VIA ELECTRONIC TRANSMISSION

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

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

Dear Secretary Azar and Administrator Verma:

The Global Justice Center ("GJC") submits this comment in response to the Department of Health and Human Services’ ("HHS") Proposed Rule entitled Patient Protection and Affordable Care Act, Exchange Program Integrity, published in the Federal Register on November 9, 2018 (the "Proposed Rule").¹ For purposes of this submission, commentary is limited to the portion of the Proposed Rule that suggests changes related to the separate payment requirements in section 1303 of the Patient Protection and Affordable Care Act ("PPACA").²

GJC is an international human rights organization based in New York dedicated to achieving gender equality through the rule of law. For the past decade, GJC has been at the forefront of efforts to ensure that the law protects and promotes access to comprehensive sexual and reproductive health rights for women and girls around the world. As experts in women’s rights and human rights, we write to express our vehement opposition to the Proposed Rule.

First, the Proposed Rule would impose undue and onerous burdens on both insurers and consumers that violate women’s fundamental human rights, including to non-discriminatory health care. Second, by singling out abortion for special treatment from all other health services, the Proposed Rule reinforces the already stigmatizing and discriminatory treatment of abortion under the PPACA. Third, the Proposed Rule does not, as claimed, fulfill Congressional intent, since Congressional intent under the PPACA was to allow issuers to decide for themselves whether to provide abortion coverage beyond the limited exceptions allowed under the discriminatory and harmful federal Hyde Amendment. Finally, the Proposed Rule imposes undue burdens on insurers and consumers that will lead to unnecessary restrictions on comprehensive health care for women. The outcome, and tacit intent, of the Proposed Rule is to further stigmatize abortion and to impose onerous burdens on both insurers and consumers that will embarrass women, annoy and inconvenience consumers, and increase administrative burdens on insurers, all with the ultimate aim of discouraging insurers from providing abortion

¹ Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56015 (Nov. 9, 2018) (to be codified at 45 CFR §155. 156).
² Patient Protection and Affordable Care Act, P.L. 111-148.
coverage. As such, the Proposed Rule violates women's fundamental rights under the US Constitution and international human rights law. For these reasons, GJC urges HHS to withdraw the Proposed Rule.

1. The Proposed Rule discriminates against women and violates women’s fundamental human rights, including the right to non-discriminatory health care.

Access to abortion is a fundamental right protected under the US Constitution and international human rights law. Since its decision in Roe v. Wade, and as confirmed in Planned Parenthood v. Casey and Whole Women’s Health v. Hellerstedt, the US Supreme Court has found that the government may not enact measures that impose an undue burden on access to abortion services. Human rights obligations binding on the US protect access to abortion under a multitude of rights—including the rights to privacy, life, and health, and the right to be free from discrimination, torture, and cruel, inhuman or degrading treatment. The realization of these rights relies on the accessibility, without undue administrative burden, on the provision of sexual and reproductive health care services. International human rights experts have made clear that the right of every woman and girl “to make autonomous decisions about her pregnancy...is at the very core of her fundamental right to equality, privacy and physical and mental integrity and is a precondition for the enjoyment of other rights and freedoms.”

The same experts have called upon states to ensure that women can “access all necessary health services, including sexual and reproductive health care, in a manner that is safe, affordable and consistent with their human rights.” They highlight that many factors contribute to women being denied essential health services, including deterrence by any means. The administrative burdens of the Proposed Rule would no doubt have a deterrent effect on the provision of and access to safe abortion services, denying women access to necessary health care which is inherently discriminatory and a violation of their human rights.

The UN Working Group on the issue of discrimination against women in law and in practice (“WGDAW”) has made clear to the US government that under international human rights law, “states must take all appropriate measures to ensure women’s equal right to decide freely and responsibly on the number and spacing of their children.” The WGDAW has called on states to ensure that women can access “non-discriminatory health insurance coverage for women, without surcharges for coverage of their reproductive health,” and to “exercise due diligence to ensure that the diverse actors and corporate and individual health providers who provide health services or produce medications do so in a non-discriminatory way and establish guidelines for the equal treatment of women patients under their codes of conduct.” The Proposed Rule would do the opposite; it


7 Id.


imposes undue administrative burdens on both insurance providers and consumers which will lead to a reduction the availability of sexual and reproductive health services.

Specifically, the WGDAW has also expressed its concerns over provisions in the PPACA related to abortion following its country visit to the United States in December 2015. Specifically, it noted that, “the marketplace insurance coverage for safe and legal termination of pregnancy is far from universal...[and] [t]hus, insurance will frequently not be available for women who wish to exercise their right to terminate a pregnancy.”10 The WGDAW went on to recommend that the US government take measures to ensure that “insurance schemes provide coverage for abortions to which women have a right under US law,”11 in order to fulfill its human rights obligations. The Proposed Rule goes directly against this recommendation and would instead ensure further limitations on the coverage of abortion by insurance plans.12

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (the “Special Rapporteur on health”) has found that women are entitled to equal health protection afforded by the state as part of the right to health.13 Moreover, “the realization of the right to health requires the removal of barriers that interfere with individual decision-making on health-related issues and with access to health services,” including barriers that are created by legal restrictions.14 The Special Rapporteur on health makes clear that legal provisions, including provisions in civil and administrative laws such as the Proposed Rule that facilitate and justify state control over women’s lives, interfere with and violate women’s right to health and dignity.15 Instead, states should ensure that sexual and reproductive health services, including safe abortion, are accessible, including by reducing administrative barriers that interfere with their provision.

