

United States Senate
WASHINGTON, DC 20510-2606

July 28, 2021

VIA Federal eRulemaking Portal

The Honorable Xavier Becerra
Secretary, Department of Health and Human Services

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

RE: Comments on Proposed Rule: Docket No. CMS-9906-P; *Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond Proposed Rule*, 86 Fed. Reg. 35156 (July 1, 2021), RIN 0938-AU60

Dear Secretary Becerra:

We the undersigned Senators write to ask the U.S. Department of Health and Human Services (HHS) to withdraw the proposed “Segregation of Funds for Abortion Services (§156.280)” provisions contained in 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 Proposed Rule*, 86 Fed. Reg. 35156, (July 1, 2021), RIN 0938-AU60 (“Proposed Rule”).

Abortion is not health care, and American taxpayers should not be forced to subsidize it. The Patient Protection and Affordable Care Act (ACA) allows taxpayer funding for exchange plans that cover abortion on demand, in violation of the principles of the Hyde Amendment. The ACA, however, established separate payment and separate accounting requirements relating to abortion which provide transparency for consumers and enable oversight of taxpayer dollars. The Proposed Rule would flout the explicit statutory separate payment requirement and effectively interpret “separate” to mean “together” when it comes to paying for abortion coverage.

The Proposed Rule directly violates the text, clear meaning and Congressional intent of Section 1303 of the ACA (Section 1303) by allowing insurers to collect payments for coverage of elective abortion and legitimate health care in a single combined payment, rather than as separate payments as the law requires. The Proposed Rule also undermines consumer transparency by allowing issuers to conceal the abortion surcharge in paperwork, making it harder for enrollees to know whether their plan covers abortion.

As Members of Congress, we have a Constitutional prerogative to ensure that regulations governing the ACA comply with the law and Congressional intent, as well as maintain conditions on taxpayer funds established by Congress.

HHS should withdraw these provisions of the Proposed Rule and fully enforce and defend the ACA separate billing requirements, as faithfully implemented by the current regulations.

I. Background on Section 1303 of the Affordable Care Act

Since 1976, the Hyde Amendment to the annual Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act (LHHS) has prohibited the expenditure of Federal LHHS funds for elective abortions and for health benefits coverage that includes coverage of elective abortion.¹ The ACA, however, created its own funding stream outside of the annual LHHS appropriations bill to make taxpayer dollars available to buy abortion-covering plans in ACA exchanges throughout the country. These funding streams include advance premium tax credits (APTCs), whose refundable portion is indefinitely appropriated², as well as cost-sharing reduction payments (CSRs) that reduce out-of-pocket costs.

During consideration of the ACA, the U.S. House of Representatives adopted an amendment by then-Representative Bart Stupak (R-Mich.) that prevented taxpayer-subsidized plans from covering elective abortion, consistent with the Hyde Amendment.³ However, the Senate version of the ACA did not include such a prohibition. Instead, it included, in what ultimately became law, Section 1303 authored by then-Senator Ben Nelson (D-Neb.). Under Section 1303, health insurance plans on the exchanges may cover elective abortion and still receive taxpayer funds, but they must incorporate separation and transparency requirements regarding abortion.

Section 1303 permits States to enact laws that prohibit abortion coverage altogether in plans offered on the exchanges.⁴ If an exchange plan issuer chooses to cover elective abortions in States where permitted (or required), the law mandates that the following requirements must be satisfied:

- The plan cannot use an amount attributable to Federal subsidies in the form of the APTCs or CSRs to pay for elective abortions.⁵

¹ For the most recent enactment of the Hyde Amendment, see Consolidated Appropriations Act, 2021, Public Law 116-260, Div. H, sections 506-507. In this comment letter, the term “elective abortions” refers to abortions except in those cases allowed under the current version of the Hyde Amendment (rape, incest, and endangerment to the life of the mother).

² 31 U.S.C. § 1324(b)(2).

³ 155 Cong. Rec. H12921 (Nov. 7, 2009), <https://www.congress.gov/congressional-record/2009/11/07/house-section/article/H12623-3>.

⁴ ACA § 1303(a)(1); In plan year 2021, 26 states have legislation in effect that prohibits elective abortion from being covered according to [ObamacareAbortion.com 2021 Factsheet](https://downloads.frc.org/EF/EF20L25.pdf), <https://downloads.frc.org/EF/EF20L25.pdf>.

