U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

September 15, 2014

The Honorable Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services

Dear Administrator Tavenner:

Today, we issued a report on coverage of non-excepted abortion services by qualified health plans (QHP) that are offered by participating private issuers of health coverage in health insurance exchanges.[1] This work was performed at the request of eight members of the House of Representatives, including senior leadership, and provided information on whether non-excepted abortion services are covered by QHPs within the 28 states where we did not identify laws restricting such coverage for the 2014 benefit year. Additionally, we provided information for selected QHPs regarding such things as how these issuers estimate the cost of covering non-excepted abortion services, how enrollees are billed for such coverage, and how consumers shopping for QHPs are able to determine whether non-excepted abortion services are covered. To provide information for selected QHPs, we interviewed and collected documentation from a non-probability sample of 18 issuers about the QHPs they offer in 10 states.

The Patient Protection and Affordable Care Act (PPACA) and its implementing regulations impose certain requirements on QHP coverage of non-excepted abortion services.[2] While QHPs are permitted to cover non-excepted abortion services, PPACA prohibits the use of premium tax credits and cost-sharing reductions to pay for these services. To ensure these tax credits and subsidies are not used to pay for these services, the law requires QHP issuers to (1) estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for coverage of non-excepted abortion services at an amount of not less than $1 per enrollee, per month; (2) collect from each enrollee a separate payment equal to the actuarial value of the coverage; and (3) segregate this amount from any other premium amount collected from the enrollee.[3] CMS regulations also state that QHP issuers must follow the relevant state health insurance commissioner's efforts or direction to ensure compliance with these rules, and should file with the commissioner a plan detailing its processes and methodologies for segregating funds

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[1]GAO, *Health Insurance Exchanges: Coverage of Non-Excepted Abortion Services by Qualified Health Plans*, GAO-14-742R (Washington, D.C.: Sept. 11, 2014). The term "non-excepted abortion services" refers to services for which the expenditure of federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the benefit year involved, as provided in the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 10104(c), amending § 1303(b)(1)(B), 124 Stat. 119, 897 (Mar. 23, 2010). Based on the law applicable to the 2014 benefit year (January 1, 2014, through December 31, 2014), non-excepted abortion services are abortion services performed *except* where the pregnancy is the result of an act of rape or incest, or the life of the pregnant woman would be endangered unless an abortion is performed. Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. F, § 1101(a)(4), 127 Stat. 198, 412 (Mar. 26, 2013) (incorporating by reference Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, §§ 506-507, 125 Stat. 786, 1111-12 (Dec. 23, 2011)).

[2]PPACA, § 10104(c), amending § 1303, 124 Stat. at 896-99; 45 C.F.R. § 156.280.

[3]PPACA, § 10104(c), amending § 1303(b)(2), 124 Stat. at 897-99.

consistent with federal law.[4] Separately, PPACA also requires QHP issuers to provide notice to enrollees, as part of the summary of benefits and coverage at the time of enrollment, that the QHP covers non-excepted abortion services; however, CMS officials stated that they consider QHP issuers to be in compliance with the notice requirement if they provide such notice to enrollees through any plan documentation distributed with the summary of benefits and coverage on or before the date of enrollment.[5] An exchange may only certify a health plan as a QHP if the issuer provides evidence that it complies with the minimum certification requirements set forth in federal law and regulations, including those relating to coverage of non-excepted abortion services.[6]

In the course of our work, we identified instances where the practices of private issuers and others related to the coverage of non-excepted abortion services may have been inconsistent with federal requirements or where the practices varied, suggesting some uncertainty regarding how to comply with federal requirements. However, our work was not designed to assess CMS's oversight of compliance with federal requirements because this was beyond the scope of the engagement's objectives. Consequently, we did not examine the circumstances that might explain more fully how inconsistencies may have occurred, nor did our work systematically determine the extent of the potential inconsistencies or variation in practices within the federally facilitated or state-based exchanges. Nevertheless, we wish to bring these matters to your attention.

The following are the matters we identified:

(1) **Cost of Coverage and Enrollee Payments**. As noted above, federal law requires QHP issuers to estimate the cost of the coverage of non-excepted abortion services on an average actuarial basis using a minimum of $1 per enrollee, per month, and to collect from each enrollee an amount equal to the actuarial value of the coverage. During the course of our work, we noted that QHP issuers varied in their approach to these requirements.