The Proposed Rule would create impermissible barriers to accessing abortion services and as such violates the US government’s obligations to ensure women’s fundamental human rights, including to non-discriminatory health care.

2. The Proposed Rule stigmatizes abortion and highlights differential treatment of this single health care procedure.

International human rights experts have found that singling out abortion as a medical procedure has contributed to its stigmatization and any “[g]ender-based discrimination in the administration of medical services violates women’s human rights and dignity.”16 They further highlight that any stigmatization of abortion by distinguishing it from all other medical procedures causes women mental and physical suffering and therefore violates their

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11 Id.
14 Id.
15 Id., ¶13, 15; Such violations disproportionately impact women “given the physiology of human reproduction and the gendered social, legal and economic context in which sexuality, fertility, pregnancy and parenthood occur.” Id. at ¶16.
human rights. The WGDAW has urged the US government “to combat the stigma attached to reproductive and sexual health care, which leads to violence, harassment and intimidation,” and denies women the highest attainable standard of health, to which they are entitled under both international human rights law and US law.

The Special Rapporteur on health has found that stigmatization of abortion, through criminal or other legal regulations, “disempowers women, who may be deterred from taking steps to protect their health in order to avoid liability and out of fear of stigmatization.” These laws and regulations can also have a discriminatory effect, in that they disproportionately affect women. The subsequent marginalization and vulnerability of women as a result of abortion-related stigma and discrimination perpetuate the notion that abortion is an immoral and unsafe practice, and perpetuate and intensify violations of women’s right to health.

The Proposed Rule, by singling out abortion care from all other health care services, is discriminatory and violates the US government’s obligations to ensure women’s fundamental human rights.


As per Congressional intent, the PPACA allows participating insurance plans to decide for themselves whether to cover non-Hyde abortion services. Congress established “special rules” for abortion coverage in order to ensure that insurers who choose to provide non-Hyde abortion services segregate funds into a separate allocation account. The purpose of the rule is to ensure segregation, or separation, of funds. There is no indication that this purpose has not been fulfilled by the current interpretation of the provision, or that Congress believes its purpose is being frustrated by the current interpretation of the provision. Further, insurers have not indicated an inability to meet, or concern about meeting, the segregation requirement by the current practice of establishing segregated allocation accounts.

Ignoring the proven efficacy of “back end” segregation and instead requiring “front end” separate payments is not necessary to fulfill Congressional intent and, therefore, the Proposed Rule is unnecessary administrative overreach. Congressional intent was for funds to be segregated and insurers have been able to meet this requirement through current interpretation. Therefore, the Proposed Rule is unnecessary to serve the stated purpose and would impose additional administrative burdens without any additional benefit to Congress, insurers, or consumers.

4. The Proposed Rule imposes undue burdens on insurers and consumers which will lead to unnecessary restrictions on comprehensive health care for women.

The Proposed Rule would impose burdensome and costly administrative requirements on insurers with the likely and foreseeable outcome of forcing insurers to drop abortion coverage. In fact, insurers have expressed

[20] =Id.
opposition to any requirements for itemizing specific benefits and such a requirement would run counter to standard industry practice.\textsuperscript{22} The likely consequence of these additional administrative burdens will be that insurers will choose not to absorb these costs and therefore will eliminate coverage for abortions.

The Proposed Rule will also add additional administrative burdens for consumers who will now be required to submit two payments when one has been sufficient to fulfill the segregation requirements. These individual administrative burdens and transaction costs will harm and frustrate consumers. The end result will be that consumers could potentially lose coverage if they fail to pay the separate bill and that consumers will be more likely to protest the additional burdens imposed by abortion coverage, further stigmatizing abortion services.

In conclusion, the Proposed Rule violates women’s fundamental rights under the US Constitution and international human rights law, including the rights to privacy, life, and health, and the right to be free from discrimination, torture, and cruel, inhuman or degrading treatment. Compliance with these obligations is not discretionary—it is mandatory, since domestic law can never be used as an excuse for failing to comply with international treaty obligations.\textsuperscript{23} Furthermore, the Proposed Rule is not necessary to fulfill Congressional intent and is an example of unnecessary administrative overreach that will impose undue additional burdens on insurers and consumers and frustrate and harm consumers. For the reasons stated above, we urge you to withdraw the Proposed Rule.

If you require additional information about the issues raised in this comment, please contact Akila Radhakrishnan at akila@globaljusticecenter.net.

Sincerely,

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Akila Radhakrishnan
President
Global Justice Center
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\textsuperscript{22} America’s Health Insurance Plans (AHIP), Comment Letter on HHS Notice of Benefit and Payment Parameters for 2016 (CMS-9944-P) (Dec. 22, 2014).

\textsuperscript{23} Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; LaGrand (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶ 139 (Mar. 31) (“The rights guaranteed under the Vienna Convention [on Consular Relations] are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law.”)