Congress of the United States
House of Representatives
Washington, DC 20515

September 6, 2013

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

Dear Director Kaplan,

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

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

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

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

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[1]Section 1303 of the ACA specifies that unless a state has taken action to prohibit abortion coverage in plans sold on its exchange, "the issuer of a qualified health plan shall determine whether or not the plan provides coverage of [abortion] as a part of such benefits for the plan year." That means that in the 27 states that have not prohibited abortion coverage on their exchange, there will be plans sold that include elective abortion. While there are accounting arrangements in the ACA to separate abortion funds, these accounting arrangements are radical departure from prior abortion funding law. The accounting gimmick calls for an abortion surcharge of at least $1 per month. The abortion surcharge is not optional. If an individual selects a plan that includes abortion, they must pay the abortion surcharge. Furthermore, the accounting gimmicks are not relevant to the Smith amendment which specifically requires no administrative costs related to plans that include abortion, even under the accounting arrangement OPM would be carrying out administrative costs related to paying for the abortion-covering plan.

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Therefore, if a Congressional employee selects one of the plans that includes elective abortion, OPM will collect the employer and employee premium contributions and in turn disburse them to the abortion-covering plan. Such a scenario would result in administrative expenses being used in connection with a health plan that provides benefits or coverage for abortion—a clear violation of the Smith amendment. Moreover, a violation of a limitation amendment, such as the Smith Amendment, may constitute a violation of the Anti-Deficiency Act.

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

Sincerely,

Chris Smith

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Marsha Blackburn

Joseph R Pitts

Ann Wagner

Vicky Hartzler

Trey Gowdy

M.D.

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David P Roe

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Dan Burcshall

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Steve Daines

Jim Bridenstine

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Bill Huizenga

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Paul A Gosar

McIntyre Mullin

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Virginia Foxx

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