

January 8, 2019

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

Submitted electronically

**Re: Comments in Response to Patient Protection and
Affordable Care Act, Exchange Program Integrity NPRM,
CMS-9922-P**

To Secretary Azar and Administrator Verma:



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The American Civil Liberties Union (“ACLU”) submits these comments on the proposed rule published on November 9, 2018 with the title “Patient Protection and Affordable Care Act, Exchange Program Integrity.”

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU has a long, proud history of vigorously defending reproductive freedom in Congress and in the courts. We have participated in nearly every critical case concerning reproductive rights to reach the Supreme Court and advocated for policies that promote access to reproductive health care. The ACLU strongly opposes the Department of Health and Human Services’ (the “Department”) proposed rule (“Proposed Rule”), which is an attempt to eliminate insurance coverage of abortion in the Affordable Care Act (“ACA”) marketplaces.

The ACA allows insurance plans participating in ACA marketplaces to decide for themselves whether or not to provide abortion as part of a comprehensive health insurance plan. Section 1303 of the ACA, however, sets out “special rules” that these insurers must follow in order to cover abortion beyond the limited exceptions allowed under the discriminatory and harmful federal Hyde Amendment.¹ These “special rules” inappropriately treat abortion differently from all other health services and reinforce harmful stigma surrounding abortion care. Nevertheless, they have been implemented by issuers offering coverage in ACA marketplaces, state insurance commissioners, and—prior to the Proposed Rule—the federal government, in ways that minimize the burdens on consumers and plans, and that allow plans to continue providing insurance coverage of abortion as part of comprehensive plans offered in the marketplace.

The Proposed Rule imposes onerous new burdens on both issuers and consumers that could eliminate abortion coverage in many parts of the country. This is a violation of congressional intent. Given that abortion is a common procedure—one in four women in the U.S. will have an abortion by age 45²—by pushing abortion further out of reach, the Proposed Rule threatens the health, well-being, and economic security of more than a million individuals across the country. For these reasons, the ACLU calls on the Department to withdraw the Proposed Rule in its entirety.

I. The Proposed Rule Would Impose Unnecessary and Onerous Burdens on Insurers that Would Force Them to Drop Abortion Coverage in the Marketplace, a Result that Would Be Contrary to Congressional Intent.

- a) *The Proposed Rule would force many health insurers to drop abortion coverage.*

The Proposed Rule would impose burdensome and costly requirements on insurers with the goal of forcing them to drop abortion coverage. Specifically, the Proposed Rule would force insurers to allocate additional, significant administrative resources towards issuing and processing payments from multiple instruments from each subscriber, needlessly raising administrative and personnel costs.³ Issuers have repeatedly expressed their opposition to such requirements for these reasons. For example, America’s Health Insurance Plans (AHIP) has stated that it does “not

¹ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1303 (2010), *amended by* Health Care and Education Affordability Act, Pub. L. No 111-152 (2010). *See also* “Hyde Amendment” Dep’t of Defense and Labor, Health and Hum. Serv., and Educ. Appropriations Act, 2019, Pub. L. No. 115-245, §§ 506-507.

² Jones RK and Jerman J, *Population group abortion rates and lifetime incidence of abortion: United States, 2008–2014*, AM. JOURNAL OF PUBLIC HEALTH, 2017, doi:10.2105/AJPH.2017.304042.

³ While the Proposed Rule contemplates some additional costs for insurers and consumers, the Department has likely grossly underestimated the burden this rule would impose.

support any requirements to itemize the cost of, or separately bill for specific benefits that are incorporated in a comprehensive benefit plan.”⁴ That is because such requirements go against standard practice in the insurance industry.

