ALLIANCE DEFENDING FREEDOM
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VIA Federal eRulemaking Portal

July 28, 2021

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attention: CMS-9906-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Comments on Notice of Proposed Rulemaking: Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, 86 Fed. Reg. 35156 (July 1, 2021), RIN 0938-AU60

Dear Administrator Brooks-LaSure:

Alliance Defending Freedom (ADF) submits the following comments on the Notice of Proposed Rulemaking (NPRM) CMS-9906-P, on Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, issued by the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services (the Department).

The Department has sought comment on its proposal to repeal the current separate billing regulation for abortion services under the Affordable Care Act (ACA) and to codify 2016 policy regarding the ACA's separate payment requirement. ADF strongly opposes the portions of the NPRM that propose to remove the separate billing requirements for healthcare plans that offer abortion services for which federal funding is prohibited. The separate billing requirements are critical to ensuring that federally subsidized health plans are administered in compliance with the law and that federal funding is not being used to pay for abortion.

In summary, ADF submits the following comments in response to the portions of the NPRM that would remove the separate billing requirements from the Affordable Care Act (ACA):

- The proposed amendments weaken statutory prohibitions on federal funding for abortions that protect the conscience rights of taxpayers consistent with the Hyde Amendment and the Supreme Court's opinion in *Harris v. McRae*.

- Separate billing regulations align best with the text of the ACA and the intent of Congress in including Section 1303 by providing the most common-sense route to encourage consumers to make separate payments as required by statute and to maintain the segregation of funds from intake to expenditure.

- Transparency and honesty are best served by policies that give consumers all the information they need to make an informed decision about their own insurance coverage, but the proposed amendments sacrifice transparency for the sake of concision.

- The Department has not shown that changing the billing requirements will add a financial benefit to either consumers or insurers that outweighs the harm caused to transparency, conscience protections, and statutory compliance.

- Requiring separate billing by insurers promotes separate payments by consumers and shifts the burden of facilitating statutory compliance off individual consumers and onto insurers.

- The Department's cost estimates failed to consider important factors, explore sufficient data, and make necessary estimates.

I. Separate Billing is Necessary to Respect Public Opinion and the Conscience Rights of the American People

Soon after *Roe v. Wade* placed abortion under the label of the constitutional right to privacy, Congress passed the first Hyde Amendment, prohibiting federal tax dollars from being used "to pay for an abortion" or "to require any person to perform, or facilitate in any way the performance of, any abortion."[1] Within three years of Roe, the federal Medicaid program was already paying for 300,000 elective abortions

[1] Consolidated Appropriations Act, 2021, 116 P.L. 260, 2020 Enacted H.R. 133, 134 Stat. 1182 (Dec. 27, 2020). The Amendment permits federal funding to be used for an abortion only in circumstances of rape, incest, or when the mother's life is endangered.

annually.[2] In 1993, the Congressional Budget Office estimated that removing restrictions on abortion funding from federal health programs would result in federal funding of between 325,000 and 675,000 abortions every year.[3] Since 1976, the Hyde Amendment has been renewed yearly in the Appropriations Act. Although the demand for abortion has decreased in recent years, the Hyde Amendment's annual renewal has been key in shielding the American people from being forced to pay for abortions that go against their consciences for almost fifty years.

The Hyde Amendment's limitation on abortion funding is repeated in the text of the Affordable Care Act. Section 1303 of the ACA requires that any healthcare plan that chooses to cover abortion services for which federal funding is prohibited must "establish allocation accounts" that are "used exclusively to pay for" those abortion services. These accounts may *only* be funded by "separate payments" collected from each plan enrollee that are "equal to the actuarial value of the coverage of" the covered abortion services and not less than one dollar. The ACA requires that these payments be collected separately,[4] paid through a separate deposit,[5] placed into separate accounts,[6] and maintained as segregated funds.[7]

In 2015, the Obama administration, in defiance of Section 1303, chose to permit insurers receiving federal subsidies to collect a single payment from enrollees to cover both the abortion coverage premium and the premium for healthcare services.[8] The Trump administration corrected this error in the 2019 Program Integrity Rule,[9] but the Department now proposes to reinstate the unlawful 2015 approach. This would again allow taxpayer-subsidized health plans to charge for abortion services by

> "sending the policy holder a single monthly invoice or bill that separately itemizes the premium amount for coverage of such abortion

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[2] Testimony of Douglas Johnson, Federal Legislative Director, National Right to Life Committee, before the Subcommittee on Health, Committee on Energy and Commerce, U.S. House of Representatives (Feb. 9, 2011). Available at: http://www.nrlc.org/uploads/ahc/ProtectLifeAct DouglasJohnsonTestimony.pdf.
[3] Robert D. Reischauer, Director, Congressional Budget Office, Letter to Congressman Vic Fazio (July 19, 1993).
[4] 42 U.S.C. § 18023(b)(2)(B)(i).
[5] 42 U.S.C. § 18023(b)(2)(B)(ii).
[6] *Id.*
[7] 42 U.S.C. § 18023(b)(2)(C).
[8] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10749-10877 (Feb. 27, 2015).
[9] Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, 86 Fed. Reg. 35156, 35179 (proposed July 1, 2021).

