



Date: October 6, 2017

From: Randy Pate, Director, Center for Consumer Information and Insurance Oversight

Subject: CMS Bulletin Addressing Enforcement of Section 1303 of the Patient Protection and Affordable Care Act

Since inception, section 1303 of the Patient Protection and Affordable Care Act (PPACA) has applied certain prohibitions, restrictions, and requirements with respect to coverage of certain abortion services by qualified health plans (QHPs) offered through the individual market Exchanges. Section 1303 prohibits the use of certain Federal funds to pay for coverage by QHPs of abortions for which payment would not be permitted under the Hyde Amendment. Thus, QHP issuers may not use premium tax credits or cost-sharing reductions (CSRs) to pay for such abortion services. In addition, if the QHP includes coverage of such abortion services, issuers must provide notice of such coverage. Section 1303 also requires issuers to charge and collect at least \$1 per enrollee per month for coverage of such abortion services, deposit the collected funds into a separate account, maintain the segregation of such funds, and use only such funds to pay for such abortions. Failure to adhere to these requirements could result in decertification or civil monetary penalties. This Bulletin discusses these restrictions in greater detail and sets forth guidance for how these restrictions are to be enforced beginning in plan year 2018.

I. Background and Purpose

Every year since 1976, Congress has included a provision known as the Hyde Amendment in annual appropriations legislation, which funds the activities and services provided by the U.S. Department of Health and Human Services (HHS), including the activities and services provided by the Centers for Medicare & Medicaid Services (CMS). The Hyde Amendment as currently in effect prohibits taxpayer funding for abortion, except for pregnancies that are the result of rape or incest, or if a woman suffers from a life-threatening physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, as certified by a physician. Similarly, section 1303 of the PPACA explicitly prohibits issuers from using any portion of premium tax credits or CSR payments, to pay for coverage for abortions that do not fall under a Hyde exception (non-Hyde abortions).¹ A 2014

¹ Section 1303(b)(2)(A) of PPACA, Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 42 U.S.C. § 18023(b)(2)(A).

U.S. Government Accountability Office (GAO) report (2014 GAO Report) identified issues related to section 1303 compliance with respect to certain issuers.²

Section 1303 of the PPACA also requires QHP issuers to take specific steps to prevent use of certain Federal taxpayer funds for non-Hyde abortion services. First, QHP issuers must provide notice to enrollees if non-Hyde abortions are covered by their QHP. The statute requires that this notice be provided as part of the summary of benefits and coverage explanation at the time of enrollment.³ QHP issuers may, if they so choose, provide consumers with additional notice. Similarly, the Exchanges may provide notice to consumers on whether QHPs provide such coverage at earlier points during the QHP selection process.

Second, QHP issuers must determine the amount of, and collect from enrollees, a separate payment that equals the cost, determined on an average actuarial basis, for covering non-Hyde abortion services.⁴ However, section 1303 requires that such payment must be at least \$1 per enrollee per month. Where premiums are paid through employee payroll deposit, the statute provides that separate payment must be made by a separate deposit.⁵

Finally, pursuant to section 1303(b)(2)(C) of the PPACA, QHP issuers must segregate funds for non-Hyde abortion services collected from enrollees into a separate allocation account that is to be used exclusively to pay for non-Hyde abortions. Thus, if an issuer disburses funds for a non-Hyde abortion on behalf of an enrollee, it must draw those funds from the segregated allocation account. The account cannot be used for any other purpose.

Despite the clear statutory requirements, the following information indicates that compliance with, and enforcement of, section 1303 has been inconsistent. The above-referenced 2014 GAO Report suggests that many QHP issuers are not following the requirements of section 1303.⁶ Of the 18 QHP issuers surveyed for the 2014 GAO Report that covered non-Hyde abortion services,⁷ four failed to provide notice to enrollees that such abortion services were included in the QHPs they sold.⁸ Two of the eighteen QHP issuers charged less than the statutorily required minimum of \$1 per enrollee per month for coverage of non-Hyde abortion services.⁹ Finally, seventeen of the eighteen QHP issuers surveyed failed to satisfy the requirement for collecting separate payments, even though CMS had provided informal guidance allowing issuers to send enrollees an invoice that separately itemizes the premium amount for non-Hyde abortion services or to bill separately for such services.¹⁰ Subsequent to the 2014 GAO Report, CMS issued guidance reiterating QHP issuers' legal obligation to charge no less than \$1 per enrollee per

² U.S. Government Accountability Office, "Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans," (Sept. 15, 2014), available at <http://www.gao.gov/products/GAO-14-742R>.

