

May 14, 2010

Department of Health and Human Services
Attention: DHHS-2010-MLR
Hubert H. Humphrey Building
Room 445-G
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Comments on Health and Human Services -- “Medical Loss Ratios; Request for Public Comments Regarding Section 2718 of the Public Health Service Act”, 75 Fed. Reg. 19297, April 14, 2010.

Dear Secretary Sebelius,

The undersigned groups are writing in response to your request for comments, published April 14, 2010, regarding Section 2718 of the Public Health Service Act.

The medical loss ratio requirement in the Patient Protection and Affordable Care Act which requires health plans in the large and small group market that have a medical loss ratio of less than 85%¹ or 80%² respectively to provide an annual rebate to each enrollee will unduly burden health plans that provide coverage of abortion.

Section §1303(b) of the Patient Protection and Affordable Care Act imposes strict segregation requirements on all health care plans that choose to cover abortion. This is a unique provision that includes the only set of administrative requirements that are attached to a specific medical service for plans offered in the new exchanges under the federal health care reform law. The onerous restrictions on abortion coverage will lead to increased administrative costs for plans that choose to cover abortion which could cause the medical loss ratio for those plans to fall below the specified levels, requiring them to pay a rebate to their enrollees. As compared to plans that do not cover abortion, plans with abortion coverage will be more likely to fall under the medical loss ratio and therefore be penalized for choosing to cover abortion. **We therefore ask that the Secretary draft regulations which will allow the costs imposed by §1303(b) to be excluded from the total amount of premium revenue for the purpose of the ratio calculation under §2718.**

Under § 1303(b), health care plans in the exchanges that include abortion coverage beyond what is permitted under the Hyde Amendment are prohibited from using federal subsidies for those abortion services and must follow strict segregation rules. All health plans that cover abortion services beyond what is permitted under the Hyde Amendment must collect separate payments from individuals enrolled in the plan – one payment for the coverage of abortion and one

¹ States may increase the percentage.

² States may increase the percentage. The Secretary may also lower the percentage for a particular State if the Secretary determines that the 80% medical loss ratio might destabilize the individual market in that State.

payment for the remainder of the premium. The health plan must hold the payments from subsidized individuals in two separate accounts which must consist solely of such payments and can be used “exclusively” to pay for those respective services.

To determine how much to collect for the coverage of abortion, the issuer of the health plan must determine the actuarial value of abortion coverage, without taking into account any cost reduction estimated to result from such coverage, including the absence of prenatal or postnatal care or delivery costs. The issuer may not estimate the actual cost of the abortion coverage at less than \$1 per month per enrollee, regardless of the cost.³

Health care plans in the exchanges that choose to include abortion coverage will therefore face increased administrative requirements including determining the actuarial value for abortion coverage, processing separate payments from enrollees, and establishing multiple accounts to hold the required payments. The additional requirements imposed by §1303(b) will therefore generate extra administrative costs for plans that cover abortion – costs that will not be imposed on other health plans in the exchanges. These additional administrative costs will reduce the medical loss ratio; likely forcing the plans that cover abortion to offer a rebate to enrollees, even though these plans are no more profitable and do not have greater discretionary administrative costs than other health plans.

The administrative costs imposed by §1303(b) of the federal law on health care plans that cover abortion are akin to regulatory fees and taxes, costs which the statute expressly allows to be excluded from the medical loss ratio calculation. While under the new medical loss ratio provision all health care plans will have to work to reduce their current administrative costs to meet the new threshold, §1303(b) imposes new administrative costs on certain plans. The costs that will result from compliance with §1303(b) are mandatory expenses imposed by the government through the PPACA which will be enforced through regulations and guidelines. The language of §1303(b) is unyielding and leaves plans with no discretion in applying the strict segregation rules, making it impossible for plans to even lower the administrative costs related to abortion coverage while still complying with the law. For instance, plans are required to incur additional processing costs by collecting two separate payments from individuals in the plan and holding the payments separately, despite the fact that federal funding could be kept separate from private premium payments by simply holding the federal and private monies in two separate accounts. Like a tax or regulatory fee, the administrative costs are unavoidable; in fact the only way to avoid the new administrative costs is to not cover abortion. Hence, without excluding these costs from the medical loss ratio calculation, health care plans that cover abortion will be more likely to owe a rebate to its enrollees - essentially a fee for covering abortion.

