THE TAX-RELATED PROVISIONS OF H.R. 3

HEARING

BEFORE THE

SUBCOMMITTEE ON SELECT REVENUE MEASURES

OF THE

COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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THE TAX–RELATED PROVISIONS OF H.R. 3

THURSDAY, MARCH 16, 2011

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SELECT REVENUE MEASURES,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:00 p.m., in Room 1100, Longworth House Office Building, Hon. Pat Tiberi [Chairman of the Subcommittee] presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON SELECT REVENUE MEASURES

FOR IMMEDIATE RELEASE
Wednesday, March 9, 2011
SRM–2

CONTACT: (202) 225–1721

Chairman Tiberi Announces a Hearing on The Tax-Related Provisions of H.R. 3

Congressman Pat Tiberi, (R–OH), Chairman of the Subcommittee on Select Revenue Measures of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing on the Tax Code's treatment of abortion-related expenses and the changes to such tax treatment proposed by section 2 of H.R. 3—the No Taxpayer Funding for Abortion Act—as ordered reported by the House Judiciary Committee on March 3, 2011. **The hearing will take place on Wednesday, March 16, 2011, in Room 1100 of the Longworth House Office Building beginning at 2:00 p.m.**

In view of the limited time available to hear witnesses, oral testimony at this hearing will be from invited witnesses only. However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing. A list of invited witnesses will follow.

BACKGROUND:

Rep. Chris Smith (R–NJ) introduced the No Taxpayer Funding for Abortion Act (H.R. 3) on January 20, 2011. The bill was referred to the Committee on the Judiciary, and, in addition, to the Committees on Energy and Commerce and Ways and Means. On March 3, 2011, the House Judiciary Committee ordered the bill reported to the House by a vote of 23–14. The Ways and Means Committee received a referral because the bill includes tax provisions that fall within the jurisdiction of the Committee. Ways and Means Committee Chairman Dave Camp (R–MI) asked Chairman Tiberi to hold a hearing for the purpose of examining these provisions so that the Committee can provide its expertise, ensuring that the tax provisions are administrable and operate as intended.

In announcing the hearing, Chairman Tiberi said, **"The Ways and Means Committee has a responsibility to lend our tax policy expertise to the development of H.R. 3 to ensure that the relevant provisions serve their intended purpose."**

FOCUS OF THE HEARING:

The hearing will focus on the tax policy issues raised by H.R. 3 as ordered reported by the House Judiciary Committee on March 3, 2011.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Please Note: Any person(s) and/or organization(s) wishing to submit written comments for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, *http://waysandmeans.house.gov*, select "Hearings." Select the hearing for which you would like to submit, and click on the link entitled, "Click here to provide a submission for the record." Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word docu-

ment, in compliance with the formatting requirements listed below, **by the close of business on Wednesday, March 30, 2011**. Finally, please note that due to the change in House mail policy, the U.S. Capitol Police will refuse sealed-package deliveries to all House Office Buildings. For questions, or if you encounter technical problems, please call (202) 225–3625 or (202) 225–2610.

FORMATTING REQUIREMENTS:

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any supplementary materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission or supplementary item not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be provided in Word format and MUST NOT exceed a total of 10 pages, including attachments. Witnesses and submitters are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. A supplemental sheet must accompany each submission listing the name, company, address, telephone, and fax numbers of each witness.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available on the World Wide Web at *http://www.waysandmeans.house.gov/*.

Chairman TIBERI. I would like to call today's hearing to order. Before we proceed, I would like to introduce a new Member of the Subcommittee and a new Member of the Full Committee. He reigns from the great State of Texas. Please welcome Kenny Marchant. Kenny, glad to have you with us. Would you like to say a few words as a new Member of the Subcommittee.

Mr. MARCHANT. Thank you, Mr. Chairman. I really appreciate the opportunity to serve on the Committee. I thank the steering committee for making the recommendation, and was thrilled to see that I was assigned to your Subcommittee. So I am ready to go to work.

Chairman TIBERI. Great to have you. Thank you so much. The Ways and Means Committee derives its jurisdiction from Article 1, section 7, of the United States Constitution, which provides that all bills for raising revenue shall originate in the House of Representatives. Furthermore, Rule 21 Clause 5(a) of the rules of the House allows a point of order to be raised against any bill containing a tax or a tariff measure that is reported by a Committee other than the Ways and Means Committee.

I want to thank Chairman Camp for asking me to hold the hearing today, as H.R. 3 clearly contains tax provisions within the Ways and Means Committee jurisdiction. I agree with Chairman

Camp that it is imperative for the Ways and Means Committee to review, and when necessary, to mark up bills containing tax-related provisions that are moving throughout the legislative process within other committees of jurisdiction.

H.R. 3 was introduced by Representative Chris Smith on January 20th of 2011. The bill was referred to the Judiciary Committee, the Energy and Commerce Committee and the Ways and Means Committee. On March 3, 2011, the Judiciary Committee ordered the bill to be favorably reported to the House. In addition, H.R. 358 was introduced by Representative Joseph Pitts on January 20th of 2011. On February 15, 2011, the Energy and Commerce Committee ordered the bill favorably reported. The purpose of today's hearing is to review and to better understand the tax-related provisions of both H.R. 3 and H.R. 358, which are within the Ways and Means Committee's jurisdiction, and to determine to what extent these provisions work or don't work as intended.

I look forward to working with Mr. Neal and the other Members of the Subcommittee to accomplish this task. In addition, I want to welcome our witness today, Tom Barthold, Chief of Staff of the Joint Committee on Taxation, to this hearing, and thank him for leading us with his expertise on these tax issues. I yield as much time as he would like to the former Chairman and to the Ranking Member, my friend, Mr. Neal.

Mr. NEAL. Thank you very much, Mr. Chairman. Last week was the 100th anniversary of International Women's Day, a celebration rooted in the struggle for women to participate in society on an equal footing with men. The President and many other world leaders chose this time to laud accomplishments of women and expressed renewed commitments to ending violence and discrimination against women. One way in which we can honor that struggle is by improving women's health, certainly not limiting it. But last night I found out that we will be also debating a bill today which may allow hospitals to deny emergency lifesaving care to pregnant women, a bill not even referred to this Committee. It is expected that this Committee will take up H.R. 3 and H.R. 358 as introduced in a matter of weeks. H.R. 3 seeks to extend current restrictions on abortions in Federal facilities to private health care plans, but it doesn't stop just there. It seeks to redefine rape, excluding protections for any rape short of forceable rape, a distinction surely lost on most victims. It seeks to redefine incest, including protections for any incest not involving a minor.

The bill, even as modified by the Judiciary Committee, would exclude protections for women whose life is medically endangered, but not by the pregnancy itself, such as a woman suffering from brain cancer in need of chemotherapy. The American College of Obstetricians and Gynecologists, a profession dedicated solely to women's health, expressed opposition to legislative proposals that "put government between a physician and a patient."

Remember how incensed we were a decade ago that medical decisions could be made by HMO bean counters, and yet here we will let government bean counters do it for us. And because this bill has not been drafted as amendments to the Internal Revenue Code, it is hard to capture its full reach. Can a company deduct expenses for research on a better birth control pill, where abortion might,

emphasis on the word "might," be possible as part of the clinical trial?

There are at least a dozen tax provisions potentially impacted by this imprecise language. And I have to wonder what is next in our Committee. Do Members in opposition to the death penalty deny deductions for research expenses on a drug which might be used in conjunction with that? Do Members in opposition to tobacco use deny advertising deductions to tobacco companies? The Tax Code can be an extremely powerful tool to accomplish a policy goal, including social policy, but it also can be a very blunt instrument. This is the first time in almost two decades that I have served on this Committee that the issue of abortion has come to us other than by amendments, and I am surprised that it is being brought to us the way that it has been.

Mr. Chairman, both you and Chairman Camp had talked with great sincerity about simplifying our Tax Code, and I certainly believe both of you. We want to streamline that Tax Code for the benefit of individuals, businesses and tax administrators, and I want to be part of that effort, but this bill certainly doesn't get us there. Thank you, Mr. Chairman.

Chairman TIBERI. Thank you, Mr. Neal. And I ask unanimous consent that all Members' written statements be included in the record. Without objection, so ordered. Obviously, this topic provides a lot of heated debate from folks, not just within the Committee, but outside the Committee. There is one point of clarification, Mr. Neal, that I want to make: that the introduced version of the bill talked about forceable rape. That was corrected within the Judiciary Committee's markup.

Mr. Barthold, thank you for appearing today. You have the customary 5 minutes to present your testimony, with your full written testimony submitted for the record. And you may begin.

STATEMENT OF THOMAS BARTHOLD,
CHIEF OF STAFF, JOINT COMMITTEE ON TAXATION

Mr. BARTHOLD. Well, thank you, Mr. Chairman and Mr. Neal. It is my pleasure to present the testimony of the staff of the Joint Committee on Taxation concerning the potential effects on the Internal Revenue Code of H.R. 3, the No Taxpayer Funding for Abortion Act, as reported by the Committee on the Judiciary. And also I will make some brief comments about H.R. 358, the Protect Life Act. H.R. 3 as reported by Judiciary does not amend the Internal Revenue Code, but it does directly affect the Code by prohibiting certain tax benefits from being used to pay for abortions or health benefit plans that may cover abortions. So in particular, section 303 of that bill seeks to prevent abortions from being paid for with Federal tax credits or deductions or with funds withdrawn on a tax preferred basis from certain trusts and accounts.

So the purpose of my testimony today is to outline some of the key tax-related features of the bill and to explain which provisions of a Code our staff believes are clearly implicated by the bill and which provisions might be implicated and perhaps to discuss some of the questions raised by the ambiguities in the bill's language in its present form for the Internal Revenue laws of the United States.

Now, as I mentioned, the bill does not directly amend the Code. And consequently, there is some uncertainty about which Code provisions are affected by the bill. This uncertainty relating to the scope of the bill is increased because the bill does not define certain key terms. The undefined terms include which Code sections count as credits under the Internal Revenue laws, what vehicles might be considered "tax preferred trusts or accounts" from which funds may be withdrawn on a tax preferred basis and which taxpayers are intended to be prohibited from using tax benefits to pay for abortions. Certain health benefits related to the Code are definitely impacted by the bill. These sections include the health care tax credit, the premium assistance credit, the Indian employment credit, the small business health care credit and the individual deduction for medical expenses.

All of these sections that I just named contain tax credits and deductions that are clearly defined in the Code and that directly relate to the taxation of health benefits and medical expenses. Our staff also believes that it is clear that if a taxpayer withdraws funds from an Archer Medical Savings Account, MSAs, or a Health Savings Account, known as HSAs in common parlance, to pay for an abortion, then the amount of funds withdrawn must be included in the taxpayer's income. This is because both Archer MSAs and HSAs are clearly tax exempt, that means that they are tax preferred, and they are trusts or accounts the funds of which are held exclusively for payment of qualified medical expenses. They thus come directly under the language of the bill as reported by Judiciary. But other sections of the Code may be impacted by the bill as well, depending upon the interpretation of the bill's language. These sections include the COBRA premium assistance, the deduction for general business expenses, and the research credit.

Whether COBRA premium assistance is affected by the bill depends upon whether repayment of premium assistance amounts to employers by the IRS—whether that is understood as a tax credit or as a mere procedural device for purposes of the bill. Whether the deduction for general business expenses is affected by the bill depends upon the breadth and interpretation of the term "taxpayer." Whether the research credit is affected depends both upon how broadly the phrase "amounts paid are incurred for an abortion" is interpreted and also on the intended scope of the legislation itself. Under the bill, distributions or payments under employer-sponsored health plans using integral government trusts, retiree medical accounts, welfare benefit plans, including VEBAs, health flexible spending arrangements, health reimbursement arrangements, might need to be included in income if used to pay for an abortion. But here, whether employer-sponsored health plans using these arrangements are affected depends upon the interpretation of the bill's language, and in particular, it is unclear whether all those vehicles that I just named are, in fact, tax preferred trusts or accounts for purposes of the bill.

Now, last, let me note that H.R. 358, the Protect Life Act, amends the Patient Protection and Affordable Care Act to prohibit the use of premium assistance credits that were provided for under that Act and are section 36B of the Internal Revenue Code for qualified health plans that offer abortion coverage. In this respect,

H.R. 358 is like H.R. 3, as reported by the Judiciary Committee. That concludes my brief oral summary.

As the Chairman noted, our staff has prepared a more detailed discussion of why we think some things might clearly fall under the aegis of H.R. 3 as reported by the Judiciary and where there are ambiguities. And I, of course, am ready to try to answer any question that you or the other Members of the Subcommittee might have. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Barthold follows:]

JOINT COMMITTEE ON TAXATION
March 16, 2011
JCX-18-11

TESTIMONY OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION BEFORE THE SUBCOMMITTEE ON SELECT REVENUE MEASURES OF THE HOUSE COMMITTEE ON WAYS AND MEANS HEARING ON H.R. 3, THE "NO TAXPAYER FUNDING FOR ABORTION ACT," AS REPORTED BY THE HOUSE COMMITTEE ON THE JUDICIARY[1]

MARCH 16, 2011

My name is Thomas A. Barthold. I am Chief of Staff of the Joint Committee on Taxation. It is my pleasure to present the testimony of the staff of the Joint Committee on Taxation today concerning the potential effects on the Internal Revenue Code of H.R. 3, the "No Taxpayer Funding for Abortion Act," as reported by the House Committee on the Judiciary and H.R. 358, the "Protect Life Act."

I. OVERVIEW

H.R. 3, the "No Taxpayer Funding for Abortion Act," as reported by the House Committee on the Judiciary, (hereinafter the "bill") does not amend the Internal Revenue Code (the "Code"). The bill does, however, directly affect the Code by prohibiting certain tax benefits from being used to pay for abortions or for health benefit plans that cover abortions. In particular, section 303 of the bill seeks to prevent abortions from being paid for with Federal tax credits or deductions or with funds withdrawn on a tax-preferred basis from certain trusts and accounts.

The bill provides that, for taxable years beginning after date of enactment:

1. No tax credit is allowed with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion (subsection 303(1) of the bill);

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[1] This document may be cited as follows: Joint Committee on Taxation, Testimony of the Staff of the Joint Committee on Taxation Before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means Hearing on H.R. 3, the "No Taxpayer Funding for Abortion Act," as Reported by the House Committee on the Judiciary (JCX-18-11), March 16, 2011. This document can be found on the Joint Committee on Taxation website at www.jct.gov.

2. Amounts paid or incurred for an abortion may not be taken into account for purposes of determining any tax deductions for expenses paid for the medical care of a taxpayer or the taxpayer's spouse or dependents (subsection 303(2) of the bill); and

3. Any amount paid or distributed from certain tax-preferred trusts or accounts for an abortion must be included in gross income (subsection 303(3) of the bill).

The purpose of my testimony today is to outline some of the key tax-related features of the bill, to explain which provisions of the Code are clearly implicated by the bill and which provisions might be implicated, and to discuss certain questions raised by ambiguities in the bill's language.

As mentioned above, the bill does not directly amend the Code. Consequently there is some uncertainty about which Code provisions are affected by the bill. This uncertainty relating to the scope of the bill is increased because the bill does not define certain key terms. These undefined terms include: which Code sections count as "credits" under the internal revenue laws, what vehicles are considered to be "tax-preferred trusts or accounts" from which funds may not be withdrawn on a tax-preferred basis, and which "taxpayers" are intended to be prohibited from using tax benefits to pay for abortions.

Certain health-benefits related sections of the Code are definitely impacted by the bill. These sections include the health care tax credit, the premium assistance credit, the Indian employment credit, the small business health care credit, and the individual deduction for medical expenses. All of these sections contain tax credits and deductions that are clearly defined in the Code and that directly relate to the taxation of health benefits and medical expenses.

It is also clear that if a taxpayer withdraws funds from an Archer Medical Savings Account ("Archer MSA") or a Health Savings Account ("HSA") to pay for an abortion then the amount of the withdrawn funds must be included in income. This is because both Archer MSAs and HSAs are tax-exempt, that is, "tax-preferred," trusts or accounts the funds of which are held exclusively for the payment of qualified medical expenses. They thus come directly under the aegis of the bill.

Other sections of the Code may be impacted by the bill as well, depending on the interpretation of the bill's language. These sections include COBRA premium assistance, the deduction for general business expenses, and the research credit. Whether COBRA premium assistance is affected by the bill depends on whether repayment of the premium assistance amount to employers by the Internal Revenue Service ("IRS") is better understood as a tax "credit" or as a procedural device for purposes of the bill. Whether the deduction for general business expenses is affected by the bill depends on whether the term "taxpayer" is, for purposes of subsection 303(2) of the bill, understood to mean only an individual or both individuals and entities. Whether the research credit is affected depends both on how broadly the phrase "amounts paid or incurred for an abortion" is interpreted and on the intended scope of the legislation.

Under the bill, distributions or payments under employer sponsored health plans using integral governmental trusts, retiree medical accounts, welfare benefit funds (including voluntary employee beneficiary associations ("VEBAs")) health flexible spending arrangements ("health FSAs") and health reimbursement arrangements ("HRAs") might need to be included in income if used to pay for an abortion. Whether employer sponsored health plans using these arrangements are affected depends on the interpretation of the bill's language; in particular it is unclear whether these vehicles are "tax-preferred trusts or accounts" for purposes of the bill.

H.R. 358, the "Protect Life Act," amends the Patient Protection and Affordable Care Act, as amended ("PPACA"),[2] to prohibit use of premium assistance credits for qualified health plans that offer abortion coverage.

[2] Pub. L. No. 111-148.

II. EXPLANATION OF THE TAX-RELATED PROVISIONS OF THE BILL

A. Introduction

Section 303 of the bill prohibits the use of certain tax benefits to pay for abortions, and, in some cases, to pay for health benefits plans that include abortion coverage. In particular, the bill provides that for taxable years beginning after date of enactment:

1. No tax credit is allowed with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion (subsection 303(1) of the bill);

2. Amounts paid or incurred for an abortion may not be taken into account for purposes of determining any tax deductions for expenses paid for the medical care of a taxpayer or the taxpayer's spouse or dependents (subsection 303(2) of the bill); and

3. Any amount paid or distributed from certain tax-preferred trusts or accounts for an abortion must be included in gross income (subsection 303(3) of the bill).

The bill does not define certain key terms, and as a result the scope of the Federal tax law changes made by the bill is not entirely clear. For example, the term "abortion" is not defined in the legislative language.[3] The scope of the term determines the applicability of the bill in specific situations – for example, whether the health care tax credit may be used to pay for health plans that cover emergency contraception – but it does not, for the most part, affect the analysis of which Federal tax provisions are affected by the bill. Other terms that are essential for understanding the scope of the bill – including "taxpayer" and "tax-preferred trust or account" – are important for our tax analysis and are discussed in detail below.

The bill explicitly disallows the use of tax credits and tax deductions to pay for abortions and requires income inclusion when payments for abortion are made from tax-favored medical trusts and accounts. The bill does not, however, generally attempt to change present law with respect to tax exclusions for employer provided health care. Thus, Code sections 104 (relating to the exclusion for compensation for injuries or sickness), 105 (relating to the exclusion for amounts received under accident and health plans), and 106 (relating to the exclusion for contributions by an employer to accident and health plans) are not implicated by subsections 303(1) or 303(2) of the bill. Subsection 303(3) does, however, override the exclusion from income under sections 104 and 105 for payments to reimburse the cost of medical care in the form of abortion services made from a tax-preferred trust or account.

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[3] Certain obstetric treatments are expressly carved out of the bill's purview, including the treatment of any infection, injury, disease, or disorder caused or exacerbated by the performance of an abortion, abortions of pregnancies resulting from rape or incest, and abortions where the woman would be in danger of death were the pregnancy not terminated. Secs. 308 and 309 of the bill.

B. Tax Credits (Subsection 303(1) of the Bill)

Subsection 303(1) of the bill provides that, for taxable years beginning after the date of enactment, "no credit shall be allowed under the internal revenue laws with respect to amounts paid or incurred for an abortion or with respect to amounts paid or incurred for a health benefits plan (including premium assistance) that includes coverage of abortion."

There are several tax credits relating to health benefit plans definitely impacted by the bill. There are certain other credits for which the implications of the bill, if any, are uncertain. I will discuss both categories of credits: first those health related credits that are definitely affected and then those credits which might arguably be affected.

