



January 8, 2019

**Submitted Electronically**

Secretary Alex M. Azar II  
Centers for Medicare & Medicaid Services  
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES  
Attn: CMS-9922-P  
P.O. Box 8016  
Baltimore, MD 21244-8010

**Re: Proposed Rule, Patient Protection and Affordable Care Act; Exchange Program Integrity, CMS-9922-P**

Dear Secretary Azar:

On behalf of Americans United for Life, I write in strong support of the proposed rule strengthening program integrity and oversight of Exchanges under the Patient Protection and Affordable Care Act (PPACA).<sup>1</sup> Specifically, I write in support of the updated requirements related to billing and collection of payments for certain abortion services.

Americans United for Life (AUL) is the oldest and most active pro-life nonprofit legal advocacy organization in the country. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,<sup>2</sup> AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. To this end, AUL has created model bills prohibiting taxpayer funding of the abortion industry,<sup>3</sup> supported legislation to comprehensively prohibit both funding and insurance coverage for abortion through the PPACA,<sup>4</sup> and successfully defended

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<sup>1</sup> Pub. L. 111-148, as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152.

<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> AMS. UNITED FOR LIFE, DEFENDING LIFE 460-61 (2018 ed.) (AUL state policy guide providing model bills that prohibit taxpayer funding of abortions).

<sup>4</sup> See, e.g., Memorandum from Ams. United for Life on the Protect Life Act & Its Application to the Affordable Care Act (June 25, 2012), <http://www.realhealthcarerespectslife.com/wp-content/uploads/2012/06/AUL-Protect-Life-Act-memo-June-2012.pdf>.

the Hyde Amendment—which ensures that federal and state governments do not have to fund elective abortion—before the U.S. Supreme Court in *Harris v. McRae*.<sup>5</sup>

I have thoroughly reviewed the proposed rule and it is my legal opinion that the proposed regulations are legal and sound public policy.

Section 1303 of the PPACA<sup>6</sup> sets forth prohibitions, restrictions, and requirements relating to the coverage of certain abortion services by qualified health plans (QHPs) offered through the individual market Exchanges.

- **Prohibition on the use of federal funds.** Section 1303 prohibits QHPs from using certain federal funds (premium tax credits and cost-sharing reductions) to pay for coverage of abortions for which public funding is restricted under the Hyde Amendment (non-Hyde abortions).<sup>7</sup>
- **Segregation of funds.** Section 1303 requires insurers to charge and collect a *separate* payment for coverage of non-Hyde abortions, deposit the collected funds into a *separate* account, maintain the *segregation* of those funds, and use *only* those separate funds to pay for non-Hyde abortions.<sup>8</sup>
- **Notice.** Section 1303 requires that insurers provide notice to consumers when the QHP provides coverage of non-Hyde abortions.<sup>9</sup>
- **Penalties for noncompliance.** Failure to adhere to the requirements under Section 1303 could result in decertification or civil monetary penalties.

In 2016, the Obama Administration passed regulations allowing the required separate billing and separate payment for non-Hyde abortions to be made using methods that were less than separate.<sup>10</sup> For example, billing for non-Hyde abortions was allowed to be lumped together with other insurance charges by merely adding an additional line item to the bill. Those regulations ignore the letter of the law and circumscribe the statutory requirement of segregation of funds.

The proposed regulations conform with the plain language of Section 1303 and better ensure compliance with its statutory requirements by adding much needed clarification about what “segregation of funds” means in practice. Below are specific comments on several of the proposed regulations.

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<sup>5</sup> 448 U.S. 297 (1980).

<sup>6</sup> Section 1303 of PPACA, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 42 U.S.C. § 18023.

<sup>7</sup> 42 U.S.C. § 18023(b)(2)(A).

<sup>8</sup> *Id.* § 18023(b)(2)(B)–(C).

<sup>9</sup> *Id.* § 18023(b)(3).

<sup>10</sup> HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10750 (Feb. 27, 2015).

- **Separate billing and collection.** If finalized, the new regulations would require insurers to have two separate bills (and invoices) with two separate payments made for each bill (i.e., two completely separate transactions). The two bills would be required to be in two separate mailings with separate postage or in two separate emails. Separating the bills in this way is not only consistent with the requirements of Section 1303, but will help prevent the comingling of money and avoid the misuse of federal funds. Complete separation will help avoid consumer confusion and potential oversight by the consumer of a second bill in the same envelope or email. Separate bills and payments will also provide more transparency to consumers over what they are being charged for.
- **Continuation of coverage when payments are not made separately.** The proposed regulations require insurers to accept combined payments made by consumers. The insurer, however, must still treat the payments as separate and notify the consumer of the importance of paying separately. This is a common-sense requirement that recognizes that the insurer is responsible for following the requirements of Section 1303 and does not unduly penalize the consumer. This regulation will help avoid any disruption to insurance coverage by ensuring that consumers will not lose any coverage or have their plan terminated if they inadvertently make a combined payment.
- **Documentation, compliance reviews, and monitoring.** The proposed regulations require that the separate payments be documented for inspection and mandate compliance reviews and monitoring of federally-facilitated Exchanges. The processes of reviewing and monitoring are necessary to prevent compliance issues (which have been a problem in the past<sup>11</sup>) and to help ensure taxpayer dollars are adequately safeguarded.
- **State enforcement.** The proposed regulations call upon states to enforce requirements in their own Exchanges; should they fail to do so, HHS expects to step in as far as federal funds are concerned. By relying on the states primarily, and in the first instance, to enforce Section 1303 and its regulations, the proposed regulations will help avoid the federal government’s unnecessary involvement in state affairs and unnecessary use of federal resources, including taxpayer dollars.
- **Compliance plan.** The proposed regulations require any insurer covering non-Hyde abortions to submit a “separation plan” to its state department of

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<sup>11</sup> See, e.g., U.S. Gov’t Accountability Off., GAO-14-742R, *Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans* (Sept. 15, 2014), <https://www.gao.gov/products/GAO-14-742R>.

insurance, detailing the process and methodology for meeting Section 1303's separation requirements. By requiring a separation plan at the outset, the regulations will help avoid confusion during billing and collection, as well as give HHS an opportunity to offer advice and work with insurers to better align their plans with the statutory requirements of Section 1303 and its accompanying regulations.

- **Attestation of adherence:** The proposed regulations require that when insurers provide attestation that they are following the law, they also include an attestation that they are adhering to the new separate billing and collection requirements. This common-sense requirement will help ensure that insurers are aware of and will follow the new regulations concerning separate billing and collection.

Contrary to some criticism, this proposed rule is not overly complicated or costly. Nor would it cause private insurance companies to deny offering abortion coverage. The regulations merely ensure that federal funds are allocated in a manner consistent with Congress' direction pursuant to Section 1303. This rule improves and strengthens program integrity and oversight, protects consumers in federally-facilitated Exchanges, and safeguards taxpayer dollars. The proposed regulations more closely follow Congress' intent as written in Section 1303 than the 2016 Obama Administration regulations, and provide increased transparency by allowing consumers to be better aware of when and how much they are subsidizing non-Hyde abortions.

In sum, AUL strongly urges HHS to adopt this proposed rule.

Sincerely,



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*Staff Counsel*  
Americans United for Life