> services; sending the policy holder a separate monthly bill for these services; or sending the policy holder a notice at or soon after the time of enrollment that the monthly invoice or bill will include a separate charge for such services and specify the charge."[10]

The 2019 Program Integrity Rule conformed to the statutory separate payment mandate by requiring insurers to send a separate bill for abortion services, encouraging enrollees to make separate payments but not penalizing those who mistakenly failed to do so. This rule was both legally correct and consistent with the principles in which the Hyde Amendment and Section 1303 are rooted.

Statutory restrictions on tax-funded elective abortion reflect general public opinion on the issue. Polling has consistently shown that a majority of Americans support the ban on federal funding for abortions. Traditionally, this has been a bipartisan issue. The matter came to a head during the debates surrounding Obamacare, at which time public polling consistently revealed that most Americans do not want tax money to be paying for abortions. A CNN poll in 2011 showed that only 35% of respondents supported public funding of abortion.[11] Even more significantly, when asked in a 2009 International Communications Research poll if "you want your own insurance policy to include abortion," only 24% responded yes.[12] Most recently, a 2021 Knights of Columbus/Marist poll reported that 58% of Americans oppose funding domestic abortions with taxpayer money, 77% oppose supporting abortion internationally, and 76% of Americans favor "significant restrictions" on abortion.[13] Since *Roe*, Americans with pro-life and pro-choice views have consistently agreed in opposition toward government-funded abortion.[14]

Restricting federal funding for abortion is more than just a matter of public opinion, however. Respect for the sanctity of conscience has been a pillar of American ideals since the country was founded. Specifically in the field of abortion, a practice which is moral and religious anathema to many people, dozens of federal and state laws protect the conscience rights of those who object to facilitating the destruction

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[10] Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, 86 Fed. Reg. 35156, 35208 (proposed July 1, 2021).
[11] CNN/Opinion Research Corporation Poll—Apr. 9 to 10, 2011 (Apr. 11, 2011). Available at: http://i2.cdn.turner.com/cnn/2011/images/04/11/rel6a.pdf.
[12] H.R. Rept. No. 113-332, pt. 1, at 2.
[13] Americans' Opinions on Abortion, Knights of Columbus/Marist Poll National Survey (Jan. 2021). Available at: https://www.kofc.org/en/resources/news-room/polls/kofc-national-survey-with-tables012021.pdf.
[14] In the 2021 Knights of Columbus/Marist poll, 34% of those who responded that they opposed using tax dollars to pay for a woman's abortion also identified themselves as pro-choice.

of human life. The federal government[15] and almost all states[16] have laws that permit healthcare providers and professionals to decline to provide abortion services on the basis of conscience. These laws, as well as the Hyde Amendment's bar on federal funding, have been repeatedly upheld by courts,[17] because underlying them is the conviction that "taxpayers ought not to be compelled by the federal government to finance abortions which [are] repugnant to them on religious or moral grounds."[18]

Separate billing is the best way to affirm the conscience rights and public opinion of a country that rejects tax-funded elective abortion. The text of the ACA specifically states that restricted funding from the federal government may not be used to pay for abortion, and yet money is a fungible commodity. "Once commingled, it loses its separate character."[19] Money that originates as a single payment is no longer "separate" in any sense of the word. Only with separation from intake to expenditure can health care providers meaningfully ensure that abortion services are not being funded from the same pool of resources as healthcare services. That is why the separate payment requirement was written into the act in the first place.

Disregarding this, the NPRM not only permits insurance providers to group abortion coverage together with all other healthcare services as one premium charge, it also encourages insurers who choose to bill separately to instruct their enrollees to make a single payment, expressly contrary to law. When less than one-quarter of the country even wants abortion to be a part of their insurance at all, the government should seek to preserve the integrity of the system for segregating abortion funds, not try to minimize barriers and obscure charges.

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[15] See, e.g., 42 U.S.C. § 300a-7; 42 U.S.C. § 238n; Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Public Law 115-245, 132 Stat. 2981 (Sept. 28, 2018).

[16] Guttmacher Institute, State Laws and Policies: Refusing to Provide Health Services (April 1, 2021). Available at: https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services.

[17] See *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) ("Under [Georgia law], the hospital is free not to admit a patient for an abortion. …Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital."); *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

[18] *Zbaraz v. Quern*, 596 F.2d 196, 200 (7th Cir. 1979).