1. Health related credits affected by the bill

In the opinion of the staff of the Joint Committee on Taxation ("Joint Committee staff") the application of the following Code sections are definitely affected by subsection 303(1):

Health insurance costs of eligible individuals ("HCTC")

Present Law

Section 35 provides for a health care tax credit ("HCTC"). The HCTC is a refundable tax credit equal to 65 percent of the cost of qualified health coverage paid by an eligible individual. In general, eligible individuals are individuals who receive a trade adjustment allowance (and individuals who would be eligible to receive such an allowance but for the fact that they had not exhausted regular unemployment benefits), individuals eligible for the alternative trade adjustment assistance program, and individuals over age 55 who receive pension benefits from the Pension Benefit Guaranty Corporation. The credit is available for "qualified health insurance," which includes certain employer-based insurance, State-based insurance, and in some cases, insurance purchased in the individual market.

Implications of the Bill

Under subsection 303(1), the HCTC is disallowed for qualified health insurance plans that include abortion coverage. For at least some eligible individuals, there may not be a choice of qualified health insurance available to them that does not include abortion coverage and, thus, subsection 303(1) may effectively deny access to the credit for those individuals.

Refundable credit for coverage under a qualified health plan

Present Law

Section 36B, added to the Code by PPACA provides a refundable tax credit (the "premium assistance credit") for eligible individuals and families who purchase health insurance

through a health insurance exchange.[4] The premium assistance credit, which is refundable and payable in advance directly to the insurer, subsidizes the purchase of certain health insurance plans through an exchange.

The premium assistance credit is generally available for individuals (single or joint filers) with household incomes between 100 and 400 percent of the Federal poverty level for the family size. Individuals who are eligible for certain other health insurance, including certain health insurance provided through an employer or a spouse's employer, may not be eligible for the credit.

Section 1303 of PPACA includes a provision that disallows the application of the premium assistance credit to the cost of abortion coverage. To prevent the premium assistance credit from being used for the cost of abortion coverage, section 1303 requires that the portion of any premium attributable to the cost of abortion coverage be paid for separately, either with a separate check or, in the case of payroll deductions, a separate deduction. Section 1303 further requires that the separate payments be allocated to a segregated account under the health plan and that the cost of abortion services covered under the plan only be reimbursed from funds in the segregated account. Under preexisting law this separate payment of premiums and segregation of the assets alone is not sufficient to treat abortion coverage as being offered under a separate health plan. Rather, there must also be a separate election to purchase the coverage of abortion and a separate election to purchase the portion of the plan that does not cover abortion.[5]

Implications of the Bill

Under subsection 303(1) of the bill, the premium assistance credit may not be applied towards the purchase of health insurance plans that include abortion coverage. This provision could effectively preclude individuals from having access to the premium assistance credit unless their exchange offers plans that do not include abortion coverage. If providers decide to offer comprehensive medical plans that do not offer abortion coverage and separate plans that only offer abortion coverage, rather than following the allocation procedures laid out in section 1303, then the credit could presumably be used for the plans that do not provide abortion coverage.

Indian employment credit

Present Law

Section 45A provides a credit to employers against income tax liability for, among other costs, qualified employee health insurance costs paid or incurred by the employer with respect to certain employees who are either enrolled members of an Indian tribe or the spouse of an

[4] Under PPACA, States are required to establish American Health Benefit Exchanges, commonly referred to simply as "exchanges." These exchanges will be governmental agencies or nonprofit entities that, among other services, facilitate the purchase of health plans that meet certain minimum enrollment and benefit requirements.

[5] See Treas. Reg. sec. 54.9831-1(c)(3) for the rules for determining when limited excepted benefits are not an integral part of a group health plan.

enrolled member.[6] Qualified employee health insurance costs are any amounts paid or incurred by an employer for health insurance to the extent that such amounts are attributable to coverage provided to any qualified employee.

Implications of the Bill

Subsection 303(1) of the bill would disallow the Indian employment credit for qualified employee health insurance that includes abortion coverage.

Employee health insurance expenses of small employers

Present Law

The small business health care tax credit under Code section 45R, added to the Code by PPACA, is generally available to qualified small employers paying at least half of the premiums for single health insurance coverage for their employees. Small businesses can claim the credit for tax years 2010 through 2013 and for any two years after that. For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small businesses and 25 percent of premiums paid by eligible tax-exempt organizations. Beginning in 2014, the maximum tax credit will increase to 50 percent of premiums paid by eligible small business employers and 35 percent of premiums paid by eligible tax-exempt organizations.

For any taxable year beginning in 2010, 2011, 2012, or 2013, qualifying health insurance for purposes of claiming the credit is health insurance coverage within the meaning of section 9832, which is generally health insurance coverage purchased from an insurance company licensed under State law. For taxable years beginning in years after 2013, the credit is only available to a qualified small employer that purchases health insurance coverage for its employees through a State exchange.

Implications of the Bill

Subsection 303(1) of the bill would disallow the small business health care tax credit for employee health insurance that includes abortion coverage. This provision could effectively preclude some small employers from having access to the credit for years after 2013, unless the exchange in an employer's State offers plans that do not include abortion coverage.

2. Credits potentially affected by the bill

The application of the following Code sections could be affected by subsection 303(1):

[6] Section 38 provides the operative rules for claiming general business credits including the Indian employment credit. Section 39 provides the operative rules for carrying forward and carrying back to future or prior taxable years unused general business credits. Because certain business related credits may involve amounts "paid or incurred for a health benefits plan…that includes coverage of abortion" (e.g., the Indian employment credit), application of sections 38 and 39 is necessarily implicated by the bill in such instances.

COBRA premium assistance

Present Law

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")[7] gives employees who lose health coverage as a result of termination of employment a limited right to elect to purchase group health coverage sponsored by their former employer. Premiums for COBRA continuation coverage may not exceed 102 percent of the cost to the plan for similarly situated individuals who are not covered under COBRA.

The American Recovery and Reinvestment Act of 2009 ("ARRA")[8] provides a temporary COBRA premium reduction for eligible individuals who were involuntarily terminated from employment on or prior to May 31, 2010 (Code section 6432). For up to 15 months, eligible individuals are entitled to a subsidy equal to 65 percent of their monthly COBRA premium. (The last month that any individual would be eligible for an ARRA COBRA subsidy is August 2011.)

Subsidy eligible individuals pay 35 percent of their premiums, and the government reimburses the remaining 65 percent to the person to whom the COBRA premiums are payable, usually the subsidy eligible individual's former employer. Procedurally, the reimbursement is accomplished through treating the person seeking reimbursement as having paid payroll taxes to the IRS in an amount equal to the amount the person is owed in COBRA premium reimbursements. Persons seeking reimbursement may claim a credit on Forms 941, 943 or 944.

Implications of the Bill

The Joint Committee staff believes that the COBRA payroll "credit" is best viewed as a form of bookkeeping rather than a tax credit in the narrowest sense, because the amount of money paid out by an employer is not reduced by virtue of Code section 6432. The employer pays 65 percent of its former employees' COBRA continuation coverage costs and is then made whole by the government via a reduction in payroll tax owed. Because the bill does not define the term "credit" and does not amend Code section 6432 directly, it is possible that the language of subsection 303(1) could be interpreted as reaching section 6432, and thus as disallowing a reduction in payroll tax in connection with COBRA costs associated with health plans offering abortion coverage.

Credit for increasing research activities

Present Law

In general, under Code section 41, a taxpayer may claim a research credit equal to 20 percent of the amount by which the taxpayer's qualified research expenses exceed a base

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[7] Pub. L. No. 99-272.

[8] Pub. L. No. 111-5.

amount.[9] The base amount reflects past research expenditures, so the research credit is generally available with respect to incremental increases in qualified research. An alternative simplified credit calculation is available in lieu of the traditional research credit at a 14 percent credit rate. The alternative simplified credit uses a different base period and is only partially incremental. With some limitations, the research credit is available for both in-house and contract research expenses. Generally, qualified research comprises processes of experimentation conducted in the United States (including U.S. possessions) aimed at developing new or improved business components of the taxpayer. Research does not qualify if it relates to style, taste, cosmetic, or seasonal design factors. In addition, research does not qualify if it (1) is conducted after the beginning of commercial production of a business component, (2) relates to the adaptation or duplication of certain existing business components, or (3) relates to certain efficiency surveys, market research, management techniques, routine data collection, or routine quality control. Additional research credits are available with respect to qualified energy research and university basic research under different credit structures. The research credit (including the energy research credit and the university basic research credit) expires at the end of 2011.

Implications of the Bill

The bill could implicate the research credit in the following way. Under present law, costs associated with clinical trials are qualified research expenses for purposes of the credit. Depending on the scope of the language "an amount paid or incurred for an abortion," subsection 303(1) of the bill could prohibit the research credit for clinical trials researching new contraceptives (if taking drugs that prevent implantation of fertilized eggs qualifies as an abortion), new abortifacients (if chemical termination of a pregnancy qualifies as abortion), or new surgical procedures or surgical equipment.

On the other hand, it is not clear that costs associated with clinical trials are "amounts paid or incurred for an abortion," and if they are not, then the bill does not affect section 41.

[9] Section 38 provides the operative rules for claiming general business credits including the research credit. Section 39 provides the operative rules for carrying forward and carrying back to future or prior taxable years unused general business credits. Because certain business related credits may involve amounts "paid or incurred for an abortion" (e.g., the research credit), application of sections 38 and 39 is necessarily implicated by the bill in such instances.

C. Tax Deductions (Subsection 303(2) of the Bill)

Subsection 303(2) of the bill provides that, "for purposes of determining any deduction for expenses paid for medical care of the taxpayer or the taxpayer's spouse or dependents, amounts paid or incurred for an abortion shall not be taken into account."

Subsection 303(2) of the bill affects the deduction for medical expenses, and it may also affect the general trade or business deduction. I will discuss both deductions: first the deduction for medical expenses and then the deduction for general trade or business expenses.

Note that the deduction for health insurance costs for self-employed individuals is likely not affected by the bill. Medical expenses paid by self-employed individuals for themselves and their families are deductable under subsection 162(l) of the Code. Unlike subsection 162(a), subsection 162(l) only permits deductions for payment of medical insurance and not for payments for drugs, procedures, or medical care. Thus, amounts paid for an abortion, as opposed to costs for insurance that includes abortion coverage, are not deductable by self-employed individuals under present law.

Medical expenses

Present Law

Section 213 allows a deduction for certain expenses paid for medical care of the taxpayer, the taxpayer's spouse, and the taxpayer's dependents to the extent that such expenses exceed 7.5 percent of the taxpayer's adjusted gross income (10 percent for tax years beginning after December 31, 2012).

Medical care is defined for purposes of the deduction as amounts paid for "the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting the structure or function of the body," for certain transportation costs associated with such care, and for insurance covering such care. Under applicable guidance, operations or treatments affecting any portion of the body, including obstetric expenses, but excluding illegal procedures or treatments, are considered to be for the purpose of affecting the structure or function of the body, and thus constitute medical care.[10] Thus, costs associated with legal abortions are medical care expenses that are deductible under section 213.[11]

Implications of the Bill

Subsection 303(2) of the bill disallows a deduction under section 213 for the cost of an abortion. A possible interpretation of the bill's language is that payments for transportation in connection with an abortion also might qualify as paid or incurred "for an abortion" and would thus also not be allowable as a deduction.

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[10] Treas. Reg. sec. 1.213-1(e).

[11] Rev. Rul. 73-201, 1973-1 C.B. 140.

Trade or business expenses

Present Law

Subsection 162(a) generally provides a deduction for all ordinary and necessary expenses directly connected with or pertaining to the operation of a trade or business, provided such expenses are not otherwise capitalized or disallowed under another provision of the Code. Such expenses include, among other things, compensation, supplies, incidental repairs, advertising, insurance, rent, utilities, and general and administrative costs. Payments of health insurance premiums for present or former employees and their families are generally deductible as ordinary and necessary business expenses of the employer.

Implications of the Bill

Subsection 162(a) is affected by subsection 303(2) of the bill only if the term "taxpayer" is interpreted to include both entities and individuals. Although the bill does not defined the term "taxpayer," this term is defined in Code section 7701(a) as any person subject to any internal revenue tax. The term "person" includes, for these purposes, individuals and corporate and unincorporated entities (such as trusts, estates, and unincorporated associations). The references in subsection 303(2) to medical care, spouses, and dependents could be interpreted as narrowing the class of potentially affected taxpayers to individuals; that is, those persons traditionally understood as being capable of having medical care, spouses, and dependents. Under this reading of the language, the bill would have no effect on subsection 162(a).

An alternative, more expansive, interpretation of the bill's language would include entities in the definition of taxpayer. Such a reading would require addressing the meaning of an entity having medical care, a spouse, or dependents.

If the expansive reading of the term "taxpayer" is used, subsection 303(2) requires disallowance of tax deductions taken by employers in conjunction with health plans with abortion coverage offered to their employees. If the term "taxpayer" is interpreted to include entities, however, a possible consequence could be that insured and self-insured plans are treated differently with respect to identical costs. Subsection 162(a) deductions might not be allowed for the reimbursement of incurred medical expenses associated with abortions for employers with self-insured plans because those expenses might include "amounts paid or incurred for an abortion." A deduction might be allowed, however, for the cost of insured employee health insurance that includes abortion coverage because such costs would be amounts paid for a health benefits plan rather than for an abortion. In the case of an employer that self-insures, no deduction is allowed under the bill for the cost of the reimbursement of amounts paid or incurred for an abortion, and the employee must include the amount of the reimbursement in gross income. However, for an employer that purchases health insurance coverage from an insurance company, the full premium is deductible by the employer, and the actual reimbursement is excluded from the employee's gross income.

D. Tax-Preferred Trusts and Accounts (Subsection 303(3) of the Bill)

1. Overview

Subsection 303(3) of the bill provides that "in the case of any tax-preferred trust or account the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary." The bill does not provide a definition of the terms "tax preferred" or "trust or account." The Joint Committee staff believes that in the context of "Archer MSAs) and HSAs, the application of subsection 303(3) is unambiguous. Both Archer MSAs and HSAs are required under the Code to be established as separate accounts, the income of which is taxed a preferential manner.

However, the applicability of subsection 303(3) of the bill to reimbursements for medical expenses under employer sponsored health coverage is not clear and depends on the interpretation of terms "tax-preferred" and "trust or account." Generally, the tax treatment of amounts paid or distributed under an employer sponsored health plan for medical care are excludible from the employee's gross income under Code section 105(b) regardless of the form of the employer sponsored health plan. The application of subsection 303(3) to these distributions depends on the form of the employer sponsored health plan. It only applies to an employer sponsored health plan structured so that distributions or payments for medical care are made from a "tax-preferred trust or account."

As an initial matter, it appears that, in the context of an employer sponsored health plan, subsection 303(3) of the bill would only apply to a self-funded health plan. Fully insured health plans purchased from an insurance company do not generally maintain accounts for the particular health plan (or individual participants in the health plan) from which distributions are made. However, as discussed below, not all self-funded plans include tax-preferred accounts under any interpretation of those terms.

Which distributions from a self-funded health plan for abortion services are implicated depends on the meaning of the terms "tax-preferred" and "account or trust." How these two terms are interpreted and applied together arguably can lead to different answers to the question whether a payment or distribution for medical expenses for an abortion under an employer sponsored health plan is includible in the gross income of the beneficiary.

First, it is unclear under subsection 303(3) whether an account includes only a segregated set of assets, or separately accounted for share of assets, in a trust or fund to which investment gains and losses are allocated, such as a separate account under a defined contribution plan.[12] Even if that interpretation prevails, it is not clear that "account" only includes a separate account that is only available for the benefit of an individual and the individual's dependents (similar to an HSA) or whether it includes a separate account for the health plan, such as a welfare benefit fund. An alternative interpretation might be that an account for this purpose means a dollar amount (which may or may not be adjusted for investment experience) that is available to

[12] See definition of defined contribution plan in section 414(i).

reimburse the incurred expenses for medical care of an individual (and the individual's dependents).

2. Archer MSAs and HSAs

Present Law

Archer MSA

Under section 220, an Archer MSA is a tax-exempt trust or custodial account created or organized in the United States as a medical savings account exclusively for the purpose of paying the qualified medical expenses of the account holder. Eligibility for an Archer MSA is limited; only employees (and their spouses) of a small employer that maintains a high deductible health plan ("HDHP") and self-employed persons (and their spouses) who maintain an HDHP qualify for an Archer MSA.

An account holder's contributions to an Archer MSA are tax deductable, interest and other earnings on the Archer MSA's assets accrue tax free, and distributions for "qualified medical expenses" are not taxed. Contributions made to an Archer MSA by an employer on behalf of an employee are excluded from the employee's gross income.

HSA

Under section 223, an HSA is a tax-exempt trust or custodial account established with a qualified HSA trustee to pay or reimburse qualified medical expenses. Eligibility for an HSA is limited to individuals who are covered under an HDHP (and, generally, not covered under other insurance) and who are not claimed as a dependent by another taxpayer.

An account holder's contributions to an HSA are tax deductible, contributions by an employer on behalf of an employee are generally excluded from the employee's income, and interest and other earnings on HSA assets accrue tax-free. Distributions from an HSA are excludible from gross income if they are made for qualified medical expenses.

Qualified medical expenses

For both Archer MSAs and HSAs, the term "qualified medical expenses" means amounts paid by the account holder for medical care (as defined in section 213(d)) for the account holder, the account holder's spouse, and his dependents, but only to the extent such amounts are not otherwise compensated (e.g., by insurance).

Implications of the Bill

The Joint Committee staff believes that Archer MSAs and HSAs are tax-preferred trusts or accounts within the meaning of subsection 303(3) of the bill regardless of how those terms are interpreted. The assets in an Archer MSA or an HSA are required to be held in a separate trust or custodial account; all investment gains and losses on the assets held in the trust or accounts are allocated to the trust or account; and the trust or account under an Archer MSA and HSA is

generally exempt from tax. Distributions from these accounts for qualified medical expenses are excludible from gross income.

Although under present law, distributions from an Archer MSA to cover costs associated with an abortion are excludible from gross income, subsection 303(3) of the bill results in the inclusion in income of funds withdrawn from an Archer MSA or HSA to pay for the cost of an abortion (and, as discussed above, possibly also certain transportation costs incurred in connection with an abortion).

3. Tax preferred trusts and accounts under employer sponsored health plans

Present Law

General principles for tax treatment of employer sponsored health plans

Section 106 generally provides that the value of coverage under an employer-provided health plan for employees (including retirees) and their dependents[13] is excludible from gross income.[14] The exclusion applies both to coverage under a self-funded health plan (self-insured coverage) and health insurance purchased from an insurance company insurance. In addition, under section 105(b), any reimbursements under the health plan for incurred medical care expenses for employees (including retirees) and their dependents (such as when the plan pays the doctor and the hospital for an employee's surgery) generally are excluded from gross income.[15]

Reimbursements for incurred costs of medical care under a health plan that is not attributable to excludible employer provided coverage (such as health insurance purchased privately) are excludable from gross income under section 104(a)(3). If premiums for employer-sponsored coverage include any after-tax contributions by employees, reimbursements for medical care (such as payments to the hospital and doctor for surgery) under the employer sponsored health plan are excludable from gross income based on a combination of sections 104(a)(3) and 105. However, many employers maintain cafeteria plans which allow employees

[13] For purposes of employer sponsored coverage, the term dependents when used with respect to an individual (including an employee) is intended to include the individual's spouse, dependents (as defined in section 152, determined without regard to section 152(b)(1), (b)(2), and (d)(1)(B)), and any child (as defined in section 152(f)(1)) of the individual who as of the end of the taxable year has not attained age 27.

[14] Health coverage provided to active members of the uniformed services, military retirees, and their dependents is excludable under section 134. That section provides an exclusion for "qualified military benefits," defined as benefits received by reason of status or service as a member of the uniformed services and which were excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice then in effect.

[15] A similar rule under section 3121(a)(2) and 3306(a)(2) excludes employer-provided health insurance coverage and reimbursement for incurred expenses for medical care from the employees' wages for payroll tax purposes. See also sec. 3231(e)(1) for a similar rule with respect to compensation for purposes of Railroad Retirement Tax.

to pay their portion of any cost of the health plan through pre-tax salary reduction contributions.[16]

Under present law, legal abortions are medical care within the meaning of section 213(d), and thus are medical care for purposes of both sections 104(a)(3) and 105(b). Reimbursements (including direct payment to the provider) under an employer sponsored health plan for the incurred cost of an abortion (and perhaps certain transportation costs incurred in connection with an abortion) are thus excludable from gross income.

Self-funded health plans

General rules

Employers provide health coverage to employees either by purchasing an individual or group policy issued by a licensed insurance company or by self-funding the coverage.[17] In some cases, an employer maintaining a self-funded health plan simply pays for the cost of its employees' covered medical care from the general assets of the company as the medical expenses are incurred during the coverage period. In other cases, an employer will make contributions to a welfare benefit fund to self fund the health plan.

