



**Questions and Answers:
Separate Billing for non-Hyde Abortion Services, set forth in
Exchange Program Integrity Final Rule, December 20, 2019
and
HHS Interim Final Rule providing
Additional Policy and Regulatory Revisions in Response to
the COVID-19 Public Health Emergency, May 8, 2020**

Updated August 5, 2020

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On July 20, 2020, a federal judge blocked the separate billing rule issued by the Department of Health and Human Services ("HHS") which requires issuers to send, and enrollees to pay, separate monthly bills for the premium for non-Hyde abortion services and the premium for other coverage. 84 Fed. Reg. 71,674, 71,684 (Dec. 27, 2019). The U.S. District Court for the Northern District of California granted summary judgment to a coalition of state attorneys general, led by New York and California, and set aside the rule on the grounds that HHS did not provide a reasoned explanation for why it deviated from its prior rule, and the new rule thus is arbitrary and capricious, in violation of the Administrative Procedures Act. The rule was previously set to take effect on August 26, 2020.

This decision applies in New York and can be found [here](#).

Updated Q&A, July 1, 2020

Below are responses to questions received regarding implementation of the federal Exchange Program Integrity Final Rule, issued by the Centers for Medicare and Medicaid Services (CMS) on December 20, 2019.¹ This Q and A document was updated on May 5, 2020 with the issuance of CMS Interim Final Rule, Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and again on July 1, 2020 in response to additional questions received from health insurers.²

1. Are plans expected to provide members with advance notice of the invoicing change/requirements? If yes, how far in advance?

Plans should refer to the specific requirements in the final rule regarding invoicing. NY State of Health encourages issuers to provide members with advance notice to avoid as much disruption as possible.

2. Does NYSOH intend to provide consumers with any notice or educational materials regarding the separate invoicing requirement?

¹ Fact Sheet: <https://www.cms.gov/newsroom/fact-sheets/2019-health-and-human-services-exchange-program-integrity-final-rule-fact-sheet>

Final Rule (CMS-9922-F): <https://www.federalregister.gov/documents/2019/12/27/2019-27713/patient-protection-and-affordable-care-act-exchange-program-integrity>

² Interim Final Rule (CMS-5531-IFC) <https://www.cms.gov/files/document/covid-medicare-and-medicaid-ifc2.pdf>

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NY State of Health does not plan to issue consumer notices or education materials regarding this federal requirement. NY State of Health encourages issuers to educate consumers on this federal requirement to avoid consumer confusion.

3. **Are insurers required to take any action when a member fails to make payment on the separate invoice? Further, is the insurer required to continue accruing that balance in subsequent invoices? For example, if member fails to pay the \$1 separate invoice amount in August, would the insurer be permitted to bill the accrued \$2 (\$1 for August and \$1 for September)?**

Please refer to the response to question 10 below.

4. **What obligations does an insurer have in instances in which the QHP enrollee receiving APTC, without prompting by the insurer, pays an amount valued at multiple months' worth of the separate invoice amount? For example, a member's coverage effective date is 1/1/21 and their separate invoice amount is \$1. The member makes a payment of \$12 on 12/26/20 with the intent to satisfy the balance of their annual separate invoice amount. Are insurers permitted to apply it to all 12 months? If so, would the insurers be required to send a separate invoice for \$0 for the remaining 11 months?**

Please refer to the response to question 18 below.

5. **Are issuers that offer online premium payment expected to make available to enrollees a separate online portal for payment of the separate invoice amount?**

Please refer the Final Rule, pages 71685 and 71705-71706 that refer to electronic bills.

Updated Q&A, May 5, 2020

6. **The HHS Interim Final Rule related to COVID-19 provides a 60-day extension of time for compliance with the provision requiring separate billing for non-Hyde abortion services. Is the State also extending this deadline?**

The separate billing requirement for non-Hyde abortion services is a federal rule / requirement. It was contained in the 2019 Exchange Program Integrity Rule issued by HHS. The HHS Interim Final Rule related to COVID-19 [CMS-5531-IFC], which is subject to public comment, provides a 60-day extension of time for compliance with the separate billing provision, to the first billing



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cycle after August 26, 2020. QHP Issuers must comply with the requirements outlined in the federal rules. There is no separate NY State process regarding separate billing for these services.

