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Submitted Electronically

July 24, 2021

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-9906-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Subj: Patient Protection and Affordable Care Act; Segregation of Funds Relating to Abortion, CMS-9906-P (RIN 0938-AU60)

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 86 Fed. Reg. 35156 (July 1, 2021), on requirements, enacted as part of the Affordable Care Act (ACA), relating to the segregation of payments for elective abortions.

The ACA departed from the longstanding principle, embodied in the Hyde Amendment, that federal funds not pay for elective abortions or health plans that cover such abortions. 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 or any other Act of Congress. Until Congress amends the ACA to prohibit use of federal funds to pay for health plans that cover

elective abortions, it is the Department's responsibility to enforce the separation requirements that Congress made part of the ACA.

Those requirements are an explicit and unambiguous statutory command. If there were any ambiguity (there is none in our view), 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."[1]

As noted by over a hundred Members of Congress in a letter to the Department on August 6, 2018, HHS had initially "failed to enforce" the separation requirements, and a 2014 Government Accountability Office Report found than many insurers were simply ignoring them.[2] Thus, for some time, the separate charge for elective abortions in practice had 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.[3]

The problem was addressed and largely corrected in 2019. That year, HHS adopted a final rule, 84 Fed. Reg. 71674 (Dec. 27, 2019), that required insurers to send separate bills, and collect separate payments, for elective abortions. 45 C.F.R. § 156.280(e)(2)(ii).

The rule now proposed by HHS would turn the clock back by eliminating the 2019 regulatory requirements of separate billing and separate payment even though those requirements are literally written into the statute. 86 Fed. Reg. at 35216. The proposed rule would allow insurers to meet the separation requirements merely by separately *itemizing* the amount for elective abortions, or by providing a *notice* after enrollment of the separate charge for such abortions. On its face, this is insufficient because 42 U.S.C. § 18023, by its express terms, requires "separate payment[s]" and deposits into "separate account[s]" for elective abortions.

We urge HHS to retain the 2019 regulatory requirements of separate billing and separate payments for elective abortion as those requirements faithfully mirror what the ACA commands.

In addition, we urge HHS to take one additional step. 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.

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[1] 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.

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

[3] *Id*. at 2.

Conclusion

We object to the proposed revision of section 156.280(e)(2)(ii). In addition, we encourage the Administration to 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.

Thank you for the opportunity to comment.

Sincerely,

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

Michael F. Moses
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