Types of benefits under self-funded health plans

General rules

From an employee's perspective, in many cases, a self-funded plan may be no different from an insured health plan. The plan has a written set of covered benefits and required co-payments. The employee may or may not be required to pay a portion of the cost ("premium") for the coverage. If an employee contribution to the premium is required, it may be made on an after-tax basis on or on a pre-tax basis.[18]

Reimbursement arrangements

Certain types of benefits arrangements are generally only offered in self-funded plans. Employers may provide a self-funded health plan in the form of an agreement to reimburse

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[16] Sec. 125.

[17] A self-funded plan is a self insured plan. Pursuant to Treas. Reg. sec. 105-11(b), generally a self-insured plan is a separate written plan for the benefit of employees which provides for reimbursement of employee medical expenses referred to in section 105(b). A plan or arrangement is self-insured unless reimbursement is provided under an individual or group policy of accident or health insurance issued by a licensed insurance company or under an arrangement in the nature of a prepaid health care plan that is regulated under Federal or State law in a manner similar to the regulation of insurance companies. A plan underwritten by a policy of insurance or a prepaid health care plan that does not involve the shifting of risk to an unrelated third party is considered self-insured for purposes of section 105(b).

[18] If coverage is elective, the pre-tax contributions may be made through a cafeteria plan, or, if coverage is required, the contribution is the equivalent of a required salary reduction.

medical expenses of their employees (and their spouses and dependents), not reimbursed by a health insurance plan including self funded coverage, through flexible spending arrangements that allow reimbursement for medical care not in excess of a specified dollar amount. Health coverage provided in the form of one of these arrangements is also excludible from gross income under section 106 as health coverage under an employer-provided health plan, and the actual reimbursements are also excluded from gross income under section 105(b).[19]

A flexible spending arrangement for medical expenses under a cafeteria plan ("Health FSA") is an arrangement under which employees are given the option to reduce their current cash compensation and instead have the amount made available for use in reimbursing the employee for his or her medical expenses.[20] In the case of a health FSA, the employee makes a choice under a cafeteria plan before the beginning of the coverage period between (1) receiving cash compensation, and (2) a reduction in salary equal to an amount not exceeding the maximum amount of reimbursement. Health FSAs are subject to the requirements for cafeteria plans, including a requirement that amounts remaining under a health FSA at the end of a plan year must be forfeited by the employee (referred to as the "use-it-or-lose-it rule").[21]

Alternatively, the employer may specify a dollar amount that is available for medical expense reimbursement. These arrangements are commonly called health reimbursement arrangements ("HRAs"). Some of the rules applicable to HRAs and health FSAs are similar (e.g., the amounts in the arrangements can only be used to reimburse medical expenses and not for other purposes), but the rules are not identical. In particular, HRAs cannot be funded on a salary reduction basis, and the use-it-or-lose-it rule does not apply. Thus, amounts remaining at the end of the year may be carried forward and used to reimburse medical expenses in following years.[22] Because amounts remaining at the end of the year may be carried over to subsequent years, an employer may be more likely to maintain funds dedicated to an HRA in a separate trust.

Neither Treasury regulations nor the Code requires the establishment of a trust account or separate funding for either health FSAs or HRAs, and reimbursements are usually made out of an employer's general assets. Even though the amount of the salary reduction is deducted from the employee's pay, it is generally retained in the general assets of the employer until it is used to reimburse the incurred cost of medical care. Because there is no trust or custodial account required for Health FSAs and HRAs, they are sometimes thought of as bookkeeping records of

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[19] Sec. 106.

[20] Sec. 125. Prop. Treas. Reg. sec. 1.125-5 provides rules for Health FSAs. There is a similar type of flexible spending arrangement for dependent care expenses.

[21] Sec. 125(d)(2). A cafeteria plan is permitted to allow a grace period not to exceed two and one-half months immediately following the end of the plan year during which unused amounts may be used. Notice 2005-42, 2005-1 C.B. 1204.

[22] Guidance with respect to HRAs, including the interaction of FSAs and HRAs in the case of an individual covered under both, is provided in Notice 2002-45, 2002-2 C.B. 93.

the maximum reimbursement for the coverage period reduced by the amount of any reimbursements already paid.

Separate trust and accounts used in self funded health plans

Welfare benefit funds

A welfare benefit fund is a separate trust or account with assets that are segregated from the employer's general assets.[23] Generally, all investment gains and losses on the assets held in the trusts or accounts are allocated to the trusts or accounts. A welfare benefit fund used for a self-funded health plan generally may be a VEBA, which is tax exempt under section 501(c)(9), or a taxable trust, including a grantor trust (generally, a trust the assets of which are treated as being owned directly by the grantor for Federal income tax purposes). Absent use of a welfare benefit fund, an employer that self-funds may only deduct the cost of medical care provided through the plan under its general accounting method used for other business expense deductions under section 162(a). One reason an employer may choose to establish a welfare benefit fund is to take advantage of the deduction rules in sections 419 and 419A, which may allow some smoothing of current costs and, in certain limited situations, may allow prefunding of future expected costs.[24]

Even if an employer uses a welfare benefit fund for its self-funded health plan, the employer has limited opportunity to prefund the costs of health care coverage for active employees for future coverage years because the employer may not be able to deduct the contributions.[25] One exception for active employees is where a separate welfare benefit fund is maintained pursuant to a collective bargaining agreement.[26] There are no limits on the deduction for amounts required to be made to a separate welfare benefit fund maintained pursuant to the collective bargaining agreement to pre-fund the health plan. In the case of a welfare benefit fund for retiree medical benefits, section 419A(c)(2) permits an employer to deduct contributions to a welfare benefit fund for retiree medical benefits that generally are funded over the working lives of the covered employees.

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[23] See definition of fund with respect to a welfare benefit fund in section 419(e)(3).

[24] For a plan subject to ERISA, a trust may be required if a self-funded plan includes employee contributions (either pre-tax or after tax). However, in Technical Release No. 92-01, the Department of Labor has stated that it will not assert this requirement in the case of a health flexible spending arrangement under a cafeteria plan.

[25] Secs. 419(c)(3) and 419A(c)(1). The Code generally limits the deductions that may be taken with respect to contributions to a "welfare benefit fund" for active employees to (1) the amount which would have been allowable as a deduction for the benefits provided during the taxable year as if the employer had provided such benefits directly, and (2) claims for benefits incurred but unpaid as of the close of the taxable year (and administrative costs with respect to such claims).

[26] See sec. 419A(f)(5) and A-1 of Treas. Reg. sec. 1.419A-2T (which is generally effective until three years after the issuance of final regulations).

VEBAs

VEBAs are tax exempt under section 501(c)(9). A VEBA is a mutual association of employees that can be organized to provide for the payment of life, sick, accident or other benefits to its members or their dependents or designated beneficiaries. A VEBA is exempt from tax (other than unrelated business income tax) if no part of its net earnings, exclusive of benefit payments, inures to the benefit of any private shareholder or individual and it otherwise meets the requirements of section 501(c)(9). A VEBA may be funded by employees or an employer, and funds in the possession of the VEBA are held in trust for the payment of the specified benefits. One common use for VEBAs is a welfare benefit trust for an employer sponsored health plan. Although employers may use VEBAs to self-fund health coverage plans for their active employees and retirees outside the context of a collect bargaining agreement, VEBAs are more commonly used in the case of self-funded (as opposed to insured) health plans maintained pursuant to collective bargaining agreements.

One might expect an employer that establishes a welfare benefit fund to favor a VEBA over a taxable trust. However, in addition to the limits on the deductibility of contributions to prefund a self-funded health plan, section 512(a)(3) provides special rules for calculating unrelated business taxable income that effectively limit the tax benefits of a VEBA (other than separate VEBAs maintained pursuant to collectively bargained plans).[27] Thus, the combination of the limits on the deductibility and the special unrelated trade or business income rules limits the incentives to use VEBAs as welfare benefit funds for active employees outside the context of a collective bargaining agreement.

Other trusts or accounts used for self-funded health plans.

Integral government trusts

Some governments establish trusts (referred to as integral government trusts) to fund a health plan for their employees and retirees that satisfies the requirements of sections 104(a)(3), 105(b) and 106 for the reimbursements for the incurred cost of medical care to be excludible from gross income. Section 115 of the Code provides that gross income does not include income derived from the exercise of any essential government function and accruing to a State or any political subdivision thereof. Providing health benefits to current and former employees of a political subdivision such as a State, city, or municipality constitutes the performance of an essential governmental function. Thus integral governmental trusts are tax exempt. The individual terms and conditions of each trust differ based on the relevant individual trust agreement.

[27] In the case of a VEBA, a portion of the passive investment income of the trust is taxable as unrelated business taxable income. The taxable portion of the income is generally equal to the amount by which the actual amount held in reserve for the fund exceeds the account limit for the fund (disregarding any reserve for retiree medical benefits). Under Treas. Reg. sec. 1.419A-2T, there is no limit on the account limit for a welfare benefit fund, including a VEBA, maintained under a collective bargaining agreement.

Retiree medical account under qualified retirement plans

Section 401(h) permits a qualified pension or annuity plan to provide for payment of benefits for sickness, accident, hospitalization and medical expenses for retired employees, their spouses and dependents. For the pension or annuity plan to meet the provisions of section 401(h), such medical benefits must be subordinate to pension benefits and must be established and maintained in a separate account. These accounts are generally referred to as retiree medical accounts. Although an employer is required to account separately for the funds that are contributed to the pension plan trust for retiree health benefits, no separate physical account typically exists for the contributed funds, and assets of the trust are not usually segregated.

Earnings on the retiree medical account contributions accumulate tax free in the trust (based on the tax-exempt status of the trust under normal retirement plan rules), and distributions from a retiree medical account to a retiree or a retiree's dependents pay for their medical care are excluded from gross income under section 105(b).

Present law requires qualified pension and annuity plans to maintain plan assets in a trust. No separate physical account typically exists solely for the funds contributed to a retiree medical account, however, and assets are not usually segregated. However, the share of the trust assets attributable to the retiree medical account must be separately accounted form including the allocable share of investment gains and losses. The only accounts under retire medical accounts required for individual employees are for key employees within the meaning of section 416(i), if any.[28] This is to prevent discrimination in favor of these employees rather than to protect the interests of these employees.

Implications of the Bill

Definition of tax-preferred trust or account under section 303(3) of the bill

As discussed above, subsection 303(3) provides that, in the case of any tax-preferred trust or account the purpose of which is to pay medical expenses of the account beneficiary, any amount paid or distributed from such an account for an abortion shall be included in the gross income of such beneficiary. The meaning of the terms "tax-preferred" and "trust or account" are unclear. How these two terms are interpreted and applied together arguably can lead to different answers to the question whether a reimbursement for medical expenses for an abortion under an employer sponsored health plan is includible in gross income of the beneficiary.

Implications if tax-preferred trust or account means account or trust itself is tax exempt

The term "tax-preferred" might be interpreted to mean that the funds of the health plan are tax preferred only if such funds are held in a trust or account under which the investment income of the assets of the trust or account are tax exempt or otherwise tax favored. Under this interpretation of tax-preferred, the trust or account must be limited to a fund where the assets are segregated in a separate taxable entity that is tax exempt. The types of accounts and trusts that fit

[28] Sec. 401(h)(6).

into this definition of tax preferred trust or account and thus are at least potentially affected by subsection 303(3) are a VEBA, an integral governmental trust, and a retiree medical account under a qualified retirement plan. If this is the correct interpretation of tax-preferred trust or account, the distributions from these types of trusts to pay for an abortion would be includable in gross income, but distributions from other health plans (self-funded or insured) to pay for an abortion continue to be excludable from gross income. The result of this interpretation is the employer's choice to self fund its health plan and its choice of one of these tax exempt funding vehicles for its self-funded health plan determines the tax treatment of the beneficiaries of the health plan who are reimbursed for the cost of an abortion under the plan.

The term "tax preferred" could be interpreted to mean that (1) the funds of the health plan are tax preferred only if such funds are held in a trust or account under which the investment income of the assets of the trust or account are tax exempt or otherwise tax favored, and (2) if a separate trust or account is maintained for each employee. Under this interpretation, subsection 303(3) would have a very limited application because this is not a common design for employer sponsored health plans. A possible result of this interpretation is that only the accounts of key employees under a retiree medical account are subject to subsection 303(3) of the bill. However, it is possible that an employer might use one of these tax-exempt trusts to fund its health plan and the health plan might be an HRA structured as separate accounts for each employee, similar to a defined contribution plan. In that case, under this interpretation of subsection 303(3), distributions from the separate account to pay for an abortion would be includable in gross income.

Implications if tax preferred trust or account means tax-preferred with respect to beneficiaries of the health plan

If "tax-preferred" means tax preferred from the perspective of the beneficiaries of the health plan and "account" means a fund that holds assets where the investment experience of the assets is allocated to the fund (or an account within the trust where the allocable portion of the investment experience of the trust is allocated to the account), then, in addition to the tax-exempt trusts and accounts described above, arguably any welfare benefit fund maintained for a health plan is a tax-preferred trust or account for purposes of subsection 303(3) of the bill. All disbursements from the welfare benefit trust to reimburse the incurred costs of medical care of employees (and their dependents) are excludable from gross income under either section 104(a)(3) or 105(b).

If this is the correct interpretation of tax-preferred trust or account, the distributions from a welfare benefit fund to pay for an abortion are includable in gross income be reason of subsection 303(3) of the bill, but distributions from other health plans (self funded or not) to pay for an abortion continue to be excludable from gross income. The result of this interpretation is that the employer's choice to self fund its health plan and its choice of a welfare benefit fund as the funding vehicles for its self-funded health plan determines the tax treatment of the beneficiaries of the health plan who are reimbursed for the cost of an abortion under the plan.

Implications if tax preferred trust or account means tax-preferred with respect to beneficiaries of the health plan and a specified dollar amount is an account

Implications if health FSAs and HRAs are tax-preferred trusts and accounts

For health FSAs and HRAs to be "tax-preferred trusts or accounts" for purposes of subsection 303(3), the meaning of tax-preferred must be viewed from the perspective of the beneficiary or employee and the employee's dependents rather than the tax treatment of investment returns of the trust and account, and trust or account must include a dollar amount (which may or may not be adjusted for investment experience) that is available to reimburse the incurred expenses for medical care of an individual (and the individual's dependents). If health FSAs and HRAs are "tax-preferred trusts or accounts," then subsection 303(3) is implicated because, under present law, legal abortions are medical expenses under section 213(d), and payments to reimburse the costs associated with them made under a health FSA or HRA are excluded from gross income under section 105(b). Subsection 303(3) results in the inclusion in income of payments made under a health FSA or an HRA to pay for the cost of an abortion.

Implications if only a health FSA is a tax-preferred trust or account

Finally, it is possible that subsection 303(3) could be interpreted more narrowly. Under a narrower interpretation, a tax-preferred trust or account applies only to a health FSA under a cafeteria plan. It is possible that the intent is to coordinate this interpretation with the less expansive interpretation of subsection 303(2), under which subsection 303(2) only applies to disallow the deduction under section 213 for unreimbursed medical expenses associated with an abortion. Thus, subsection 303(3) could be interpreted only to prevent a taxpayer with an opportunity to make salary reduction contributions under a health FSA through a cafeteria plan from being able to obtain the equivalent of a deduction for the reimbursements of the medical cost incurred for an abortion through the health FSA that is not allowed under section 213. Although this approach might create a rational relationship between these two provisions of the bill, it is difficult to maintain this limited interpretation under the language of subsection 303(3) of the bill as currently drafted.

Further, this interpretation arguably fulfills this purpose only if reimbursements permitted under a health FSA are limited to the amount of employee salary reduction contributions. While this limitation may be typical of health FSAs actually offered through cafeteria plans, such a limitation is not required. The maximum reimbursement under a cafeteria (including the amount attributable to salary reduction) generally is not permitted to exceed 500 percent of the salary reduction contributions by the employee.[29] The maximum reimbursement could be as large as five times the amount of the employee's salary reduction. To the extent that the maximum reimbursement amount for an employee for a coverage period exceeds the employee's salary reduction amount, the health FSA is difficult to distinguish from a HRA.[30] Thus, a provision

[29] Proposed Treas. Reg. sec. 1.125-5(a)(2).

[30] As described in Proposed Treas. Reg. 1.125-5(d), under the uniform coverage rule, the amount of the entire salary reduction for the coverage year must be available on the first day of the coverage period even though the amount of the salary reduction contributions are deducted from the employee's salary ratably over the year.

designed simply to require inclusion in income for reimbursement of medical expenses associated with abortion under a health FSA may have a broader effect than denying the equivalent of a deduction for those medical expenses.

III. EXPLANATION OF THE TAX-RELATED PROVISIONS OF H.R. 358, THE "PROTECT LIFE ACT"

Present Law

As discussed above, section 1303 of PPACA provides that premium assistance credits are not allowed to be applied towards the cost of abortion coverage. The structure of section 1303, which requires separate premium payments and segregation of assets, does not treat abortion coverage as being offered under a separate health plan in all cases.

Provisions of H.R. 358

Under H.R. 358, the premium assistance credit may not be applied to health plans that include abortion coverage even if the cost of the coverage is segregated and paid for separately. Unlike PPACA section 1303, however, H.R. 358 provides that, if an exchange offers a health plan that includes coverage for abortion services, it must also offer an identical plan that does not include abortion services. Thus, H.R.358 does not limit the availability of the premium assistance credit in all cases, because each individual must have the option to purchase a plan that does not include abortion coverage. H.R. 358 could, however, reduce the likelihood that coverage for abortion services will be available in an exchange.

Comparison of H.R. 358 and Subsection 303 of the Bill

Both H.R. 358 and the bill disallow the premium assistance credit to be used for a qualified health plan that covers abortions. The main difference between H.R. 358 and section 303 of the bill is that section 303 of the bill applies to the "internal revenue laws," while H.R. 358 only amends provisions of PPACA, and indirectly the Code section 36B premium assistance credit.

Chairman TIBERI. Thank you, Mr. Barthold. I appreciate your testimony today and being here to answer questions that we might have. Many Americans will disagree with the notion that absent special circumstances such as the life of the mother, rape or incest abortion should be properly categorized as medical care. But the question I have for you today, under current tax law, all legal abortions are considered to be medical care, and the heart of the question would be, does H.R. 3 then change that or is it silent on that?

Mr. BARTHOLD. What constitutes medical care is generally described under Treasury regulations, it is not specified in the Internal Revenue Code. And current Treasury regulations provide that abortions are considered medical care. H.R. 3 as reported by the Judiciary Committee does not amend the definition in the regulations. The effect that—one effect that it does have, however, is that it would narrow the scope of deductibility of what is otherwise considered to be medical care. So the short answer to your question, Mr. Chairman, is no, H.R. 3 does not change that abortion, that legal abortions, are considered to be medical care.

Chairman TIBERI. You touched on this in your comments. The Internal Revenue Code is Title 26 of the U.S. Code. H.R. 3 adds tax provisions to Title 1 of the U.S. Code, not to Title 26. You indicated the bill's failure to amend the Tax Code directly may cause some ambiguity or uncertainty about what exactly the bill does, and that is one of the reasons why we are here to talk to you today. Would it create more certainty under the Tax Code, particularly for taxpayers and those who analyze this legislation, if we directly amended the appropriate sections of the Tax Code rather than having them off-coded provisions in other areas?

Mr. BARTHOLD. As a general matter, I would think the answer would have to be yes. A couple of the points that I made in my testimony is that there is a lack of clarity about whether the term "taxpayer" used in H.R. 3. It seems in the language of H.R. 3 to be intended just to apply to individual taxpayers, but under the Internal Revenue Code, "taxpayer" is defined to be individuals, but also corporations, trusts and different types of entities. So I would assume that the Ways and Means Committee, if they were to address this issue, would clarify more precisely what was intended by "taxpayer." So by amending the Internal Revenue Code you would be providing clarity on that point.

Chairman TIBERI. Employers generally may deduct ordinary and necessary expenses of conducting a trade or a business. Health insurance premiums for employees generally constitute a deductible business expense for that purpose. My understanding of the author's intent is that H.R. 3 is not supposed to affect the employer's business expense deduction. Does the language in the bill make that clear or is there ambiguity in section 303?

Mr. BARTHOLD. Section 303 of the bill as reported in Subparagraph 2 is the language that refers to treatment of deductions. And it is here that there is one of the points of ambiguity that I just touched upon. It refers to a deduction by a taxpayer, but it also says the taxpayer's spouse or dependant child. That would seem to suggest that taxpayer refers to just an individual not a business entity. However, as I just noted a moment ago, the defined term

taxpayer in the Internal Revenue Code includes a business entity. For example, a C-corporation is a taxpayer.