- Two issuers in our sample indicated that they estimated the cost of non-excepted abortion services without regard to the statutory minimum of $1 per enrollee, per month; had not rounded up their estimates to the statutory minimum; and were therefore not using this statutory minimum as a basis for determining premium amounts to collect from enrollees for non-excepted abortion services. Other issuers in our sample indicated that they estimated the cost of these services to be less than $1 per enrollee, per month, but, to comply with PPACA, rounded the amount up to $1.

- For several of the issuers we contacted, the actual premium amount associated with non-excepted abortion services coverage was reported to be $1; however, for other issuers the actual premium amount varies from the cost issuers estimated for this coverage. For example, one issuer in our sample noted that it interpreted federal law to require a minimum separate allowed cost of $1 for non-excepted abortion services that, when adjusted to a paid cost based upon plan design and administrative expenses, could result in less than a $1 premium per month for certain enrollees. Therefore, while this issuer's estimate of the cost of covering non-excepted abortion services exceeded

[4]45 C.F.R. § 156.280(e)(5).

[5]PPACA, § 10104(c), amending § 1303(b)(3)(A), 124 Stat. at 899.

[6]PPACA, § 1301(a)(1), 124 Stat. at 162-63; 45 C.F.R. § 155.1000(b)-(c).

the statutory minimum of $1 per enrollee, per month, its premium amounts varied among different plans—an approach approved by its state department of insurance. In contrast, one issuer with which we spoke informed us that its state regulators advised it was necessary to charge a premium amount of at least $1 per enrollee, per month for non-excepted abortion services under PPACA in each of its plans. Two additional issuers informed us that they similarly interpreted PPACA to require a minimum monthly premium amount of at least $1 per enrollee.

- The Washington Health Benefit Exchange—which bills and collects monthly premiums from enrollees unless they have opted to pay their QHP issuer directly—does not assess any premium to individuals enrolled in QHPs that cover non-excepted abortion services whose premiums are fully subsidized under the law. Because PPACA prohibits the use of premium tax credits and cost-sharing reductions to pay for non-excepted abortion services, officials from the exchange have since told us that they are taking steps to address this issue. Specifically, they plan to modify their billing practices beginning in 2016 so that the exchange collects a monthly premium from subsidized enrollees for non-excepted abortion coverage. To address billing practices in effect for 2014 and 2015, officials from the exchange told us that they plan to use a year-end reconciliation process to notify the Internal Revenue Service of any amounts owed by the applicable taxpayer for non-excepted abortion coverage.[7]

- One issuer with which we spoke also expressed uncertainty as to whether federal law requires issuers to terminate coverage for fully subsidized enrollees who failed to pay their QHPs' premium amount—which equaled $1 per enrollee, per month—for coverage of non-excepted abortion services. Federal regulations direct QHP issuers to terminate coverage for enrollees receiving advance payment of the premium tax credit where the enrollee has failed to pay all outstanding premiums for a period of three consecutive months.[8]

(2) **Notice of Coverage**. As noted above, PPACA requires QHP issuers to provide notice to enrollees that the QHP covers non-excepted abortion services.[9] During the course of our work, we noted that four issuers were not notifying enrollees that abortion services were provided as a covered benefit. Officials with two of these issuers told us they had only recently become aware of the requirement to notify enrollees that their QHP covers non-excepted abortion services, and stated that they were in the process of updating their enrollee materials to come into compliance with the notice requirement. Officials with the other two issuers, both of which offered QHPs in the same state, told us that they are not notifying enrollees that their QHPs cover non-excepted abortion services. These issuers indicated that they use model plan materials required by the state that do not specifically include any notation that non-excepted abortion services are a covered benefit, and that such information would only be provided upon enrollee request. However, nothing would preclude these issuers from notifying enrollees through another

[7]We do not know, for enrollees whose premiums are not fully subsidized, whether the exchange collects from these enrollees a separate amount equal to the actuarial value of the coverage for non-excepted abortion services.

[8]45 C.F.R. § 156.270(g).

