September 6, 2013

Acting Director Elaine Kaplan
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Director Kaplan,

We are writing regarding a proposed rule printed in the Federal Register on August 8, 2013. This proposed rule addresses health insurance for Congressional staff and Members of Congress. We are deeply concerned by a recent news report that seems to indicate that in carrying out the proposed rule, the Office of Personnel Management (OPM) does not plan to comply with the Smith Amendment regarding Federal employee health plans that provide benefits or coverage for abortion.

As you know, funds appropriated through the Financial Services Appropriations bill are covered by an amendment authored by Rep. Christopher Smith (R-NJ) in 1983. This longstanding statutory requirement specifies that funds are not used for “abortion, or the administrative expenses in connection with any health plan under the Federal employee health benefits program which provides any benefits or coverage for abortions.”

The amendment is specifically drafted to refer to the “administrative expenses in connection with” any health plan that includes benefits or coverage for abortion, so that OPM administrative activities for Federal employees cannot include any activity related to a plan that includes elective abortion. Examples of OPM administrative expenses include collecting employer contributions from the various Federal agencies, collecting individual premium contributions from Federal employees, and making premium payments to insurance companies on behalf of Federal employees. As a result of the Smith amendment, none of the plans offered to Federal employees include abortion, except in cases of rape, incest or to save the life of the mother.

Under the proposed rule, OPM will carry out new administrative duties on behalf of Congressional employees under the authority of its mandate to provide Federal employee health benefits. These duties will include collecting and disbursing premiums for plans sold in the various exchanges (or marketplaces) established by the Affordable Care Act (ACA). The ACA explicitly allows exchange health insurance plans to include elective abortion in the package of benefits sold on the exchanges.¹

¹Section 1303 of the ACA specifies that unless a state has taken action to prohibit abortion coverage in plans sold on its exchange, “the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion] as a part of such benefits for the plan year.” That means that in the 27 states that have not prohibited abortion coverage on their exchange, there will be plans sold that include elective abortion. While there are accounting arrangements in the ACA to separate abortion funds, these accounting arrangements are radical departure from prior abortion funding law. The accounting gimmick calls for an abortion surcharge of at least $1 per month. The abortion surcharge is not optional. If an individual selects a plan that includes abortion, they must pay the abortion surcharge. Furthermore, the accounting gimmicks are not relevant to the Smith amendment which specifically requires no administrative costs related to plans that include abortion, even under the accounting arrangement OPM would be carrying out administrative costs related to paying for the abortion-covering plan.
Therefore, if a Congressional employee selects one of the plans that includes elective abortion, OPM will collect the employer and employee premium contributions and in turn disburse them to the abortion-covering plan. Such a scenario would result in administrative expenses being used in connection with a health plan that provides benefits or coverage for abortion—a clear violation of the Smith amendment. Moreover, a violation of a limitation amendment, such as the Smith Amendment, may constitute a violation of the Anti-Deficiency Act.

Such violations must be avoided. Please provide a written explanation as to what steps you are taking to ensure that OPM personnel only collect and pay premiums for exchange plans that do not include abortion except in cases of rape, incest or to save the life of the mother. We look forward to your response no later than September 12, 2013.

Sincerely,

[Signatures]

[Signatures]
2. Blackburn, Marsha
3. Pitts, Joseph
4. Hartzler, Vicky
5. Harris, Andy
6. Lipinski, Dan
7. Lankford, James
8. Wagner, Ann
9. Gowdy, Trey
10. Black, Diane

11. Fleming, John
12. Carter, John
13. Rothfus, Keith
14. King, Peter
15. Daines, Steve
16. Pompeo, Mike
17. Fincher, Stephen
18. Huizenga, Bill
19. McKinley, David
20. Roe, David
21. Benishek, Dan
22. Ross, Dennis
23. Bridenstine, Jim
24. Flores, Bill
25. Duffy, Sean
26. Brooks, Mo

27. Gosar, Paul
28. Griffin, Tim
29. Boustany, Charles
30. Nunnelee, Alan
31. Neugebauer, Randy
32. Long, Billy
33. Meadows, Mark
34. Barr, Andy
35. Mullin, Markwayne
36. Kelly, Mike
37. Lamborn, Doug
38. Broun, Paul
39. Walberg, Tim
40. Franks, Trent
41. Westmoreland, Lynn
42. Conaway, Mike

43. Peterson, Collin
44. Gohmert, Louie
45. Burgess, Michael
46. Aderholt, Robert
47. Huelskamp, Tim
48. Brady, Kevin
49. Scott, Austin
50. Johnson, Bill
51. Ros-Lehtinen, Ileana
52. Jones, Walter
53. Goodlatte, Bob
54. Duncan, Jeff
55. McCaul, Mike
56. Schock, Aaron
57. Southerland, Steve
58. Crawford, Rick

59. Forbes, Randy
60. Wilson, Joe
61. Hall, Ralph
62. Luetkemeyer, Blaine
63. Tiberi, Patrick
64. Rokita, Todd
65. Miller, Jeff
66. Weber, Randy
67. King, Steve
68. Bachmann, Michele
69. Latta, Robert
70. Terry, Lee
71. Wolf, Frank
72. Gibbs, Bob
73. Roby, Martha
74. Gingrey, Phil

75. Cassidy, Bill
76. Fortenberry, Jeff
77. Jordan, Jim
78. McIntyre, Mike
79. Foxx, Virginia
80. Sensenbrenner, James
81. Bentivolio, Kerry
82. Poe, Ted
83. Bilirakis, Gus
84. Hultgren, Randy