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Subcommittee on the Constitution

Hearing on H.R. 3
No Taxpayer Funding for Abortion Act

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Mr. Chairman and Distinguished Members of the Subcommittee;

Thank you for extending me this opportunity to testify today on this important bill. My testimony focuses on the provisions of H.R. 3 that relate to the tax treatment of health insurance and health care expenditures and to its non-discrimination provision.

H.R. 3 carries important implications for private health care spending that carries tax-favored status.

H.R. 3 dramatically expands the Hyde Amendment's long-standing concept of what constitutes public funding in an abortion context. In doing so, H.R. 3 reaches a wide range of policies related to the tax-favored treatment of private health care expenditures by individuals and employers. The measure achieves this result essentially by imposing a federal coverage exclusion on certain types of medically necessary procedures that can be covered under a health benefit plan or paid for with private funds, as a condition of favorable tax treatment under the Internal Revenue Code.

The Code has long promoted access to health care through provisions that incentivize private health payments by individuals and employers toward the cost of medically necessary care, including the purchase of health benefit plans. Products and activities so incentivized include health insurance products, third party administered plans, health care products that encourage saving for health care expenditures and out-of-pocket payments. Under H.R. 3, health benefit products whose coverage includes benefit exclusions linked to certain procedures would no longer be eligible for favored treatment. Individuals and employers who purchase such products, even without knowledge of their design or practices, would be required to conform to the new federal exclusion.

The exclusion would take effect in the first taxable year following enactment, rather than in the first plan year or following a phase-in time allowing the IRS to develop compliance procedures. No provision would be made for grandfathering existing plans or benefit arrangements. Noncompliance would result in exclusion of the product from the market, as well as liability on the part of affected individuals and employers for recoupment of the tax value of their expenditures. Depending on the excluded procedures and the value of any benefit plan involved, this recoupment amount could be in the thousands – or tens of thousands – of dollars for individuals. Employers could face far larger recoupments.

The Internal Revenue Service presumably would be charged with administering this new federal exclusion. Oversight would necessitate the development of a system that can police the contents of every health benefit services product sold through the tax-preferred market in order to assure that no product covers excluded procedures. In addition, oversight would require a recoupment process covering prohibited individual and employer expenditures.

For more than 30 years, the Hyde Amendment has focused on public spending by the federal government, including expenditures through appropriated funds as well as the

government's expenditures for health benefits offered to federal employees. If enacted into law, H.R. 3 would dramatically expand the concept of public expenditure in order to reach laws governing tax treatment of private health expenditures. Specifically H.R. 3 would add a new Chapter 4 to Title I of the U.S. Code. As amended, Chapter 4 (§303) would create a federal exclusion related to the tax treatment of a range of medical care products:

- It would bar tax-favored expenditures in the form of tax credits made available to qualified small employers that select health benefit plans for their employees if those plans cover excluded abortions;
- It would bar tax-favored expenditures in the form of tax credits made available to qualified individuals who purchase a health insurance or health benefit product if those products cover excluded abortions. This bar appears to apply to all credits, even credits that, as in the case of the Affordable Care Act, are not extended unconditionally but must be recouped in the case of individuals whose incomes rise;
- It would bar individuals from deducting from their incomes the cost of premiums for policies covering prohibited abortions;
- It would bar individuals from claiming a deduction from personal income for uncovered medical expenses related to excluded but medically necessary abortions;
- It would bar individuals from using tax-preferred savings accounts that allow them to marshal their own incomes to pay for the cost of medically necessary but excluded abortions.

Furthermore, the language of H.R. 3 is sufficiently vague – and unaccompanied by any clause limiting the deduction to a deduction taken by the taxpayer – so that read in its broadest form, H.R. 3 conceivably could empower the IRS to reach a deduction taken by an employer who sponsors and contributes to the cost of an employee health benefit plan as a component of overall employee compensation. Section 303(2) (whose sweeping title is "Tax Benefits Relating to Abortion") provides in pertinent part that "*any*" deduction for . . . "a health benefits plan that includes coverage of abortion shall not be taken into account." [emphasis added] Read literally, §303(2) applies to *any* deduction taken for products that cover excluded procedures, regardless of whether such products were purchased intentionally or without knowledge on the part of the employer. Threatened with the loss of deductibility for expenses related to employer-sponsored health plans, employers might cease to provide health benefits as a form of compensation, at least until they could switch to a product certified by the IRS.

As I have noted, not only does the measure impose a federal coverage exclusion for certain medically necessary procedures, but its effect is immediate and without regard to whether such products have been purchased intentionally or without knowledge of their design. Understanding the full scope of coverage under a health benefit plan is a

near-impossibility because of the sheer sweep of the meaning of coverage.[1] Indeed, under the Employee Retirement Income Security Act, health plan administrators have no duty to disclose every covered or excluded procedure.[2] Because H.R. 3 leaves no time for individuals, employers, or the health insurance and health benefits industries to come into compliance, no time would be provided to adjust either product design or purchasing practices.

