December 22, 2014

Submitted Electronically
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G
200 Independence Avenue SW.
Washington, DC 20201

Re: Public Comments in Regard to Proposed Rule Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016
File Code: CMS-9944-P

Dear Sir or Madam,

The Family Research Council (FRC) respectfully submits the following comments on the Proposed Rule setting forth payment parameters and provisions related to user fees for federally-facilitated Exchanges (79 Fed. Reg. 70674, November 26, 2014). Of particular interest to FRC is the proposed rule regarding the payment of the abortion surcharge.

The proposed rule as laid forth by the Department of Health and Human Services (HHS) as described in Section G. On the Segregation of Funds for Abortion Services (§156.280) (79 Fed. Reg. 70729) is problematic because it does not comply with Affordable Care Act's (ACA) provision requiring an actual "separate payment"; it does not address the lack of transparency prior to enrollment; it does not require separate *itemization* of the abortion surcharge; and it does not offer guidance on *how* the abortion surcharge should be kept separate from federal funds. The following is an explanation of each of these concerns.

It Does Not Comply With ACA's Requirement of an Actual "Separate Payment"

First, it does not comply with the statutory requirement of ACA that an actual "separate payment" be made and segregated, but rather further endorses the existing accounting gimmick. The fact that the proposed rule does not even require the abortion surcharge to be paid separately contradicts claims that the ACA is not subsidizing abortion.

Section 1303(b)(2)(B) of the ACA, as implemented in §156.280(e)(2)(i), requires that individual market Exchange issuers collect a "*separate payment*" of at least $1 per month for abortion, per enrollee of a plan that covers elective abortion. The law requires a separate payment for elective abortion coverage.

In order for ACA to pass, then-Senator Ben Nelson (D-NE) and Sen. Harry Reid (D-NV) offered this key provision and amendment in December 2009: "…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...."[1]

In 2009, President Obama promised: "Under our plan, no federal dollars will be used to fund abortions."[2] Yet, the Government Accountability Office (GAO) report that was released on September 16, 2014[3] proves that taxpayer funds are being used to subsidize abortion-on-demand in over 1,000 plans on the Exchange, contrary to what the President claimed. The ACA circumvents the Hyde Amendment by subsidizing plans that include elective abortion. According to the Congressional Budget Office (CBO), over the next 10 years $855 billion in taxpayer funds in the form of advanceable, refundable tax credits will be used for ACA plans,[4] including plans that cover elective abortion. This proposed rule shows that there is no legal requirement that the abortion surcharge be kept separate from federal money paying for these plans.

It Does Not Address the Lack of Transparency Prior to Enrollment

Second, the proposed rule does not address the lack of transparency prior to enrollment. Consumers have a right to know at any time before and during enrollment whether the plans they are considering cover elective abortion, if they will be paying an abortion surcharge, how much that surcharge will be, and how the issuer will deposit funds into a separate allocation account.

In our own research, we have discovered that there is no consistent transparency when it comes to which insurance carriers and plans cover elective abortion. The elective abortion coverage of various insurance carriers is often not revealed on their website or in their summaries of benefits, leaving consumers without crucial knowledge at the time of enrollment. Further, numerous insurance carriers have provided conflicting information about their abortion coverage or simply did not know their own company's policy on abortion coverage.

The proposed rule must be modified to address the serious transparency issues about abortion coverage present to consumers prior to and during enrollment.

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[1] "113th Congress 2D Session H.R. 7 AN ACT To prohibit taxpayer funded abortions.," U.S. Government Printing Office, accessed December 22, 2014, http://www.gpo.gov/fdsys/pkg/BILLS-113hr7eh/pdf/BILLS-113hr7eh.pdf.
[2] "Remarks by the President to a Joint Session of Congress on Health Care," The White House Office of the Press Secretary, accessed December 22, 2014, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care.
[3] "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans," U.S. Government Accountability Office, September 15, 2014, accessed on December 22, 2014, http://www.gao.gov/assets/670/665800.pdf.
[4] "Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, 2014," Congress of the United States Congressional Budget Office, accessed on December 22, 2014, http://www.cbo.gov/sites/default/files/cbofiles/attachments/45231-ACA_Estimates.pdf.

It Does Not *Require* Separate Itemization, Legitimizing Even Less Transparency Once Enrolled

Third, the proposed rule permits the insurance issuer to itemize the abortion surcharge, but does not require that the issuer even do so. The rule legitimizes an option in which an insurer does not need to itemize any abortion surcharge. It states: "Section 1303 of the Affordable Care Act permits, but *does not require* a QHP issuer to separately identify the premium for non-excepted abortion services on the monthly premium bill in order to comply with the separate payment requirement." [Italics, for emphasis.]

Since the proposed rule states that the reporting requirements would be fulfilled even if the abortion surcharge was not itemized, it allows insurers to hide any abortion surcharge from consumers. This loophole relieves insurers of any accountability toward consumers' informed consent about paying a secret abortion surcharge, many of whom would have a conscientious objection to doing so.

The GAO report confirmed that out of the 18 insurance issuers that were interviewed, none of them collected the abortion surcharge separately, per ACA requirements. The GAO report stated that the issuers "did not itemize the premium amount associated with non-excepted abortion services coverage on enrollees' bills nor indicate that they send a separate bill for that premium amount." Officials from one issuer vaguely told them "that their bills indicate that there is a $1 charge 'for coverage of services for which member subsidies may not be used'."

HHS should neither permit nor legitimize options that hide and deceive consumers about how their money is being used. This proposed rule would encourage even more secrecy about the abortion surcharge. There is serious reason to be concerned about the lack of transparency that this rule would codify.

It Does Not Offer Guidance and Enforcement to Ensure Separate Allocation Accounts

Fourth, the rule does not offer guidance on *how* the abortion surcharge is to be kept separate from federal funds as required by the plain text of section 1301(b)(2)(C) of ACA as implemented in §156.280(e)(2)(ii) and 156.280(e)(3). Nor does it provide guidance on how this will be enforced.

When the GAO released the report showing that none of the issuers collected the abortion surcharge separately nor were itemizing the bill, the Centers for Medicare and Medicaid Services (CMS) said they "will work with stakeholders, including states and issuers, so they fully understand and comply with the federal law prohibiting the use of federal funds for abortions."

The itemization on paper was not even taking place. Yet, even if issuers had itemized the abortion surcharge, itemization on paper does not in fact guarantee that the abortion surcharge is actually being segregated into a different account.

HHS, in the proposed rule, puts the full weight of enforcement on states and state insurance commissioners, without any other enforcement mechanism in place: "As is the case with many

provisions in the Affordable Care Act, States and State insurance commissioners are the entities primarily responsible for implementing and enforcing the provisions in section 1303 of the Affordable Care Act related to individual market QHP coverage of non-excepted abortion services" (70729). It does not provide a mechanism of enforcement of the federal requirement.

Conclusion

FRC urges HHS to modify this proposed rule to reflect current law requiring that the abortion surcharge be a "separate payment" in actuality. Further, the proposed rule should require that issuers make abortion coverage and the abortion surcharge completely transparent to consumers before and during enrollment. The proposed rule should also *require* that all issuers itemize the abortion surcharge (for those paying for plans with elective abortion) so that they can give full informed consent. Lastly, the proposed rule should create an enforcement mechanism to make sure that issuers comply with the law.

Ultimately, this proposed rule shows how flimsy the ACA is when claims are made that it guarantees that no federal money will be used to subsidize abortion-on-demand and that insurance carriers are transparent about elective abortion coverage and the abortion surcharge in their plans.

Respectfully Submitted,

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