



SUBMITTED VIA EMAIL

William L. Saunders
Senior Vice President of Legal Affairs
Americans United for Life
655 15th St. NW
Suite 410
Washington, D.C. 20005

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attn: CMS-OCIIO-IFC
P.O. Box 8010
Baltimore, MD 21244-8010

Re: File Code OCIIO-9995-IFC

To whom it may concern:

On July 30, 2010, the Department of Health and Human Services issued an interim final rule to implement requirements in section 1101 of Title I (pertaining to the creation of the Pre-Existing Condition Insurance Plan Program (PCIP program), or “high risk pools”) of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act).

The regulation includes a list of services for which coverage under the PCIP program is “unequivocally prohibited.”¹ Section 152.19(b) provides that “[b]enefit plans offered by a PCIP shall not cover . . . (4) Abortion services except when the life of the woman would be endangered or when the pregnancy is the result of an act of rape or incest.”²

¹ Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45014, 45018 (July 30, 2010) (to be codified at 45 C.F.R. pt.152).

² *Id.* at 45031.

While this regulation went into effect on July 30, 2010, HHS invited comments on the regulation to be submitted by 5 p.m. on September 28, 2010.

In response, Americans United for Life (AUL), a public-interest law and policy organization, submits the following comments, which demonstrate that:

1. Section 152.19(b) of the regulation is consistent with existing federal law and policy prohibiting the use of federal tax dollars for abortions or for insurance plans that cover abortions;
2. The Affordable Care Act and existing law do not explicitly prohibit the use of federal tax dollars for abortions through the PCIP program, but section 1101 of Title I, Subtitle B gives the Secretary of HHS the authority to do so;
3. Executive Order 13535 issued on March 24, 2010 did not expressly prohibit the use of federal tax dollars for abortions through the PCIP program; however, the Executive Order's language demonstrates the intent of the Administration to do so, as does its characterization of the effect of the Executive Order and its promises that no federal tax dollars would be used for abortions through health care reform and;
4. In light of long standing federal law prohibiting the use of federal tax dollars for abortions and the authority given by the Affordable Care Act to the Secretary of HHS to prohibit federal funding for abortions through the PCIP program, Section 152.19(b) of the regulation should remain in place.

1) Section 152.19(b) of the regulation is consistent with existing federal law and policy prohibiting the use of federal tax dollars for abortions or for insurance plans that cover abortions.

Over the course of the last four decades, Congress has passed numerous laws (and administrations have promulgated numerous regulations) prohibiting the use of federal tax dollars for abortions or for subsidizing insurance plans that cover

abortions.³ The most well known of these laws, the Hyde Amendment, prohibits the use of funds appropriated through the Labor, Health and Human Services (LHHS) appropriations bill for abortions or abortion coverage.⁴ Additional statutes and appropriations riders have applied the same principles embodied in the Hyde Amendment to other sources of federal funding.⁵

While there was debate during the consideration of health care reform over *how* to maintain the “status quo” on abortion funding in the new law, there was little disagreement over the fact that the Hyde Amendment epitomizes the status quo. The status quo on federal funding for abortion, as embodied in the Hyde Amendment, is this: **no federal tax dollars should be used to pay for abortions or abortion coverage.** In fact, federal law even specifies that state dollars which are comingled with federal dollars should not be used to pay for abortions or abortion coverage (e.g., state Medicaid matching funds).

Therefore, Section 152.19(b) of the regulation is wholly consistent with existing federal law in that it ensures federal funds appropriated to the PCIP program may not be used for abortions.

2) The Affordable Care Act and existing law do not explicitly prohibit the use of federal tax dollars for abortions through the PCIP program, but section 1101 of Title I, Subtitle B gives the Secretary of HHS the authority to do so.

a. The Affordable Care Act and Abortion

The Affordable Care Act does not comprehensively prohibit the use of federal tax dollars authorized by and/or appropriated through the Act for abortions or abortion coverage, nor does it specifically prohibit the use of federal tax dollars allocated to the PCIP program for these purposes. In fact, section 1101, creating the PCIP program, does not address abortion funding or other “benefits” at all. In a recent memorandum, the Congressional Research Service (CRS) found that the

³ Most of the existing federal prohibitions on abortion funding provide exceptions for cases of rape, incest, or when the life of the mother is endangered. Therefore, unless otherwise noted, references to prohibitions on funding for abortions in this comment exclude these three cases.

⁴ Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 802 (Mar. 11, 2009).

⁵ See, e.g., *id.* at 676-77 (Federal Employee Health Benefits Program); 700 (District of Columbia); 584 (Dept. of Justice).

