds for administrative expenses in connection with health plans that cover abortion, for federal employees, no matter where the funds come from.

OPM's interpretation of PPACA Sec. 1312(d)(3)(D) does not remove Members of Congress and their staffs from the federal employees health program. Rather, it simply establishes an exchange plan component to the federal employees' health program, in addition to the program's traditional OPM-contracted plans. See, for instance, proposed § 890.102(c)(9) which explains that Members of Congress and their staffs are not eligible to purchase "a health benefit plan for which OPM contracts or which OPM approves," referring to the traditional federal employee plans, but may "purchase health benefit plans, as defined in 5 U.S.C. 8901(6), that are offered by an Exchange.")

To elaborate on how the Proposed Rules' provisions still fall "under the Federal employees health benefits program": The Proposed Rule amends 5 CFR 890.101, 5 CFR 890.102, 5 CFR 890.201, 5 CFR 890.303, 5 CFR 890.304, and 5 CFR 890.501 – all of which fall under "Part 890 - Federal Employees Health Benefits Program." In its commentary accompanying the Proposed Rule, OPM explains that Members and their staffs continue to fall within the definition of an "employee" pursuant to 5 U.S.C. § 8901(1)(B) & ©, the statute which governs the FEHB program. In addition, OPM asserts that these Exchange plans fall within the FEHB's statutory definition of a "health benefits plan" – "there is no doubt that such plans [Exchange plans] fit within the definition of 'health benefit plan' under 8901(6)." Moreover, the Proposed Rule states that "nothing in this part shall limit or prevent a health insurance plan purchased through an Exchange . . . from being considered a 'health benefit plan under this chapter' for purposes of 5 U.S.C. 8905(b) and 5 U.S.C. 8906." [§ 890.201]. Because these exchange plans continue to fall

within the definition of a "health benefits plan" under the statute, OPM opines that the government continues to be authorized to make a contribution towards these federal employees' health benefits.

To underscore: Under the Proposed Rule, the provision of a government contribution towards the purchase of exchange plans by Members of Congress and their staffs is deemed to be authorized by the same statutory authority that currently authorizes the "regular" FEHB plans, and the authority to continue the employer premium is predicated upon this interpretation. Therefore these new exchange-based federal employee health benefits continue to fall "under the Federal employees health benefits program." Moreover, the Proposed Rule stipulates that both the government contributions and employee withholdings towards exchange plans will be administered through the Employees Health Benefits Fund, and that "costs" will be paid "in accordance with 8909(a)(2)."

Section 8909(a)(2) specifically states that "expenses for administering" the Federal employee health insurance shall be paid "**within the limitations that may be specified annually by Congress."**

OPM's INTENT TO VIOLATE THE SMITH LIMITATION AMENDMENT

The Q and A indicates that initially, OPM expects Members and their staffs to enroll in the individual market on the exchanges, rather than through the SHOP exchanges (participation in which OPM promises to pursue further). They will enroll in the exchange "in the place where they reside." In response to the question, "Will individuals who enroll in Exchange plans follow the eligibility and enrollment requirements of Exchanges or the FEHB program?" **OPM responds that the "individuals who enroll in Exchange plans will be subject to the same rules established for others on the Exchanges."** If that were so, enrollees would be allowed to buy exchange plans that cover elective abortion – yet, this would clearly violate the Smith Amendment.

The PPACA contains a provision that allows states to pass laws that limit or exclude abortion coverage from exchange-participating plans. [42 U.S.C. §18023(a)(1)]. To date, 23 states have passed some version of such an "abortion opt-out" law, but in the majority of states, no abortion opt-out law has been enacted. (Even in some of the 23 opt-out states, the language of the state law would permit exchange-participating health plans to cover some abortions that do not fall within the Smith Amendment exceptions.) Surely, many exchange-participating health plans may cover elective abortion in states that do not prohibit this. The OPM will violate the Smith Amendment if it facilitates payments by a Member of Congress or congressional staffperson to any such abortion-covering plan. It would also be setting up a two-tier scheme under which all federal employees would be prohibited from obtaining employer contributions to any health plan that covers elective abortion – *except members of Congress and their personal-office employees.*

