



Office of the General Counsel

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Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9926-P
P.O. Box 8016
Baltimore, MD 21244-8016

Subj: HHS Notice of Benefit and Payment Parameters for 2020—File Code
CMS-9926-P

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we offer the following comments on the proposed rule on the Patient Protection and Affordable Care Act, HHS Notice of Benefit and Payment Parameters for 2020, published at 84 Fed. Reg. 227 (Jan. 24, 2019).

We commend HHS for the proposed rule because it expands the range of options for consumers who want to enroll in a qualified health plan (“QHP”) that does not cover elective abortions. We have two sets of suggestions, however, for how the rule might be improved. We also have a comment about certain characterizations, made by HHS in the preamble to the proposed rule, about state laws that, in violation of the Weldon amendment, require abortion coverage.

First, under the proposed rule, an issuer of plans that cover elective abortions is required to make available to consumers at least one plan, at some benefit level, that does not cover elective abortions. For example, if an issuer offers three plans (bronze, silver, and gold) and all three plans cover elective abortions, then the issuer is only required to offer one plan, at one of the three benefit levels, that does not include elective abortions. The proposal to require the availability of at least one plan without elective abortion coverage is a move in the right direction, but we believe the Department should go even further. A consumer may need a health plan *at some specific benefit level* but may not want to participate—and, even more

compellingly, may have religious or moral objections to participating—in a plan that includes elective abortions. Indeed, many consumers will and do object to participating in a health plan that pays for or covers *any* abortions, elective or otherwise.¹ We believe HHS should consider revising the rule to ensure the availability, at *every* benefit level, of plans that do not cover abortion, elective or otherwise, so that consumers, especially those with religious or moral objections to abortion coverage, can purchase a plan that comports with their needs and their conscience. Otherwise those with religious or moral objections to abortion will find it more difficult, perhaps even impossible, to find a health plan that comports with their conscience and best meets their needs, undermining a key objective of the rule. See 84 Fed. Reg. at 291 (preamble) (stating that “consumers are best served ... when they ... can select a QHP that best meets their needs”).

Second, whether a plan does or does not cover abortion should be indicated in a notice that is conspicuous to the consumer. The notice can be as simple as “This plan covers non-elective and elective abortions,” or “This plan covers only non-elective abortions,” or “This plan does not cover any abortions.” The disclaimer should be displayed in a prominent place and in a font of sufficient size and boldness to ensure that the consumer easily and quickly sees it.

Third, the preamble incorrectly suggests that a federal requirement that issuers offer a plan without elective abortion coverage would be trumped by a state law requiring such coverage.² The opposite is true: any state law requiring abortion coverage would run afoul of, and therefore must yield to, the Weldon amendment. The Weldon amendment, a rider included in every HHS/Labor appropriations bill since 2004, states:

(1) None of the funds made available in this Act may be made available to a Federal agency or program, *or to a State or local government*, if such agency, program, or *government* subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, *pay for*, *provide coverage of*, or refer for abortions.

(2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored

¹ HHS correctly concludes that nothing in ACA § 1303, codified at 42 U.S.C. § 18023, precludes HHS from requiring a QHP issuer that offers plans with elective abortion coverage from offering a plan without such coverage. 84 Fed. Reg. at 291-92. Section 1303, as HHS correctly explains, only requires that the issuer be allowed to offer plans with elective abortion coverage if permitted under state law; it does not bar a federal requirement that such issuers *also* offer plans without elective abortion coverage. By the same reasoning, nothing in section 1303 precludes HHS from requiring a QHP issuer that offers plan with elective abortion coverage from offering a plan without coverage of any abortion, whether elective or non-elective.

² See 84 Fed. Reg. at 228 (“we propose to expand the QHP options available to consumers on the Exchange by requiring QHP issuers that provide coverage of certain abortion[s] ... in QHPs to provide otherwise identical QHP benefit coverage that omits coverage of such abortion[s] ... in a separate QHP, *to the extent permissible under applicable state law*”) (emphasis added); *id.* at 291 (“we propose ... that ... the QHP issuer must also offer at least one ... [plan] that omits coverage of [elective] abortion[s] ... *to the extent permissible under state law*”) (emphasis added).

organization, a health maintenance organization, *a health insurance plan*, or *any other kind of* health care facility, organization, or *plan*.³ [Emphasis added.]

Thus, Weldon prohibits any state that chooses to receive Labor/HHS funds—and all states do so—from discriminating against a health plan on the basis that it does not pay for or cover abortion. Significantly, Weldon applies to *all* abortions, whether elective or non-elective. Furthermore, Weldon is not part of the Affordable Care Act (“ACA”) and is therefore not subject to the ACA’s non-preemption clause. ACA, § 1303(c), 42 U.S.C. § 18023(c).⁴ Obviously, a state’s outright refusal even to *allow* issuers to issue plans without abortion coverage is a Weldon violation of the most radical sort. We believe HHS should acknowledge in the final rule, or at a minimum in the preamble to the final rule, that such state law requirements do indeed violate Weldon, and that the federal requirement to offer a health plan without abortion coverage prevails in the event of any conflict with state law.

We also urge HHS, inasmuch as it is currently aware of such violations of Weldon by state law, to act promptly to rectify them. Complaints asserting Weldon violations are currently pending with HHS, and we urge HHS to act speedily to address these violations and others that come to its attention. Delay in doing so, we believe, would be an injustice in the particular circumstance given the clear requirements of the law, and may lead other states, in the absence of rigorous and prompt enforcement by HHS, to follow suit.⁵

Conclusion

We commend the Department in its efforts to make available health plans that do not cover elective abortions. We encourage HHS to go even further in supporting the rights of consumers, consistent with their conscience, to enroll in plans that best meet their needs and do not cover any abortions, and to give consumers clear and conspicuous notice whether a given plan does or does not cover abortion. Finally, to ensure that consumers have an opportunity to purchase a plan without abortion coverage, we strongly encourage the Administration to act without undue delay to enforce the Weldon amendment, especially in those states that have formally adopted requirements that, on their face, conflict with the amendment.

³ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d) (Mar. 23, 2018).

⁴ The ACA’s non-preemption clause, section 1303(c)(1), states that “Nothing *in this Act*,” meaning the ACA, “shall be construed to preempt or otherwise have any effect on State laws regarding the prohibition of (or requirement of) coverage ... on abortions....” The Weldon amendment, however, is not part of the ACA, and is therefore not subject to Section 1303(c)(1). By its terms, Weldon renders unlawful any state law or other state action that discriminates on the basis of a plan’s non-coverage of abortion.

⁵ We understand the need for HHS, through its Office for Civil Rights, to conduct careful and thorough investigations before making a determination that Weldon has been violated and before taking remedial action, but it would seem to us that such an investigation can be conducted and concluded with some dispatch when a state has formally adopted a requirement that, on its very face, conflicts with the Weldon amendment, as some states have done, and as HHS itself is aware. *See* 84 Fed. Reg. at 309 nn. 172-73 (noting laws in California, New York, and Oregon that require coverage of abortions).

Thank you for the opportunity to comment.

Sincerely,

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