⁵ ACA § 1303(a)(2)(A).

- Plan issuers “must collect from each enrollee in the plan (without regard to the enrollee’s age, sex, or family status) a separate payment” for both an amount equal to the “actuarial value” of the elective abortion coverage and an amount equal to the rest of the premium, after reducing for APTCs and CSRs.⁶
- Plan issuers must “deposit all such separate payments [for elective abortion] into separate allocation accounts.”⁷ One separate allocation account consists solely of such payments and is used exclusively to pay for elective abortions.⁸
- The estimate of the actuarial value of the elective abortion coverage cannot be less than \$1 per enrollee per month, and may not take into account cost reductions to the insurer relating to prenatal care, delivery, or postnatal care.⁹
- The plan must provide a notice to enrollees of the elective abortion coverage as part of the summary of benefits and coverage explanation at the time of enrollment.¹⁰

II. The Obama Administration’s combined payment policy violated Section 1303. The 2019 Program Integrity Rule restored the rule of law.

Defying Congressional intent and the plain text of Section 1303, the Obama Administration permitted health insurers receiving taxpayer subsidies for plans on the ACA exchanges to collect premiums for elective abortion coverage and the rest of the premium in a “single transaction.”¹¹ HHS stated this policy expressly in the preamble to the final rule promulgated on February 27, 2015, titled, “*The Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016*” (80 FR 10750) (“2016 Payment Notice”). The 2016 Payment Notice improperly indicated that the law’s separate payment requirement could be satisfied in “a number of ways,” some of which involve a combined payment, rather than a separate one, including:

Sending the enrollee a single monthly invoice or bill that separately itemizes the premium amount for non-excepted abortion services; sending a separate monthly bill for these services; or sending the enrollee 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.¹²

For reasons described below, the first and third of these methods are completely inadequate to satisfy the Section 1303 separate payment requirements.

⁶ ACA § 1303(a)(2)(B)(i).

⁷ ACA § 1303(a)(2)(B)(ii).

⁸ ACA § 1303(a)(2)(C)(ii).

⁹ 80 FR 10840.

¹⁰ ACA § 1303(a)(3)(A).

¹¹ 80 FR 10840.

¹² 80 FR 10840.

The Obama Administration’s unlawful policy guidance was corrected by the Trump Administration through the final rule titled “*Patient Protection and Affordable Care Act; Exchange Program Integrity*”, 84 FR 71674, December 27, 2019 (“2019 Program Integrity Rule”). The 2019 Program Integrity Rule, which established the current separate billing regulations, faithfully implemented Congress’s direction in Section 1303 by mandating that issuers “send to each policy holder of a QHP [qualified health plan] monthly bills” for the elective abortion coverage and the rest of the premium “either by sending separate paper bills which may be in the same envelope or mailing, or by sending separate bills electronically, which must be in separate emails or electronic communications.”¹³ Additionally the rule requires that issuers must “[i]nstruct the policy holder to pay” the bills for the elective abortion coverage and the rest of the premium “through separate transactions.”¹⁴

While the 2019 Program Integrity Rule is not yet in effect due to ongoing litigation, the rule is clearly grounded in the plain meaning of the law and, if implemented, would adhere to both letter and the spirit of the separate payment requirements that Congress enacted in Section 1303.

III. The Proposed Rule Violates the Plain Text and Congressional Intent of Section 1303.

The Proposed Rule violates the plain text and Congressional intent of Section 1303. Specifically, the Proposed Rule would eliminate the separate abortion billing requirements of the 2019 Program Integrity Rule and put in its place the Obama-era guidance that illegally allowed separate payments to be made together:

An issuer will be considered to satisfy the obligation in paragraph (e)(2)(i) of this section [the abortion separate payment requirements] if it sends the policy holder a single monthly invoice or bill that separately itemizes the premium amount for coverage of abortion services described in paragraph (d)(1) of this section [elective abortions]; sends the policy holder a separate monthly bill for these services; or sends 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 specifies the charge.¹⁵

The first and third of these methods -- itemizing or providing advance notice of elective abortion coverage -- are completely inadequate to satisfy the Section 1303 requirement that issuers “must collect from each enrollee in the plan (without regard to the enrollee’s age, sex, or family status) a separate payment.”¹⁶ Under the first method, the issuer would merely have to itemize the abortion surcharge separately on the monthly bill, but would still collect monthly premiums in a combined payment, rather than two separate payments. Under the third option, the issuer would

¹³ 45 CFR 156.280(e)(2)(ii)(A).

