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*Submitted Electronically*

December 12, 2018

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-9922-P
P.O. Box 8016
Baltimore, MD 21244-8010

**Subj: Patient Protection and Affordable Care Act; Exchange Program Integrity, CMS-9922-P (RIN 0938-AT53)**

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("USCCB"), we submit the following comments on the proposed rule, published at 83 Fed. Reg. 56015 (Nov. 9, 2018), on ensuring the program integrity of insurance exchanges created under the Affordable Care Act ("ACA"). We write specifically about the proposed rule's treatment of elective abortions.

ACA departed from the longstanding principle, embodied in the Hyde Amendment, that federal funds not pay for abortions or health plans that cover abortion. Instead, ACA provides that health insurance issuers (1) must not use federal subsidies to pay for elective abortions, (2) must collect from each enrollee in the plan a "separate payment" of not less than $1 per month for any elective abortions coverage, and (3) must deposit these separate elective abortion payments into "a separate account that consists solely of such payments and that is used exclusively to pay" for elective abortions. 42 U.S.C. § 18023(b)(2) (collectively "separation requirements").

The Department, of course, cannot amend this statute or any other. That is up to Congress.[1] However, until ACA is amended to prohibit use of federal funds to pay for health plans that cover abortions, it is the Department's responsibility to enforce the separation requirements that Congress made part of ACA.

These requirements are an explicit and unambiguous statutory command. If there were any ambiguity (and there is none), it would be resolved by legislative history. That history makes clear, just as the statute does, that Congress intended that payments and accounts for elective abortions be kept separate from other funds. As then-Senator Ben Nelson explained: "the insurance company must bill you separately from your own personal funds … for … 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."[2]

As over a hundred Members of Congress correctly noted in a letter to the Department on August 6, 2018, the previous administration "failed to enforce" the separation requirements, and a 2014 Government Accountability Office Report found than many insurers were simply ignoring them.[3] Thus, the separate charge for abortion in practice has been "all but invisible," depriving consumers of the needed transparency and allowing many unwittingly (and contrary to their religious and moral convictions) to purchase plans that include abortion coverage.[4]

Enforcement of the separation requirements, enacted eight years ago as part of ACA, is therefore long overdue. We commend the Administration for the proposed rule and we urge its adoption as a final rule. Adoption of the rule will allow consumers to know what they are paying for and, armed with this information, to avoid coverage of elective abortions consistent with their conscience.

The Administration should consider taking one additional step, however. It can be expected that many people will object to paying for coverage of elective abortions. We believe the Administration should make clear that insurers may allow people to opt out of coverage for elective abortions and to avoid the separate charge for such coverage by opting out. The best place to do that would be in the actual text of the regulations. If the Administration concludes, however, that the regulatory text is not the place to recognize such an opt out, at a minimum it should do so, and do so explicitly, in the preamble to the final regulations.

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[1] Indeed, the House of Representatives has acted on at least four separate occasions to remedy ACA's violation of Hyde. *See* "No Taxpayer Funding for Abortion Act," H.R. 7.

[2] 155 Cong. Rec. S14134 (Dec. 24, 2009), http://www.gpo.gov/fdsys/pkg/CREC-2009-12-24/pdf/CREC-2009-12-24-pt1-PgS14134-2.pdf#page=1.

[3] https://chrissmith.house.gov/uploadedfiles/2018-08-06_-_smith_letter_on_section_1303_-_abortion_funding_transparency.pdf.

[4] *Id*. at 2.

## Conclusion

We urge adoption of the proposed rule, but also encourage the Administration to recognize, in the regulatory text (or, at a minimum, in the preamble to the final rule) that insurers may allow people to opt out of coverage for elective abortions and to avoid the separate charge for such coverage by opting-out.

Thank you for the opportunity to comment.

Sincerely,

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel

Michael F. Moses
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