NRLC COMMENT ON PROPOSED RULE AND SMITH AMT, 9

POTENTIAL VIOLATIONS OF ANTI-DEFICIENCY ACT

If OPM transmits an employer (government) contribution and/or an employee contribution to a health plan that covers abortion (except to save the life of the mother, or in cases of rape and incest), it would be violating the plain language of the Smith Amendment, in the same fashion that it would violate the Smith Amendment for OPM to transmit such a payment for any of the millions of federal employees who will remain within the original FEHB program.
If OPM employees proceed to actually violate the Smith Amendment, the Anti-Deficiency Act, 31 U.S.C. § 1341, may come into play. This is a longstanding federal law that provides, in certain circumstances, civil and criminal liability for expenditure of congressional funds outside the limits set by Congress.

The Anti-Deficiency Act reads as follows:

> *31 USC § 1341 - Limitations on expending and obligating amounts*
>
> *(a) (1) An officer or employee of the United States Government or of the District of Columbia government may not—*
> *(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;*
>
> *(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;*
>
> *(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or*
>
> *(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.*
>
> *(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.*
>
> *(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.*

Violations of the Anti-Deficiency Act may involve criminal penalties. The pertinent statute reads as follows:

> *31 USC § 1350 - Criminal penalty*
>
> *An officer or employee of the United States Government or of the District of Columbia*

> *government knowingly and willfully violating section 1341 (a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.*

APPENDIX: STATUTES AUTHORIZING OPM INVOLVEMENT IN FEDERAL EMPLOYEE HEALTH BENEFITS

5 U.S.C. 8909 states:
§ 8909. Employees Health Benefits Fund

(a) There is in the Treasury of the United States an Employees Health Benefits Fund which is administered by the Office of Personnel Management. The contributions of enrollees and the Government described by section 8906 of this title [5 USCS § 8906] shall be paid into the Fund. The Fund is available–
(1) without fiscal year limitation for all payments to approved health benefits plans; and
(2) to pay expenses for administering this chapter [5 USCS §§ 8901 et seq.] **within the limitations that may be specified annually by Congress**. [emphasis added]

Payments from the Fund to a plan participating in a letter-of-credit arrangement under this chapter [5 USCS §§ 8901 et seq.] shall, in connection with any payment or reimbursement to be made by such plan for a health service or supply, be made, to the maximum extent practicable, on a checks-presented basis (as defined under regulations of the Department of the Treasury).

(b) Portions of the contributions made by enrollees and the Government shall be regularly set aside in the Fund as follows:
(1) A percentage, not to exceed 1 percent of all contributions, determined by the Office to be reasonably adequate to pay the administrative expenses made available by subsection (a) of this section.
(2) For each health benefits plan, a percentage, not to exceed 3 percent of the contributions toward the plan, determined by the Office to be reasonably adequate to provide a contingency reserve.

The Office from time to time and in amounts it considers appropriate, may transfer unused funds for administrative expenses to the contingency reserves of the plans then under contract with the Office. When funds are so transferred, each contingency reserve shall be credited in proportion to the total amount of the subscription charges paid and accrued to the plan for the contract term immediately before the contract term in which the transfer is made. The income derived from dividends, rate adjustments, or other refunds made by a plan shall be credited to its contingency reserve. The contingency reserves may be used to defray increases in future rates, or may be applied to reduce the contributions of enrollees and the Government to, or to increase the benefits provided by, the plan from which the reserves are derived, as the Office from time to time shall determine.

(C) The Secretary of the Treasury may invest and reinvest any of the money in the Fund in interest-bearing obligations of the United States, and may sell these obligations for the purposes of the Fund. The interest on and the proceeds from the sale of these obligations become a part of the Fund. [. . .]