ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

December 22, 2014

Via Electronic Submission

The Honorable Sylvia Mathews Burwell
Secretary, U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20001

The Honorable Katherine Archuleta
Director, U.S. Office of Personnel Management
1900 E Street NW, Room 3468
Washington, DC 20415

RE: Proposed Rules Concerning Abortion Coverage Disclosure and Abortion Surcharges

Dear Secretary Burwell and Director Archuleta:

Today, nearly 15 months after the opening of the first enrollment period for health insurance plans offered via exchanges created under the Affordable Care Act, Americans are being coerced and misled into enrolling in health insurance plans that include coverage of and require secret payments for elective abortions. Whether one supports or opposes abortion or insurance coverage for abortion, our nation has historically and legislatively affirmed the right not to participate in or facilitate abortions in violation of one's conscience. This principle is now in serious jeopardy. We have heard from many Americans who have been shocked to learn that the healthcare plan they have enrolled in not only includes elective abortions, but requires them to pay an additional fee – undisclosed to them – that can only be used to pay for others' elective abortions. Unfortunately, the recently proposed rules from your agencies would not address these problems in an effective or consistent way. We urge you to act to ensure that no one is coerced or otherwise misled into enrolling in plans covering and directly funding abortions through the Affordable Care Act.

The Affordable Care Act requires the calculation of the average actuarial value, and collection, of a "separate payment" for abortion coverage for any plan that includes coverage of abortions for which federal taxpayer dollars may not be used (all abortions except those for reasons of rape, incest, or the life of the mother). 42 U.S.C. § 18023(b)(1)(B)(i)(II). However, your agencies have issued and enforced rules instructing insurers to collect only a single payment. As directed by your agencies, insurers covering elective abortions "must provide a

notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage." 45 C.F.R. § 156.280(f)(1). Further, the rules instruct that with respect to abortion coverage, "any advertising used by the [insurer], any information provided by the Exchange, and any other information specified by HHS must provide information only with respect to the total amount of the combined payments." 45 C.F.R. § 156.280(f)(2). These rules have effectively mandated secrecy of abortion coverage and the abortion premium surcharge.

Indeed, in some states the problem is even more serious. As you are aware, and as the Government Accountability Office has confirmed,[1] in Hawaii, New Jersey, Rhode Island and Vermont, *every* ACA plan available for purchase via the state's health insurance exchange includes elective abortion coverage. These plans thus require enrollees to pay an unknown amount determined by the insurer for this abortion coverage, hidden in their overall premium, and set aside in a separate account by the insurer to pay for others' elective abortions within the same plan.

Until November 2014 every Connecticut enrollee was also required to pay this hidden abortion premium surcharge. The Bracy family discovered that this was the case when their plan was cancelled "to meet the requirements of … the Affordable Care Act."[2] But when they sought to enroll in a plan via Access Health Connecticut, Barth Bracy discovered that every plan on the exchange included coverage of elective abortion and required him to pay an undisclosed portion of his premium into an account to be used for elective abortions. Barth Bracy is Executive Director of the Rhode Island Right to Life Committee. He had written extensively about this exact problem. Yet even he required the assistance of national organizations like the Charlotte Lozier Institute to confirm that every plan offered on the Connecticut exchange would require him to pay this hidden abortion surcharge because he could not confirm this fact through reviewing plan documents alone. After the Bracys sued, insurance plans were added to the Connecticut exchange that did not include abortion coverage and an undisclosed abortion premium surcharge.

This regime of secrecy – especially in those states where there is no choice of a plan without elective abortion coverage – is particularly offensive because participation is enforced by the ACA's individual mandate. Individuals and families are subject to substantial penalties if they fail to obtain insurance coverage mandated under the ACA. 26 U.S.C. §5000A. Due to ACA requirements for all insurance plans, the only plans many Americans can afford are those offered on ACA exchanges because of the tax subsidies they can receive there. Having forced consumers out of their chosen plans and into the exchanges, the Administration your agencies serve has a duty to at least ensure that enrollees have a free choice of plans on the exchanges and are fully informed about the plans they are purchasing.