So if a broader interpretation were taken of the word "taxpayer" in the context of H.R. 3 as reported, I think that is why our staff concluded there is ambiguity. And it could be argued by some that a deduction for the employer's business expense would be implicated by the current language of H.R. 3 as reported.

Chairman TIBERI. So your recommendation would be to clarify that with the author?

Mr. BARTHOLD. Taxpayers, individuals, always like things clarified, so I will say yes.

Chairman TIBERI. I appreciate that. I will yield 5 minutes to Mr. Neal.

Mr. NEAL. Thank you, Mr. Chairman. Mr. Barthold, let me ask you a few questions about H.R. 3 as introduced and amended, just so we have a better understanding of how it will impact women in their health care decisions. And just to clarify, it is the introduced version of H.R. 3 which was referred to Ways and Means.

Now, let's consider the case of a woman suffering a severe and chronic heart condition who has been advised to terminate her pregnancy. Under this bill, when she deducts those medical expense's, the IRS would determine whether or not the deduction was appropriate. If the doctor believed her heart condition would worsen because of that pregnancy or may not prove to be fatal, then the doctor could not certify the IRS certification test as specified by this bill and her medical costs would be denied, is that correct?

Mr. BARTHOLD. Let me say as you phrased it, it sounds like generally yes, but since you are talking about the IRS providing certification procedures, I think it would fall into a gray area, because as you correctly noted, the language of the bill talks about placing the woman, in this case, in danger of death due to the continued pregnancy. That then becomes somewhat judgmental. And if we are going to have a certification as to what constituents danger of death, maybe Dr. Boustany could inform you much better than I could. So I think as you phrased your question, Mr. Neal, the answer is yes, but I think because there is not a bright line about this kind of—this particular condition is on one side and another type of condition is on the other side that we really couldn't say with certainty how it would be implemented. Sorry for the long answer.

Mr. NEAL. I saw the comments from Grover Norquist this morning who has deemed this bill impacting pregnant women and their families as a tax increase. He apparently has received an assurance from this Subcommittee that the tax increase will be offset with some other cuts. Now, it is clear that this bill, even as modified, will impact not only an individual such as the woman with heart disease that I outlined above, but could also impact families with an employer-provided health insurance plan, am I correct?

Mr. BARTHOLD. Yes. Let me offer a couple of examples. Paragraph 1 of section 303 would deny credits to the employer-provided plans—to an employer who provided health plans that offered abortion coverage. The small business assistance credit would therefore be implicated. The Indian wage credit where the credit for wages include compensation that includes employer-provided health bene-

fits, that would also be implicated. And those would be employer-provided plans.

Mr. NEAL. Mr. Barthold, let me clear up some confusion by the provisions of H.R. 358. Under the new health care law, health exchange plans could cover abortion services, but only if the plans collected two premiums from the enrollee: One for the cost of the abortion coverage and one for the remaining cost of the plan, and kept those premiums segregated from any tax credits or other government assistance.

Under this bill, though, no one using premium assistance credits, all of whom are low- to middle-income families, can still choose a plan covering abortion services even if they paid for that coverage with their own money. So all of these low- and middle-income women would be segregated into one plan prohibiting abortion, but those wealthier women not needing the premium assistance could be in a separate plan that did provide abortion coverage, is that correct?

Mr. BARTHOLD. Yes, I would have to agree that that would seem to be how H.R. 358 would work.

Mr. NEAL. And I understand that H.R. 3 was referred to the Ways and Means—referred to the Ways and Means Committee is that despite the fact that it does not amend the Tax Code, it does seek to end, as the title of the bill states, taxpayer funding of abortions. If this bill passes, it seems that there could be no limit to any tax deduction or tax credit in the Code being considered public financing and subject to our scrutiny.

Mr. Barthold, one could argue that the deduction for charitable donations like the various tax deductions and credits targeted by this bill, or even the tax-exempt status afforded religious groups, could be viewed as a taxpayer funding of certain religions, is that correct?

Mr. BARTHOLD. That is actually an open question, Mr. Neal. There is a case before the Ninth Circuit currently, which is essentially asking that question. It is asking, is a deduction permitted for a charitable donation to a church funding a State religion, so is a deduction to an organization a funding? So I think we would have to consider that an open question.

In perhaps the context, the more direct context that you are asking, you might phrase it by saying there is a 501(c)(3) hospital organization. If abortions were performed at that hospital, and one made what are under present law deductible donations to the 501(c)(3) hospital, would that be construed under the bill as funding an abortion and therefore excludable. I think the same rationale that has the case before the Ninth Circuit would say that we have to call that uncertain at present.

Mr. NEAL. Last, the Hyde amendment has been accepted practice in this institution, with nobody really being in love with it, but at the same time, acknowledging the reality of what it has done. And for us to take this approach today is far different than Mr. Hyde would have proposed years ago. Thank you, Mr. Chairman.

Chairman TIBERI. Thank you, Mr. Neal. I think you make a good point that one of the reasons why Mr. Camp wanted to have this hearing today is to try to clarify the way the bill is written versus the way it should be properly written under the Internal

Revenue Code and maybe potential unintended consequences, and one of those is, to my point earlier, that provisions of the bill are written to Title 1 of the U.S. Code and not to Title 26. So that is, again, within our jurisdiction. And unintended consequences of the bill within the Tax Code would need to be corrected, and it is this Committee's job to do that. With that, I will yield to Mr. Berg from North Dakota.

Mr. BERG. Thank you, Mr. Chairman. I wanted to address one issue on whether or not the impact on revenue, my understanding is the Joint Committee on Taxation has determined that the impact is negligible and my understanding is the CBO also has reviewed this and said the financial impact is negligible. To continue, back in the 1990s, Congress enacted some self-employed deductions enabling them to deduct the cost of their health premiums. It was an attempt to provide some tax equality for employer-provided health insurance. And my question is on section 303 which will deny certain deductions. What is the effect that provision would have on self-employers or would it affect them?

Mr. BARTHOLD. Thank you, Mr. Berg. Our staff feels that it is quite clear that as reported by the Judiciary Committee that paragraph 2 of section 303, which, as you noted, would deny deductions for payments for abortion and abortion-related services, that a self-employed individual under present law would not be affected. The deduction under present law for self-employed persons is that they may deduct the premium for purchasing insurance. Purchasing the premium of insurance is not a payment for an abortion, and so we feel that the clearest reading of that is there would be no effect on the self-employed health deduction.

Mr. BERG. Thank you. I will yield back, Mr. Chairman.

Chairman TIBERI. Thank you, Mr. Berg. Mr. Thompson is recognized.

Mr. THOMPSON. Thank you very much. I guess I am not surprised that this bill has been introduced, but I am a bit mystified as to how it is written. It is a fairly sloppy drafting job, and I appreciate the Committee's willingness to hold a hearing on it so at least the American public can hear the consequences of this poorly drafted bill, both its intended and unintended consequences. And I think it sounds like it is a priority for the majority to pass this bill or something similar. And I believe we all know the intended consequences of the legislation. That is, to make it harder or near impossible for women across our country to have access to a safe legal medical procedure and one that is protected by the Constitution, and to deny women and their families the opportunity to purchase with their own money, with their own money, private health insurance that covers abortion services. But because the bill is so badly drafted, I think that there are some other things that this bill is going to do that fall into the unintended consequences category.

My read of the bill suggests that it raises taxes on millions of American families violating the majority's pledge not to support tax increases. It also changes the entire structure of the private health insurance market, or if not the entire structure, I think about 80 percent—70 to 80 percent—of the plans that cover these procedures, so a major portion of the market. And it may require that

the IRS snoop into what American women are doing with their own money. So Mr. Barthold, does H.R. 3 provide any insight into how this legislation would be enforced?

For instance, would a woman have to certify that money from her health savings account that she may have used for other services, would she have to certify that that money was not used to pay for an abortion?

Mr. BARTHOLD. Do you have in mind a pre-certification? I guess the reason I am halting is under present law, for payments from a flexible spending account or a health spending account, there are regulations and general guidelines. So, of course, to—the Treasury would have to promulgate some regulations and say, to make clear, what is a permissible expense and what is not a permissible expense. Now, that——

Mr. THOMPSON. And that burden falls on whom?

Mr. BARTHOLD. Well, that burden falls—to comply the ultimate burden always falls on the individual. That doesn't mean that everyone always complies. And to verify the compliance that is usually undertaken under audit procedures. I mean, there are payments that one could try to have paid from a health savings account today which are not permissible.

Mr. THOMPSON. So if a woman were audited, would the IRS agents be at her house demanding what court documents or affidavits providing that her pregnancy was a result of incest or rape?

Mr. BARTHOLD. Well, I am not sure how the IRS would carry out that audit. The burden of proof, I believe, would be on the taxpayer. So if the taxpayer had such documents or was in a position to obtain such documents to verify the claim, that should satisfy the IRS.

Mr. THOMPSON. So it may be one of the most difficult times in a woman's life, she would have to provide some sort of documentation that rape or incest was the reason that she had to have what I can only imagine to be a very, very difficult choice that she made to have this procedure? Would H.R. 3 save the government any money?

Mr. BARTHOLD. As Mr. Berg had noted on the receipt side, our staff has estimated that it would have a negligible effect. And he reported, I believe this is also accurate, that the Congressional Budget Office said that there was only a negligible budgetary effect on the overall budget.

Mr. THOMPSON. Negligible budgetary effect, but individuals and employers could see their taxes increased?

Mr. BARTHOLD. Well, to have a negligible budgetary effect, it means that on net, there is basically next to no effect. Now, in fact, just maybe to be a little clearer on that, there is some potential to increase revenues, because as is clearly the case, some credits, for example, might be denied. However, we then think also one of the behavioral effects would be perhaps more pregnancies are carried to term, even if they result in an adoption, for example, and resulting spending on prenatal care, deliveries and the like, sort of increases tax reductions or tax benefits for that medical care.

That is the basis upon which we reached our conclusion that there was a negligible receipts effect.

Chairman TIBERI. The gentleman's time is expired. With that note, I would like to ask unanimous consent to submit for the record a Congressional Budget Office cost estimate which estimates that effects on direct spending would be negligible for each year over the 10-year period, the 10-year, window.

Without objection, the CBO cost estimate will be submitted for the record. And I certainly wouldn't want to speak for the author of the bill, but the intent is that millions of taxpayers do not want to see their tax dollars go to taxpayer fundings or credit of abortion. With that I recognize the gentleman from Texas, Mr. Marchant, for questions. Five minutes.

[The information follows:]

AMERICANS for TAX REFORM

722 12th Street N.W.
Fourth Floor
Washington, D.C.
20005
T: (202)785-0266
F:(202)785-0261
www.atr.org

March 16, 2011

The Honorable Pat Tiberi
U.S. House of Representatives
Committee on Ways and Means
Washington, DC 20515

The Honorable Richard Neal
U.S. House of Representatives
Committee on Ways and Means
Washington, DC 20515

Dear Chairman Tiberi and Ranking Member Neal:

On behalf of Americans for Tax Reform, I write today to clarify our position on H.R. 3, the "No Taxpayer Funding for Abortion Act."

As you know, the Congressional Budget Office on March 15, 2011 declared that H.R. 3 has "negligible effects on tax revenues." In budgetary parlance, that is synonymous with a zero tax score. **As a result, ATR has no problems or issues with H.R. 3. The bill has no net tax change whatsoever, and is therefore not legislation at all relating to the Taxpayer Protection Pledge.** Attempts to claim otherwise are not based on reality, but on mere political gamesmanship of the lowest order.

We look forward to continuing to working with you to make certain that all tax legislation is (at worst) tax revenue-neutral, **as H.R. 3 already is.**

Sincerely,

Grover Norquist

cc: House Ways and Means Committee Chairman Dave Camp

Mr. MARCHANT. Thank you, Mr. Chairman. Mr. Barthold, with respect to tax policy, both H.R. 3 and H.R. 358 seem to have in common, they are both attempting to prevent the new health care exchanges, health care coverage exchanges, provided for in ObamaCare to prohibit spending any kind of taxpayer money to provide abortions in these government run programs. What would be the effect of the provisions on the insurance market if that policy were put in place with these two bills?

Mr. BARTHOLD. Thank you, Mr. Marchant. Let me try and clarify present law. So from the PPACA, it says that if abortion coverage is offered, and it leaves it to the States to determine what sort of policies would be offered through these State exchanges. So that if abortion coverage were offered, it must be offered and separately charged, and that no credit could be allocated to that separate charge. It does not, per se, say that there would actually have to be a separate insurance policy, just a separate charge.

H.R. 3, as reported by Judiciary says, basically says unless there is a separate plan providing the abortion coverages, then no credit for the entire, for the entire plan. H.R. 358 says that if there is a plan that offers abortion coverage, the plan provider, the insurance company, must offer a plan that is parallel in all other respects, but with no abortion coverage, or else the plan would not qualify for the credit.

So you would anticipate in H.R. 358, under that legal structure, that you would see these credits used only for plans that offer no abortion coverage. And in practice, because of relatively, I will say, a modest cost of legal abortions and for the moral hazard aspect of who would want to purchase a plan that is essentially only offering abortion coverage, then I think our economic thinking is that those plans would not exist under H.R. 358, that you would just see within the State exchanges plans offering coverage without abortion. The incentives are largely the same than under H.R. 3. So that is sort of our current economic read of what the incentives would lead to.

Mr. MARCHANT. So the practical effect would be that most State exchanges would offer the plan?

Mr. BARTHOLD. Well, that is not completely the case, depending who is participating. But remember, what is being denied is credit that could be used to purchase the plan. So if there were a large enough number of people participating in the State exchanges who were not receiving the credits to help subsidize their purchase of the plan, it might still be viable for insurance companies to offer plans that provided some abortion coverage service.

Mr. MARCHANT. Thank you. Mr. Chairman, I yield back.

Chairman TIBERI. Thank you. Thank you, Mr. Marchant. Again, welcome to the Subcommittee. With that, I yield 5 minutes to the gentlelady from Nevada.

Ms. BERKLEY. Thank you very much, Mr. Chairman, and thank you gentlemen for allowing me to share this occasion with you on the panel. I was reading Bloomberg today, and I read this paragraph that I would like to share and put on the record. "I understand the point they are trying to make through the Tax Code saying abortion is not health care, said Grover Norquist, President of Americans for Tax Reform, a Washington-based advocacy group

that says 237 House Members have signed its no-tax increase pledge who are just concerned that policy, however well intentioned or virtuous, not ever mask a net tax increase."

Now, I know the difference between tax policy and social policy when I see one, and this is pure social policy that is going to negatively impact the tax policy of this country. And I cannot understand how people that profess to want smaller government and keep government out of the lives of people can be so interested in a piece of legislation like this, that I can't think of anything more intrusive or invasive than interfering with a woman's right to choose, and making it even more difficult for a woman to obtain what might be a lifesaving or health-restoring medical procedure.

In my district of Las Vegas, people are hurting. Our economy is in a mess. They talk to me about jobs and they talk to me about help with their mortgage foreclosures. I can't remember one person in the last year, 2 years, 10 years or 12 years that I have been serving in Congress, coming to me and asking me to please make it even more difficult for a woman to get the proper health insurance in case she has a need of a life-saving or health-restoring abortion procedure.

Mr. Barthold, let me ask you a couple of questions if I may. I am very concerned, as I said, and you have heard me testify how bad things are in Las Vegas—my small businesses are hurting, many are going under, and they were quite robust businesses less than 2 years ago. I am concerned about the small businesses in my district and how this might affect them. The health reform law provides for a tax credit for small employers so that they can provide health insurance coverage to employees. And may I say for the record the first 10 years that I served in Congress, every small business person that came into my office begged, begged the United States Congress to do something to help them to be able to provide health insurance to their employees. How would these credits be affected by H.R. 3? Would it deny credits for employer-sponsored coverage that included abortion services.

Mr. BARTHOLD. Thank you, Ms. Berkley. As I noted in my testimony, our staff thinks that it is quite clear that H.R. 3, as reported, would say that credit could not be claimed, that the small business insurance purchase assistance credit could not be claimed for a policy that provided for abortion coverage.

Ms. BERKLEY. Now, let me ask you, how does JCT expect employers to respond if their credits are restricted? What do you think is going to happen?

Mr. BARTHOLD. Well, our economic view is that employers purchase insurance or other health care benefits as part of compensation that they offer their employees. The effect of the proposal is to say that a certain type of benefit could not be provided. However, the credit that is being provided would exceed the value of just the incremental cost, so that the overall subsidy in the small business case that you raised would be reduced.

So we might expect to see small business employers reduce their employee coverage through the plan—through the credit. Another option is to try and purchase smaller or different insurance packages that do not provide abortion services.

Ms. BERKLEY. So in other words, and maybe you can answer yes or no, employers will seek coverage that does not cover abortion services?

Mr. BARTHOLD. I think that would clearly be the case.

Ms. BERKLEY. That is extremely disturbing, that is a disturbing outcome to me. It seems to me the implication of this bill is that if any of my constituents who participate in an employer-provided insurance plan that provides abortion coverage would have to change their policy, and that would mean we would be putting the cost of that transition on small businesses that are already hurting.

If a company so situated wanted to keep its insurance plan exactly as it is today, would you expect the cost of doing so to rise dramatically—to rise under this legislation?

Chairman TIBERI. The gentlelady's time has expired, but the gentleman may answer the question.

Ms. BERKLEY. Thank you.

Mr. BARTHOLD. Thank you, Mr. Chairman. As I noted just a moment ago, the credits offered under the small business credit helped tip the decision to purchase insurance. Absent that credit, obviously, the cost would rise.

Ms. BERKLEY. Thank you very much.

Chairman TIBERI. Thank you. The gentleman from Minnesota, Mr. Paulsen, is recognized for 5 minutes.

Mr. PAULSEN. Thank you. Dr. Barthold, in your testimony you had indicated that in H.R. 3, it may deny the R&D credit and the Indian employment credit to employers in certain situations or circumstances. Can you explain in more detail the fact patterns you think could cause employers to lose potentially those credits?

Mr. BARTHOLD. Certainly, sir. Let me start with the Indian employment credit, which I mentioned in my opening summary. The Indian employment credit provides a credit that is tied to the compensation of qualifying employees, and compensation is defined to include their cash wage, plus any health benefits that are provided.

So in that case, if the employer were providing cash wages and purchasing insurance for his or her employees, a credit is provided based on the total cost of wage and insurance benefit provided. And it seems quite clear on the face of the language in H.R. 3 that that would be a credit for the purchase of a policy, which if the policy included abortion services, which included abortion services, and so the credit, the entire credit would be denied.

We had—our staff had listed in the ambiguous category the research credit under section 41. We listed it as ambiguous because it goes to the ambiguity of, one, what constitutes an abortion for purposes of the bill? And two, what constitutes funding of an abortion? And so what we posited as an example in our more detailed document that we made available to the Members was that a business might be undertaking research into new contraceptives. Those contraceptives, to get them approved, requires clinical trials.

If the contraceptives' action were deemed to be an abortion, then this could be construed by going, you know, sort of two steps down the road of funding of the research to fund the clinical trial was funding an abortion and therefore the research credit under section 41 might be denied to that business.

Mr. PAULSEN. Thank you, Mr. Chairman. That is all.

Chairman TIBERI. I thank the gentleman from Minnesota. The gentleman from New York, Mr. Crowley, is recognized for 5 minutes.

Mr. CROWLEY. I appreciate the Chairman for allowing me to participate in today's Subcommittee hearing. I am very grateful. One of the bills under review is H.R. 3. That is right, H.R. number 3. That means its enactment is a top priority for my colleagues on the other side of the aisle, my Republican colleagues. So to put things in perspective, the Republican's first priority, H.R. 1, I am not saying this, but outside groups are saying, is cutting 700,000 American jobs.

The second priority, H.R. 2, repealing the American people's access to some kind of health care and the same type of health care that Members of Congress receive and adding $230 billion to our deficit.

Now priority number three, placing burdens on small businesses, hindering economic growth and job creation and intruding on the American people's ability to make decisions about their health without Uncle Sam sitting at their bedside. Tick-tock, tick-tock, I guess we will continue to wait for the Republican job agenda.

In the meantime, let's take a look at H.R. 3 and how it will hurt America's small businesses. Mr. Barthold, section 303, clause 1 of H.R. 3, prohibits tax credits for any health benefits that happen to include abortion. In the Joint Committee's analysis of the tax provisions impacted by H.R. 3, you identified eight tax credits that would be affected by this clause alone, is that correct?

Mr. BARTHOLD. Yes, sir.

Mr. CROWLEY. Thank you. And one of these tax credits is a small business tax credit included in the Affordable Care Act, which assists small businesses who provide private health care coverage to their employees, is that correct, sir?