“[Affordable Care Act] does not indicate what benefits may or may not be subsidized with federal funds appropriated under section 1101(g)(1) of the Act.”⁶

While section 1303 of Title I, Subtitle D (which provides for the establishment of Qualified Health Plans (QHP’s)) restricts abortion funding and coverage,⁷ these restrictions *only* apply to funding for QHP’s and therefore do not apply to any of the other funds authorized and/or appropriated through the Act.⁸ The CRS stated “[a]bortion restrictions included in section 1303 of [the Affordable Care Act] . . . would not appear to apply specifically to the funds made available for high risk pools by section 1101.”⁹

b. Existing law and the PCIP Program

Existing restrictions on federal funding for abortion also do not apply to the PCIP program. The Hyde Amendment, as discussed above, prohibits the use of federal tax dollars appropriated through the Labor, Health and Human Services

⁶ Memorandum from Cong. Research Service to S. Comm. on Health, Education, Labor, and Pensions, *High Risk Pools Under PPACA and the Coverage of Elective Abortion Services*, p. 1 (July 23, 2010), available at <http://help.senate.gov/imo/media/doc/CRS%20Report%20for%20HELP%2007232010.pdf>.

⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 896 (Mar. 23, 2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ148.111.pdf. Other sections that address abortion funding or coverage in the Affordable Care Act: **Section 1334(a)(6)** (Ensures that at least one multi-State qualified health plan in an Exchange does not provide coverage for abortion, and thus implies that abortion coverage is otherwise permitted in the multi-State qualified health plans); **Section 10221** (Prohibits abortion funding and coverage under the Indian Health Care Improvement Act so long as the annual appropriations bill for the Indian Health Service includes a prohibition on abortion funding and coverage); **Section 399Z-1(a)(3)(C)** and **(f)(1)(B)** (Define “School-Based Health Centers as health clinics that do not provide abortions and prohibit the use of federal grants for School-Based Health Centers for abortions. These sections do not prohibit referrals for abortions or abortion counseling in School-Based Health Centers, or the use of federal funds for these purposes).

⁸ *Id.* Section 1303 provides that QHP’s (health plans which may participate in the new Health Benefit Exchanges) may provide abortion coverage to enrollees. However, the section creates an accounting mechanism designed to prevent federal subsidies from being used to directly pay for abortions through Qualified Health Plans. (Nonetheless, this provision is a departure from the status quo on abortion funding – the Hyde Amendment and other federal programs such as the Federal Employee Health Benefits Program (FEHBP) prohibit federal subsidies from supporting insurance plans that cover abortions, regardless of whether the federal dollars are used to directly pay for abortions.)

⁹ *Supra* note 6.

Appropriations bill for abortions or abortion coverage. Other federal laws and regulations similarly prohibit the use of *specific* federal tax dollars for abortions. However, the PCIP program is funded through “moneys in the Treasury not otherwise appropriated,” and existing law does not contain a comprehensive prohibition on the use of Treasury funds for abortion.¹⁰ In other words, the funding for the PCIP program is not subject to the Hyde Amendment or to other restrictions on federal funding for abortion.

Again, the CRS memorandum supports AUL’s analysis on this point, stating that “[b]ecause the Hyde Amendment restricts only the funds provided under the appropriations measure for the Departments of Labor, HHS, and Education, it would not seem to apply to the funds provided for the high risk pools pursuant to section 1101(g)(1) of [the Affordable Care Act]. . . . Other abortion funding restrictions, such as those in the appropriations measure for the Department of State and Foreign Operations, operate like the Hyde Amendment and limit only funds provided under that particular appropriations measure.”¹¹

c. The PCIP Program and the Secretary’s Authority

While the Affordable Care Act and existing law do not directly prohibit the use of federal tax dollars appropriated to the PCIP program for abortions, the Act gives the Secretary of HHS broad authority to create additional requirements for qualified high risk pools. Section 1101(c)(2)(D) provides that the Secretary may determine “**any other requirements**” she deems “**appropriate**” for a qualified high risk pool (emphasis added).¹²

In the introduction to the regulation, HHS clarifies that as the PCIP program is similar to other federal programs to which restrictions on federal funding for abortions apply, “the services covered by the PCIP program shall not include abortion service except in the case of rape or incest, or where the life of the woman would be endangered.”¹³ The introduction further notes that the list of excluded services in Section 152.19(b) of the Regulation, including abortion, parallels the list of excluded services in the Federal Employee Health Benefits Program

¹⁰ *Supra* note 7, at 143.

¹¹ *Supra* note 6, at 3.

¹² *Supra* note 7, at 142.

¹³ *Supra* note 1.

(FEHBP).¹⁴ These parallel provisions are logical, given that both the PCIP program and the FEHBP are federally-created insurance programs.

Clearly, given the breadth of the authority given to the Secretary and the logic in prohibiting abortion funding and coverage under the PCIP program as it is prohibited under other similar federal laws, Section 152.19(b) is entirely “appropriate” and would fall under the authority of the Secretary granted by Section 1101(c)(2)(D).

The CRS memo reached a similar conclusion, stating that “it may be possible for the Secretary of HHS to provide that a high risk pool may not use federal funds to pay claims or subsidize premiums related to the coverage of elective abortions. The Secretary’s seemingly broad authority to establish other requirements for high risk pools may also arguably allow for a restriction on elective abortion coverage in the high risk pools.”

3) Executive Order 13535 issued on March 24, 2010 did not expressly prohibit the use of federal tax dollars for abortions through the PCIP program; however, the Executive Order’s language demonstrates the intent of the Administration to do so, as does its characterization of the effect of the Executive Order and its promises that no federal tax dollars would be used for abortions through health care reform.