¹⁴ 45 CFR 156.280(e)(2)(ii)(B).

¹⁵ 86 FR 35216.

¹⁶ ACA § 1303(a)(2)(B)(i).

simply send the policyholder a single advance notice of the abortion surcharge around the time of enrollment, perhaps buried in many pages of paperwork and plan documents. After this advance notice is provided, the abortion surcharge would be completely hidden to the consumer, embedded, but not disclosed, within the monthly premiums that are once again collected in single combined, rather than separate, payments.

Both of these proposed alternative compliance methods unmistakably violate the law and eliminate transparency, making it harder for consumers to know whether their plan covers abortion and if they are paying for such coverage. Such lack of transparency is of particular concern for consumers who have strong moral or religious convictions against paying premiums for plans that subsidize abortions for themselves, their dependents, or for other enrollees in the plan. HHS should also require in regulation that exchange plans that cover abortion, and the extent of such coverage, should be clearly indicated during the shopping experience, whether on HealthCare.gov, a state-based exchange, or otherwise.

Contrary to the apparent assumption of the Proposed Rule, the word “separate,” as used in the law, has a real meaning. According to Merriam-Webster Dictionary, the word “separate” means “to set or keep apart.”¹⁷ Under no reasonable construction of the term “separate payment” can it mean a single or combined payment. It is obvious that a legal requirement to engage in a course of conduct cannot be satisfied by the opposite of the prescribed conduct.

Section 1303 also reinforces the separate payment requirement with the added stipulation for payroll deposits that “[i]n the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit.”¹⁸ The fact that Section 1303 expressly requires separate deposits for elective abortion coverage in the case of premiums paid through employee payroll deposits further supports the correct interpretation that insurers must also collect these payments from individuals through separate transactions.

Under this interpretation, if a separate payment can mean one or a combined payment, then a separate allocation account can also mean one or a combined account, and a separate employee payroll deposit can mean a single combined deposit. Therefore, in order to achieve consistent interpretation, HHS must extend its correct construction of “separate” in the context of separate allocation accounts to also require the collection of truly separate payments.

The legislative history regarding Section 1303 is also clear that the law requires completely separate billing for elective abortion coverage. During legislative debate on Section 1303, then-Senator Ben Nelson (D-Neb.) restated explicitly what was already clear from the language of the text itself:

¹⁷ <https://www.merriam-webster.com/dictionary/separate>, as accessed on July 16, 2021.

¹⁸ ACA §1303(a)(2)(B).

...if 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.¹⁹

Since Senator Nelson is the author of Section 1303 and one of the key votes necessary for passage of the ACA, his description of that provision carries significant weight in specifying its intended purpose. The meaning of Section 1303 is straightforward and Congressional intent is clear. Insurance companies offering taxpayer-subsidized ACA exchange plans that cover elective abortion must send two separate bills to consumers, who must then pay those bills separately. The Proposed Rule flies in the face of the law and Congressional intent.

The Notice of Proposed Rulemaking also seeks comment on a “technical” change to the section heading in 45 CFR § 156.280, to eliminate the reference to “Separate billing” for abortions and instead only refer to the “Segregation of funds” for abortions.²⁰ This technical change is inappropriate and further enshrines the Proposed Rule’s attempt to establish regulations that deviate from the law, for the same aforementioned reasons.

IV. Faulty Reasoning in the Preamble to the Proposed Rule

The preamble to the Proposed Rule employs faulty reasoning that undermines the justifications provided for the rule change and makes the proposed changes arbitrary and capricious.

First, HHS attempts to justify its provision of alternative compliance methods (itemizing or providing advance notice of elective abortion coverage) on the basis that “Section 1303 does not specify the method a QHP [qualified health plan] issuer must use to collect the separate payment”.²¹ This statement is misleading at best. The fact that there are several ways for insurers to collect payments for premiums (by mail, online, etc.) does not grant HHS authority to rewrite the law and allow such “separate” payments to be made “together.”