Mr. BARTHOLD. Yes, sir. That is what Ms. Berkley and I were just discussing.

Mr. CROWLEY. Yes. Thank you, sir. This tax credit is worth 35 percent of the cost of providing private health insurance coverage, and in 2014 that will increase to 50 percent of the cost of providing health insurance. It is still early, but we have already seen that more small businesses are now providing private health insurance to their employees as a result of these tax credits.

However, if this private health insurance happens to include abortion care, as 87 percent of private health plans do, then these employers will no longer be eligible for this tax credit under H.R. 3, is that correct?

Mr. BARTHOLD. Yes, sir.

Mr. CROWLEY. Thank you, sir. This means that every small businessowner, right down to the mom and pops running a restaurant, will have to sort through pages of fine print just to apply for that tax credit. It is not always easy to tell whether a plan excludes or includes abortion procedures. With the time that they could be spending growing their business and creating jobs, small businessowners will instead spend their time flipping through paperwork and on the phone and on hold with their insurance provider to confirm whether or not that coverage is provided. We have

heard a lot of rhetoric lately about eliminating burdens on small businesses. You might even recognize some of these same arguments that were used during the debate on 1099 repeal. I supported the repeal of the 1099 requirement because I agree with that need to reduce paperwork and regulatory hoops that small businessowners have to jump through. What I don't understand is why my Republican colleagues now want to impose an avalanche of new paperwork on small businesses. And let me be clear, these new onerous rules on employer-provided health care offered by Republican colleagues pertain to private health insurance plans and to private sector small businesses.

We are not talking about a health plan for Federal employees that is subsidized by our employers, the American taxpayers. That plan already prohibits any form of abortion coverage. So why are we adding these new job killing onerous provisions on small businesses, the engine for job creation in America? Why is this bill priority number three? I know you can't answer that question, Mr. Barthold, I am not asking you that, but nor can I, Mr. Barthold.

Mr. Barthold, I am frustrated as well. I can't answer that question either. Under this proposal, the IRS will have to divert resources from finding tax cheats to scrutinizing every single small business filing to ensure they are not offering health coverage to their employees that offer abortion services.

Mr. Barthold, I know this bill doesn't bother to get into the details of how this new intrusion into private health care will be enforced, so I am not going to ask you to speculate. But it seems likely to me that H.R. 3 would create a massive and unnecessary burden on small businessowners and will give vast new power to the IRS to examine our individual health care decisions. Aside from the burden on small businesses and expanding the reach of the IRS, H.R. 3 would also mean a brand new tax burden on small businesses. I yield back the balance of my time.

Chairman TIBERI. I guess the gentleman of New York does not have a question for Mr. Barthold.

Mr. CROWLEY. I asked three or four, and he answered them. Thank you, sir.

Chairman TIBERI. Thank you. The gentleman from Louisiana, Dr. Boustany, is recognized for 5 minutes.

Mr. BOUSTANY. Thank you, Mr. Chairman. When we think about burdens on small businesses, I have to harken back to the burdens that the new health care law is going to add on small businesses, large businesses and on job creation in this country. I want to make a couple points first, and then I may have a question as well. To my friend from New York, part of this is protecting the jurisdiction of this Committee. The bill, H.R. 3, has tax implications and the bill was referred to our Committee. I am thankful that the Speaker and his office saw it fit to bring that bill to our Committee so that we can actually look at the accuracy of the language in the bill with regard to the tax provisions. I think that is very important. And I think it is important to protect the integrity of the jurisdiction of this Committee.

My friend also referenced the expansion of IRS activities with regard to small businesses and how this bill would affect them. But I would also like to express that the IRS' activity is going to be

vastly expanded because of the Health Care Act. And the more we grow government intrusion in any form into health care and personal decisions, obviously, the IRS, because there are tax implications, their role will grow. On our side of the aisle we don't like it, but that is where we are today. So I just wanted to respond to a couple of those things.

Dr. Barthold, with regard to FSAs, I don't think we mentioned anything about the impact of this bill on FSAs, and I understand that the authors of H.R. 3 intended to prevent tax free distributions from FSAs from being used to pay for abortions. And people still could use FSA money for abortions, but they would be taxed on it, is that correct?

Mr. BARTHOLD. Dr. Boustany, there is actually some—this is one of the areas we identified as lack of clarity. I mean, we noted that the staff's view is that for Archer MSAs, for example, it is quite clear that that is a tax preferred account. And paragraph 3 of section 303 of H.R. 3, too many 3s there, as reported, would say that the taxpayer would have to take an income inclusion for a payment from a tax preferred account for abortion—related to abortion services. It is not clear under present law if an FSA would be considered to be a tax preferred account under H.R. 3. If however, as you note, the intent were that it be treated as a tax preferred account, then following the analysis of the Archer MSA, yes, you could still pay for abortion services, but then the value of that payment would be included in the taxable income of the recipient.

Mr. BOUSTANY. And so if H.R. 3, as referred by the Judiciary Committee, were to come to us, or would go on and be passed into law, I should say, then we would need further IRS guidance on this tax implication?

Mr. BARTHOLD. Well, I would think that the Committee would want to tell the IRS—tell the Treasury to tell the IRS what the intent was in terms of the scope of a tax preferred account. Or if left to its own, yes, it would fall under IRS guidance as to whether an FSA constituted a tax preferred account.

Mr. BOUSTANY. Thank you, Dr. Barthold.

Mr. CROWLEY. Would the gentleman yield just for the purpose of adding to the record, a statement for the record? Unanimous consent, that is all I am asking?

Mr. BOUSTANY. Yes, that is fine.

Mr. CROWLEY. Mr. Chairman, I would just ask unanimous consent to include in the record a Bloomberg article that Ms. Berkley had mentioned. I am not so sure that you entered that into the record.

Chairman TIBERI. Without objection.

Mr. CROWLEY. I would like to actually enter that into the record. Thank you.

[The information follows:]

Bloomberg

Abortion Foes in Congress Run Into Tax Obstacle in Attempt to Curb Funding

By Richard Rubin - Mar 16, 2011

House Republicans' efforts to limit government funding for abortion are colliding with their emphasis on tax cuts, underscoring potential conflicts between the party's social and fiscal agendas.

A Republican bill that would cut taxpayer funding for abortion aims to prevent women from using itemized medical deductions, certain tax-advantaged health care accounts or tax credits included in last year's health care law to pay for abortions or for health insurance plans that cover abortion.

Under common Republican definitions, limiting a tax benefit is viewed as a tax increase -- which is anathema to the House majority.

"I understand the point they're trying to make through the tax code, saying abortion is not health care," said Grover Norquist, president of Americans for Tax Reform, a Washington- based advocacy group that says 237 House members have signed its no-tax-increase pledge. "We're just concerned that policy, however well-intentioned or virtuous, not ever mask a net tax increase."

A House Ways and Means subcommittee will consider the issue in a hearing today. The bill is co-sponsored by 221 House members.

No-Tax-Increase Pledge

Norquist said yesterday that he has been discussing the tax issue with bill sponsors and committee staffers. They have assured him, he said, that they will include a tax-cutting provision in the bill so it complies with his group's pledge.

"As the sole House committee that generates tax policy, we speak with a lot of groups that are mindful of how specific legislation may impact the code and taxpayers alike, and ATR is one of those groups," said Ways and Means spokeswoman Michelle Dimarob. The purpose of today's hearing, she said, is to give Congress "the information it needs to ensure that the provisions are administrable and operable."

The bill, which is sponsored by Representative Christopher Smith, a New Jersey Republican, also prohibits government spending for abortion and forbids federal health care facilities to offer

abortion services. The bill provides exceptions for abortions performed to save a woman's life or to end pregnancies resulting from rape or incest. The House Judiciary Committee approved the measure March 3.

Most congressional Republicans support cutting spending for abortion. Their 2011 spending bill included a ban on funding for Planned Parenthood, and some lawmakers have been pushing to include similar language in the short-term spending measures that are funding the federal government while lawmakers devise a longer-term plan.

Spending provisions in the abortion bill, which expand and make permanent previous restrictions, fit with the party's stated agenda of reducing government expenditures.

Medical Deduction

The tax provisions raise a more complicated question because they would generate more money for the government. If a woman cannot use the itemized medical deduction -- which is available for expenses exceeding 7.5 percent of adjusted gross income -- for an abortion, she would pay more in taxes than she would have otherwise.

The bill would attempt to apply the same logic to health savings accounts and flexible spending accounts by removing abortion from the list of eligible medical expenses, said David Christensen, senior director of congressional affairs at the Family Research Council, a Washington-based group that advocates religious values in public policy.

"We think that the IRS should not be incentivizing abortion through the tax code," he said.

Changing the tax treatment of abortion is a "very different concept" that could lead to other social policy changes through the tax code, said Donna Crane, policy director at NARAL Pro-Choice America, an abortion-rights group in Washington.

"There's a lot of policies that can be enacted and changed that are super-creepy," she said.

Tax Breaks Remain

The bill would not affect the two largest tax breaks for health care: allowing employers to deduct the cost of health insurance for employees and letting employees receive employer- sponsored coverage without paying taxes on the value of the benefits.

Christensen said his group would support examining those tax provisions as well.

The Congressional Budget Office released a report yesterday saying that the bill would have a "negligible" effect on tax revenue.

"Negligible's fine," Norquist said. "Zero's better, so there needs to be an offset."

As Congress pursues broader tax changes, similar tax provisions could cause fractures between fiscal conservatives who don't want taxes to increase and social conservatives who want to use economic policy as a tool with less attention to the fiscal consequences.

"The government should still have a right to shape the tax code in favor of public good or against something that they consider something that is not a public good," Representative Trent Franks, an Arizona Republican, said at a hearing last month.

To contact the reporter on this story: Richard Rubin in Washington at rrubin12@bloomberg.net

To contact the editor responsible for this story: Mark Silva at msilva34@bloomberg.net

Mr. BOUSTANY. Thank you. I yield back, Mr. Chairman.

Mr. TIBERI. Thank you. I thank the gentleman from Louisiana.

That concludes today's hearing. Please be advised that Members may submit written questions to the witnesses. Those questions and the witness' answers may be part of the record.

I thank you, Dr. Barthold, for providing guidance and expertise to us in the drafting of the tax provisions of H.R. 3 and H.R. 358. As I said earlier, millions of taxpayers do not believe that their taxes should go to funding or subsidizing in any way abortions, and I hope this hearing helps inform the full Committee, as it may consider the provisions of H.R. 3 and H.R. 358 in future that fall within the Committee's jurisdiction.

With that, the hearing is adjourned.

[Whereupon, at 3:00 p.m., the Subcommittee was adjourned.]

[Submissions for the Record follow:]

AMERICANS UNITED FOR LIFE

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

Subcommittee on Select Revenue Measures
House Ways and Means Committee
1102 Longworth House Office Building
Washington D.C. 20515

Re: Hearing on the Tax-Related Provisions of H.R. 3

March 29, 2011

Dear Chairman Tiberi and Members of the Subcommittee:

Recent polls reveal that an overwhelming majority of Americans—whether pro-life or pro-abortion—oppose the use of federal tax dollars to support abortion.[1] H.R. 3, The No Taxpayer Funding of Abortion Act, ensures that Americans are not forced to support abortion and subsidize the abortion industry with their tax dollars. The bill applies the principles of longstanding federal law and policy – that taxpayer funding should not be used to promote or subsidize abortion – in a permanent government-wide prohibition.

The Hyde Amendment[2] has restricted abortion funding in Medicaid since 1976—three years after *Roe v. Wade*.[3] A rider to the Labor Health and Human Services (LHHS) Appropriations bill, the Hyde Amendment enacts a broad prohibition on the use of federal funds appropriated through the LHHS Appropriations. The text states that "[n]one of the funds…shall be expended

[1] Quinnipiac University, "U.S. Voters Oppose Health Care Plan by Wide Margin, Quinnipiac National University Poll Finds; Voters Say 3-1, Plan Should Not Pay for Abortions," December 22, 2009, at http://www.quinnipiac.edu/x1295.xml?ReleaseID=1408 (last visited Mar, 27, 2011).
[2] The Hyde Amendment, first enacted in 1976, and as included in the Omnibus Appropriations Act, 2009, H.R. 1105, 111th Cong, 2009, signed into law Mar. 11, 2009. The Hyde Amendment, Pub. L. No. 111-8 (2009).
[3] 410 U.S. 113 (1973).

for any abortion,"[4] *and* that "[n]one of the funds … shall be expended for health benefits coverage that includes coverage of abortion."[5] Thus, the Hyde Amendment prohibits "direct" and "indirect" funding for elective abortions.

Before the Patient Protection and Affordable Care Act passed in 2010, no government health plans covered elective abortion, including Medicaid, the Federal Employees Health Benefits Program, the State Children's Health Insurance Program, and other programs. For example, in the Federal Employees Health Benefits (FEHB) program, the Government contributes to premiums of federal employees in order to allow them to purchase private health insurance. Since 1983, the annual Financial Services and General Government Appropriations bill that provides funding for the FEHB program has prohibited these government contributions from being used towards insurance plans that cover abortion (with the exception of the period 1993-1995).[6]

The constitutionality of these funding restrictions is clear. In 1980, the Supreme Court upheld the constitutionality of the Hyde Amendment, in the case of *Harris v. McRae.*[7] The Court held that the funding restriction of the Hyde Amendment

> places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.[8]

Moreover, studies confirm the relationship between public funding and the incidence of abortion. The Guttmacher Institute, an organization whose mission includes working to "protect, expand and equalize access to information, services and rights that will enable women and men to…exercise the right to choose abortion," conducted a Literature Review in 2009 that shows strong consensus that abortion rates are reduced when public funding is restricted.[9] (The study is available at http://www.guttmacher.org/pubs/MedicaidLitReview.pdf) Specifically, Guttmacher reported:

> The best studies are the five that used detailed data from individual states and compared the ratio of abortions to births before and after Medicaid restrictions took effect. These found that 18–37% of pregnancies that would have ended in Medicaid-funded abortions

[4] Hyde Amendment *supra* note 2, §507(b).
[5] *Id.* §507(c).
[6] Pub. L. No. 111-8, §§613-614 (2009).
[7] 448 U.S. 297 (1980).
[8] *Id.* at 315.
[9] Stanley K. Henshaw, Theodore J. Joyce, Amanda Dennis, Lawrence B. Finer and Kelly Blanchard, *Restrictions on Medicaid Funding for Abortions: A Literature Review,* Guttmacher Institute, June 2009, *available at* http://www.guttmacher.org/pubs/MedicaidLitReview.pdf. (last visited Mar. 21, 2011). The review cites 20 academic studies documenting this relationship and only four that found the results of public-funding inconclusive.

> were instead carried to term when funding was no longer available.[10]

Thus, prohibiting public funding of abortion is consistent with the opinion of the majority of Americans who do not want their tax-dollars paying for elective abortions, and it helps achieve the legislative goal of reducing the incidence of abortion.

H.R. 3 eliminates the need for appropriations riders (such as the Hyde Amendment which must be renewed annually), regulations (which can be overturned by new administrations), and executive orders (which exist at the will of a president). This is important because the abortion industry has made it clear that its agenda includes targeting vulnerable annual "riders" to appropriations bills and regulations that currently prohibit federal funding of abortion. For example, the National Organization of Women (NOW) has vowed, "[T]he Board of NOW is hereby instructed to develop a long-term strategy with other allied organizations for the defeat of the Hyde Amendment and that the grassroots level of NOW be urged to take action in an aggressive campaign to repeal the Hyde Amendment..."[11]

H.R. 3 also ensures consistency throughout federal law that no tax credits provide a financial incentive for abortion. Abortion is not health care or a public good and should never be construed as such.

Sincerely,
/s/ William L. Saunders
Senior Vice President of Legal Affairs
Americans United for Life

[10] *Id.* at 27.
[11] *See* http://www.now.org/organization/conference/resolutions/2010.html#Hyde (last visited Mar. 29, 2011).

NATIONAL ABORTION FEDERATION

1660 L Street, NW, Suite 450 • Washington, DC 20036 • p: 202.667.5881 • f: 202.667.5890
www.prochoice.org

March 23, 2011

Dear Members of the Subcommittee on Select Revenue Measures of the Committee on Ways and Means:

I am writing regarding recent Congressional testimony for HR3, the "No Taxpayer Funds for Abortion Act" and HR 358, the "Protect Life Act." As an obstetrician-gynecologist with more than 20 years of experience providing both obstetric and complex abortion care, I wish to set the record straight.

I direct Northwestern University's Center for Family Planning & Contraception as well its academic Section of Family Planning. The medical center where I work performs nearly 13,000 deliveries annually. Most patients are healthy women having healthy babies, but I am frequently asked to provide abortions for women confronting severely troubled pregnancies or their own life-endangering health issues. Physicians who provide health care to women cannot choose to ignore the more tragic consequences of human pregnancy—and neither should Congress. The following portraits of the women I see illustrate just a few of the circumstances where abortion saves women's lives:

- One of my own obstetric patients carrying a desired pregnancy recently experienced rupture of the amniotic sac at 20 weeks gestation. The patient had a complete placenta previa, a condition where the afterbirth covers the opening to the uterus. Although the patient hoped the pregnancy might continue, she began contracting and suddenly hemorrhaged, losing nearly a liter of blood into her bed in a single gush. Had we not quickly intervened to terminate the pregnancy, she would have bled to death, just as women do in countries with limited access to obstetric services.

- My service frequently receives referrals from Northwestern's Division of Maternal Fetal Medicine and other high risk pregnancy services throughout the Chicago area. One of the more frequent reasons for referral is preterm rupture of membranes with chorioamnionitis, an intrauterine infection which can develop at any time during pregnancy. Since antibiotics will not sufficiently penetrate the endometrial cavity containing the baby, the treatment for this condition is to evacuate the uterus. If the infection occurs at term, we deliver the baby. If the condition occurs before 24 weeks, we must abort the pregnancy lest the patient become septic and die. Over my years of practice, I have had many patients who would have died without access to abortion in this situation.

- My service often receives consults regarding patients with serious medical issues complicating pregnancy. We recently had a 44-year-old patient whose pregnancy had been complicated by a variety of non-specific symptoms. A CT scan obtained

at 23 weeks gestation revealed that the patient had lung cancer that had metastasized to her brain, liver, and other organs. Her family confronted the difficult choice of terminating a desired pregnancy or continuing the pregnancy knowing that the physiologic burden of pregnancy and cancer might worsen her already poor prognosis. The family chose to proceed with pregnancy termination.

- My service often receives referrals regarding unusual obstetric conditions because we work at a tertiary care center. One complex condition referred to my service involved a patient who had a twin gestation in which one of the embryos was a molar pregnancy. Molar pregnancy is an abnormal pregnancy in which the embryo fails to develop—or develops partially—and the placenta develops into grape like tissue clusters. The abnormal placenta of molar gestation expands the uterine cavity and often causes severe hemorrhage. Patients are also more likely to develop a number of other medical problems during their pregnancy including intractable nausea and vomiting and early onset hypertensive disorders. Longer term, molar gestation places the patient at higher risk of developing choriocarcinoma, a cancer in which placenta-like material spreads throughout the body. Most molar gestations involve no embryo, but this patient had one normal twin and one molar gestation. Although she was only 22 weeks gestation, her uterus already approximated the size of a term pregnancy containing enough grape like clusters of placenta to fill a milk crate. We admitted the patient to the intensive care unit, obtained 10 units of blood in case severe bleeding occurred, and successfully terminated the pregnancy. By intervening when we did, we preserved the patient's life, her health, and her ability to have children in the future.

- My service sometimes sees patients who have received organ transplants or are awaiting transplants. I remember one woman in her early twenties who had end stage alcoholic cirrhosis of the liver. She had stopped using alcohol and successfully balanced school, work, and frequent hospitalizations to deal with her severe liver disease and related disorders. While awaiting a transplant, she conceived. She decided to terminate the pregnancy rather than accept the risks to her life and health posed by continued gestation. We have cared for other patients who chose to terminate while awaiting transplant or after undergoing transplant of heart, liver, and other organs. Although some of these patients might manage to continue pregnancies to term, each patient's circumstance is highly variable with unpredictable risk to life and health.

- A colleague on my team recently took care of another patient with leukemia. We have had many during my 15 years at Northwestern. Several years ago, we had three patients with leukemia requiring pregnancy terminations at approximately the same time. Because leukemia causes abnormal blood cells, patients with leukemia confront increased risk of both bleeding and infection. Pregnancy compounds these risks, particularly if they need to receive ongoing chemotherapy during the pregnancy.

