



MEMORANDUM

July 23, 2010

To: Senate Committee on Health, Education, Labor, and Pensions
[REDACTED]

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Subject: High Risk Pools Under PPACA and the Coverage of Elective Abortion Services

This memorandum responds to your request concerning the temporary high risk insurance pool program established by the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148, as amended). You asked a series of questions specifically related to the federal funding of abortions in the temporary high risk pools. These questions are addressed below.

1. Do the restrictions in the Patient Protection and Affordable Care Act (PPACA) affirmatively prohibit federal funds from being used by state Pre-Existing Condition Insurance plans (“high risk pools”) to cover elective abortions?¹

Section 1101 of PPACA provides for the establishment of a temporary high risk insurance pool program for specified individuals with preexisting conditions between the date on which the program is established and January 1, 2014. Pursuant to section 1101(g)(1), \$5,000,000,000 is appropriated to the Secretary of Health and Human Services (HHS), out of any moneys in the Treasury not otherwise appropriated, to pay claims against the high risk pool that are in excess of the premium amounts collected from enrollees. PPACA does not specify what benefits may or may not be subsidized with federal funds appropriated under section 1101(g)(1) of the Act.

Abortion restrictions included in section 1303 of PPACA, as amended by section 10104 of the Act, would not appear to apply specifically to the funds made available for high risk pools by section 1101. Section 1303 prohibits an issuer of a qualified health plan that is available in a health insurance exchange (beginning in 2014) from using funds attributable to a premium assistance credit or cost-sharing reduction to pay for elective abortion services, if such services are covered by the plan. Individuals who are eligible

¹ The term “Pre-Existing Condition Insurance Plan” (PCIP) refers to the marketing name that the U.S. Department of Health and Human Services is using for the program. States, however, are permitted to use their own name in their jurisdictions.

for a premium assistance credit or cost-sharing reduction may select a plan that provides coverage for elective abortions, subject to funding segregation requirements that will be imposed on both the plan issuer and the enrollees in such a plan.²

2. Does the President's March 24, 2010 Executive Order 13535 prohibit federal funds from being used by state high risk pools to cover elective abortions?

Executive Order No. 13535 does not specifically address high risk pools and the funds provided under section 1101 of PPACA.³ The executive order directs the Director of the Office of Management and Budget and the Secretary of HHS to develop a model set of segregation guidelines for state health insurance commissioners to use when determining whether qualified health plans offered in the health insurance exchanges are complying with PPACA's segregation requirements.⁴ The executive order also directs the Secretary of HHS to ensure that recipients of federal funds for community health centers (CHCs) under section 10503 of PPACA "are aware of and comply with the limitations on abortion services imposed on CHCs by existing law."⁵

3. Does the HHS Request For Proposals specifically prohibit federal funds from being used by state high risk pools to cover elective abortions?

The PPACA high risk pool program can be administered either by the states or by HHS. On May 10, 2010, HHS issued a solicitation for proposals and model contract to states to run the high risk pools established under PPACA in their respective jurisdictions.⁶ The contracts awarded through this solicitation will include a start-up period of performance that will run until December 31, 2010, and three additional one-year periods of performance that will run until December 31, 2013. The solicitation contains no specific language with respect to coverage of any particular health services or procedures, including elective abortion.

The solicitation, however, requires states to follow HHS guidelines and directives or risk termination of the contract, specifically noting that "HHS will provide guidance on regulations that it may promulgate that will govern requirements and operations of high risk pool programs. Contractors must follow such guidance for the duration of the contract, as well as other applicable laws and regulations."⁷ This statement is replicated in the HHS model contract document.⁸ The solicitation and model contract neither explicitly provide the authority to cover elective abortions with federal funds, nor do they specifically prohibit the use of federal funds. However, HHS issued a statement on July 14, 2010, stating:

² Funding segregation refers generally to payment and accounting requirements that ensure that federal funds are not used for nor subsidize elective abortion services.

³ Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

⁴ *See id.* § 2.