[19] *Abdnour v. Abdnour*, 19 So. 3d 357, 364 (Fla. Dist. Ct. App. 2009).

II. Separate Billing is Necessary to Comply with the Law

The passage of the ACA was made possible specifically because of the inclusion of Section 1303, which reiterates the Hyde Amendment's restrictions on federal funding of abortion services and then goes on to prescribe the manner by which this funding restriction is to be applied in certain plans. The text of Section 1303 mandates that "the issuer of the plan shall[] collect …a separate payment for" the coverage of non-Hyde abortion services and for all healthcare coverage other than non-Hyde abortion services.[20] The insurer must then deposit the separate payments into "separate allocation accounts," and the account that holds the payments made for abortion coverage must be used solely and exclusively for that purpose. Commingling is not permitted at any stage. The word "separate" is used seven different times, and Section 1303 repeatedly insists on a separate "payment," not an additional "fee" or "charge."

Congressional intent regarding Section 1303, its purpose, and its implementation, is beyond doubt. Senator Ben Nelson, the author of Section 1303, spoke clearly on the record about how it was intended to operate:

> [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.
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> 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.[21]

Senator Nelson was not importing a new meaning onto Section 1303. He wrote it. The language is clear that abortion coverage must be paid for in a separate transaction from any and all healthcare coverage. This interpretation is consistent with the plain language of Section 1303's separate payment requirement, as well as with the other related notice and choice provisions. It is simply not possible to reconcile the approach of the NPRM with the requirement that a "separate payment" be collected.

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[20] 42 U.S.C. § 18023(b).
[21] 155 Cong. Rec. S 14134 (Dec. 24, 2009) (emphasis added).

Regrettably, the Department has shown no intention of following Congress's purpose in Section 1303, but instead quite the opposite—on this and many similar laws. President Biden's campaign platform went even further, including the specific goals of repealing the Hyde Amendment, providing federal funding for Planned Parenthood, and requiring publicly funded insurance coverage of both contraception and abortion.[22] The Biden administration's proposal to rewrite Title X regulations seeks to introduce a mandate for abortion referrals that would effectively cut pro-life care centers out of the federal family planning program.[23] It is clear that the administration believes that women have a right to publicly-funded abortion on demand, and intend to impose that belief on the country, in spite of the law and the American public's position to the contrary.

III. Separate Billing is Necessary to Protect and Inform Consumers

Apart from the 2019 Program Integrity Rule, ACA provisions that mandate separate payments and segregation of funds have a history of being ignored. The separate payment requirement has been a part of the ACA since the beginning, and yet before additional regulations were imposed, insurers did not even list the charge for abortion services as a separate line item in a consumer's bill—or collect a payment at all for enrollees whose premiums were otherwise fully covered by federal funding.[24]

Thus, insurers are unlikely to choose to follow the separate payment requirement of the statute unless the regulations require them to do so. This is why almost 100 members of Congress asked the Department to reconsider its regulations in 2018, a request that culminated in the current rule from 2019.[25] Explaining that the 2015 regulations made "the abortion surcharge all but invisible" and "negate[d] the clear meaning of the statute's phrase, 'separate payment,'" the members of Congress asked HHS to issue new regulations that "align with the clear meaning and legislative history of Section 1303."

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[22] The Biden Agenda for Women, Biden Harris Democrats. Accessed July 20, 2021. Available at: https://joebiden.com/womens-agenda/.
[23] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 19812 (proposed April 15, 2021) (to be codified at 42 C.F.R. pt. 59).
[24] U.S. Government Accountability Office, Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans (Sept. 15, 2014). Available at: https://www.gao.gov/assets/gao-14-742r.pdf.
[25] Letter from Christopher H. Smith, Member of Congress to the Honorable Alex Azar, Secretary, U.S. Dept. of Health and Human Services (Aug. 6, 2018). Available at: https://chrissmith.house.gov/uploadedfiles/2018-08-06_-_smith_letter_on_section_1303_-_abortion_funding_transparency.pdf.

The Department has explained that its motivation in replacing the current separate billing requirement is the "high burden it would impose on issuers, states, Exchanges, and consumers, as well as the high likelihood of consumer confusion and unintended losses of coverage."[26] The NPRM expresses concern that actually complying with the text of the ACA with regard to separate payments would be too heavy of a burden on consumers, and that HHS must therefore rewrite Congress's mandate in order to save the American people from crippling confusion. However, the NPRM's proposed solution to consumer confusion is to figure out on behalf of consumers what they should want to purchase and to hide those charges underneath the umbrella of a single bill. Instead, the Department should be pursuing greater transparency by being open and obvious to consumers about their options and what they are paying for, so that "no person [has] to pay for abortion coverage that they don't want."[27]

Moreover, abortion payment is not the only situation in which customers must pay a separate premium for a different portion of their health insurance coverage. For example, if an individual has Medicare as well as a supplemental Medigap policy, he or she must pay a separate premium to the private insurance company that provides the Medigap.[28] Or, in another example, individuals who have both a Medigap policy and a Medicare Prescription Drug Plan may need to make two separate premium payments, even if the two plans come from the same provider.[29] The Department should be helping consumers avoid confusion by providing them with all the information they need to make an informed decision, not limiting their knowledge of their own health plans.