- My service frequently sees patients with early pre-eclampsia, often referred to by the term "toxemia". Pre-eclampsia usually complicates later gestation, but occasionally complicates pregnancy as early as 18 to 20 weeks, well before the fetus is viable. The only treatment for severe pre-eclampsia is delivery. Otherwise, the condition will worsen, exposing the mother to kidney failure, liver failure, stroke and death. One Christmas morning I had to leave my own family so that I could provide a pregnancy termination for a remarkably sick, pre-eclamptic teenager.

Patients like those described above rarely knew that pregnancy could jeopardize their lives and health. Some opposed "abortion", even while they themselves were undergoing an abortion. Like most tertiary obstetric centers, we receive referrals of such patients from within our own system and throughout our metropolitan area. Some of the referrals come from providers or sectarian institutions that ostensibly oppose abortion, but rely upon us as the "safety valve" to assure that patients get care they need and deserve. We usually manage to intervene before a risk to health becomes a risk of life, but we do so because the law currently embraces patient and provider autonomy. What will obstetricians do when the law criminalizes interventions needed to save the lives of our daughters, wives, and mothers? Should health insurance only cover the cost of obstetrics when everything goes well—or should it also cover the cost of a standard obstetric procedure when the patient's life and health is most at risk?

I hope our elected representatives will allow those of us who experience these circumstances on a regular basis to set the record straight—and prevent the passage of legislation that would harm women, families, and those who care for them.

Cassing Hammond, MD
Director, Section of Family Planning & Contraception
Associate Professor of Obstetrics and Gynecology
Northwestern Feinberg School of Medicine

Chair, National Abortion Federation Board of Directors

CENTER FOR REPRODUCTIVE RIGHTS

Center for Reproductive Rights
Supplemental Testimony

Before the Subcommittee on Select Revenue Measures
Committee on Ways and Means
United States House of Representatives

March 30, 2011

The Center for Reproductive Rights (CRR) submits the supplemental testimony below in response to issues raised at the hearing before the Subcommittee on Select Revenue Measures by the testimony of the Joint Committee on Taxation and questions raised by Committee Members.

CRR uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect, and fulfill. We envision a world where every woman is free to decide whether and when to have children; where every woman has access to the best reproductive healthcare available; where every woman can exercise her choices without coercion or discrimination. More simply put, we envision a world in which every woman participates with full dignity as an equal member of society.

Restrictions on abortion coverage – such as H.R. 3 – impose real and high costs on women. Current restrictions on insurance coverage for federal employees forced one woman, D.J., to pay thousands of dollars after confronting incredibly difficult circumstances. After terminating a wanted pregnancy because she learned that the fetus had no brain and no chance of survival, she discovered that her federal insurance was barred from covering the procedure. In the midst of her grief, she was handed a $9,000 bill.[1] H.R. 3 would inflict that pain on many more women.

H.R. 3 provides no clear theory of "federal funding," and in fact contorts the concept beyond recognition.[2] H.R. 3 picks and chooses where to impose its strictures along utterly arbitrary – indeed, indiscernible – lines. A tax credit for outsourced workers to assist with medical expenses is thankfully no longer captured by the bill, but a tax credit to allow small businesses to provide workers with health insurance coverage remains in its sights. Similarly, expenses related to the COBRA program, which extends health benefits for workers, are now excluded from the bill's reach, but health flexible spending arrangements (FSAs) which involve pre-tax dollars from workers' pockets, are unaccountably still subject to its harsh rules.

1634 Eye Street, NW, Suite 550
Washington, DC 20006
Tel. 202 629 2658
www.reproductiverights.org

Below, we make two key points about the harms of H.R. 3 that came to light at the hearing.

1) H.R. 3 misuses the tax code for social engineering, and thus would force tax auditors and employers to intrude into the most personal, private aspects of women's lives.

As the hearing before the Subcommittee on Select Revenue Measures earlier this month made clear, the bill injects ideological principles into the tax code, using the tax mechanism to shame and punish women who seek to use medical insurance coverage for a legal choice.

H.R. 3 has far-reaching and potentially limitless implications. It creates a narrow "exception" for pregnancies that are the result of rape or incest, or where the woman's life is endangered. The public reacted rightly with outrage when an earlier version of this bill attempted to redefine rape. The current version now gives that same power to the Internal Revenue Service (IRS).

H.R. 3 calls on the IRS to conduct rape audits.[3] As Thomas A. Barthold, Chief of Staff of the Joint Committee on Taxation, testified, the burden of proof regarding whether or not an abortion occurred within the narrow confines of one of those exceptions will fall on the taxpayer.[4] This means that women will be required to keep records, and to open up those records – and their highly personal traumatic experiences – to the probing investigations of IRS agents. According to a former longtime IRS official, "on audit [she] would have to demonstrate or prove, ideally by contemporaneous written documentation, that it was incest, or rape, or [her] life was in danger . . .[i]t would be fairly intrusive for the woman."[5]

The case of incest is even more difficult. H.R. 3 could require the taxpayer (which could include an abusive father) to substantiate that the abortion was the result of abuse, creating an untenable and volatile situation for a family already in difficult and painful circumstances. To make matters worse, in addition to policing rape and incest, H.R. 3 would turn IRS officials into amateur physicians, requiring them to determine which dangerous conditions should qualify as life endangering under the bill.

Needless to say, such determinations – for practical, medical and emotional reasons – are far beyond the expertise and training of the typical IRS auditor. Indeed, they so poorly suit the role of the IRS auditor that this alone constitutes substantial evidence that H.R. 3 works a serious abuse of the tax code in the service of ideology.

In addition to inviting the IRS into the most personal aspects of women's lives, H.R. 3 (as amended by H.R. 1232), could require that women report their abortions to their employers. H.R. 3/1232 provides that abortion services must be excluded from health flexible spending arrangements ("health FSAs"), which otherwise allow individuals to reduce their cash

compensation and set aside funds for medical expenses. Under H.R. 3/1232, according to the Joint Committee on Taxation, it is likely that the IRS will require that any amount paid for abortion services "be reported on the employee's Form W-2 . . . as wages."[6] That is, H.R. 3/1232 creates a big brother regime in which women's private medical decisions are forced to become public events, exposed to an endless stream of parties who could use that information to the woman's detriment.

Given the bill's misleading title, the slim reed on which the opposition's argument rests is the equation of tax credits with direct federal funding. The hypocrisy of this suggestion would be laughable if it were not so threatening in this instance, as small-government conservatives would be surprised to learn that money now in the pocket of individuals due to the operation of a tax credit is in fact considered federal dollars. This political point aside, the government has long recognized a critical distinction between direct federal funding and tax "expenditures" or credits. Indeed, this distinction is essential to the reasoning that allows religious institutions and non-profits to remain tax exempt without that status working a violation of the Constitution's Establishment Clause.

In testimony, Barthold referred to a case on the distinction between direct government expenditures and tax-subsidized private choices currently before the Supreme Court. The case, *Arizona Christian School Tuition Organization v. Winn*, includes consideration, among other issues, of the distinction between direct government expenditures and tax credits. The case was argued in November 2010, and a decision is expected later this term.

As indicated, in *Winn*, the Court is considering the constitutionality of an Arizona statute permitting taxpayers to receive a tax credit of up to $500 for contributions made to "student tuition organizations" – private organizations that fund private-school scholarships for children, including scholarships to parochial schools. Under the Court's precedents, while direct government expenditures for religious purposes are an unconstitutional violation of the First Amendment's Establishment Clause; tax-subsidized private, non-governmental choices do not implicate the First Amendment.

A panel of the Ninth Circuit Court of Appeals ruled the statute at issue in *Winn* unconstitutional,[7] and a slim majority of the full court denied review.[8] The dissent in the decision denying review emphasized that "[m]ultiple layers of private, individual choice separate the state from any religious entanglement."[9] In other words, according to the dissent, by "'delegating' the choice to taxpayers, the government already broke the circuit [between government and religion]" – that is, the private taxpayer choice attenuates any link to government action.[10]

The Arizona Christian School Tuition Organization appealed the decision to the U.S. Supreme Court, which agreed to hear the case. During oral argument, a number of the Justices objected to the respondent's argument that appeared to conflate direct government spending with tax credits based on the theory that a reduction in taxes is a governmental expenditure.

For example, Justice Scalia stated, "That's a great leap to say that it's government funds, that any money the government doesn't take from me, because it gives me a deduction, is government money…This money has never been in the government's coffers. The government has declined to take this money."[11] Justice Alito similarly indicated his skepticism of Winn's argument that tax credits for private donations are imputable to the government, asking respondent Winn's attorney, "You think that all the money belongs to the government – except to the extent that it deigns to allow private people to keep some of it[?]"[12]

Most importantly, Justice Kennedy, widely regarded as the crucial swing vote on the Court, expressed tremendous skepticism about the respondent's argument eliding government expenditures and tax credits, noting, "But I must say, I have some difficulty that any money that the government doesn't take from me is still the government's money."[13] Justice Kennedy continued:

> JUSTICE KENNEDY: Let me ask you. If – if you reach a certain age, you can get a – a card and go to certain restaurants, and they give you a 10 percent credit. I think it would be rather offensive for the cashier to say, "and be careful how you spend my money." (Laughter.)
> JUSTICE KENNEDY: But that's the whole theory of your case.[14]

In light of the Court's earlier decisions distinguishing between direct government expenditures and tax-subsidized private choices, as well as the skepticism of Justice Kennedy and others, the Supreme Court is likely to reverse the Ninth Circuit's decision and reaffirm that tax breaks do not transform a private choice into a governmental decision.

2) H.R. 3 is an egregious attack on America's small businesses.

The economic challenges facing small businesses in this economy are serious; without attention from Congress, any economic recovery remains in doubt. A crucial step is to address escalating health care costs, and the loss of workers due to preventable illness that could have been avoided by proper care covered by health insurance. After a long period of neglect, the Affordable Care Act's (ACA's) tax breaks for small businesses at last offers hope to small businesses that they will be able to afford health insurance coverage for their workers. The ACA's tax credits are critical to stemming the escalation in health care costs, and making health care coverage affordable for American entrepreneurs and their businesses.

If there is to be an economic recovery, small businesses will be the engine for that growth. But instead of rewarding them, this bill would punish them in ever more innovative ways. The attack on small business healthcare tax credits in H.R. 3 would greatly complicate and confuse this community's ability to provide insurance coverage. Small business might respond to these burdens in several ways, each of which undermines employees' access to health insurance, and the goal of the ACA. They could reduce coverage, as Barthold testified, or they could decide not to provide coverage at all.

Even without taking full account of the impacts on coverage by small businesses, the paperwork burdens and costs imposed by this new and unwarranted mandate are steep. First, the provision would require every small business eligible for a tax credit – numbering some 4 million[15] – to closely examine its healthcare plan to ascertain whether the plan includes coverage for abortion.

While some of these small businesses may not have offered health insurance coverage prior to the ACA, that program of tax credits has already begun, and many have likely signed up for coverage. Whether a healthcare plan does cover abortion care is far from simple to figure out, as coverage could occur in many categories, from prescription drugs to outpatient surgery to maternity care that includes unforeseen complications.

Indeed, most plan managers do not likely know whether this service is covered, and will have to waste precious time on the phone with insurers to figure it out. A 2010 Kaiser Family Foundation study revealed that a stunning 71% of employers replied "don't know" when asked whether their insurance plans provided coverage for abortion services.[16] Yet surveys by both the Kaiser Family Foundation and the Guttmacher Institute indicate that a majority of healthcare insurance plans offered today provide coverage for abortion.[17]

Second, a majority of small businesses that today do provide abortion coverage – or approximately 2.4 million businesses – will have to switch insurance plans or pay the penalty of the loss of tax credits made available to them in the Affordable Care Act.[18] But this, as it turns out, is a catch-22.

If a small business does decide to switch plans, their new healthcare insurance plan must meet requirements for non-grandfathered plans.[19] This transformation of the marketplace was thoughtfully designed through the ACA and its implementing regulations to be gradual, as plans move from being grandfathered to needing a new health insurance contract. Yet H.R. 3 would inject a sudden interruption in this plan that will impact a majority of small businesses in the country.

More importantly, even a cursory look at the administrative costs required for small businesses to meet this one mandate in H.R. 3 shows that they are staggering. This kind of evaluation of a healthcare insurance plan and legal requirements requires the attention of the most valuable or second-most valuable employee at a typical small business. If we estimate that the time of that person is worth $300/hour, if it takes 5 hours for every one of the 4 million small businesses eligible for the small business tax credit[20] to evaluate whether or not its coverage includes abortion (which is a conservative estimate), the cost for this assessment alone is a staggering $6 billion.

If a majority of plans (estimated at 60 percent) – or 2.4 million businesses – then must switch plans in order to maintain eligibility for the tax credit, they must shop for a new plan, weigh options and costs, and address requirements for non-grandfathered plans. Again, a conservative figure for the time likely to be spent on this useless additional project is 30 hours. Using the same figures, the cost for this portion of the rule as a tax on small businesses is a stunning $21.6 billion.

In total, this aspect of H.R. 3 imposes a tax on small businesses of more than $27 billion in paperwork costs alone. Any way you slice this, small business owners will pay because some in Congress have decided to rewrite a reasonable and much-needed law to suit their own narrow ideological goals – goals that have nothing to do with the ordinary functioning and day-to-day life of the average small business. That Congress would support this penalty on small businesses at a moment of such dire economic hardships for America's most hard-working sector defies all logic and reason. That Congress would do so to penalize women in particular – when women are faring far worse, with 90% of the jobs created in the last year going to men[21] – is simply shameful.

Congress should emphatically reject this extreme proposal.

Endnotes

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[5] *See id.*
[6] Joint Committee on Taxation, *Description of H.R. ____*, (JCX-21-11), 12-13, March 29, 2011.
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[8] *Winn v. Ariz. Chr. Sch. Tuition Org.*, 586 F.3d 649 (9th Cir. 2009).
[9] *Id.* at 662 (O'Scannlain, J., dissenting).
[10] *Id.* at 667 (O'Scannlain, J., dissenting).
[11] *Ariz. Chr. Sch. Tuition Org. v. Winn*, No. 09-987, (Nov. 3, 2010), at 30-31.
[12] *Id.* at 35.
[13] *Id.* at 31.
[14] *Id.* at 31.
[15] Small Business Majority, *A Helping Hand for Small Businesses: Health Insurance Tax Credits*, at 2 (2010).
[16] *See* Kaiser Family Foundation & Health Research and Education Trust, *Employer Health Benefits 2010 Annual Survey*, 186, *available at* http://ehbs.kff.org/pdf/2010/8085.pdf.
[17] Most Americans with employer-based insurance currently have coverage for abortion. *See* Guttmacher Institute, *Memo on Private Insurance Coverage of Abortion* (Jan. 2010), *available at* http://www.guttmacher.org/media/inthenews/2011/01/19/index.html.
[18] *Id.*
[19] *See* Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 FR 70114 (2010).
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NARAL
Pro-Choice America Foundation

"No Taxpayer Funding for Abortion Act" (H.R.3):
An Extreme Attack on Women's Access to Abortion Coverage

Testimony submitted by

Nancy Keenan
President

Also on Behalf of

NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Maryland
NARAL Pro-Choice Massachusetts
NARAL Pro-Choice Minnesota
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NARAL Pro-Choice North Carolina
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Texas
NARAL Pro-Choice Virginia
NARAL Pro-Choice Washington
NARAL Pro-Choice Wisconsin

U.S. House of Representatives
Committee on Ways and Means
Subcommittee on Select Revenue Measures

March 16, 2011

Members of the Ways and Means Subcommittee on Select Revenue Measures: I am honored to submit this testimony on behalf of NARAL Pro-Choice America, our state affiliates, and the pro-choice Americans we represent.

Today you are considering the "No Taxpayer Funding for Abortion Act" (H.R.3), introduced by Rep. Chris Smith (R-NJ), a bill that is misleading in its claim that it ends public funding for abortion care. This bill is not about public funding. Regardless of one's view on this issue, federal law is clear: federal funding of abortion is forbidden, except in very narrow circumstances. Instead, this bill is an attempt to reopen the debate on private insurance coverage of abortion and to dismantle entirely the Affordable Care Act. Recognizing the subcommittee's narrow jurisdiction on this legislation, I would like to offer the following analysis, which situates H.R.3's tax provisions within a broader policy context.

Introduced as part of the effort to repeal and replace the health-care law, this bill exposes that anti-choice House leadership's view of "public funding" bears no resemblance to reality. The legislation's true objective is to insert anti-choice politics into the tax code and jeopardize the availability of private insurance coverage for abortion. More sweeping in scope than its name implies, the Smith bill does far more than reinforce existing bans on public funding for abortion care; it launches a radical new anti-choice attack on abortion access.

Imposes Tax Penalties on the Purchase of Abortion Coverage

The Smith legislation interferes with coverage of abortion services within the private-insurance market and makes chaotic changes to tax policy. It does so by imposing tax penalties on small businesses and many individuals who choose private health plans that cover abortion care. (At present, 87 percent of private plans cover abortion services.[1]) In levying taxes on the purchase of plans that include abortion coverage, the Smith bill severely threatens the private market for comprehensive insurance coverage that includes abortion care.

Specifically, the law would:

- Force small businesses to pay taxes on the health benefits they offer their employees if their insurance plan covers abortion care. It does so by eliminating the Small Business Health Tax Credit enacted as part of the health-care law for any small business that provides workers a comprehensive insurance plan including abortion care. As the vast majority of private insurance plans currently cover abortion services,[2] many of the four million small businesses estimated to be eligible for this credit if they provide health care to their workers would be forced to forgo this assistance.[3]

- Restrict the use of private dollars placed in tax-preferred Health Savings Accounts (HSAs) and Flexible Spending Accounts (FSAs). The Smith bill forbids individuals from using

private funds saved in HSAs and FSAs from being used to pay for abortion care, except in extremely limited circumstances.

- Impose tax penalties on many individuals who have high out-of-pocket health-care costs. Current law allows individuals to deduct all health-care expenses that exceed 7.5 percent of their gross income. The Smith bill, however, would make the cost of abortion care non-deductible—even in extreme health circumstances where care can cost tens of thousands of dollars—forcing those individuals who access such care to pay increased taxes.[4]

- Raise taxes for workers who lose their jobs as a result of outsourcing. Under current law, individuals who lose their jobs due to outsourcing are eligible for the Health Coverage Tax Credit, which covers 65 percent of the costs of a qualified health-plan premium. Under the Smith bill, however, any health plan that includes abortion coverage would be disqualified from receiving this tax credit.[5]

The National Women's Law Center (NWLC) quantified the impact that these tax penalties would have on hypothetical individuals and small businesses. Based on the NWLC's analysis:

- A restaurant with 40 half-time employees whose wages totaled $500,000 and health-care costs totaling $240,000 per year would be eligible for a Small Business Health Tax Credit under current law. Under the Smith bill, however, that restaurant's taxes would be raised by $28,000 if its health insurance plan includes abortion coverage.[6]

- A man with a wife and three children loses his job when his manufacturing plant closes and becomes eligible for certain federal assistance, including the Health Coverage Tax Credit. However, under the Smith bill, if his insurance plan covers abortion care, as most plans do, he would be disqualified from this benefit – costing him $9,129.[7]

Imposing benefits exclusions for abortion services will not only raise taxes for businesses that purchase insurance coverage of abortion and individuals who seek abortion care, but it also will jeopardize insurer willingness to offer products that include abortion coverage. Particularly for small-employer plans, insurance companies may be more likely simply to drop abortion coverage from policies than attempt to comply with H.R.3's complex framework. As noted by Prof. Sara Rosenbaum of the George Washington University School of Public Health and Health Services, "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…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."[8]

Moreover, newly considering tax benefits to be public funding – as the bills' sponsors propose – throws many tax exclusions into question, logically and legally. For instance, as Rep. Jerrold Nadler (D-NY) has correctly pointed out, classifying tax deductions, credits, or tax-favored status as public funding would require reconsidering the constitutionality of tax benefits

associated with sectarian organizations, given the Establishment Clause's explicit prohibition of public funding of religious activities: "If tax-advantaged private spending is government funding – the entire premise of this bill – then your tax deductable charitable contribution to your church, synagogue, or other religious institution is also government funding – government funding prohibited by the Establishment Clause of the First Amendment."[9]

Revives Core Provision of the Stupak-Pitts Amendment

In an effort to reopen the contentious issue of abortion coverage, the Smith legislation revives the core provision of the failed Stupak-Pitts amendment, and effectively would end abortion coverage for women in state insurance exchanges who use their own, private funds to pay for their insurance. The Smith bill makes it highly unlikely that insurance companies will opt to offer abortion coverage in state exchanges: it forbids any plan offering such coverage from accepting even one subsidized customer, forcing insurers to choose between offering their product without abortion coverage to the entire universe of consumers in a state exchange and offering a benefits package that does include abortion services to a small minority of unsubsidized customers. (Because a vast majority of participants in state insurance exchanges will be subsidized,[10] it seems clear which choice insurers are likely to make.) As a result, in addition to women who will pay part, or even most, of their insurance premium with private funds, millions of unsubsidized individuals and small-businesses employees who obtain insurance through a state health-insurance exchange will be denied abortion coverage.