⁵ *See id.* § 3.

⁶ U.S. Department of Health and Human Services, "Solicitation for State Proposals to Operate Qualified High Risk Pools," May 10, 2010, available at http://www.hhs.gov/ocio/Documents/state_solicitation.pdf. U.S. Department of Health and Human Services, "Contract to Operate a Qualified High Risk Pool," May 10, 2010, available at http://www.hhs.gov/ocio/Documents/state_hrp_model_contact_061010.pdf.

⁷ HHS further notes that as, "of the date of this solicitation, the final regulations for the high risk pool program have not yet been published. If there are significant changes to the requirements below as a result of Federal regulations, HHS will amend this solicitation and give States an opportunity to make changes in their proposals prior to the issuance of contracts."

⁸ U.S. Department of Health and Human Services, "Contract to Operate a Qualified High Risk Pool," May 10, 2010.

¹⁰ U.S. Department of Health and Human Services, "Statement of HHS Spokeswoman Jenny Backus on the Pre-Existing Condition Insurance Plan Policy," July 14, 2010, available at <http://www.hhs.gov/news/press/2010pres/07/20100714d.html>.

As is the case with FEHB plans currently, and with the Affordable Care Act and the President's related Executive Order more generally, in Pennsylvania and in all other states abortions will not be covered in the Pre-existing Condition Insurance Plan (PCIP) except in cases of rape or incest, or where the life of the woman would be endangered.¹⁰

While this press release is not a formal policy issuance, it is reasonable to conclude that HHS intends on issuing regulations formalizing this stated policy.

4. Do the current law restrictions, codified in annual appropriations bills (Hyde Amendments), prohibit federal funds authorized under PPACA for high risk pools from being used by a state plan to cover elective abortions?

The "Hyde Amendment" refers to an amendment first offered by Rep. Henry J. Hyde in 1976 to the Departments of Labor and Health, Education, and Welfare, Appropriation Act, 1977.¹¹ The amendment restricted the use of appropriated funds to pay for abortions provided through the Medicaid program. Since 1976, similar provisions have been included annually in the appropriations measures for the Departments of Labor, HHS, and Education, and are now commonly referred to as the "Hyde Amendment." Section 507(a) of the Consolidated Appropriations Act, 2010, for example, states: "None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion."¹² An exception to the general prohibition on using appropriated funds for abortions is provided in section 508(a) of the omnibus measure:

The limitations established in the preceding section shall not apply to an abortion –

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.¹³

Because 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 PPACA. Section 1101(g)(1) indicates that such funds are appropriated "out of any moneys in the Treasury not otherwise appropriated." 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.

5. Could it be possible for a state high risk pool to use federal funds to cover and pay for elective abortions that would typically be prohibited under the Hyde Amendment?

PPACA does not indicate what benefits may or may not be subsidized with federal funds appropriated under section 1101(g)(1) of the Act. In addition, as previously indicated, the Hyde Amendment and other abortion funding restrictions that are included in the annual appropriations measures for various federal

¹¹ Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.").

¹² Pub. L. No. 111-117, § 507(a), 123 Stat. 3034, 3280 (2009).

¹³ Pub. L. No. 111-117, § 508(a), 123 Stat. 3034, 3280 (2009).

agencies would not seem to apply to the funds available under section 1101(g)(1). HHS regulations that apply to programs or projects administered by the Public Health Service for health services that are supported by federal financial assistance, and that restrict the availability of funds for elective abortion services, would also not appear to apply to the funds appropriated under section 1101(g)(1). The programs or projects contemplated by the regulations must be administered by the Public Health Service, and it does not appear that the high risk insurance pool program established by section 1101 will be administered by that agency.¹⁴

Under section 1101, high risk pools must meet specified requirements, including “any other requirements determined appropriate by the Secretary.”¹⁵ 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.

¹⁴ See 42 C.F.R. § 50.301.

¹⁵ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1101(c)(2)(D), 124 Stat. 119, 142 (2010).