Rather than imposing additional obligations upon consumers, the current 2019 regulations appropriately shift the burden of compliance away from consumers and onto insurers. The ACA requires the collection of "separate payments" for abortion services. Thus, in order to comply with the law, consumers whose insurers sent a

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[26] Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, 86 Fed. Reg. 35156, 35177 (proposed July 1, 2021).

[27] Letter from Christopher H. Smith, Member of Congress to the Honorable Alex Azar, Secretary, U.S. Dept. of Health and Human Services (Aug. 6, 2018). Available at: https://chrissmith.house.gov/uploadedfiles/2018-08-06_-_smith_letter_on_section_1303_-_abortion_funding_transparency.pdf.

[28] What's Medicare Supplement Insurance (Medigap)?, Medicare.gov. (Accessed July 20, 2021) Available at: https://www.medicare.gov/supplements-other-insurance/whats-medicare-supplement-insurance-medigap.

[29] Medigap & Medicare drug coverage (Part D), Medicare.gov (Accessed July 20, 2021). Available at: https://www.medicare.gov/supplements-other-insurance/whats-medicare-supplement-insurance-medigap/medigap-medicare-drug-coverage-part-d.

single bill would need to calculate and separate out the abortion charge themselves and make a separate payment. The 2019 rule places the responsibility for statutory compliance on the insurer tasked with sending a separate bill, leaving the consumer only responsible for paying the bills that he or she receives.

The NPRM proposes that consumers would not be required to make separate payments at all. This ignores the statutory requirement altogether by taking the stance that the Department does not intend to enforce the law as written, opening consumers up to jeopardy if the administration changes its approach. Any argument that consumers should not realistically be expected to separate out the charges on their bills reveals a quarrel not with the implementing regulations, but with the text of the ACA itself.

IV. The Provided Cost Estimates Do Not Justify Removing the Separate Billing Requirement

The Department based its financial analysis on the projections from the 2019 Program Integrity Rule. The 2019 rule provided estimates for one-time and ongoing costs for insurers and exchanges. But, although the rule gave a breakdown of the assignment of its cost projections, it did not fully explain how the numbers were derived. Some cost estimates seemed to be sourced only from public comments.[30] Since the 2019 rule was never given full effect, it is not clear from evidence that the 2019 estimates should be used or were accurate. For example, the 2019 rule acknowledged that the minimum $1 per enrollee would provide most insurers with extra financial resources that could be put towards administrative costs, but the current NPRM did not take this into account in its cost analysis.[31] Without exploring further information, the Department cannot claim a full and complete savings of the 2019 rule's estimated costs. The Department should consider information it has or could obtain from plans and exchanges concerning these issues.

More importantly, however, the NPRM did not attempt any comparison between the benefits of statutory compliance, which is an appropriate justification for

[30] Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71674, 71699 (Dec. 27, 2019).

[31] Patient Protection and Affordable Care Act; Exchange Program Integrity, 84 Fed. Reg. 71674, 71690 (Dec. 27, 2019) ("[T]he actuarial value of the non-Hyde abortion coverage under QHPs generally may be less than the minimum $1 per enrollee, per month QHP issuers must charge for such services under section 1303 of the PPACA; and we are not aware of any reason QHP issuers could not use funds from the allocation account into which premium amounts attributable to the non-Hyde abortion service benefit must be deposited to cover administrative costs associated with coverage of non-Hyde abortion services.").

agency policy choices,[32] and the hypothetical cost savings proposed by the Department. It did not make this comparison, of course, because in its opinion the statute does not require consumers to make separate payments and so there is no beneficial increase in statutory compliance. But that does not obviate the need for the Department to consider this alternative and take it into consideration in making cost and benefit estimates. The fact that the comparison implies that the 2019 rule is in greater alignment with the statutory text than is this NPRM is not a sufficient reason for the Department to ignore the need to make such a comparison now. Thus, the Department's cost savings analysis is artificially one-sided, and does not lay out an honest comparison of values.

V. Conclusion

For the foregoing reasons, ADF urges the Department to remove the changes to the separate billing requirement from its Notice of Proposed Rulemaking.

Respectfully Submitted,

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[32] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) ("an agency may justify its policy choice by explaining why that policy 'is more consistent with statutory language' than alternative policies" (internal citation omitted)).