Both the Program Integrity Rule and the Interim Final Rule reference enforcement discretion in certain circumstances, provided QHP Issuers can demonstrate a good faith effort to comply. However, the rules further state that HHS is unlikely to exercise enforcement discretion in the event a QHP issuer fails to meet the separate billing requirement after more than a year following publication of the 2019 Program Integrity Rule or more than 6 -months after the end of the COVID public health emergency, whichever is later. (Interim Final Rule, pg. 175).

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March 2020 Q&A:

Timeline:

7. When would QHP Issuers be required to first start sending these new invoices?

The Final Rule states that Qualified Health Plan (QHP) Issuers be in compliance with the policies being finalized in 156.280(e)(2) on or before the day that is 6 months after the publication of the final rule, which would be June 27, 2020. (Final Rule, 71689).

However, the Final Rule also acknowledges that requiring QHP Issuers to begin complying mid-plan year may pose implementation challenges (Final Rule, 71689); and that HHS will consider extending enforcement discretion to a QHP Issuer that fails to timely comply with the separate billing policy as required, if HHS finds that the QHP Issuer attempted in good faith to timely comply. (Final Rule, 71690). Evidence of good faith efforts might include records showing that planning for compliance with the requirements started within a reasonable time. (Final Rule, 71690).

Scope of the Requirements:

8. Do the requirements apply only to subsidized QHP enrollees who receive Advance Premium Tax Credit (APTC), or all QHP enrollees? Do the requirements apply off-exchange?

The requirements apply only to subsidized QHP enrollees who receive APTC. The requirements do not apply off-exchange.

Under the Final Rule, QHP Issuers must take certain steps (separate billing, separate payment) to ensure that no premium tax credit or cost-sharing reduction funds are used to pay for non-Hyde abortion services, for which public funding is prohibited. (See, Final Rule 71674).

9. Do the requirements apply to Essential Plan? Do the requirements apply to Child Health Plus?

It is our interpretation of the Final Rule that the separate billing requirement applies only to QHPs. However, Essential Plan issuers must segregate funds and comply with the prohibitions on the use of federal funds.

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Grace Periods:

- 10. If an enrollee refuses to pay the separate bill for non-Hyde abortion services, is the QHP Issuer obligated to impose a grace payment hold and later terminate their enrollment? Is it within the QHP Issuer's discretion to continue coverage without regard to whether or not payment for the non-Hyde services is ever received?**

Until regulatory changes are finalized through a separate rulemaking, HHS will not take enforcement action against a QHP Issuer that adopts and implements a policy, applied uniformly to all enrollees, where an enrollee will not face a grace period and termination of coverage for the failure to pay the separate premium payment. (Final Rule, 71686).

NY State of Health (NYSOH) encourages QHP Issuers to exercise this discretion permitted in the federal rule.

- 11. Will grace period rules apply separately to both invoices, or can we consider a combined total for the purposes of determining whether enrollees are in their grace period and any payment threshold?**

The premium payment threshold applies to the total premium.

Process:

- 12. Must a QHP Issuer bill a straight \$1/month for each enrollee regardless of how many family members/dependents are on the plan, the plan's monthly premium, and whether the non-Hyde abortion service being used? Are any family members exempt from the non-Hyde premium (e.g. a male, a two-year old child, etc.)?**

QHP Issuers must send an entirely separate monthly bill to the policy holder for the portion of the premium attributable to coverage of non-Hyde abortion services; and must instruct the policy holder to pay this bill separately from payment of the (separate) premium bill for coverage of all other services.

QHP Issuers must collect a separate payment for each enrollee in such a plan without regard to the enrollee's age, sex or family status, for an amount equal to the greater of the actuarial value of coverage of non-Hyde abortion services, or \$1 per enrollee per month (see, Final Rule at 71683).

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QHP Issuers must determine the amount of the separate payment for the actuarially justified cost of coverage for non-Hyde abortion services, which must be no less than \$1 per enrollee per month.