Second, HHS attempts to justify the Proposed Rule on the grounds that increasing coverage of abortion through taxpayer-subsidized ACA exchange plans “promot[es] health equity.”²² HHS argues that “the high burden associated with the [2019] separate billing regulation might result in issuers withdrawing coverage of abortion services for which federal funds are prohibited

¹⁹ 155 Cong. Rec. S14134 (Dec. 24, 2009), <https://www.congress.gov/111/crec/2009/12/24/CREC-2009-12-24-pt1-PgS14132.pdf>.

²⁰ 386 FR 35177.

²¹ 86 FR 35179.

²² Ibid.

altogether to avoid the associated burden, requiring some enrollees to pay for these services out-of-pocket”.²³ Stated differently, the Proposed Rule notes that eliminating the 2019 Program Integrity Rule would *increase* the prevalence of elective abortion coverage on the ACA exchanges, which are heavily subsidized by Federal taxpayer funds:

Based on a 2014 study, the average costs to patients for first trimester abortion care was \$461, and anywhere from \$860 to \$1,874 for second-trimester abortion care. Transferring these costs to enrollees could disproportionately impact low income women who may already face barriers to accessing quality health care due to their socioeconomic status, gender, sexual orientation, nationality, or race. We believe proposing repeal of the separate billing regulation would remove these burdensome requirements and obstacles, promoting health equity.²⁴

While we agree with HHS that the Proposed Rule would increase the incidence of abortion, we disagree that “abortion” is “quality health care” and that promoting abortion can be in any way considered “promoting health equity.” Brutally killing an innocent unborn child is not health care. Far from advancing equity, or even equality, increasing ACA taxpayer funding for plans that provide abortion coverage by finalizing the Proposed Rule may exacerbate the tragic disparity in the abortion rate among lower income women and racial minorities, particularly black women. Black women have abortions at nearly four times the rate of white women,²⁵ and are especially targeted by the abortion industry, whose abortion centers are disproportionately located in minority neighborhoods.²⁶

Third, along the same lines, the preamble to the Proposed Rule speculates, without evidence, that enforcing the abortion separate billing requirement “would disproportionately harm and burden communities who already face barriers to accessing care and that any potential coverage losses caused by the separate billing regulation could further exacerbate existing health disparities and jeopardize health outcomes.”²⁷ HHS makes this assumption and other similar statements throughout the Proposed Rule without providing any evidence that certain groups of people are any less capable of paying a separate insurance bill for elective abortion than others. HHS must be able to provide evidence to substantiate its assertions; in any event, such arguments cannot justify violating the express terms of an Act of Congress.

²³ Ibid.

²⁴ Ibid.

²⁵ Centers for Disease Control and Prevention, Abortion Surveillance – United States, 2016 (Nov. 29, 2019); <https://www.cdc.gov/mmwr/volumes/68/ss/ss6811a1.htm#suggestedcitation>, as cited in “Answers to Common Attacks Against the Hyde Amendment”, U.S. Conference of Catholic Bishops, Secretariat of Pre-Life Activities, October 2020, <https://www.usccb.org/resources/Answers%20to%20Common%20Attacks%20Against%20the%20Hyde%20Amendment.pdf>

²⁶ Willis L. Krumholz, “Yes, Planned Parenthood Targets And Hurts Poor Black Women”, *The Federalist*, February 18, 2016, <https://thefederalist.com/2016/02/18/yes-planned-parenthood-targets-and-hurts-poor-black-women/>

²⁷ 86 FR 35179.

Fourth, the Proposed Rule’s analysis of costs and burdens of both the 2019 Program Integrity Rule and the Proposed Rule fails to address or take into account recent changes in the law made by the American Rescue Plan Act (“ARPA”, March 11, 2021, Public Law 117-2). Under ARPA’s greatly enhanced taxpayer subsidies for ACA exchange plans in 2021 and 2022, millions of Americans are newly eligible for zero-dollar coverage under certain exchange plans.²⁸ However, in states like California, New York, and Maryland, where all or most ACA exchange plans cover elective abortion, consumers are not able to purchase a zero-dollar premium plan, because APTCs cannot legally be paid toward the abortion surcharge of at least \$1 per enrollee per month, as the Proposed Rule itself admits.²⁹ Consequently, individuals whose full monthly premium only consists of the small abortion surcharge are already paying, in effect, a “separate bill” for that coverage and would not face additional burdens under the current regulations established by the 2019 Program Integrity Rule. We ask that HHS reconsider its analysis to take into account this reality and, furthermore, to explain how the Department will enforce the elective abortion surcharge for otherwise zero-premium exchange plans. We also request that HHS provide a state-by-state analysis of the effects of the Proposed Rule.

