November 27, 2017

Acting Secretary Hargan
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Submitted electronically: www.regulations.gov

RE: CMS-9930-P
NPRM Notice of Benefit and Payment Parameters for 2019

Dear Acting Secretary Hargan,

Thank you for the opportunity to comment on the Department of Health and Human Services' (HHS) proposed Notice of Benefit and Payment Parameters for 2019. The more than 100 national and state-based undersigned organizations representing consumers, patients, and health care providers share the strong belief that everyone in this nation deserves high-quality, affordable health coverage and care. We write to express serious concerns with HHS' proposed changes to the Essential Health Benefits (EHB) standard, which would reverse the progress that has been made in ensuring people have access to ***basic*** health care services and has closed health care coverage gaps that for decades had left individuals underinsured.

Before the Affordable Care Act (ACA), consumers often did not have health coverage for services that are now covered as EHBs. For example, prior to the ACA, one in five people enrolled in the individual market lacked coverage of prescription drugs and mental health coverage was often excluded from health plans.[1] Also, 75% of non-group market plans did not cover maternity care (delivery/inpatient care), and 45% did not cover inpatient/outpatient substance use disorder services.[2] These services can be a small percentage of the relative benefit costs in commercial market plans, yet scaling

[1] Dania Palanker et al., *Eliminating Health Benefits Will Shift Financial Risk Back to Consumers*, The Commonwealth Fund, Mar. 24, 2017, http://www.commonwealthfund.org/publications/blog/2017/mar/eliminating-essential-health-benefits-financial-risk-consumers.
[2] Gary Claxton et al., *Would States Eliminate Key Benefits if AHCA Waivers are Enacted?*, Kaiser Family Foundation, June 14, 2017, https://www.kff.org/health-reform/issue-brief/would-states-eliminate-key-benefits-if-ahca-waivers-are-enacted/.

back on their coverage would significantly raise out-of-pocket costs for individuals who need them.[3]

Proposed Flexibility to Lower the Threshold of Covered Services

HHS' proposed changes to the EHB benchmark options, including the proposed definition of a "typical employer plan" would jeopardize adequate coverage of the ten EHB categories and subject enrollees to medical debt. HHS' proposal strongly emphasizes reducing coverage and lowering premiums, which will result in inadequate coverage of benefits and higher out-of-pocket costs for many consumers. We are concerned that HHS' proposed EHB benchmark options may lead to the selection of rare, outlier benchmarks, with extremely limited coverage for critical services.

We are concerned with HHS' proposal to give states three new EHB benchmark options to define the EHBs in the state. In the preamble to the proposed rule, HHS recognizes that under these benchmarks, consumers with specific health care needs may be offered less comprehensive plans that no longer cover certain services.[4] Under HHS' proposal, people who rely on services that are no longer considered EHBs will have to pay out-of-pocket for them or forgo the care they need. In addition, the out-of-pocket maximum and annual and lifetime limit consumer protections will no longer apply to services that are not considered EHBs since these protections only apply to EHBs. This will increase health care costs for many, including people with pre-existing conditions.[5] It will also drive up medical debt and health-related bankruptcies, which have been reduced since the ACA was enacted.[6]

The proposed changes to the EHB benchmarks will also threaten women's access to comprehensive health care and harm the economic security and well-being of women and their families. Because of the ACA, women now have robust coverage that provides access to essential services, including reproductive health services. Prior to the ACA, women often paid for inadequate coverage that did not meet the full range of their health needs. For example, many plans that covered maternity services were not affordable. One study discovered that many individual plans charged a separate

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[3] Rebekah Bayram & Barbara Dewey, *Are Essential Health Benefits Here to Stay?*, Milliman, March 2017, http://us.milliman.com/uploadedFiles/insight/2017/essential-health-benefits.pdf.
[4] *Id.*
[5] Sarah Lueck, *Administration's Proposed Changes to Essential Health Benefits Seriously Threaten Comprehensive Coverage*, Center on Budget and Policy Priorities, November 7, 2017, https://www.cbpp.org/research/health/administrations-proposed-changes-to-essential-health-benefits-seriously-threaten.
[6] Allen St. John, *How the Affordable Care Act Drove Down Personal Bankruptcy*, Consumer Reports, May 2, 2017, https://www.consumerreports.org/personal-bankruptcy/how-the-aca-drove-down-personal-bankruptcy/.

deductible for maternity coverage that was as high as $10,000 and some plans forced individuals to wait up to a year before their maternity care would be covered.[7] Coverage of maternity care and newborn care is also critically important for women of color and their children. In 2015, infant mortality rates were particularly concerning for communities of color.[8] HHS' proposed EHB benchmarks will leave many women and their families without the care they need when they need it.

