The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400
heritage.org

Comment on Proposed Rule "Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond"

Date: July 28, 2021

To: The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services

In response to: Proposed Rule: Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond; published at 86 FR 35156

Reference: RIN 0938-AU60
CMS-9906-P

Dear Administrator Brooks-LaSure:

This correspondence is submitted in response to the Department of the Treasury and the Centers for Medicare & Medicaid Services' request for comment regarding the proposed rule "Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond," at 86 Fed. Reg. 35156 (July 1, 2021).

The proposed rule would, among other things, reverse a 2019 rule promulgated by the previous administration regarding billing and payment collection for certain abortion services.[1] That rule was promulgated to enforce the plain text enacted in section 1303 of the Patient Protection and Affordable Care Act (PPACA), requiring that insurers collect a separate payment for certain abortion coverage in qualified health plans approved to be sold on the exchanges.[2]

In contrast, this new proposed rule would contravene the explicit wording of the statute and would reverse the previous administration's attempt to implement the statute's requirements for transparency with respect to abortion coverage in health plans.

[1] See: U.S. Department of Health and Human Services, "Patient Protection and Affordable Care Act; Exchange Program Integrity," Final Rule, at 84 FR 71674 (December 27, 2019).
[2] Pub. Law 111-148 §1303, as amended by §10104 of the same, and codified at 42 U.S. Code § 18023.

The Heritage Foundation's support for the objectives of the 2019 regulation and opposition to taxpayer dollars being entangled with abortion activity is a matter of public record.[3] Because the Department's current proposed rule seeks to reverse important policies outlined in the 2019 regulation, this comment respectfully writes in opposition to the proposal.

**Background on Section 1303**

In section 1303 of PPACA, Congress addressed a number of issues involving coverage and funding of abortion arising from other provision of the legislation that imposed new benefit requirements on private insurance plans and provided new, income-related federal subsidies for purchasing such plans.

In subsection (a), Congress affirmed the authority of the states to either permit or prohibit the inclusion of abortion coverage in "qualified health plans" offered through the exchange in the state.

Then in subsection (b), Congress established a set of "special rules relating to coverage of abortion services."

Paragraph (1) addresses voluntary choice of coverage of abortion services.

Subparagraph (A) stipulates that a qualified health plan (QHP) may – but is not required to – cover abortion services. Subparagraph (B) stipulates that plans which include abortion coverage are prohibited from using federal funds, including tax credits and advance payment reductions, for abortion services that are restricted under the Hyde Amendment – that is, non-Hyde (hereafter referred to as "elective") abortion services.

The Hyde Amendment is language incorporated to the annual appropriations bill for the Departments of Labor, Health and Human Services, and Education, and Related Agencies (LHHS). Since 1976, the amendment has prohibited funds appropriated through LHHS to be spent on abortions and for health benefits coverage of elective abortion.[4] Current Hyde Amendment language includes exceptions for rape, incest, or when the life of the mother is in danger.

Paragraph (2) addresses a prohibition on the use of federal funds for elective abortion services.

Subparagraph (A) requires that the issuer of a QHP must ensure that "any amount attributable" to subsidies such as advance premium tax credits (APTCs) or cost-sharing reduction (CSR) funds are not used to pay for elective abortions. Subparagraph (B) establishes actions issuers of plans that cover elective abortion coverage must take regarding allocation accounts.

---

[3] Ex. see: Melanie Israel, "The Pro-Life Agenda: A Progress Report for the 116th Congress and the Trump Administration," The Heritage Foundation *Backgrounder* No. 3471, February 24, 2020, https://www.heritage.org/sites/default/files/2020-02/BG3471.pdf

[4] Ex. see: Pub. Law No. 166-260, Consolidated Appropriations Act, 2021, https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf

Specifically, the issuer of the plan shall "collect from each enrollee in the plan (without regard to the enrollee's age, sex, or family status) a separate payment" for an amount equal to the "actuarial value" of the elective abortion coverage and an amount equal to the rest of the premium (after a reduction for APTCs and CSRs).[5]

The issuer "shall deposit all such separate payments into separate allocation accounts"[6] so that one "consists solely of such payments and that is used exclusively to pay for" elective abortions.[7]

In addition to collecting separate payments and segregating funds for elective abortion services, paragraph (3) ("Rules relating to notice") requires QHPs that cover elective abortions to "provide a notice to enrollees, only as part of the summary of benefits and coverage explanation, at the time of enrollment, of such coverage."

In summary, federal law under PPACA's accounting and notice requirements regarding elective abortion coverage is unambiguous. The law requires separate – that is, two distinct – payments for elective abortion services and other services covered under a policy. The law requires that a separate allocation account be used exclusively to pay for elective abortions. And the law requires that consumers have transparency regarding coverage for elective abortions.

**Congressional intent affirms what the law requires**

While the plain letter of the law is clear, so too is the legislative history of Section 1303. When Congress considered PPACA, the House of Representatives version incorporated an amendment authored by Representative Bart Stupak (R-Mich.) that would have applied the terms of the Hyde Amendment to taxpayer-subsidized health plans. But the Senate version of the bill did not include such language. Rather, Senator Ben Nelson (D-Neb.) shepherded an amendment that ultimately became Section 1303 into law and his explanation of the separate payment concept cannot be clearer:

> [I]f you are receiving Federal assistance to buy insurance, and if that plan has any abortion coverage, the insurance company must bill you separately, and you must pay separately from your own personal funds—perhaps a credit card transaction, your separate personal check, or automatic withdrawal from your bank account—for that abortion coverage. Now, let me say that again. You have to write two checks: one for the basic policy and one for the additional coverage for abortion. The latter has to be entirely from personal funds.[8]

Congress allowed QHPs on the exchanges to cover elective abortions, and Congress made clear that such plans would be subject to specific requirements regarding transparency and separation of funds.