Given the costly and significant administrative burdens that the Proposed Rule would impose, many insurance companies could be forced to drop abortion coverage altogether. This appears to be the Department’s goal. Just last year, the Department issued guidance reaffirming longstanding regulations implementing Section 1303, but now the Department has made a complete reversal by proposing a new, expensive, and purposely onerous framework for insurers that want to continue covering abortion in the marketplace. The fact that the Department is proposing to give insurers such a short time period to implement the new regime is further evidence that the Proposed Rule is meant to coerce insurers into dropping abortion coverage. In short, this proposal is just the latest in the Department’s attempts to stigmatize abortion and eliminate all insurance coverage of abortion.

b) *The Proposed Rule violates Congressional intent.*

Congress passed the Section 1303 special rules after rejecting more extreme alternatives that would have eliminated abortion coverage in the marketplace.⁵ Instead, Section 1303 makes clear that – absent a state law to the contrary – insurers offering marketplace coverage can decide for themselves whether to cover abortion. But the Proposed Rule’s onerous requirements will effectively take that decision away from issuers. By forcing insurers to drop coverage and eliminating abortion coverage in many parts of the country, the Proposed Rule would violate Congressional intent regarding Section 1303.

This would also present special challenges to states that require insurance plans regulated by the state to cover abortion, recognizing the importance of abortion coverage to women’s health and economic security.⁶ The Proposed Rule’s new onerous burdens would interfere with those policies, in direct conflict with the plain language of the ACA. Section 1303(c)(1) clearly states that “Nothing in this Act shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of *(or requirement of)* coverage....” (emphasis added).

The Proposed Rule is also contrary to Congress’ intent in passing Section 1554 of the ACA, which prohibits the Secretary of HHS from promulgating any regulation that “creates any unreasonable barriers to the ability of individuals to obtain

⁴ America’s Health Insurance Plans (AHIP), Comment Letter on HHS Notice of Benefit and Payment Parameters for 2016 (CMS-9944-P) (Dec. 22, 2014).

⁵ See e.g. Huma Khan & Z. Byron Wolf, *Senators Defeat Anti-Abortion Amendment in Health Care Bill By 54-45*, ABC News, Dec. 8, 2009, <http://abcnews.go.com/Politics/HealthCare/senators-defeat-abortion-amendment-health-care-bill/story?id=9279079> (last visited Dec. 19, 2018).

⁶ E.g., New York requires comprehensive insurance plans to cover medically necessary abortion. Title 11 NYCRR. 52.1(p), available at https://www.dfs.ny.gov/insurance/r_finala/2017/rf62a48txt.pdf.

appropriate medical care.”⁷ It would clearly create new, unreasonable barriers to obtaining health care by causing people to lose insurance coverage, as detailed below. Additionally, the unnecessary administrative burdens the Proposed Rule would impose on insurers who offer plans providing coverage for abortion are unlawful “unreasonable barriers” under Section 1554, as is the confusion among consumers that the Proposed Rule would create.

II. The Proposed Rule Will Impose Significant Costs on Consumers and Lead to Confusion, which Could Potentially Jeopardize Individuals’ Health Coverage.

a) The Proposed Rule would impose significant costs on consumers.

The Proposed Rule, if finalized, would impose significant costs on consumers. The Department estimates the Proposed Rule will cost consumers more than \$30 million, but the actual cost would likely be much higher. The Administration failed to account for several costs, including the cost of consumer learning regarding the Proposed Rule’s new billing and payment requirements. The Department itself notes “may have significant upfront costs and could also continue to be resource intensive on an ongoing basis,” but without reason it “excludes” those costs from the anticipated effects of the Proposed Rule.⁸ In arbitrarily excluding these anticipated costs from its analysis, the Department has mischaracterized and failed to reckon with the significant costs its Proposed Rule would impose on consumers. Moreover, the Department fails to account for the costs insurers will likely pass onto consumers as a result of implementing these burdensome requirements. As multiple issuers have indicated, such requirements are likely to confuse consumers as well as impose unnecessary burdens on qualified health plan issuers that are likely to be “passed on to beneficiaries in the form of higher plan premiums.”⁹ Such an outcome would not only undermine one of the primary goals of the ACA – to reduce health care coverage costs – but also the Administration’s oft-repeated goals of “reduc[ing] administrative burdens” of the ACA and “lowering health care costs for Americans.”¹⁰ Finally, the Department fails to account for the potentially devastating costs associated with consumers losing coverage altogether as a result of the rule, as explained below.

b) The Proposed Rule would cause significant consumer confusion and could cause consumers to lose their health coverage entirely.

