

**Congress of the United States**  
**Washington, DC 20515**

August 4, 2014

The Honorable Sylvia Mathews Burwell  
Secretary, Department of Health and  
Services  
200 Independence Ave SW  
Washington, DC 20201

The Honorable Marilyn Tavenner  
Administrator, Centers Services of Human  
Medicare & Medicaid Services  
200 Independence Ave SW  
Washington, DC 20201

Dear Secretary Burwell and Administrator Tavenner:

Passage of the Affordable Care Act (ACA) marked a radical departure from the longstanding and bipartisan principles of protecting taxpayer dollars from funding elective abortions. Since the ACA, which is estimated to provide hundreds of billions of dollars in subsidies to insurance plans,<sup>1</sup> bypasses the Hyde amendment, and allows funding for plans that include abortion provided they comply with an accounting gimmick, we write to request the Department provide Congress and taxpayers with transparency over the use of federal funding in these instances.

Under the Hyde amendment and other similar funding limitation amendments, federal taxpayer dollars have long been protected from being used for abortion or insurance plans that include elective abortion. However, the ACA accounting arrangement to insurance companies has never been a part of the Hyde amendment. For this reason, the minimal accounting requirements under the ACA, often referred to as the Nelson amendment, remain part of the statutory law that must be enforced.

As a part of the accounting gimmick, statutory language in section 1303 of the ACA<sup>2</sup> requires an abortion surcharge. Specifically, issuers of Exchange plans that cover elective abortion must “collect from each enrollee in the plan” a “separate payment” for elective abortions, defined as abortions in cases other than rape and incest or to save the life of the mother, and a “separate payment” for all other services. The statute then stipulates that the insurer is to “deposit all such separate payments into separate allocation accounts.” This scheme was reiterated in the President’s Executive Order 13535.<sup>3</sup>

The abortion surcharge was explained this way by then-Senator Ben Nelson (D-NE):

*“...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>4</sup>*

This separate payment approach was contemporaneously acknowledged by NARAL, Planned Parenthood and the Center for Reproductive Rights.<sup>5</sup>

<sup>1</sup> [http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA\\_Estimates.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf)

<sup>2</sup> <http://www.law.cornell.edu/uscode/text/42/18023>

<sup>3</sup> <http://www.whitehouse.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst>

<sup>4</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>5</sup> [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_fac\\_funding\\_firewalls\\_3.10.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_funding_firewalls_3.10.pdf)

<http://www.prochoiceamerica.org/media/fact-sheets/abortion-health-care-nelson.pdf>

<http://www.washingtonpost.com/wp-dyn/content/article/2009/12/21/AR2009122103224.html>

As the state exchanges and the federal marketplace have been implemented for 2014 it has come to our attention that many consumers are not able to obtain information about whether the plans they are considering include abortion, and they find that the amount of the abortion surcharge is impossible to identify. In fact, Politifact noted that the separate payment “turns out to be a hidden fee.”<sup>6</sup>

Research by the National Right to Life Committee indicates that at least in some states the obfuscation of the abortion surcharge is no accident.<sup>7</sup> Official documents issued by government agencies implementing the ACA in Maryland,<sup>8</sup> New York,<sup>9</sup> and Washington<sup>10</sup> have informed insurers that the abortion surcharge does not have to be itemized and the surcharge can be collected through a single payment. This guidance is inconsistent with the text of the law, and makes it nearly impossible for a consumer to be aware that their premium includes an abortion surcharge.

In the interest of ensuring that consumers have access to information regarding abortion coverage, please provide the following information.

