

January 08, 2019

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,

We write to express our support and thanks for the Department of Health and Human Services (HHS) proposed rule, entitled “Patient Protection and Affordable Care Act; Exchange Program Integrity,” as it relates to changing the separate payment requirement in Section 1303 of the Patient Protection and Affordable Care Act (ACA). The proposed rule aligns with the clear meaning and congressional intent of Section 1303 and eliminates the hidden abortion surcharge in many ACA plans. We also write to ask that the final rule clarify the illegality of the previous Administration’s interpretation of Section 1303.

The Hyde Amendment protects most federal health care dollars from funding elective abortions and insurance plans that include elective abortion. The ACA deviated from this long-standing precedent, making taxpayer dollars available, in the form of subsidies, to buy abortion-covering health insurance plans in ACA exchanges throughout the country. Funding for ACA plans that cover abortion will not end until Congress acts. The House has already acted on four separate occasions by passing the No Taxpayer Funding for Abortion Act, and we look forward to the day when permanent statutory protection is in place.

Section 1303 of the ACA required the qualified health plans (QHPs) that covered elective abortions to fund them by collecting a separate payment (sometimes referred to as an abortion surcharge) from each beneficiary and depositing these payments into a separate account. This requirement does not change the fact that the ACA violates the precedent of the long-standing Hyde Amendment, but it does provide transparency for consumers by clearly differentiating the abortion surcharge. Section 1303 includes the following requirements<sup>1</sup>:

- The health insurance issuer must not use the subsidy amount to pay for any elective abortion
- The health insurance issuer must “collect from each plan” a “separate payment” of not less than \$1 per month for any elective abortions covered
- The health insurance issuer 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.

During a legislative debate on Section 1303, then-Senator Ben Nelson (D-NE), re-stated what was clear from the language of the text itself: “You have to write two checks: one for the basic policy and one for the additional coverage for abortion.”<sup>2</sup>

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<sup>1</sup> [42 U.S. Code § 18023](#)

<sup>2</sup> 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>

The Obama Administration undermined this requirement through subsequent regulations. Despite the plain meaning of the text, it interpreted “separate” to mean “together.” It stated that the requirement could be satisfied by “sending the enrollee a single monthly invoice or bill that separately itemizes the premium amount for non-excepted abortion services” and the QHP issuer is not required to “separately identify the premium for non-excepted abortion services on the monthly premium bill.”<sup>3</sup> In other words, the “separate” payments could be made “together.” The Obama Administration’s misinterpretation created a hidden abortion surcharge on many health care plans in exchanges throughout the nation.

This was unjustifiable: the meaning of Section 1303 was straightforward and congressional intent was clear. We are concerned that the proposed rule’s analysis fails to adequately acknowledge the illegality of the prior regulation. We ask that the final rule directly addresses this concern.

We thank HHS for issuing new regulations that align with the clear meaning and congressional intent of Section 1303. It was past time to affirm that the term “separate” currently in statute does mean “separate monthly bill for each amount specified” and “separate transactions.”<sup>4</sup> Congress clearly required a distinct payment and the current regulations instead allow the abortion surcharge to be hidden in their broader premium.

This proposed rule provides important and long overdue protections. We urge the Department to finalize it promptly.

Sincerely,



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Michael Cloud  
Member of Congress



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Christopher H. Smith  
Member of Congress



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Vicky Hartzler  
Member of Congress



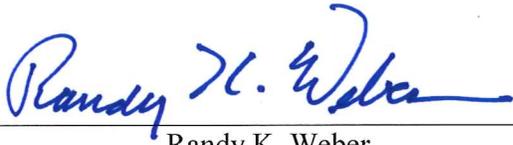
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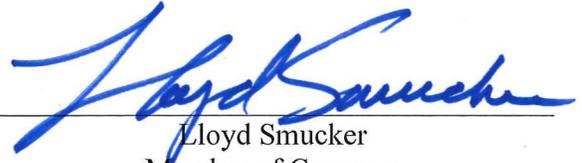
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<sup>3</sup> Final Rule. “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016.” February 27, 2015. <https://www.gpo.gov/fdsys/pkg/FR-2015-02-27/pdf/2015-03751.pdf>

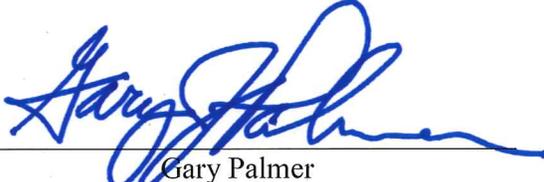
<sup>4</sup> Proposed Rule. “Patient Protection and Affordable Care Act; Exchange Program Integrity.” November 9, 2018. <https://www.gpo.gov/fdsys/pkg/FR-2018-11-09/pdf/2018-24504.pdf>



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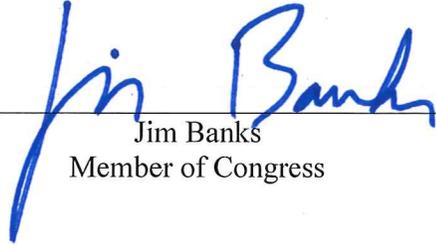
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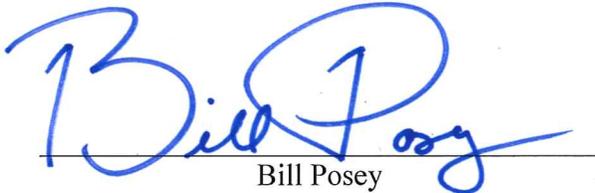
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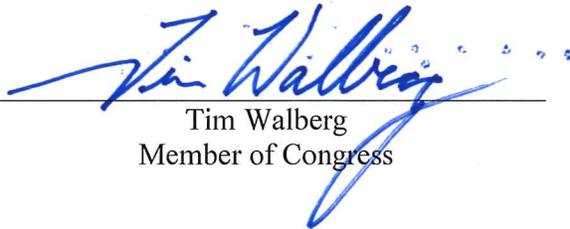
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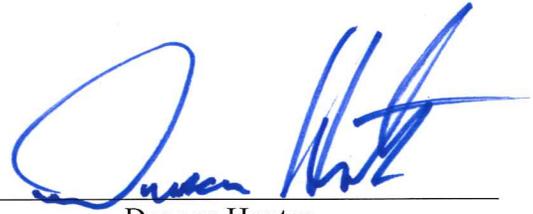
*Paul Mitchell*

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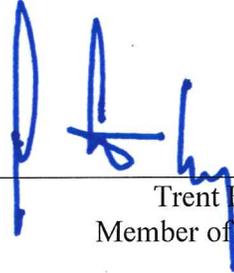
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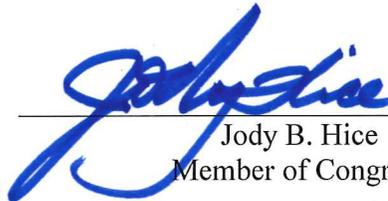
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