⁷ 42 U.S.C. § 18114(1).

⁸ Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56015 at 56028 (Nov. 9, 2018).

⁹ ANTHEM, Comment Letter on HHS Notice of Benefit and Payment Parameters for 2016 (CMS-9944-P) (Dec. 22, 2014); see also AHIP, *supra* note 4.

¹⁰ DEPT OF HEALTH AND HUMAN SERV., “Strategic Goal 1: Reform, Strengthen, and Modernize the Nation’s Healthcare System,” *available at* <https://www.hhs.gov/about/strategic-plan/strategic-goal-1/index.html>.

The requirements of the Proposed Rule would create consumer confusion and could put individuals at risk for having their health care coverage cancelled altogether. Requiring consumers to pay two separate bills could result in consumers failing to submit one or both payments, potentially resulting in a loss of coverage for failure to pay the full amount due. In fact, a study by Motivate Design, a research consulting firm, determined that requiring two separate payments by consumers seeking to purchase health care coverage could confuse consumers and cause them to forgo making any payment.¹¹ The Proposed Rule does not address what should happen if a consumer fails to pay, for any number of reasons, the second, smaller payment for the abortion coverage. Since the payment for the abortion coverage is not for separate coverage but rather is part of the policyholder's premium, the failure to make payments properly could be grounds for an insurer cancelling their coverage entirely. This result would frustrate the primary goal of the ACA to make affordable health care coverage widely available.

Indeed, the ACA has led to significant gains in health insurance coverage for many communities of color. For example, millions of Latinxs gained health insurance through the ACA and depend on it for affordable, quality care. In fact, under the ACA, the uninsured rates for Latinas of reproductive age fell by 31 percent.¹² Similarly, since ACA enrollment began in 2013, the uninsured rate for Black people has declined by more than 50 percent. More specifically, fifteen million Black women got coverage through the ACA, and the uninsured rate for Black women fell by nearly 10 percent.¹³ Moreover, between 2010 and 2015, the uninsured rate among Asian-Americans and Pacific Islanders (APIs) fell by more than seven percent. Thanks to the ACA, in a majority of states, more than 80 percent of women of color ages 18-64 now have health insurance; and 3 states and the District of Columbia have achieved almost universal coverage (95 percent or greater) among women of color.¹⁴ The Proposed Rule could lead to individuals in these communities losing coverage.

¹¹ Motivate Design, Comment letter in response to Proposed Rule Regarding Establishment of Exchanges and Qualified Health Plans (CMS-9989-P) Oct. 31, 2011.

¹² Despite these improvements in coverage, Latinas continue to have the highest uninsured rates of any group with 22.4 percent uninsured (compared to 8.0 percent of white peers). Furthermore, Immigrant women of reproductive age who are non-citizens have more than three times the uninsured rate of U.S.-born women of reproductive age in 2017. "Gains in Insurance Coverage for Reproductive-Age Women at a Crossroads." Guttmacher Institute, December 4, 2018, *available at* <https://www.guttmacher.org/article/2018/12/gains-insurance-coverage-reproductive-age-women-crossroads>

¹³ *Id.*

¹⁴ See Nat'l Women's Law Ctr., Health Insurance Coverage of Women of Color 18-64, *available at* <https://nwlc-ciww49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2017/02/WOC-Health-Coverage-by-State-2016.pdf>. NWLC calculations based on American Community Survey 2013 and 2016 1-year estimates using IPUMS-USA, *available at* <https://usa.ipums.org/usa/index.shtml>. Women of color include all women who self-identified as any race other than white, non-Hispanic in the ACS.

III. By eliminating abortion coverage in many parts of the country, the Proposed Rule would threaten consumers' health, well-being, and economic security.