V. Conclusion

The Proposed Rule directly violates the express text, clear meaning, and Congressional intent of Section 1303. In construing “separate” to mean “together,” the Proposed Rule would illegally allow insurance companies to collect combined payments for elective abortion coverage, rather than separate payments as the law requires. The Proposed Rule also undermines consumer transparency and makes it harder for consumers to know whether their plan covers abortion, which may lead many to pay for abortions in violation of their consciences or religious beliefs. Accordingly, HHS should withdraw the proposed “Segregation of Funds for Abortion Services (§156.280)” provisions set forth in this Proposed Rule.

The timing of the Proposed Rule is also concerning. Notably, President Biden and Congressional Democrats have announced their intentions to use the partisan budget reconciliation process to make permanent the ARPA increased taxpayer subsidies for ACA exchange plans, without the protections of the Hyde Amendment and at an estimated cost to taxpayers of \$200 billion over 10 years.³⁰ The purpose and effect of the Proposed Rule, in tandem with partisan legislative efforts to expand the ACA, will be to increase taxpayer funding for abortion on demand, to the financial benefit of Planned Parenthood and the abortion industry.

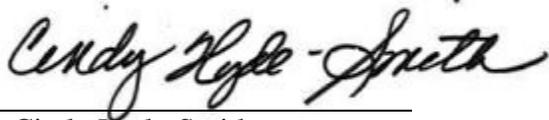
²⁸ “Fact Sheet: The American Rescue Plan: Reduces Health Care Costs, Expands Access to Insurance Coverage and Addresses Health Care Disparities”, HHS, March 12, 2021, <https://www.hhs.gov/about/news/2021/03/12/fact-sheet-american-rescue-plan-reduces-health-care-costs-expands-access-insurance-coverage.html>.

²⁹ 86 FR 35171.

³⁰ “Fact Sheet: The American Families Plan”, April 28, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>.

HHS should rigorously enforce the separate abortion payment requirements in the law, as directed by Congress and faithfully implemented by the current regulations, and promptly withdraw the provisions in the Proposed Rule to the contrary.

Sincerely,



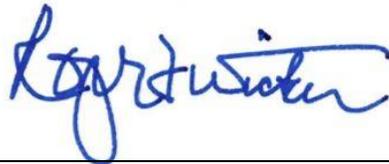
Cindy Hyde-Smith
United States Senator



Steve Daines
United States Senator



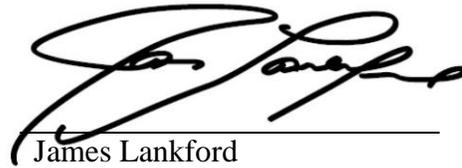
M. Michael Rounds
United States Senator



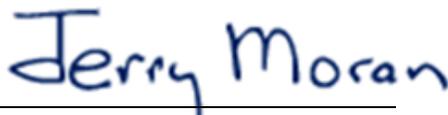
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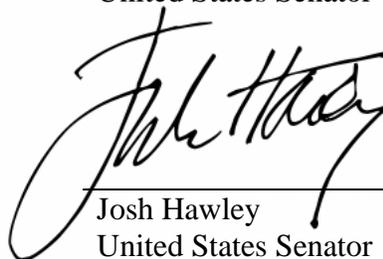
John Thune
United States Senator



Marsha Blackburn
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Todd Young
United States Senator



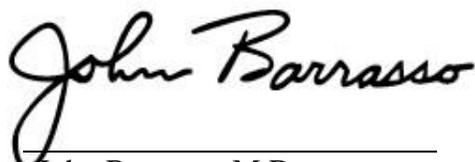
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John Cornyn
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