1. In testimony before the House Energy and Commerce Committee, Secretary Kathleen Sebelius asserted that plans are required by law to list abortion coverage in plan benefit descriptions,<sup>11</sup> but individuals with widely differing views on abortion agree that the Summary of Coverage and Benefits information available to consumers does not consistently indicate whether elective abortion is paid for in the coverage they are purchasing in the Marketplaces.<sup>12</sup> In light of the lack of transparency regarding abortion coverage in 2014, what, if anything, is HHS doing differently to ensure transparency for 2015?
2. Regarding plans sold on the federally facilitated marketplace:
  - a. Please provide a copy of all guidance, memos or other communication with insurers regarding abortion coverage disclosure that has been disseminated for the 2014 or 2015 plan years.
  - b. Please describe how compliance with the separate payment requirement is monitored and enforced; and please provide a copy of all guidance, memos or other communication with insurers regarding compliance with the separate payment requirements of section 1303.
  - c. Please provide the amount of the abortion surcharge for each plan that includes elective abortion and explain how the abortion surcharge is billed.

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<sup>6</sup> <http://www.politifact.com/rhode-island/statements/2013/oct/23/barth-bracy/anti-abortion-activist-barth-bracy-says-people-who/>

<sup>7</sup> <http://www.nationalrighttolifenews.org/news/2013/12/bait-and-switch-the-obama-administrations-flouting-of-key-part-of-nelson-deal-on-obamacare/#.Uxo7fE2UPs1>

<sup>8</sup> <http://www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin-13-24-nelson-amendment-073113.pdf>

<sup>9</sup> [http://www.dfs.ny.gov/insurance/circltr/2013/cl2013\\_07.pdf](http://www.dfs.ny.gov/insurance/circltr/2013/cl2013_07.pdf)

<sup>10</sup> <http://apps.leg.wa.gov/wac/default.aspx?cite=284-07-540>

<sup>11</sup> “Sir, every plan lists plan benefits and the one plan benefit they must list by law is abortion services, so as a shopper goes in, I would highly recommend that they look at the plan benefits section and check for the coverage they’re interested in.” Secretary Kathleen Sebelius before the Health Subcommittee of the House Energy and Commerce Committee on December 11, 2013

<sup>12</sup> In December 2013, the Charlotte Lozier Institute published a report (<http://www.lozierinstitute.org/federal-exchange-plans-still-obscure-abortion-information/>) showing that numerous Summary of Benefits and Coverage documents failed to disclose whether abortion is covered in the plan. Similarly, a March 2014 report by the Alan Guttmacher Institute issued a report (<http://www.guttmacher.org/pubs/gpr/17/1/gpr170115.html>) showing that information about abortion coverage was not clear in plan documents from numerous states. In February 2014, Elaine Rose, CEO of Planned Parenthood Votes Northwest said, “When it comes to the new state health care exchange established under the Affordable Care Act, it’s nearly impossible to find out which insurance plans cover abortion.” <http://realchangenews.org/index.php/site/archives/8703>

3. Please provide a copy of all guidance, memos or other communication issued by HHS to state exchanges regarding abortion coverage disclosure and/or compliance with the requirements of section 1303. For each state exchange:
- a. Please provide a copy of all guidance, memos or other communication with any state exchange regarding abortion coverage disclosure that has been disseminated for the 2014 or 2015 plan years.
  - b. Please describe how compliance with the separate payment requirement is monitored and enforced in each state; and please provide a copy of all guidance, memos or other communication issued by the state exchange (or other state regulatory agency) regarding compliance with the requirements of section 1303.
  - c. Please provide the amount of the abortion surcharge for each plan that includes elective abortion and explain how the abortion surcharge is billed.

We look forward to your response no later than August 15, 2014. To expedite the process, please provide answers and documents as they become available. Please feel free to contact Ellen Cain on Congressman Diane Black's office at [Ellen.Cain@mail.house.gov](mailto:Ellen.Cain@mail.house.gov) or at 202-225-4231 if you have any questions or require additional information.

Sincerely,



Diane Black  
Member of Congress



Chris Smith  
Member of Congress



Kevin Brady  
Member of Congress



Michele Bachmann  
Member of Congress



Joe Pitts  
Member of Congress



John Shimkus  
Member of Congress



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Andy Harris  
Member of Congress



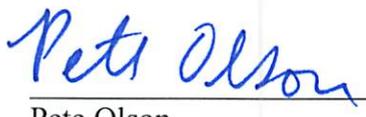
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Tim Huelskamp  
Member of Congress



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Vicky Hartzler  
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Pete Olson  
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