---

[5] 42 U.S. Code § 18023(b)(2)(B)(i).
[6] Id. § 18023(a)(2)(B)(ii).
[7] Id. § 18023(a)(2)(C)(ii).
[8] 155 Cong. Rec. S14134 (Dec. 24, 2009) https://www.congress.gov/111/crec/2009/12/24/CREC-2009-12-24-pt1-PgS14132.pdf.

**Noncompliance vs. faithfully implementing the law**

PPACA does not apply the Hyde Amendment or similar language to the totality of the health care law. Advance premium tax credits (APTCs) and cost-sharing reduction payments (CSRs) subsidize the purchase of health plans on the exchanges, and by allowing health insurers that sell plans on many state exchanges to cover abortion while remaining eligible for federal subsidies, PPACA opens new avenues for federal funding of abortion coverage because these federal funds can facilitate the purchase of health plans that cover elective abortion for millions of Americans who previously did not have such coverage. As mentioned previously, members of Congress attempted to prevent taxpayer-subsidized plans from covering elective abortion via the Stupak amendment, but ultimately enacted then-Senator Nelson's proposal, which is Section 1303.

Despite clear statutory separation and transparency requirements regarding abortion services, a 2014 Government Accountability Office report found that many QHP issuers were not following the law.[9] From failing to provide notice to enrollees regarding abortion coverage to charging less than the statutorily required minimum dollar amount for abortion coverage to not collecting separate payments for non-Hyde abortion services, QHP issuers were largely not fulfilling their legal obligations.

Guidance issued during the administration of President Barack Obama did not adequately address noncompliance – rather, it enabled noncompliance.[10] "The Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016" continued to allow what should have been separate payments to be collected together with the rest of the premium in a single payment. This accounting gimmick meant that many Americans were paying a hidden surcharge for elective abortions—often unaware that their plan included such coverage in the first place.

In contrast, the Trump Administration rule sought to ensure that insurance issuers abide by both the letter and spirit of the law and follow Congress's intent of offering some semblance of transparency regarding abortion coverage in qualified health plans.[11] "Patient Protection and Affordable Care Act; Exchange Program Integrity" – which is not currently in effect due to pending litigation – is grounded in a proper understanding of Congress's intent regarding Section 1303. The rule requires issuers to send QHP policy holders a monthly bill for elective abortion coverage and the rest of the premium and requires that issuers instruct policy holders to pay for elective abortion coverage and the rest of the premium through separate transactions. This faithfully implements what the law requires both in letter and spirit.

**Proposed rule returns to noncompliance**

The current proposed rule ignores congressional intent and the plain text of the law. One option allowed under the proposal – itemizing an abortion surcharge on a monthly bill – still allows a

[9] U.S. Government Accountability Office, "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans," Sept. 15, 2014, http://www.gao.gov/products/GAO-14-742R
[10] 80 FR 10840.
[11] 84 FR 71674.

monthly premium to be collected in one combined payment. This does not meet the standard for a "separate payment."

Another option – giving a policy holder an advance notice regarding an abortion surcharge around the time of enrollment – likewise falls short of what is statutorily required. The abortion surcharge may, in some cases, be buried in pages upon pages of plan documents. And after this "notice," the abortion surcharge would be essentially hidden from consumers within a monthly premium that is collected in a single – again, not separate – payment.

Itemizing or providing advance notice that a plan includes elective abortion coverage does not meet the statutory requirement that issuers "collect from each enrollee in the plan (without regard to the enrollee's age, sex, or family status) a separate payment."

In addition to not complying with the plain text of the law, these options do not reflect Congress's intent that consumers have transparency about abortion coverage. Nor do these options reflect Congress's intent to limit taxpayer dollars from being entangled with abortion. For consumers with sincere moral or religious objections to abortion – including objections to paying for plans that subsidize abortion (be it for themselves, their dependents, or other enrollees) – the proposed rule is particularly harmful. Rather than make transparency about abortion coverage more difficult for consumers to discern, HHS should work to ensure that all consumers are able to ascertain information about abortion coverage during their shopping experience, not after the time of enrollment.

## Conclusion

"Separate" does not mean "together." The letter of the law, dually enacted by the American people's elected representatives, is clear. Congressional intent affirms what the plain text of Section 1303 requires. The proposed rule seeks to undermine transparency regarding elective abortion coverage in certain health plans. The proposed rule seeks to allow insurance companies – contrary to the law – to collect combined payments for what is clearly required to be separate payments for elective abortion coverage.

The administration should rigorously enforce Section 1303's requirements, not attempt to rewrite the law and obfuscate the very simple concept of separate payments. Provisions of the proposed rule that do not faithfully implement the law passed by Congress should be withdrawn.

Respectfully,

Melanie Israel
Policy Analyst, DeVos Center for Religion and Civil Society
Institute for Family, Community, and Opportunity
The Heritage Foundation