President Obama’s March 24, 2010 Executive Order relating to federal funding for abortion was characterized by the White House as “reaffirm[ing] [the Affordable Care Act’s] consistency with longstanding restrictions on the use of federal funds for abortion.”¹⁵ The White House website further stated that “[t]he President has said from the start that this health insurance reform should not be the forum to upset longstanding precedent.”¹⁶ President Obama also stated during a speech on health care reform before Congress that “no federal dollars will be used to fund abortions,”¹⁷ a claim frequently repeated by members of his administration.

¹⁴ *Id.*

¹⁵ Posting of Dan Pfeiffer to The White House Blog, <http://www.whitehouse.gov/blog/2010/03/21/one-more-step-towards-health-insurance-reform> (March 21, 2010, 16:16 EST).

¹⁶ *Id.*

¹⁷ Press Release, The White House, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), available at www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/.

Unfortunately, the language of the Executive Order did not (and arguably could not) “cure” the major abortion-funding flaw in the Affordable Care Act – the absence of a comprehensive prohibition on the use of federal funds for abortions and abortion coverage. The Executive Order only addressed the insurance exchanges (section 2)¹⁸ and funding for Community Health Centers (CHC’s) (section 3).¹⁹ In other words, the Executive Order still left open the possibility that other funds authorized or appropriated through the law could be used to directly pay for abortions.

The CRS also expressed doubt that the Executive Order adequately prevented the use of PCIP program funds for abortions: “Executive Order No. 13535 **does not specifically address high risk pools and the funds** provided under section 1101 of PPACA.”²⁰

Nonetheless, in spite of the Executive Order’s failure to specifically address high risk pools and the federal funds allocated to them, the language of the Executive Order demonstrates the intent of the Administration to prohibit the use of these funds for abortions: “it is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered),

¹⁸ While the executive order *addresses* the insurance exchanges, it fails to *apply* Hyde to them. Section 2 of the order provides guidelines for “strict compliance” with the provisions in the bill that address how federal subsidies are handled in plans that cover abortions in the exchanges. However, these guidelines do nothing to *prevent* federal subsidies from going to plans that cover abortions, which directly violates federal principles embodied in the Hyde Amendment and other federal laws, including the Federal Employee Health Benefits Program (FEHBP). Other existing laws forbid federal dollars from going to insurance plans that cover abortions, regardless of whether or not the dollars *directly* pay for abortions. In contrast, all this section of the executive order accomplishes is strict compliance with the “abortion surcharge” provision in the Affordable Care Act, which segregates the portion of premiums that pays for abortions in plans that cover abortion from federal funds.

¹⁹ The Affordable Care Act does not prohibit these new CHC funds from being used to pay for abortions. While the executive order states that the Hyde Amendment and longstanding regulations currently prohibit the use of CHC funds for abortions, the Hyde Amendment is not applied to CHC funding by statutory law, but only by regulations from an administrative agency. This section of the executive order states that the Hyde Amendment will apply to the new authorization and appropriation of CHC funds. This section should effectively prohibit the use of CHC funds for abortions (such a prohibition is not contradicted by the Affordable Care Act and would be consistent with existing law).

²⁰ *Supra* note 6, at 2.

consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment.”²¹ Further, based on statements by President Obama, his Administration, and members of Congress,²² it is logical to conclude that the Administration and Congress intended for the PCIP program funds to be used in a way *consistent* with existing law, that is, consistent with federal prohibitions on the use of tax dollars for abortions or abortion coverage.

4. In light of long standing federal law prohibiting the use of federal tax dollars for abortions and the authority given by the Affordable Care Act to the Secretary of HHS to prohibit federal funding for abortions through the PCIP program, Section 152.19(b) of the regulation should remain in place.

Section 152.19(b) of the regulation ensures that the new federal funds appropriated to the PCIP program are not used to pay for abortions or abortion coverage. While it would have been preferable for Congress to expressly prohibit the use of any moneys authorized or appropriated through the Affordable Care Act for abortions or abortion coverage, section 1101 of Title I, Subtitle B of the Act provides the Secretary with broad authority to exclude coverage for certain services from the PCIP program, including abortion. Given that funding for abortion coverage is prohibited for similar federal programs, and that the Obama Administration expressed a desire not to “upset longstanding precedent” on this issue, Section 152.19(b) should remain in place.

Sincerely,

/s/ William L. Saunders
Senior Vice President of Legal Affairs

²¹ *Supra* note 15.

²² *See, e.g.*, Posting of Nancy-Ann DeParle to the White House Blog, <http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions> (July 29, 2010, 8:40 EST); Press Release, The White House, Press Briefing by Press Secretary Robert Gibbs (Oct. 7, 2009), available at <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-10709>; Ryan Grim, *Breakthrough: Health Care Talks Advance in Senate*, Huffington Post, Dec. 8, 2009, available at http://www.huffingtonpost.com/2009/12/08/senate-sinks-abortion-ame_n_384846.html (quoting Senate Majority Leader, Harry Reid (NV): “No one should use the health care bill to expand or restrict abortion. . . This is not the right place for this debate.”).