- 13. If a QHP Issuer intends to charge more than \$1.00 in the invoice for non-Hyde abortion services, will the QHP Issuer be required to bill the same amount for all enrollees in the same product? Or can this amount vary by enrollee so long as the total amount of the two bills equals the enrollee's total premium rate?**

Community rating would prohibit charging different amounts to different enrollees.

- 14. What about those products which do not carry premium responsibility today? How will enrollees whose premiums are fully subsidized by APTC be handled?**

QHP Issuers are still required to bill all enrollees at least \$1 per enrollee per month, even those enrollees whose premiums are fully subsidized by APTC.

- 15. Will the NYSOH Exchange portal be updated to include an opt-out indicator should an enrollee not want these services? How will this info come across on the 834?**

NYSOH will not include an opt-out indicator. Billing and collection of premium is the responsibility of QHP Issuers.

- 16. Is a separate invoice page an absolute requirement? As a result of this we may also need to include an additional informational page to mitigate enrollee confusion. Are there other ways to meet the rules (i.e., separate line item)?**

The Final Rule outlines the requirement for separate bills, stating that the bills must remain distinct and separate, on separate pieces of paper with separate explanations of the charges to ensure the policy holder understands the distinction between the two bills and the expectation to pay the separate bills in separate transactions. (Final Rule, 71685). However, the enrollee may pay both bills in one transaction, and the issuer must accept that payment. (Final Rule, 71685).

- 17. If a QHP Issuer sends one email to an enrollee with information on how to view the two separate bills (but without the actual bills in the email), would it be acceptable, or must there be two emails sent?**

The Final Rule requires separate electronic bills in separate emails or electronic communications. (Final Rule, 71685).

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- 18. Would it be a good faith effort to comply if a QHP Issuer sent each affected enrollee one annual bill (for \$12, for example) at the beginning of the year, rather than a \$1 bill every month? (with an understanding that the enrollee would get a refund if his/her coverage terminated early)?**

The Final Rule requires that QHP Issuers must send a separate **monthly** bill to the policy holder for only the portion of the premium attributable to coverage of non-Hyde abortion services. (Final Rule, 71685, 156.280(e)(2)(ii)(A)).

- 19. Are QHP Issuers required to use specific language in describing the separate bill for non-Hyde abortion services? May we simplify our current invoices to reduce costs associated with the number of pages?**

The Final Rule does not include suggested language and at this time NYSOH does not intend to develop a sample invoice, as the billing and collection of premium is the responsibility of QHP Issuers. QHP Issuers should instruct policy holders to pay the separate bill in a separate transaction. HHS recommends issuers include explanatory language to mitigate enrollee confusion.

- 20. Is the QHP Issuer required to add the notice to each bill every month or is it only a one time notice which needs to be included on the invoice?**

The Final Rule addresses the requirement that issuers instruct the policy holder to pay the separate bill in a separate transaction on page 71685 of the Final Rule. To mitigate enrollee confusion and satisfy the requirement to instruct policy holders to pay the separate bill in a separate transaction, HHS suggests that issuers state clearly for policy holders on both bills that the policy holder is receiving two bills to cover the total amount of premium due for the coverage period, and that the policy holder's total premium due is inclusive of the amount attributable for coverage of non-Hyde abortion services, and that the policy holder should make separate payments for each bill. (Final Rule, 71685).

- 21. For small groups who request a religious exemption, we allow their employees to elect contraceptive and reproductive services coverage directly from us at no cost. Are we expected to charge the employees for just the abortion services, even if they might not want those services (men, women who are not of child bearing age)?**

The Final Rule does not apply to small group coverage.



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- 22. The guidance indicates payments need to be separate. If an enrollee submits a single check covering the full premium owed, are we able to process it and split payments?**

If an enrollee pays their entire premium in a single transaction, the issuer is required to accept the combined payment and disaggregate the funds. (Final Rule, 71685)

- 23. Will a QHP issuer or NYSOH be sending an initial notice of this change to enrollees impacted by this rule (i.e. APTC recipients)?**

As QHP Issuers are required to send bills and collect premium, notice of the new billing requirement should come from the QHP Issuers. NYSOH does not plan to send notices regarding the separate bill for non-Hyde abortion services to enrollees.