Unfortunately, the rule proposed by HHS (79 Fed. Reg. 70729, November 26, 2014), would continue this secrecy to the detriment of enrollees and the public trust. While purporting to permit insurers to disclose the abortion premium surcharge, it would not require collection of

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[1] *See* http://gao.gov/products/GAO-14-742R (last visited December 19, 2014).
[2] http://www.adfmedia.org/files/BracyComplaint.pdf .

the "separate payment" as required by 42 U.S.C. § 18023(b)(1)(B)(i)(II). Rather than focusing on protecting consumers, the proposed rule would continue to empower insurance companies to decide whether or not to tell consumers what they are paying for. If the "services" at issue were anything other than abortion, it is difficult to believe that the federal government would permit – and even encourage – corporations to deceive customers. Yet that is the effect of the current regulations governing abortion coverage via the healthcare exchanges and will continue to be the case if the proposed rules are adopted.

Likewise, the proposed rule from the Office of Personnel Management (79 Fed. Reg. 69802, November 24, 2014) fails to protect consumers because it continues to permit insurance companies to confuse abortion coverage and conceal the abortion premium surcharge. The OPM rule would only require disclosure of abortion coverage prior to enrollment. While this requirement and the specificity of requiring inclusion of coverage information in the statement of benefits and coverage are welcome, the mere inclusion in insurance documents of language concerning abortion coverage is insufficient to place consumers on effective notice.

Detailed examination of existing statements of benefits and coverage by the Charlotte Lozier Institute and Family Research Council have revealed that some plan documents may simply state that there are "no exclusions" for pregnancy; others may state that "voluntary" abortions are excluded but may or may not interpret that word to include abortions for "health" reasons excluded from federal taxpayer subsidies under the Hyde Amendment; still others may include coverage of "medically necessary" or "involuntary" abortions without explaining whether these include abortions beyond those exempted by the Hyde Amendment. Further, even if a consumer is able to discern that abortion is included in a plan and in which circumstances, the OPM rule would not require insurers to inform consumers of the consequence of this fact – that the consumer would be required to pay a surcharge for elective abortions if they choose a plan that includes coverage for certain abortions. The OPM rule represents a small step forward, but not a leap.

Practical experience has demonstrated that it is virtually impossible for even diligent researchers reviewing insurance coverage options on an ACA exchange to discover whether the plans include abortion coverage. Attempting to discern which plans cover elective abortion in each state, the Charlotte Lozier Institute and Family Research Council have spent hundreds of hours making phone calls, inquiring by email and live chat, and searching for abortion coverage information in plan documents online.[3] What they have discovered is that even for trained

[3] The following are a few of the articles that describe the difficulties investigators have found with accessing this information. http://www.nationalreview.com/article/387993/obamacares-abortion-shell-game-arina-o-grossu (last visited December 20, 2014); http://www.nationalreview.com/article/384618/total-confusion-elective-abortion-coverage-genevieve-c-plaster/page/0/1 (last visited December 20, 2014); http://www.nationalreview.com/corner/365504/abortion-obamacare-exchanges-chuck-donovan-genevieve-c-plaster (last visited December 20, 2014); http://www.nationalreview.com/corner/360260/obamacares-abortion-subsidies-are-well-hidden-charles-donovan-genevieve-cervantes (last visited December 20, 2014). *See also* "Abortion Coverage Under the Affordable Care Act: The Laws Tell Only Half The Story," Guttmacher Policy Review, Winter 2014, Vol. 17, available at http://www.guttmacher.org/pubs/gpr/17/1/gpr170115.html#table (last visited December 21, 2014) ("[T]he information consumers can find may not tell the whole story about what issuers are, or are not, covering. Rather, because the vast majority of plan documents searched are silent with regard to abortion coverage,

professionals who know exactly what information they are trying to find, it is a Herculean, and sometimes fruitless, task. In many states, plan documents with abortion coverage information were not available online. Customer service personnel for the exchanges and the insurance companies were routinely unable to answer whether a given plan included abortion coverage and frequently gave answers that later proved to be incorrect. In many cases these same personnel neglected or failed to return promised telephone calls, all while deadlines for the purchase of insurance were approaching and passing.