In addition to restricting who may purchase abortion coverage within state insurance exchanges, the Smith bill would impose crippling administrative burdens on plans that wish to cover abortion care. If the Smith bill becomes law, insurance companies that offer abortion coverage—as 87 percent of plans currently do[11]—would face high costs, technical complexities, and onerous administrative requirements.[12]

The bill's purported solution of "preserving" the option of abortion-coverage "rider" policies for women who purchase an exchange-based plan but seek abortion coverage is a false promise. Low-income women who receive insurance subsidies are unlikely to be able to afford a supplemental policy, and women who can afford to purchase riders are unlikely to do so, as unintended pregnancies are by definition unplanned. Moreover, existing data on rider policies suggest that they simply do not work. Information from the five states that ban abortion coverage entirely except by separate rider is not promising. Last year, *The Washington Post* discovered that insurance companies in those states reported a lack of availability and demand for such riders.[13] The implication of these data is that, under the Smith bill, abortion riders will likely not be available to customers.

The combination of imposing tax penalties for purchasing plans that include abortion coverage and banning abortion coverage in state health-insurance exchanges jeopardizes the entire existence of this important reproductive-health benefit. As the state exchanges grow, they will

have a greater effect on the health-insurance industry as a whole, eventually becoming the standard for benefits packages.[14] The Smith bill, if enacted, could have an industry-wide effect, and, over time, cause the elimination of coverage of abortion services for most women – not just those who obtain coverage through a health-insurance exchange.

Recodifies Existing Bans on Abortion Coverage

This extreme proposal also would reinforce long-standing discriminatory bans on publicly funded abortion care by permanently denying low-income women, federal employees, women in the military, and residents of the District of Columbia access to abortion coverage.

Again, current law already bans public funding for abortion care; regardless of one's view of that policy, it is indisputably already the law of the land. The Smith bill writes the bans into permanent law, including the Hyde amendment, a discriminatory restriction that bars low-income women's access to abortion services, except in extreme circumstances. Currently, these various bans are renewed annually in appropriations bills and the annual Defense authorization legislation. The Smith bill would deny permanently coverage to the nearly 18 million individuals insured by Medicaid,[15] the 6.7 million non-elderly and disabled individuals currently enrolled in Medicare,[16] and the 1.5 million American Indians and Alaska Natives who receive health insurance through the Indian Health Service (IHS).[17]

Additionally, the U.S. government offers health benefits plans to eight million federal employees, their dependents, and retirees, 44 percent of which are women.[18] The Smith bill permanently bans abortion coverage for these federal employees and their dependents, even though these workers pay a portion of their health insurance premiums with their own private dollars.

Similarly, the bill also recodifies the ban on abortion care for women in military hospitals overseas, a policy that a majority of members of the Senate Armed Services Committee voted to repeal in 2010, and permanently denies abortion coverage to the nine million individuals who receive health insurance through TRICARE, the military health plan.[19]

Likewise, the Smith bill would permanently deny abortion coverage to Peace Corps volunteers. Of the 7,671 U.S. citizens who are currently volunteers and trainees for the Peace Corps, 60 percent are women.[20] Finally, the Smith bill also reimposes the ban on Washington, D.C.'s ability to use its own local funds to cover abortion services for the 64,500 low-income women currently enrolled in its Medicaid program – an unfair restriction that Congress lifted in 2009.[21]

Overall, the more than 13.5 million adult women who receive health coverage through Medicaid and other government-sponsored programs described above permanently would lose access to abortion coverage, except in incredibly narrow circumstances.[22]

Discriminatory bans on abortion coverage create significant, often insurmountable, obstacles for women seeking abortion care. Low-income women often have difficulty raising the money to pay for abortion services and research indicates that economic barriers often cause them to obtain abortion care two to three weeks later in pregnancy than do wealthier women.[23] This is especially problematic because the cost of abortion care increases the longer the pregnancy continues. Later abortion care, which is already inaccessible to women in many states, ranges into the thousands of dollars, and can pose an insurmountable cost.[24] These burdens disproportionately affect women of color, who, because of the connection between racial discrimination and economic disadvantages, are more likely than white women to be poor, to lack health insurance, and to rely on government health-care programs or plans.[25] Reiterating the abortion-coverage bans in permanent law adds insult to already deeply injurious policies.

Finally, the Smith bill also recodifies the Helms amendment, a policy that denies some of the world's poorest women access to safe abortion care by prohibiting the use of U.S. funds to pay for abortion services in developing countries. Not only would the Smith bill jeopardize the availability of abortion coverage for American women, it would have detrimental international ramifications as well.

Inadequate Exceptions

It should also be noted that the Smith bill excludes any kind of exception that would protect the health of the woman, or provide care in cases of fetal anomaly. While the absence of insurance coverage for abortion care hurts all women, it particularly harms those for whom pregnancy threatens their health. Many women welcome pregnancy at some point in their lives and can look forward to a safe childbirth; however, for some, pregnancy can be dangerous, and abortion restrictions, such as the Smith bill, that do not contain exceptions to protect women's health endanger these women. The Smith legislation would limit access even for women in the most desperate of circumstances, whose care is often the most expensive and the most urgent. For example:

- Vikki Stella, a diabetic, discovered months into her pregnancy that the fetus she was carrying suffered from several major anomalies and had no chance of survival. Because of Vikki's diabetes, her doctor determined that induced labor and Caesarian section were both riskier procedures for Vikki than an abortion. The procedure not only protected Vikki from immediate medical risks, but also ensured that she would be able to have children in the future. [26]

- Jennifer Peterson was 35 and pregnant when she discovered a lump in her breast. Tests showed she had invasive breast cancer. The cancer and its treatment, separate and apart from the pregnancy, were a threat to her health. Her pregnancy posed a significant added threat to her health during the onset and treatment of her cancer. About one in

3,000 pregnant women also has breast cancer during her pregnancy, and for these women, a health exception is absolutely necessary. [27]

- Gilda Restelli was well into her pregnancy when doctors discovered that her fetus had only fragments of a skull and almost no brain. She and her husband had been told by medical experts that their baby had almost no chance of survival after birth. Restelli quit her job, not because she was physically incapacitated, but because she could no longer bear the hearty congratulations of strangers who were unaware of the tragic circumstances surrounding her pregnancy. The Restellis made the agonizing decision to end the pregnancy. [28]

- D.J., a federal employee, was 11 weeks into a wanted pregnancy when she learned that her fetus had anencephaly, meaning that the fetus would never develop a brain. Her doctor provided abortion care at a local hospital. Several months later, she received a bill for $9,000 – and was told her insurance would not cover the costs because, as a federal employee, she was not entitled to insurance coverage for abortion services unless the pregnancy endangered her life.

Reminders of the Bill's Dangerous Intent

Until sponsors were forced to remove these provisions after public outcry, the original version of H.R.3 had two additional extreme and mean-spirited provisions:

First, the bill as introduced would have narrowed the already severely limited rape and incest exceptions that exist in federal law, denying, at minimum, abortion coverage to survivors of statutory rape and any incest survivor 18 years of age or older. Most federal laws that restrict access to abortion services allow exceptions for instances of life, rape, or incest. However, language in the original bill limited these exceptions to include only victims of "forcible rape" and "incest with a minor." This restriction would have applied to all federal programs, affecting not only low-income women in Medicaid, but women in the military and all federal employees, as well.

Additionally, the original version of the Smith bill would have allowed states to refuse coverage for abortion in all cases, even when a woman's life was in danger. Current federal law requires state Medicaid programs to cover abortion in cases where the pregnancy occurred because of rape or incest, or when the woman's life is endangered, and every court that has considered this requirement has upheld it. The original Smith bill, however, would have taken away this already-minimal protection and allowed states to refuse Medicaid coverage for abortion in all cases.

While no longer included in the current version of the bill, these provisions serve as indicators of the sponsors' startling and extreme anti-choice agenda.

Conclusion

The Smith bill represents an extreme new anti-choice agenda that drastically distorts the concept of "public funding." In trying to redefine this term falsely, the Smith legislation jeopardizes the availability of abortion coverage in the new health system and levies harsh financial penalties on businesses that provide their employees comprehensive insurance coverage. The bills' sponsors even attempted to redefine rape and invited states to deny coverage for care to women who would die without it. As has been asserted by Rep. Nadler, the purpose behind H.R.3 is clear: "to use economic coercion to prevent women and families from exercising their Constitutional right…by going after the private insurance and health care markets."[29]

Reasonable lawmakers, even those who may not agree with the pro-choice perspective on the issue of public funding for abortion, should recognize this bill for what it is: a radical departure from the status quo.

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[5] National Women's Law Center, *Oppose the Dangerous and Misleading "No Taxpayer Funding for Abortion Act"* (2010).

[6] National Women's Law Center, *Oppose the Dangerous and Misleading "No Taxpayer Funding for Abortion Act"* (2010).

[7] National Women's Law Center, *Oppose the Dangerous and Misleading "No Taxpayer Funding for Abortion Act"* (2010).

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Testimony of the National Abortion Federation on HR 3 and HR 358: Unprecedented Attacks on Women's Access to Abortion Care

On March 16, 2011, the House Subcommittee on Select Revenue Measures of the Committee on Ways and Means held a hearing on the tax policy implications of HR 3 and HR 358. Both anti-choice bills interfere with a woman's ability to make private decisions about her reproductive destiny and should be opposed.

HR 3 Will Have a Profoundly Negative Impact on the Ability of Women to Access and Pay for Abortion Care

Despite its name, HR 3, the "No Taxpayer Funding for Abortion Act," goes far beyond codifying the current ban on federal funding for abortion care. It would permanently deny abortion coverage to vulnerable women who depend on the federal government for their health care. Even though abortion has been legal in this country for more than 35 years, restrictions on public funding make it unavailable to many women. These include low-income women eligible for Medicaid, federal employees insured by the Federal Employees Health Benefits program, women in the military, and Native American women who rely on the Indian Health Service for health care. This is an unjust restriction. Women should have access to abortion care regardless of the fact that they depend on the federal government for their health care.

The Ways and Means Committee's jurisdiction is over the tax provisions in HR 3. The bill would drastically alter the insurance landscape by banning health care related tax deductions for insurance plans which cover abortion care. This could result in small businesses dropping abortion coverage from their existing health insurance plans, thus denying women access to benefits in their current policy. It could also result in raising taxes on millions of Americans and on small businesses.

During an exchange between Representative Mike Thompson (D-CA) and Thomas Barthold, the Chief of Staff of the Joint Committee on Taxation, the unduly burdensome requirements HR 3 would place on women were made clear. Mr. Barthold testified that if audited by the IRS, a survivor of rape or incest would have to prove to the IRS that she became pregnant as a result of rape or incest and that, if she decided to terminate the pregnancy, she properly took a deduction for abortion care.

Current law prohibits using federal funds for abortion care unless the pregnancy is a result of rape or incest or in certain circumstances that endanger the life of the pregnant woman. In addition to these existing prohibitions on abortion care, Representative Smith's bill is so extreme that the original language attempted to narrow the definitions of rape and incest. After weeks of public outcry, Representative Smith finally removed this offensive language from HR 3.
HR 3 also interferes with the District of Columbia's ability to determine for itself how to use locally raised funds. The bill prohibits the use of local revenue for abortion care as part of the Medicaid services provided by the District.

HR 358 Will Unduly Burden Women's Access to Abortion Care

HR 358 would resurrect the Stupak-Pitts amendment from the health care reform debate in an effort to try to prevent women from using their own private money to choose a health care plan in the new state health care exchanges that meets their reproductive health care needs. The state health care exchanges are likely to become the industry standard for the private health insurance market. This means that not only will women who use the exchanges be denied access to comprehensive reproductive health care coverage but the millions of women who purchase private health insurance outside of the exchanges are also at risk of losing their ability to buy coverage for abortion care.

HR 358, the "Protect Life Act," would actually put the lives of women at risk. This bill would let public hospitals refuse to provide emergency abortion care even when necessary to save a woman's life. Emergency Medical Treatment and Active Labor Act (EMTALA) creates a legal safety net guaranteeing that anyone in need of emergency health care, including those unable to pay for health care, cannot be denied such care at public hospitals. HR 358 would strip EMTALA of its power to ensure that women who are in emergency situations receive life-saving abortion care at public hospitals, with disastrous consequences for poor women in emergency situations.

The Consequences of HR 3 and HR 358 on the Lives of Real Women

HR 3 and HR 358 could have devastating consequences for the more than one million women who choose abortion each year—women like Dana Weinstein and Mary Vargas who stood with Democratic Members of the House of Representatives in February to oppose both HR 3 and HR 358. Dana and Mary explained how these two bills would have impacted their ability to make the decisions that were best for their families.

Dana found out during a very wanted pregnancy that her baby was missing a main part of its brain, and that the surface of the brain was malformed and severely underdeveloped, a condition called polymicrogyria. Her baby would likely not survive birth. Dana and her husband did not want to bring a child into the world that would only be here in a vegetative state, if at all.

Dana was unable to obtain the abortion care she needed in her home state of Maryland, so she had to travel across the country to Colorado to one of a small number of specialized providers and pay $17, 500 out-of-pocket for her care. She then had to enlist the help of legal counsel and spent more than a year appealing before her insurance company finally agreed to cover the total cost of her abortion care. However, it was a significant financial burden for her family to shoulder, especially at such a devastatingly emotional time.

After undergoing years of fertility treatments, Mary was pregnant with a son, already named David, when she found out at 22 weeks of pregnancy that due to the atrophy of his lungs and kidneys—a condition known as Potter's Syndrome—there was virtually no chance of his survival beyond a few hours, if indeed he survived until birth. Her husband was a federal employee so their insurance would not cover her abortion care.

Mary and her husband were faced with the choice of terminating the pregnancy if they could afford the out-of-pocket expenses, or waiting and allowing their son to suffer without comfort—to feel his bones being crushed and broken in the absence of amniotic fluid, until he died in utero, or at delivery, suffocating to death in the absence of developed lungs. As Mary describes, they chose to terminate the pregnancy "because choosing mercy was the only thing we could do for our unborn son."

HR 3 and HR 358 are unprecedented attempts to restrict women's access to abortion care. These bills would prevent millions of American women from obtaining insurance coverage for abortion care even if they pay with their own funds. It is imperative that we defeat this extreme attack on women, and ensure that women like Dana and Mary can access the abortion care they need.

Statement of Dana Weinstein

Good afternoon. My name is Dana Weinstein. In July 2009, I was happily pregnant and excitingly, anxiously expecting the arrival of our second child. For nearly 8 months, I had been loving my baby in utero and explaining to our then 2.5 year old son that he was going to become a big brother. Never, EVER did I imagine I would need to have an abortion...and certainly not one so late in my pregnancy.

At my 28 week sonogram the ventricles in our baby's brain measured a little elevated and my perinatologist arranged for further testing. Two weeks later, I had an MRI performed to see what was going on inside my baby's head. It was then that we learned the shocking, horrific, and devastating news. Our baby was missing a main piece of its brain…the part that connects the right and left hemispheres literally wasn't there. It never developed. This is known as agenesis of the corpus callosum. Even worse, the surface of the brain was malformed and severely underdeveloped, a condition called polymicrogyria. Additionally, where brain mass and tissue should have grown and been plentiful, only large pockets of empty space and gaping holes existed. Despite all the prenatal care and testing I had

throughout the pregnancy, this was not detected until I was seven and a half months along. And no amount of surgery, medicine or physical therapy could reverse, improve, or fix this horrendous diagnosis.

We learned that because of the severe brain anomalies, our baby would have had on-going seizures 70% of the time. And that was best case scenario. Our daughter would lack the physical coordination to suck, swallow, feed, walk, talk or know her environment—if she survived birth at all. The sonogram already showed the baby was not swallowing. And in hindsight, I believe her constant, non-stop movements—movements that I so lovingly joked about throughout the pregnancy as being payback for having a calm, easy-going first child—were the result of spasms caused by the brain abnormalities.

If we had carried our baby to term, we would have needed a resuscitation order in place prior to giving birth as she was incapable of living without significant medical assistance.

We did not want our daughter to exist solely because of machines. We did not want to bring a child into this world that would only be here in a vegetated state, if at all. For our baby, for our son, and for our family, my husband and I made the heartbreaking decision to terminate the pregnancy. We did what I believe was the most loving, humane act a parent could do—put an end to our baby's suffering.

Because I was late in my pregnancy, I had to travel to Colorado to one of a handful of facilities in the U.S. that provides later abortion care. It was awful to go through the hell of ending my very much wanted and loved pregnancy and to have to do it across the country, so far from my home and loved ones.

My upfront medical expenses were $17,500, which does not include an additional $3,000 in travel costs to obtain care. Since I had to go to an out of network provider, the maximum my insurance would cover was just $1,200. With the help of legal counsel and more than a year of appealing, my insurance company finally agreed to cover the total cost of my abortion care. The financial stress caused my family unnecessary anxiety during an already heartbreaking, devastating, and frightening time.

To be forced to carry a pregnancy to term because of a lack of financial resources or insurance coverage is beyond cruel, especially in situations like mine. The week I had to endure between learning the devastating diagnosis and when I could begin the termination process was agonizing. Each constant movement of my baby—movement that for months had brought me such joy and reassurance—was like a dagger to my heart. Looking down at my full pregnant belly knowing how sick my daughter was, and knowing that she would not live was horrendous. To force women to endure this for weeks or even months and give birth because of a lack of medical coverage is outrageous.

I am appalled that Congress is taking up this issue again. I can’t help but ask…what about circumstances like mine? How can families facing such a terrible prognosis be omitted

from abortion coverage? We exist and as painful as it is to talk about, we need to be heard and we need to be considered.

To say I am angered by those who are trying to prevent abortion coverage in the health care system is an understatement. I applaud our leaders and members of the Judiciary Committee here today who are taking the brave step in fighting against those trying to prevent women like me from being allowed to have the option to terminate my pregnancy and to have insurance coverage.

I am speaking today for all the women who are too fearful or made to feel ashamed, to put a face on abortion. I'm speaking today on behalf of my daughter, who I know is in a much better place. And, I'm speaking today for all of the women, who like me just a year and a half ago, never imagined they would need the help of an abortion.

Thank you.

Statement of Mary Vargas

Good morning. My name is Mary Vargas. I am a lawyer and a mother, and like most Americans I would lay down my life for my children. Like many women I never thought I would choose to end a pregnancy, but that was before David. As I make plans to visit the grave of my son on the anniversary of his death next week, I know that the choice a woman makes is not always what she would have anticipated before an abstract tragic reality became her own story.

As a lawyer, I represent people who are seeking dignity and equality. I represent both individuals with disabilities who experience discrimination and women who are denied insurance coverage for abortion care—because both in the end are about dignity and fundamental human rights. Because of my experiences, both personal and professional, I believe in a woman's right to choose.

When I was 22 weeks pregnant with my very much wanted second son whom we had already named David, he was diagnosed with a fatal form of Potters' Syndrome. His kidneys had stopped working and atrophied. As a result, his lungs could not develop. We prayed that we could hold him, regardless of disability, but our options were unspeakable.

We could terminate the pregnancy, if we could find doctors and nurses willing to provide care, and if we could pay for it out of pocket, since my husband's insurance was restricted from covering abortion care. Or we could wait. We could allow our son to suffer without comfort, to feel his bones being crushed and broken in the absence of amniotic fluid, until he died in utero, or at delivery, suffocating to death in the absence of developed lungs. Two specialists confirmed that he had no chance at life.

We struggled with the moral questions, the ethical questions, the religious questions, the practical questions, and how to explain to our living child that his brother would not be coming home. We questioned the meaning and value of mercy.

We "chose" to end the pregnancy – not for us, but because choosing mercy was the only thing we could do for our unborn son. I would have liked to have held him. Yet, I know our decision was the right one for our child. I know because of this experience that many times the choice to terminate a pregnancy is made *because* a woman value's life: because she or her unborn child, or both is dying, or because they are suffering towards no purpose.

It wasn't a choice I would wish on my worst enemy, but I'm grateful the choice was mine. As a lawyer, I carry in my heart the words of a client who described what it felt like to lose her child. Late in her pregnancy, despite the best prenatal care, she faced a devastating medical diagnosis that her baby was missing a main part of its brain and would likely not survive or only survive in a vegetative state. She considered her unborn child's suffering, and made the difficult decision to end her pregnancy. She described feeling as if she would literally go insane with grief at the loss. In this devastating time, she discovered that her ability to make the choice to terminate her pregnancy—a choice which she and her husband and her faith leader believed moral and right—was restricted by her state government and her insurance carrier.