³ PPACA section 1303(b)(3)(A)

⁴ PPACA section 1303(b)(2)(D); PPACA section 1303(b)(2)(b)(i)(II)

⁵ PPACA section 1303(b)(2)(B)

⁶ *See, e.g.*, 2014 GAO Study at 3.

⁷ At the time of the GAO Study, these issuers operated in the 28 States that had no laws restricting non-Hyde abortion services and accounted for approximately 25 percent of QHPs that covered non-Hyde abortion services within these 28 States. GAO Study at 3.

⁸ 2014 GAO Report at 8.

⁹ 2014 GAO Report at 7.

¹⁰ 2014 GAO Report at 7.

month for non-Hyde abortion services, for QHPs that cover such services.¹¹ CMS has also issued guidance that a single notice itemizing the separate amounts collected with each premium payment for non-Hyde abortion services and for all other covered services, could satisfy the separate payment requirement.¹²

II. Guidance

Here, CMS reminds QHP issuers of their obligation to comply with section 1303. Issuers must be able to demonstrate compliance with the following:

- Issuers may not seek premium tax credit payments for coverage of non-Hyde abortion services.¹³
- Issuers may not seek reimbursement for CSRs for non-Hyde abortion services.¹⁴
- Issuers must provide an annual notice in the summary of benefits and coverage that describes whether non-Hyde abortion services are covered by the QHP.¹⁵
- Issuers must charge and collect no less than \$1 per enrollee per month for coverage of non-Hyde abortion services, and deposit such amounts collected into a separate allocation account that is used exclusively to cover non-Hyde abortions. To demonstrate compliance with the requirement to collect a separate payment, issuers should provide enrollees with notice stating that a portion of the total premium amount owed is a separate payment for non-Hyde abortion services (e.g., providing the enrollee with such a notice at the time of enrollment, on a monthly invoice that itemizes the premium charge for coverage of non-Hyde abortion services, or a separate monthly bill for such coverage).

Where we are charged with directly enforcing these statutory requirements in the FFEs, we intend to do so fully, beginning with the 2018 plan year and later years, and call upon States that operate their own Exchanges to do so as well. To the extent such a State operating its own Exchange fails to substantially enforce these requirements, CMS would expect to enforce them in the State's place. Failure to comply with these requirements could result in civil monetary penalties beginning in the 2018 plan year. The PPACA clearly says that issuers are subject to these restrictions with respect to the abortion coverage at issue. Regulations implementing Section 1303 that were promulgated in 2012 also reiterated the statutory requirements. Accordingly, issuers have had ample time and notice to bring their operations into compliance with Section 1303 and its implementing regulations.

We are also in the process of evaluating whether there are additional steps that we should take to ensure compliance with the requirements of section 1303 and its implementing regulations, including reevaluating the guidance issued in 80 Fed. Reg. 10750, 10840-41. Additionally, we are exploring options for the Federally-facilitated Exchanges to provide more meaningful notice to consumers at the point of sale, beyond the summary of benefits and coverage, such as more

¹¹ 80 F.R. 10750, 10840-41 (Feb. 27, 2015).

¹² 80 F.R. 10750, 10840-41 (Feb. 27, 2015).

¹³ PPACA section 1303(b)(2)(A)(i)

¹⁴ PPACA section 1303(b)(2)(A)(ii)

¹⁵ PPACA section 1303(b)(3)(A), 45 C.F.R. §156.280(f)(1)

prominently displaying whether a plan includes non-Hyde abortion services on HealthCare.gov. We welcome comments on these subjects.

III. Where to Get More Information

If you have any questions regarding this guidance, please e-mail marketreform@cms.hhs.gov.