Congress of the United States
Washington, DC 20515

August 6, 2018

The Honorable Alex Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Azar,

The 2010 enactment of the Affordable Care Act (ACA) broke with the longstanding safeguards of the Hyde Amendment, which for over 40 years has protected taxpayers from paying for abortion and health insurance plans that include abortion. Since that time, the House has acted on four separate occasions to pass the No Taxpayer Funding for Abortion Act (H.R. 7) to remedy the severe problems with the ACA in regard to abortion coverage. Until this statutory protection is enacted into law, there are steps the Administration can take to mitigate ACA's unprecedented expansion of abortion coverage. **We urge you to issue new regulations regarding Section 1303 as soon as possible.**

Contrary to the Hyde Amendment, ACA's Section 1303 created separate abortion accounting and transparency requirements. Section 1303 of the ACA requires that when federal subsidies are paid toward the purchase of a qualified health plan that includes coverage of elective abortion:

- the health insurance issuer must not use the subsidy amounts to pay for any elective abortion,
- must "collect from each enrollee in the plan" a "separate payment" of not less than $1 per month for any elective abortions covered,
- and 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.

The statute even gives the example where "in the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit." [1] The ACA is absolutely clear: a "separate payment" must be collected when qualified health plans cover abortion.

[1] 42 USC 18023 (a)(2)(B)

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Underscoring the plain legislative meaning of the text, then-Senator Ben Nelson (D-NE) described how the process would work during legislative debate surrounding Section 1303. He said *"...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...."*[2]

The Obama administration failed to enforce Section 1303 and undermined the segregation of funds requirements through permissive regulations. A 2014 report by the Government Accountability Office found that many insurers were ignoring the requirements of Section 1303.[3] While we welcomed CMS's October 2017 guidance regarding enforcement of ACA Section 1303, meaningful enforcement requires new regulations.[4] As long as enforcement is tied to the existing Obama-era regulations for Section 1303, it will remain sorely deficient.

Current regulations define compliance with Section 1303 in a number of ways that negate the clear meaning of the statute's phrase, "separate payment."[5] For example, issuers may send a "notice *at or soon after the time of enrollment* that the monthly invoice or bill will include a *separate charge* for such services," though it is not required to be noticed on the monthly invoice itself, or issuers may send a monthly invoice or bill that "*separately itemizes*" the abortion surcharge (emphasis added). Further the rule explains that the issuer is not required to separately identify the abortion surcharge, and the surcharge can be collected in a single transaction rather than collected separately. Therefore, according to current regulations, there is no meaningful requirement for the collection of a separate payment for the plan's abortion services, making the abortion surcharge all but invisible.

HHS should issue new regulations that align with the clear meaning and legislative history of Section 1303 of ACA and its requirement for a truly "separate payment," and provide ample mechanisms for enforcement. The new regulations should also clarify that *all* qualified health plans that cover elective abortion must provide notice of such coverage to consumers at the time of enrollment. This will provide more transparency to consumers, many who are unwittingly purchasing plans that include abortion coverage. No person should have to pay for abortion coverage that they don't want.

Sincerely,

Christopher H. Smith
Member of Congress

Vicky Hartzler
Member of Congress

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[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://www.gao.gov/assets/670/665800.pdf, page 3, footnote 8

[4] https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Section-1303-Bulletin-10-6-2017-FINAL-508.pdf

[5] 80 CFR 10750, 10840-10841 https://www.gpo.gov/fdsys/pkg/FR-2015-02-27/pdf/2015-03751.pdf

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