Though abortion is a safe, legal, and constitutionally protected form of medical care in the United States, federal restrictions on insurance coverage, such as those in the Proposed Rule, coupled with increasing federal and state attacks on access to abortion care, often render the constitutional right meaningless. Regardless of whether someone has private or public health insurance, everyone should have coverage for a full range of pregnancy-related care, including abortion. Yet, already, too many are denied abortion coverage because of how much they earn, where they live, or how they are insured. For many, coverage for abortion care means the difference between getting the health care they need and being denied that care. The impact of such a denial can have long-term, devastating effects on a woman and her family's economic future. A study found that a woman who seeks but is denied abortion care is more likely to fall into poverty than a woman who is able to get the care she needs.¹⁵ Additionally, women who are denied access to an abortion have been found to suffer adverse physical and mental health consequences. For example, according to a longitudinal study that is frequently cited in peer-reviewed journals, women denied abortions are more likely to experience eclampsia, death, and other serious medical complications during the end of pregnancy, more likely to remain in relationships where interpersonal violence is present, and more likely to suffer anxiety.¹⁶

As discussed above, the Proposed Rule could result in insurers being forced to drop abortion coverage in marketplaces across the country due to the significant burdens of complying with the procedures in the Proposed Rule. This outcome will fall particularly hard on communities that already face barriers to health care. People of color are more likely to live in poverty and thus less likely to be able to afford abortion care (or other health care) out-of-pocket. Abortion care is often delayed in order to raise the necessary funds, which in turn increases the cost of care. In a 2014 study, the average costs to patients for first-trimester abortion care was \$461, and anywhere from \$860 to \$1874 for second-trimester abortion care.¹⁷ Bans on insurance coverage for abortion put people of color and their families in untenable economic situations. For those who will lose or be denied coverage under this rule,

¹⁵ Diana Greene Foster, PhD, Sarah C. M. Roberts, DrPH and Jane Mauldon, PhD. *Socioeconomic consequences of abortion compared to unwanted birth*. Abstract from the American Public Health Association's annual meeting 2012, available at <https://apha.confex.com/apha/140am/webprogram/Paper263858.html>.

¹⁶ Univ. of California-San Francisco, Turnaway Study, <https://www.ansirh.org/research/turnaway-study>.

¹⁷ See All Above All, The Impact of Out-of-Pocket Costs on Abortion Care Access, Ibis Reproductive Health (Sept. 2016), <https://allaboveall.org/wp/wp-content/uploads/2016/09/OutOfPocket-Impact.pdf>.

the cost of ending a pregnancy could force them to choose between paying for rent or groceries and paying for the care they need.

Abortion access is an essential component of reproductive health care. Black women account for 27.1 percent of all U.S. abortions, although they make up just 14.9 percent of the U.S. female population.¹⁸ Eighteen percent of Latinas will need abortion care over their lifetime, compared to only 10 percent of their white counterparts. AAPI women account for roughly 6 percent of abortion patients, with disproportionate numbers of AAPI foreign-born women experiencing higher rates of abortion: of foreign-born patients, 20 percent are Asian. Various factors, such as Black women's greater likelihood of being poor, unemployed, or working in low-wage jobs without insurance coverage, drive this disproportionate and inequitable abortion rate. These factors create barriers to accessing high-quality reproductive health care, including contraceptive information and other family planning services. Women living in states that have the largest percentage of Black residents face numerous barriers to exercising their right to abortion. These states, where Black people comprise 20 percent or more of the population, each have four to six abortion restrictions that hamper access to abortion care. Latinas, and other people of color, are also more likely to live in poverty and thus less likely to be able to afford abortion care (or other health care) out-of-pocket. AAPI women also comprise a disproportionately high share of the low-wage workforce. As a result, restrictions on abortion care, such as restrictions on insurance coverage of abortion, amplify existing health disparities and disproportionately harm women who already face barriers to accessing quality health care, due to their socioeconomic status, gender, sexual orientation, and race.