The additional burden placed on plans that cover abortion by the medical loss ratio requirement is clearly an unintended consequence of the provision. The intent of the medical loss ratio provision is to increase the value of consumers’ premium payments by limiting the expenditure by health care plans on non-medical costs.⁴ The medical loss ratio provision was in no way

³ The Patient Protection and Affordable Care Act. P. L. 111-148, §1303(b)(2)(D), (March 23, 2010).

⁴ The relevant sub-section of the Patient Protection and Affordable Care Act is in fact entitled, “Ensuring that Consumers Receive Value for Their Premium Payments.” The Patient Protection and Affordable Care Act. P. L. 111-148, §10101(f) (March 23, 2010) (adding § 2718(b) to the Public Health Service Act).

intended to impose additional costs solely on plans that choose to cover abortion. As the medical loss ratio provision was not intended to affect a health care plan's ability or decision to include coverage of abortion, the regulations should reconcile §1303(b) and §2718 so as not to inadvertently penalize plans that choose to cover abortion.

Under the Patient Protection and Affordable Care Act, health care plans in the exchanges will already be deterred from covering abortion due to the onerous segregation requirements. The stated purpose of the abortion restrictions was to segregate federal from private funds so as to prohibit federal funds from paying for abortion services. The provision goes far beyond requiring the segregation of private and federal funds and instead creates significant deterrents for plans to cover abortion. If the plans that cover abortion also have to provide rebates to their enrollees because of the mandatory administrative costs imposed by §1303(b), the medical loss ratio provision will now provide a second reason for plans in the exchange to decline to cover what is currently a standard medical service covered by most private insurance plans.⁵

The exclusion of abortion coverage by plans in the exchanges will also likely affect plans outside the exchanges. As health insurance companies attempt to standardize their products, the industry could shift toward the exclusion of abortion coverage as a standard benefit.⁶ The abortion restrictions in §1303(b) are already discriminatory and excessive. The unintended effect of the medical loss ratio provision laid atop the abortion restrictions will go one step further in discriminating against women by further inhibiting their ability to purchase comprehensive health coverage. If the Secretary does not exclude the costs associated with §1303(b) from the required medical loss ratio calculation, the medical loss ratio provision will work to further penalize health care plans which cover abortion, putting women inside and outside the exchanges at risk of losing the comprehensive health coverage they currently have.

Thank you for your consideration.

Sincerely,

⁵ According to a survey of health insurers conducted by the Guttmacher Institute, more than 87% of "typical" employment-based health plans cover medical and surgical abortion. Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002*, 36 *PERSP. ON SEXUAL & REPROD. HEALTH* 72, 75 (2004). An alternative survey conducted by the Kaiser Family Foundation and the Health Research and Education Trust asked employers about benefits covered under policies they sponsored for their workers and found that while only 46% of firms reported covering abortion, a large percentage (26%) reported "don't know" regarding coverage of abortion. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, *EMPLOYER HEALTH BENEFITS 2003 ANNUAL SURVEY* 109 (2003).

⁶ Experts at the George Washington School of Public Health & Health Services concluded in an analysis of the Nelson-Hatch Amendment that the Amendment's prohibition on abortion coverage in the Exchange will have an industry-wide effect and will eliminate coverage of abortion for all women, including those who seek coverage outside of the Exchange. Although the current language on abortion in the PPACA is different than the Nelson-Hatch Amendment, we believe it could result in the same shift in the insurance industry. See Sara Rosenbaum et al., *An Analysis of the Nelson-Hatch/Pitts Amendment for Coverage of Medically Indicated Abortions*, November 2009, at 1, available at http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf.

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Center for Reproductive Rights
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National Council of Jewish Women
National Family Planning and Reproductive Health Association
National Latina Institute for Reproductive Health
National Partnership for Women and Families
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NARAL Pro-Choice America
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Planned Parenthood Federation of America
Raising Women's Voices for the Health Care We Need
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