[9]Under PPACA and CMS's implementing regulations, QHPs that cover non-excepted abortion services must notify enrollees of such coverage as part of the summary of benefits and coverage at the time of enrollment. PPACA, § 10104(c), amending § 1303(b)(3)(A), 124 Stat. at 899; 45 C.F.R. § 156.280(f)(1). CMS officials stated that the agency considers issuers to be in compliance with this requirement if notice is provided to enrollees in any format as long as those materials are distributed along with the summary of benefits and coverage prior to or at the time of enrollment.

mechanism, such as through the summary of benefits and coverage, which state officials confirmed is governed only by federal law.

(3) **Separate payment**. As noted above, federal law requires issuers to collect from each enrollee in a QHP covering non-excepted abortion services a separate payment for coverage of these services. According to CMS officials, the agency, during regular technical assistance calls, communicated information about ways that QHP issuers could collect this separate payment amount. For example, CMS officials stated that two of the ways that QHP issuers could do so are by sending the enrollee a single invoice or bill that separately itemizes the premium amount for non-excepted abortion services or by sending a separate bill for these services. However, these practices were not evident among those interviewed during the course of our review. Specifically, we found that 15 issuers and the Washington Health Benefit Exchange were not itemizing the premium amount associated with non-excepted abortion services coverage on enrollees' bill nor did they indicate they send separate bills for those premium amounts. Another issuer told us that its bills indicate that there is a $1 charge for "coverage of services for which members subsidies may not be used." This issuer indicated that, while its bills do not specifically refer to "non-excepted abortion services," the issuer did not understand the law or regulations to require this level of specificity.

(4) **Segregation plans**. We did not consistently query private issuers or state departments of insurance that we contacted during our study regarding the filing of segregation plans, as this issue was not within the scope of our work. However, during the course of our work, one state department of insurance indicated that it was unaware of the regulation regarding the filing of a segregation plan with the state.[10] In addition, two issuers offering QHPs that cover non-excepted abortion services in another state indicated that they had not filed segregation plans, and at least one of these issuers was not aware of any direction by that state's department of insurance to file such a plan. As noted above, CMS's regulations state that QHP issuers *should* file segregation plans with the relevant state health insurance commissioner. CMS officials indicated that neither PPACA nor CMS regulations require an issuer to file a segregation plan, and that it is up to each state health insurance commissioner as to whether QHP issuers are required to file such plans. If QHPs do not file such plans, it is unclear how state departments of insurance are to ensure that issuers are complying with PPACA's segregation requirements.[11]

CMS is responsible for implementing federal requirements governing the establishment and operation of health insurance exchanges, including QHP coverage of non-excepted abortion services, and overseeing QHP participation in the federally facilitated exchanges. In light of these responsibilities, we bring these matters to your attention so that you may consider whether additional guidance or outreach to QHP issuers, state departments of insurance, and state-based exchanges is necessary to ensure compliance with these requirements. We have also discussed these issues with CMS officials as we completed work on the report issued today, and note that HHS's comments on the draft report indicated that additional clarifications may be needed. We hope that this information is helpful in this regard.

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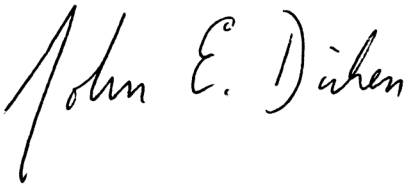
[10]This state department of insurance has since issued a regulatory bulletin directing QHPs that cover non-excepted abortion services to file a segregation plan with the department.

[11]PPACA directs state health insurance commissioners to ensure QHP compliance with the segregation of funds requirements applicable to the coverage of non-excepted abortion services. PPACA, § 10104(c), amending § 1303(b)(2)(E), 124 Stat. at 898-99.

Sincerely yours,



John E. Dicken
Director, Health Care

cc: The Honorable John Boehner
Speaker of the House of Representatives

The Honorable Kevin McCarthy
Majority Leader
House of Representatives

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
House of Representatives

The Honorable Joseph R. Pitts
Chairman
Subcommittee on Health
Committee on Energy and Commerce
House of Representatives

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
House of Representatives

The Honorable Tim Murphy
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

The Honorable Chris Smith
House of Representatives

The Honorable Cathy McMorris Rodgers
House of Representatives