LGBTQ people, intersex folks, two-spirit, and gender non-conforming people who can get pregnant rely on a full range of health services, including abortion, to be their whole selves. Despite misconceptions held by policymakers, some medical providers and certain issuers, lesbian and bisexual women require sexual and reproductive health services similar to those needed by heterosexual women. A majority of lesbian and bisexual women have reported having had intercourse with men and at least 30 percent have been pregnant¹⁹ and 16 percent reported one or more abortions.²⁰ Broadly, studies indicate that unintended pregnancies are equally as common, if not more common, for lesbian and bisexual women as for

¹⁸ Jerman J, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, op. cit., available at <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

¹⁹ J.M. Marrazzo and K. Stine, *Reproductive Health History of Lesbians: Implications for Care*, AM. J. OF OBSTETRICS AND GYNECOLOGY (2003).

²⁰ Elizabeth M. Saewyc, Linda H. Bearinger, Robert Wm. Blum and Michael D. Resnick, *Sexual Intercourse, Abuse and Pregnancy Among Adolescent Women: Does Sexual Orientation Make a Difference?*, 31 FAMILY PLANNING PERSPECTIVES 127 (1999).

heterosexual women.²¹ Abortion is necessary health care and must be treated as such, otherwise equitable provision of services will be inhibited and made virtually inaccessible for LGBTQ individuals. All people deserve the right to determine their reproductive future and shape their families in the way they choose. The high likelihood that many insurers would stop covering abortion if the Proposed Rule takes effect would disproportionately impact LGBTQ people.

IV. The Rule’s Separate Payment Requirement Violates the Administrative Procedure Act (“APA”)

The Department published this Proposed Rule in violation of the Administrative Procedure Act (APA). Specifically, the Department failed to comply with the APA’s requirements by acting arbitrarily and capriciously without statutory authority.²² The Proposed Rule conflicts with the fundamental objective of the ACA to provide universal, comprehensive, affordable coverage. Targeting abortion coverage with additional burdensome regulations represents a backdoor ban on abortion that may ultimately push coverage out of reach for many individuals, including low-income families and undermining the very purpose of the statute itself.

In addition, an agency must provide “adequate reasons” for its rulemaking, in part by “examin[ing] the relevant data and articulat[ing] a satisfactory explanation for its action,”²³ and can only change an existing policy if it provides a “reasoned explanation” for disregarding or overriding the basis for the prior policy.²⁴ The Department failed to adequately assess the costs and harms imposed by the Proposed Rule, or to provide adequate reasons for adopting a new interpretation of the separate payment requirement—particularly after years of rulemaking and guidance on this issue.²⁵ HHS’s new belief that its prior rulemakings “do not adequately reflect what we see as Congressional intent” for implementation of the separate payment requirement is a wholly insufficient justification.²⁶

²¹ Caroline S. Hartnett, Lisa L. Lindley and Katrina M. Walsemann, *Congruence across Sexual Orientation Dimensions and Risk*, WOMEN’S HEALTH ISSUES JOURNAL (2016).

²² 5 U.S.C. § 706(2)(A), (B), (C). (Under the Administrative Procedure Act (APA), “agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to a constitutional right,” or “in excess of statutory jurisdiction, authority, or limitations” shall be held unlawful and set aside.)

²³ *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (June 20, 2016) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 103 (1983)).

²⁴ *Id.* at 2125-26.

²⁵ See, e.g., 77 Fed. Reg. 18309 (Mar. 27, 2012); 80 Fed. Reg. 10750 (Feb. 27, 2015); CMS Bulletin Addressing Enforcement of Section 1303 of the Patient Protection and Affordable Care Act (October 6, 2017), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Section-1303-Bulletin-10-6-2017-FINAL-508.pdf>.

²⁶ 83 Fed. Reg. at 56027.

V. Conclusion

The Proposed Rule imposes onerous, unnecessary burdens and costs on insurers and consumers, and is targeted to force insurers to drop abortion coverage altogether. It is contrary to congressional intent regarding abortion coverage, and it will push abortion access out of reach for many. For all of these reasons the ACLU calls on the Department to withdraw the Proposed Rule in its entirety. Should you have any additional questions or require additional information, please contact Georgeanne Usova at gusova@aclu.org.

Sincerely,



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National Political Director



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