

February 19, 2019

VIA ELECTRONIC TRANSMISSION

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

Attn: Comments in Response to Patient Protection and Affordable Care Act, Notice of Benefit and Payment Parameters for 2020, CMS-9926-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, Notice of Benefit and Payment Parameters for 2020 (the “Proposed Rule”). For purposes of this submission, commentary is limited to the portion of the Proposed Rule that would amend the Patient Protection and Affordable Care Act (“PPACA”) so that private insurance providers that provide abortion services would be required to offer a version of the plan which does not cover abortion services.¹

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 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 uses the administrative apparatus of the Executive branch to undermine safe access to abortion services afforded by law and frustrates the intent of Congress, which has instructed under the PPACA that issuers should decide for themselves whether to provide abortion coverage beyond the limited exceptions allowed under the discriminatory and harmful federal Hyde Amendment. Fourth, the Proposed Rule imposes undue administrative burdens on insurers. The outcome, and tacit intent, of the Proposed Rule is to further stigmatize abortion and to increase administrative burdens on insurers, all with the ultimate aim of discouraging insurers from providing abortion coverage. As such, the Proposed Rule violates women’s fundamental

¹ Patient Protection and Affordable Care Act, P.L. 111-148.

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.² The realization of these rights relies on the accessibility of sexual and reproductive health care services.³ 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.”⁴

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.”⁵ They highlight that many factors contribute to women being denied essential health services, including deterrence by any means.

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.”⁶ 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

² Office of the High Commissioner for Human Rights, *Abortion*, https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf.

³ Human Rights Comm., *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct.30, 2018). See also Human Rights Comm., *Concluding observations on the third period report of San Marino*, ¶ 15, U.N. Doc. CCPR/C/SMR/CO/3 (Dec. 3, 2015); Human Rights Comm., *Concluding observations on the fifth periodic report of Sri Lanka*, ¶ 10, U.N. Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014); Human Rights Comm., *Concluding observations on the situation of civil and political rights in Equatorial Guinea*, ¶ 9, U.N. Doc. CCPR/CO/79/GNQ (Aug. 13, 2004).

⁴ Office of the High Commissioner for Human Rights, Joint Expert Statement on International Safe Abortion Day – Friday 28 September 2018 (Sept. 27, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23644&LangID=E>.

⁵ Office of the High Commissioner for Human Rights, Joint Expert Statement on International Safe Abortion Day – Thursday 28 September 2017 (Sept. 27, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22167&LangID=E>.

⁶ Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America, ¶65, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/172/75/PDF/G1617275.pdf?OpenElement>.

under their codes of conduct.”⁷ The Proposed Rule would do the opposite; it unfairly discriminates against the provision of abortion services.

Specifically, the WGDAW has also expressed its concerns over provisions in the PPACA related to abortion following its country visit to the US 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.”⁸ 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,”⁹ in order to fulfill its human rights obligations. The Proposed Rule goes directly against this recommendation and seeks to limit the opportunities for women to access safe and legal abortions.

The Proposed Rule will limit women’s ability to access 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.”¹⁰ 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 human rights.¹¹ 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.¹²

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

⁷ Working Group on the issue of discrimination against women in law and in practice, Policy paper, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* (Oct. 2017), <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>

⁸ Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America, ¶68, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/172/75/PDF/G1617275.pdf?OpenElement>.

⁹ *Id.*

¹⁰ International Safe Abortion Day – Friday 28 September 2018 (Sept. 27, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23644&LangID=E>

¹¹ Office of the High Commissioner for Human Rights, Joint Expert Statement on International Safe Abortion Day – Thursday 28 September 2017 (Sept. 27, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22167&LangID=E>

¹² Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice on its mission to the United States of America, ¶70, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/172/75/PDF/G1617275.pdf?OpenElement>.

have a discriminatory effect, in that they disproportionately affect women.¹³ 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.¹⁴

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.

3. The Proposed Rule is an example of administrative overreach and frustrates, rather than fulfills, Congressional intent.

As per Congressional intent, the PPACA allows participating insurance plans to decide for themselves whether to cover non-Hyde abortion services. The Proposed Rule is an attempt, through use of the administrative apparatus of the Executive branch, to impose logistical hurdles for insurance providers who choose to provide abortion services. This is another in a long line of proposed regulations that are unnecessary to the smooth functioning of the ACA marketplace, but are, in actuality, stealth attempts to discourage the provision of abortion services. These types of regulations, including the Proposed Rule, are examples of administrative overreach that frustrates Congressional intent and should be rejected.

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

The Proposed Rule would impose burdensome and costly administrative requirements on insurers. Insurers have expressed opposition to any requirements for itemizing specific benefits, and requiring a separate plan to be provided to eliminate one specific procedure would be onerous and against standard industry practice.¹⁵ As a consequence of these additional administrative burdens, insurers may choose not to absorb these costs and therefore will eliminate coverage for abortions.

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.¹⁶ Furthermore, the Proposed Rule unfairly singles out abortion for special treatment, which is discriminatory and will lead to stigmatization of a legal procedure. Finally, the Proposed Rule is an example of unnecessary administrative overreach that will impose undue additional burdens on insurers and harm consumers. For the reasons stated above, we urge you to withdraw the Proposed Rule.

¹³ Human Rights Council, Interim Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health General Assembly, U.N. Doc A/66/254 (Aug. 3, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/443/58/PDF/N1144358.pdf?OpenElement>

¹⁴ *Id.*

¹⁵ America's Health Insurance Plans (AHIP), Comment Letter on HHS Notice of Benefit and Payment Parameters for 2016 (CMS-9944-P) (Dec. 22, 2014).

¹⁶ 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.")

If you require additional information about the issues raised in this comment, please contact Michelle Onello at monello@globaljusticecenter.net.

Sincerely,

Michelle Onello
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