The potential amount of funding in play as a result of these broad changes in the tax-favored treatment of private medical care purchases is enormous. The Congressional Research Service reports that in 2007, tax-favored expenditures exceeded $310 billion when private health insurance, out-of-pocket payments, and other private expenditures were taken into account.[3]

A separate matter is how the private insurance and health benefits industries would react to this federal health coverage exclusion. We have considered this question previously in the context of the Stupak Amendment introduced and passed by the House of Representatives during the 2009-2010 health reform debate.[4] The vast majority of typical products sold in the employer market appear to cover medically indicated abortion services.[5] Because products that violate the exclusion would no longer qualify for favorable tax treatment, the industry can be expected to scramble quickly to come into compliance. Where the exclusion is as complex and fact-driven as that laid out in H.R. 3, compliance poses great difficulties. What evidence would be needed to document a rape, for example? Would the IRS provide guidance on allowable -- versus excluded -- procedures related to rape? What evidence would be required to justify coverage related to incest? What information would a claimant have to submit? What information would be relevant during the review or an appeal of a coverage denial? What evidence would justify an abortion involving a "physical disorder, physical injury, or physical illness that would, as certified by a physician, place the pregnant female in danger of death"?

To be sure, the insurance and health benefits industries might look to the coverage experiences of public insurers such as Medicaid. However, a far easier and completely legal strategy for private insurers and plan administrators would be simply to exclude coverage of all abortions from their coverage products, whatever the clinical or factual evidence, rather than risk a violation of the federal exclusion that in turn would result in the loss of tax-favored treatment for the entire product. This result is particularly likely

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[1] Rand Rosenblatt, Sylvia Law and Sara Rosenbaum, *Law and the American Health Care System* (Foundation Press, NY, NY 1997)

[2] See, e.g., *Jones v Kodak Medical Assistance Plan*, 169 F. 3d 1287 (10th Cir. 1999)

[3] CRS Memorandum to Senator Tom Coburn (December 1, 2009)

[4] S. Rosenbaum, L. Cartwright-Smith, R. Margulies, S. Wood, and D. Mauery, *An Analysis of the Implications of the Stupak/Pitts Amendment for Coverage of Medically Indicated Abortions* (George Washington University School of Public Health and Health Services, Department of Health Policy, 2009) **http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/index.cfm?mdl=pubSearch&evt=view&PublicationID=FED314C4-5056-9D20-3DBE77EF6ABF0FED**

[5] The Guttmacher Institute reports that 87% of employer-sponsored plans cover some level of medically indicated abortion procedures. Guttmacher Institute Media Center, Memo on Private Insurance Coverage of Abortions (January 19, 2011)

given the fact that under the terms of H.R. 3, the risk of violation is not limited to coverage designs that include federally excluded procedures. Loss of tax-favored status could result from an erroneous claims determination in a single case, since H.R. 3 links its exclusion to any plan that "includes coverage of abortion" without regard to whether the coverage is pursuant to plan design or a single claims decision.

Furthermore, given the nature of insurance coverage and health benefits arrangements, the industry's response could not end at specific excluded procedures. An insurance exclusion relates not only to specific abortion procedures but also to downstream treatments for conditions that arise from excluded procedures.[6] Thus, an insurer or health benefit product, including tax preferred trusts and accounts, would rightfully exclude not only the initial medically indicated abortion procedure but any payment for procedures required to treat complications arising from the initial procedure, such as a medically necessary abortion followed by extended treatment for the results of sepsis.

The Prohibition Against Government Discrimination Against Certain Health Care Entities Is Incomplete

H.R. 3 would codify into permanent law existing nondiscrimination provisions and would tie these newly codified provisions to governmental and private enforcement powers. As written however, the measure would apply only to discrimination against health care entities that do not provide, pay for, provide coverage of, or refer for abortions. Notably absent from the new provision is any protection for health care entities that do in fact provide, pay for, provide coverage of, or refer for abortions that are completely lawful. The absence of such a protection is important in my view given the potential for discriminatory conduct against entities that pay for or provide legal abortions. In the absence of equal protection, a health plan would be free to exclude from its network a physician who provides lawful abortions or a hospital that is willing to provide a life-saving abortion. If a truly enforceable prohibition against discrimination over abortion-related activities is to be added to permanent federal law, the prohibition should be expanded to cover the full range of public practices that might be discriminatory, not only to a selected sub-group.

[6] *Kenseth v Dean Health Plan*, 610 F. 3d 1652, (7th Cir. 2010)