In October 2013 when the Charlotte Lozier Institute began researching abortion coverage in the ACA exchanges, it was common for front-line personnel to admit they were not provided with information on abortion coverage, and then transfer the caller to a different department with an agent who was just as ill-equipped. Months later, customer service personnel responded more readily, but with information later confirmed as completely inaccurate by the Government Accountability Office. Some companies noted that abortion information is not listed on any of their sales documents and that it only appears on member policies that are not made available until after an individual enrolls. One licensed agent referred to a year-long, ongoing email chain between his company's legal department and "healthcare.gov" about the company's abortion coverage policy, stating that he had no pertinent plan document on hand. The same challenges for consumers remain for this current enrollment period.

Exchange and insurance personnel were even more in the dark about the consequence of abortion coverage by these plans – whether they require an abortion premium surcharge. Some simply expressed bewilderment and had no idea that plans covering elective abortion would require a separate abortion premium amount. Others tried explaining how deductibles work or even referred the callers to Planned Parenthood. Some assumed the separate abortion surcharge referred to a separate rider available for purchase, in which case representatives stated that the ACA mandates that all plans cover elective abortion and a rider was not applicable. Sometimes, the separate abortion account was misunderstood to be applicable only if an employer had a religious exclusion on the policy. One company explained they are not obligated to bill elective abortion as a separate mandatory fee, but that when members send payments, they may identify the extra charge and separate it themselves.

These were not isolated instances. This was the common experience of those who were calling to simply discern which plans included and which excluded elective abortion coverage. If these individuals who know which questions to ask and what information to seek can't get answers to these simple questions, it is a hopeless task to ask consumers to seek this information out. The exchange and insurance company employees simply cannot answer the questions. They, like the customers they supposedly serve, are in the dark – in no small part because your agencies have forbidden illumination of abortion coverage and the surcharge that accompanies it.

If Americans are to be forced off their existing, chosen insurance plans and into the ACA insurance exchanges regulated by your agencies, they should at least be entitled to full disclosure

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or occasionally provide confusing or contradictory information, it is often difficult to know whether and to what extent abortion might be excluded. Notably, in eight of the states investigated, Guttmacher did not find a single issuer providing any information on abortion coverage in their plans' SBCs.").

of the contents of the plans on those exchanges and what they are paying for. Unfortunately, the proposed rules do not protect consumers, and in fact may continue to mislead them into enrolling in abortion-including plans and paying for others' abortions in violation of their conscience. Additionally, the proposed rule released November 26 comes late during open enrollment, as there are another 30 days for comments before a response is issued, and in the meantime Americans have enrolled in plans in order to meet the December 15 deadline for coverage to begin in January. Among these are individuals and families who wish to avoid abortion-including plans according to their conscience, but may have unknowingly purchased them due to the lack of transparency. Immediate action is needed if other individuals who wish to avoid ACA exchange abortion plans are to be able to enroll by the looming February 15 deadline.

Rather than the proposed rules, we encourage HHS and OPM to require – not simply permit – full and clear disclosure of the scope of abortion coverage in each and every insurance plan and whether and in what amount the insured under each plan will be responsible for an abortion premium surcharge. This information should be included at the beginning of the summary of benefits and coverage for all plans and should be available to consumers via exchange websites at all points in the process, not just at the point of enrollment. Further, exchange websites should be required to separately list plans that do not include elective abortion coverage so that consumers can easily identify those plans.

Finally, to increase consumer choice, consumers should be permitted to opt out of abortion coverage and payment of the abortion premium surcharge for all plans. And whether via this mechanism or some other, it is incumbent upon your agencies to immediately act to provide new or modified plans on the exchanges in at least Hawaii, New Jersey, Rhode Island and Vermont, that will permit consumers to enroll in healthcare plans without being forced to pay for others' elective abortions.

Whatever one's views of abortion, the current exchanges and plans regulated by your agencies do not protect any "right to choose" abortion coverage. In fact, they leave many Americans without a choice that fits both their health needs and respects their right of conscience. They deceive and compel Americans to pay for others' elective abortions. This is unconscionable and within your power to correct.

/s/ M. Casey Mattox	/s/ Chuck Donovan	/s/ David Christensen
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Senior Counsel	President	V.P. of Government Affairs
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