Not only did she have to go through the hell of ending her very much wanted and loved pregnancy, but she had to do it across the country far from her home and loved ones because care was not available in her state. And she had to obtain legal counsel, and spend more than a year appealing to her insurance company before they would finally agree to cover the more than $17,000 she had to pay out of pocket for the abortion care she needed.

In the end, what I know to be true both as a professional and as a mother, is that the decision to terminate a pregnancy is a decision that can never be understood at a distance. It is because of these real life experiences with abortion, that I am appalled by the legislative efforts that deny the complexity of abortion, and the freedoms at stake. Neither the Smith Bill nor the Pitts Bill is a simple codification of existing restrictions on abortion (of which there are, already, many). This legislation is a deliberately crafted framework designed to remove abortion as an option for women, regardless of their circumstances. These bills would put women's lives and health at risk, and prevent women like me from exercising their own faith and morality. This cannot be who we are as Americans.

Thank you.

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The National Abortion Federation (NAF) is the professional association of abortion providers in North America. Our mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women. Our members include clinics, doctors' offices, and hospitals, who together care for more than half the women who choose abortion each year in the United States, Canada, and Mexico City. For more information, visit our website at www.prochoice.org.

Statement of National Council of Jewish Women on
HR 3, No Taxpayer Funding for Abortion Act

Written Testimony submitted by
Nancy Kaufman, Chief Executive Officer, National Council of Jewish Women

US House of Representatives
Committee on Ways and Means
Subcommittee on Select Revenue Measures

March 16, 2011

The National Council of Jewish Women (NCJW) is a grassroots organization of volunteers and advocates who are inspired by Jewish values. Since 1893, NCJW members have turned progressive ideals into action, striving for social justice by improving the quality of life for women, children, and families, and by safeguarding individual rights and freedoms.

NCJW has a long history of strong support for the protection of every female's right to reproductive choices, including safe and legal abortion, access to contraception, and the elimination of obstacles that limit reproductive freedom. The ninety-thousand members, volunteers, and supporters of NCJW have long supported abortion care as an essential component in the spectrum of comprehensive, confidential, affordable reproductive health services that must be accessible to women, regardless of age or ability to pay. We believe that each woman must have the right to exercise her own moral judgment when making personal decisions, including those that affect her reproductive life. Ensuring that women, regardless of financial status or age, have access to comprehensive reproductive health services is essential not only to women's health but also to women's equality and economic opportunity.

We view HR 3, the "No Taxpayer Funding for Abortion Act," introduced by Representative Chris Smith (R NJ), as harmful to women and families on several fronts. This legislation would unjustly target their pocketbooks, imposing financial barriers on many American workers and discriminating against low-income women; cruelly endanger their health; and wrongly erode their right to privacy and religious liberty.

If enacted, the government would greatly restrict consumer options in the private insurance market and penalize the insurance companies and employers who offer abortion-inclusive health insurance coverage. While more than 85 percent[1] of private plans today offer such coverage, HR 3 would increase taxes on the individuals and families who now have abortion coverage and want to keep it, while barring others from buying this coverage with their own money. Penalizing consumers – male and female – with increased taxes as a means of restricting abortion coverage is an unjust and extreme move that would harm women, men, and their families.

HR 3 also puts women at risk. It would make permanent the Hyde Amendment, banning abortion for women receiving subsidized insurance – discriminating against low-income and other women who rely on federal health programs, such as Medicaid beneficiaries, US servicewomen, and federal employees. Moreover, this legislation would not provide exceptions for women whose health may be harmed by the continuation of a pregnancy and, as originally proposed, it would change long-standing definitions of rape

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[1] Guttmacher Institute, *Memo on Private Insurance Coverage of Abortion*, http://www.guttmacher.org/media/inthenews/2011/01/19/index.html (Feb. 3, 2011)

and incest exceptions to deny care to some minors, women with disabilities, adult incest survivors, and others whose pregnancies are the result of rape. In so doing, this bill would callously and carelessly endanger women's health and well-being.

NCJW believes that the above reasons alone should be enough to oppose HR 3, but this legislation does take an additional step that makes it especially offensive to NCJW and all Americans who value individual rights and freedoms. The "No Taxpayer Funding for Abortion Act" would erode our nation's guarantee of religious liberty.

We recognize that abortion is a complex issue – replete with moral, bio-ethical, philosophical and theological implications. What is clear is that the issue engenders strong feelings on all sides. Different religions have differing views on when life begins; and even within religions, there can be varying opinions. We submit that this diversity of opinions is a question that our nation has answered by upholding the key, founding principle of religious freedom. A central part of the United States Supreme Court's 1973 decision in *Roe v. Wade* recognized that different moral and religious traditions have differing views of abortion.

Reproductive rights are integrally bound up with religious freedom. As a faith-based women's organization, we understand that those who would restrict women's access to abortion and other reproductive health care services are often motivated by their religious belief and seek to impose their religious views on others. Yet, having freedom of choice means that women are valued as moral decision-makers and are free to make decisions about their reproductive lives based on their own religious beliefs and conscience, in consultation with their physicians, families, and religious leaders – or whomever they choose to involve. For the legislature to mandate one religion's views on this very personal issue is to restrict religious liberty for all.

Judaism teaches that, during a pregnancy, the life of the mother takes precedence over the potential life of a fetus. In fact, the Jewish scholar, Rabbi Sofer, taught: "no woman is required to build the world by destroying herself."[2] We respect and recognize the right of religious groups whose beliefs differ from ours to follow the dictates of their faiths in this matter. But we ask no less for ourselves.

We oppose HR 3 because it blatantly disregards and undermines the basic right of our *freedom* to choose. And both *religious* freedom and *personal* freedom are the underpinnings of this right.

NCJW strongly and respectfully urges you to oppose HR 3. This legislation would take extreme measures that would not only impose discriminatory financial hardships on women and families and endanger women's health, but it would greatly impinge on religious freedom. As you deliberate the suitability and constitutionality of this legislation, we hope that you will take into account not only its detrimental impact on women's over-all health, equality, and economic opportunity, but also its impact on religious liberty.

[2] Resp. Hatam Sofer, E.H. No. 20

March 31, 2011

VIA ELECTRONIC DELIVERY

The Honorable Pat Tiberi
Chairman – Subcommittee on Select Revenue Measures
Ways and Means Committee Office
1102 Longworth House Office Building
Washington D.C. 20515

RE: March 16, 2011 Hearing on "The No Taxpayer Funding for Abortion Act" (H.R. 3)

Dear Chairman Tiberi and Members of the Subcommittee on Select Revenue Measures:

The National Health Law Program (NHeLP) strongly opposes H.R. 3, "The No Taxpayer Funding for Abortion Act," which would impose dangerous and unprecedented restrictions on women's access to abortion services, and, for the most vulnerable women, may put their lives at risk. The National Health Law Program is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people.

H.R. 3 would permanently ban abortion coverage with only extremely narrow exceptions for low income women who access their health care in publicly funded programs, and it would make private insurance coverage for any woman almost impossible to obtain. The ban on tax credits for any health plan that includes coverage of abortion is an unprecedented departure from current insurance practice and will deny low-income women and families who will rely on insurance coverage through the Exchange access to medically necessary abortion services. Low income women and low income women of color already experience severe health disparities in reproductive health, maternal health outcomes and birth outcomes. H.R. 3 would exacerbate those disparities by denying women access to abortion services that are necessary to protect their health and their lives.

Clinical guidelines and generally agreed upon medical practices are baseline practices that are accepted in the profession and codified in professional policies and position statements. Every person expects that the care they receive from their health care provider will meet those established standards of care. Accordingly, several leading health professional and medical societies in the United States and Western Europe have issued accepted standards of care for reproductive health (which include providing medically-accurate contraceptive information, services, and supplies, as well as abortion), particularly for women with emergent health issues and those who require preconception and interconception management of chronic health conditions.[1] Specifically, accepted

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1 For example, the American College of Obstetricians and Gynecologists, The American Medical Association, The Royal College of Obstetricians and Gynaecologists of the United Kingdom, The World

standards of medical care advise that women suffering chronic conditions – such as pregestational diabetes, lupus, and cardiovascular disease -- that could lead to adverse health and birth outcomes should avoid pregnancy until their condition is under control.[2]

Similarly, even when a woman has decided to carry her pregnancy to term, there are still a number of emergent medical conditions that may put her or her fetus at serious risk. As a result, access to safe and timely abortion services becomes critical. These conditions include, but are not limited to: premature rupture of membranes, preeclampsia and eclampsia, anencephaly (fetus incompatible with life), and chronic conditions for which pregnancy termination may be medically appropriate. In these situations, accepted medical standards and guidelines from the American College of Obstetricians and Gynecologists, Royal College of Obstetricians and Gynecologists of the United Kingdom, and the Cochrane Collaboration acknowledge that the patient must then decide to balance her health and life with the prospects of fetal survival. These standards and guidelines all recognize that a woman must make this decision. The guidelines then charge health providers with giving the patient complete and accurate medical information about her treatment options.

Failing to provide individuals with insurance coverage for medically necessary abortions in the Exchange is a denial of necessary health services. Moreover, the extremely narrow exceptions outlined in §309 of life endangerment, rape and incest do not incorporate accepted standards of medical care, as the exceptions fail to take into account other circumstances where abortion services may be medically necessary. While recognizing that abortion is a politically-charged subject, politics should not interfere with the provision of care a medical provider determines is medically necessary for the patient.

Accordingly, we encourage the Subcommittee on Select Revenue Measures and your colleagues in the House of Representatives to protect the health of women and their right to quality and comprehensive reproductive health information and services.

Respectfully,
/s/

Emily Spitzer
Executive Director

Health Organization, The U.S. Preventive Services Task Force, and The HHS Centers for Disease Control and Prevention.

2 National Health Law Program, *Health Care Refusals: Undermining Quality Care for Women*, Standard of Care Project, 2010 (*citing* Johnson K., Posner SF, Biermann J, et al. Recommendations to Improve Preconception Health and Health Care – United States. A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care, MMWR Morbidity and Mortality Weekly Report Recommendations and Reports, 2006, 55: 1-23).

"No Taxpayer Funding for Abortion Act" (HR 3)

Testimony submitted by

Debra Ness, President
Judith Lichtman, Senior Advisor

U.S. House of Representatives
Committee on Ways and Means
Subcommittee on Select Revenue Measures

March 16, 2011

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539
email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

Members of Ways and Means Subcommittee on Select Revenue Measures: we are honored to submit this testimony on behalf of the National Partnership for Women & Families and the women and families we represent.

The National Partnership for Women & Families is a nonprofit, nonpartisan 501(c)(3) organization located in Washington, D.C. We have worked tirelessly for the last forty years to expand access to quality, affordable health care for all Americans that includes comprehensive reproductive health services; to eliminate discrimination in the workplace; and to enable women to meet the dual demands of work and family. The National Partnership vehemently opposes H.R. 3 (as introduced and as modified by committee), the deceptively entitled "No Taxpayer Funding for Abortion Act" and we urge Congress to reject this legislation.

Supporters of H.R. 3 claim that this bill simply seeks to permanently ban federal funding of abortion. But those claims are blatantly misleading. This radical proposal represents an extreme attack on abortion access that goes well beyond codifying the unjust and unacceptable restrictions on federal funding of abortion care that have long burdened women who rely upon the federal government for their health care. H.R. 3 also threatens the availability of abortion coverage in the entire private health insurance market by banning private insurance coverage of abortion in the health care exchanges and by increasing taxes and costs on individuals and small businesses that want to keep the health plans they already have that include abortion coverage. Congress should reject H.R. 3 because it infringes on the health insurance choices of *all* women.

Threatens the Availability of Abortion Coverage in Private Insurance Market

Today, a majority of private health plans offer coverage that includes abortion care. The restrictions imposed on private plans selling coverage in the health care exchanges combined with the tax penalties applied to individuals and small businesses purchasing plans that include abortion coverage mean that H.R. 3 ultimately threatens the availability of abortion coverage in the entire private insurance market.

H.R. 3 bans any federal expenditure to private health plans purchased through the health care exchanges that include abortion coverage. This means that low and moderate income individuals and families eligible for premium assistance to purchase health plans through the state exchanges would be unable to select private plans that include abortion care. Because the majority of consumers purchasing plans in the new exchanges would be eligible for premium assistance, private health plans would be forced to drop abortion coverage in plans sold through the exchanges – effectively banning abortion coverage in the health care exchanges for all women. Women and small businesses that currently have policies that include abortion coverage would lose coverage they already have. Moreover, each year, more Americans and small businesses are expected to use the exchanges because the health coverage they offer should be far more affordable. Over time, the size of employers eligible to participate is expected to grow. The significant number of consumers that would be impacted by this provision now and in the future gives insurers every incentive to drop abortion coverage that is widely available in private plans

today in order to standardize insurance products. Therefore, H.R. 3 threatens the availability of abortion coverage even in private plans sold outside the exchanges.

Congress extensively debated and rejected a similar proposal – embodied in an amendment authored by former Congressman Bart Stupak – during consideration of health care reform. The Patient Protection and Affordable Care Act (ACA) ultimately included a provision that requires insurers choosing to offer plans that include abortion coverage to adhere to stringent accounting procedures to segregate federal funds from private dollars used to cover abortion care. President Obama subsequently issued an Executive Order to ensure compliance with this provision. The National Partnership strongly opposes this provision in ACA but we make the point here to emphasize that there is widespread agreement that ACA already clearly prohibits federal funds from being used to pay for abortion coverage. To claim that further restrictions are needed is a disingenuous way to promote an extreme attack on access to abortion care.

H.R. 3 also could increase taxes and costs on millions of individuals and small businesses that wish to keep the insurance plans they currently have. The bill takes away tax credits for small businesses who wish to continue to offer their employees private health plans that include coverage of abortion care. The bill would prevent small businesses that want to continue to offer comprehensive health coverage from taking advantage of the Small Business Health Tax Credit, enacted as part of the Affordable Care Act, if their plans included abortion coverage. This tax credit for small businesses will be worth up to 50 percent of premium costs in 2014. H.R. 3 would also increase taxes on certain workers who lose their jobs due to outsourcing. Under current law, workers who lose their jobs because of outsourcing are eligible for a Health Coverage Tax Credit paying 65 percent of the cost of health insurance coverage. Under H.R. 3, health plans that include abortion coverage would be ineligible for this credit which would increase health costs for workers choosing these plans. Moreover, H.R. 3 would prohibit women from being able to use tax preferred savings accounts – flexible spending or health savings accounts – to cover the expenses of an abortion, no matter what the situation. Women who are facing medical issues that require them to terminate a pregnancy, for example, would face the added burden of having to pay for abortion expenses that could climb over $10,000 and having no tax relief that would be available for other medical expenses.

These tax penalties force consumers to face significantly higher taxes and costs or drop plans that they already have that include abortion coverage. If consumers can no longer afford health plans that include abortion coverage, health insurers will eventually eliminate these plans from the private insurance marketplace.

H.R. 3 impedes the ability of women and families to choose private health plans that cover their health care needs. The dual impact of banning abortion coverage in state health-insurance exchanges and of imposing tax penalties for purchasing plans that include abortion coverage jeopardizes the existence of health insurance coverage of abortion care in the entire private health insurance market.

Makes Unacceptable Federal Restrictions on Abortion Coverage Permanent

H.R. 3 would codify existing restrictions on federal funding for abortion that prohibit abortion coverage in health insurance provided by the government, with few exceptions. These include women covered through Medicaid, women serving in the military and dependents of military personnel, women receiving veteran's benefits, women serving in the Peace Corps, women covered through the Indian Health Services, federal employees, and women in federal correctional facilities. The bill would also reinstate a ban on the District of Columbia, lifted in 2009, that prohibited DC from using its own funds to pay for abortion care.

The National Partnership remains adamantly opposed to restrictions on abortion coverage because they threaten women's health by making it harder to obtain abortion care. They are especially burdensome for low-income women who do not have the funds to pay for care that is not covered by their health insurance. In some instances, these restrictions eliminate access to abortion for women even if they use their own funds.

Conclusion

The National Partnership for Women & Families urges Congress to reject H.R. 3, the "No Taxpayer funding of Abortion Act." The bill goes well beyond codifying the unjust restrictions on access to abortion care that have long burdened women who depend upon the federal government for their care. In seeking to impose sweeping restrictions on all forms of government spending that might possibly be linked to the provision of abortion care H.R. 3 takes away health coverage women already have and threatens to end all insurance coverage for abortion – regardless of whether federal funds are used.

Religious Coalition for Reproductive Choice
1413 K STREET, NW
14TH FLOOR
WASHINGTON, DC
20005
202.628.7700
FAX 202.628.7716
INFO@RCRC.ORG
WWW.RCRC.ORG

PRO-FAITH • PRO-FAMILY • PRO-CHOICE

Statement of the Religious Coalition for Reproductive Choice on HR 3, "No Taxpayer Funding for Abortion Act" and HR 358, "Protect Life Act"

US House of Representatives
Committee on Ways & Means
Subcommittee on Select Revenue Measures

March 16, 2011

As clergy and leaders of religious communities from a wide range of faith traditions, we are united in moral outrage at the attempt to drastically limit access to reproductive health care through the "No Taxpayer Funding for Abortion Act" (HR 3, introduced by Representative Chris Smith) and the "Protect Life Act" (HR 358, introduced by Representative Joe Pitts). These bills are an attack on the respect and reverence for human dignity that is at the core of so many of our faith traditions. On behalf of people of faith across the nation, we call on you to stand against HR 3 and HR 358.

Current law allows federal funding for abortion for a woman who becomes pregnant as the result of rape, incest or in the case of life endangerment. These bills tried to further narrow the current exception of rape to "forcible" rape, which would prevent many rape survivors from accessing abortion coverage, including survivors of statutory rape and many forms of date rape. Furthermore, these bills could allow public hospitals to refuse to treat pregnant women in emergencies, even when their health or life was in danger. HR 3 would severely limit ALL women's access to reproductive health care, regardless of if they are covered by Medicaid or private insurance. Finally, it would violate the hallowed promise of our nation to respect diverse religious views, in this case on the appropriateness of abortion.

Religious Coalition for Reproductive Choice
1413 K STREET, NW
14TH FLOOR
WASHINGTON, DC
20005
202.628.7700
FAX 202.628.7716
INFO@RCRC.ORG
WWW.RCRC.ORG

PRO-FAITH • PRO-FAMILY • PRO-CHOICE

We believe HR 3 and HR 358 would violate the trust that women and men have placed in the law, to protect their access to health services.

We are united in a shared reverence of the sacredness of compassion. Women who have survived rape or incest deserve health care services, including abortion, even if they don't have the means to pay for it. Women whose lives are threatened deserve appropriate health care and to not be turned away from a hospital. Vulnerable women who cannot afford health insurance deserve comprehensive care. They deserve compassion; they deserve justice. Women and their families deserve better than this.

As clergy and leaders of faith communities, we call on Congress to ***stand in their defense and against these dangerous and misleading bills.***

Peace and blessings,

Reverend Carlton W. Veazey
President and CEO, Religious Coalition for Reproductive Choice

INDIVIDUALS

NAME	CITY	STATE
Rabbi Dennis Linson	Irvine	CA
Rabbi Steven B. Jacobs	Los Angeles	CA
Rabbi Morris L. Rubinstein	Sun Valley	CA
Rabbi Josh Berkenwald	San Jose	CA
Rabbi Gail Labovitz	Los Angeles	CA
Rev. Stephen J. Mather	Coronado	CA
Rev. Nicole M. Lamarche	Hayward	CA
Don Frew	Berkeley	CA
Anna Korn	Berkeley	CA
George L. Hersh	Berkeley	CA

Religious Coalition for Reproductive Choice
1413 K STREET, NW
14TH FLOOR
WASHINGTON, DC
20005
202.628.7700
FAX 202.628.7716
INFO@RCRC.ORG
WWW.RCRC.ORG

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Juliette Athena Ashmoon	Ventura	CA
Katya Madrid	Benicia	CA
Rev. Randi Walker	Berkeley	CA
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14TH FLOOR
WASHINGTON, DC
20005
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United States House of Representatives
Committee on Ways and Means
Subcommittee on Select Revenue Measures

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

Sara Rosenbaum, J.D.
Harold and Jane Hirsh Professor, Health Law and Policy
Chair, Department of Health Policy
George Washington University School of Public Health and Health Services

March 16, 2011

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.

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

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