Consumers value the ACA's comprehensive benefits and consumer protections limiting out-of-pocket costs. Two-thirds of consumers—67%—believe that the top health care priority should be to lower, not increase, their out-of-pocket costs.[9] At least two-thirds of marketplace enrollees— 65% or more—reported satisfaction with their qualified health plan in 2014 through 2016 in three separate national surveys.[10] To improve their coverage, most consumers want policymakers to lower the cost of prescription drugs, to ensure that benefits are comprehensive, and to improve network adequacy.[11] The proposed rule does not do this and is a step in the opposite direction.

Public Comment

If states are allowed to select new EHB benchmarks for the 2019 plan year and beyond, states should be required to provide reasonable opportunity for notice and public comment that includes public hearings, a public comment period, and the publication of plan documents and analysis in usable form and understandable formats, along with data (such as actuarial certifications and reports) that must be submitted to HHS.

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[7] NAT'L WOMEN'S LAW CTR., TURNING TO FAIRNESS: INSURANCE DISCRIMINATION AGAINST WOMEN TODAY AND THE AFFORDABLE CARE ACT, 11 (Mar. 2012), https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

[8] In 2015, the infant mortality rate per 1,000 live births was 5 percent for Hispanic infants, 8.3 percent for American Indian/Native Alaskan infants, 11.3 percent for Non-Hispanic Black infants, compared to 4.9 percent for non-Hispanic White infants. *Infant Mortality*, Centers for Disease Control and Prevention, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last updated Aug. 29, 2017).

[9] Ashley Kirzinger et al., *Kaiser Health Tracking Poll: Health Care Priorities for 2017*, Kaiser Family Foundation, Jan. 6, 2017, https://tinyurl.com/ychdlcaz.

[10] U.S. Government Accountability Office, *Most Enrollees Reported Satisfaction with their Health Plans, Although Some Concerns Exist*, GAO-16-761, Sept. 2016, https://www.gao.gov/assets/680/679673.pdf.

[11] Drew Altman, "The Health Care Plan Trump Voters Really Want," *New York Times* (Jan. 5, 2017), https://www.nytimes.com/2017/01/05/opinion/the-health-care-plan-trump-voters-really-want.html; Ashley Kirzinger et al., *supra*, note 8; Jennifer Tolbert & Larisa Antonisse, *Listening to Trump Voters with ACA Coverage: What They Want in a Health Care Plan*, Kaiser Family Foundation, Feb. 2017, http://files.kff.org/attachment/Issue-Brief-Listening-to-Trump-Voters-with-ACA-Coverage-What-They-Want-in-a-Health-Care-Plan.

Substitution of Benefits

HHS' proposal to allow issuers to substitute benefits within ***and between*** EHB categories will harm consumers by increasing coverage gaps and out-of-pocket costs. This policy will make it easier for issuers to substitute services that certain populations (*e.g.*, individuals with chronic conditions) need and replace them with actuarially equivalent services that are less costly and more likely to attract healthier populations.

This proposal will also make it difficult for consumers to compare health coverage options, making plan selection challenging. In the preamble of the proposed rule, HHS recognizes that this proposal would increase the burden on consumers as they would "need to spend more time and effort comparing benefits offered by different plans in order to determine what, if any, benefits have been substituted and what plan would best suit their health care and financial needs."[12]

HHS also notes that by allowing substitution between categories, states "may encounter difficulties in ensuring that all categories are filled in such a way that amounts to EHB".[13] This will lead to inadequate coverage of the ten EHB categories. Therefore, HHS should eliminate any provision allowing issuer flexibility to substitute benefits within EHB categories, and not adopt a rule allowing substitution of benefits between categories.

Conclusion

Thank you for considering our requests. We urge you to protect the coverage gains made under the ACA that have made it possible for consumers to access a wide range of benefits and secure the health care they need in 2019 and beyond. If you have any questions, please contact Michelle Lilienfeld (lilienfeld@healthlaw.org) at the National Health Law Program or Claire McAndrew at Families USA (cmcandrew@familiesusa.org).

Sincerely,

National Organizations

Families USA

National Health Law Program

[12] 82 Fed. Reg. 51131.
[13] *Id.*

The AIDS Institute

American Academy of Pediatrics

American Association on Health & Disability

1,000 Days

AIDS United

American Public Health Association

American Nurses Association

Association of Asian Pacific Community Health Organizations (AAPCHO)

Autistic Self Advocacy Network

Center for Law and Social Policy

Center for Medicare Advocacy

Center for Public Representation

Center for Reproductive Rights

CenterLink: The Community of LGBT Centers

Coalition on Human Needs

Community Catalyst

Depression and Bipolar Support Alliance

Eating Disorders Coalition

FORGE, Inc.

GLMA: Health Professionals Advancing LGBT Equality

Global Alliance for Behavioral Health and Social Justice

Health HIV

HIV Medicine Association

The Jewish Federations of North America

John Snow Inc. (JSI)

Justice in Aging

Lakeshore Foundation

Legal Action Center

NARAL Pro-Choice America

The National Alliance to Advance Adolescent Health

National Alliance of State & Territorial AIDS Directors

National Association for Children's Behavioral Health

National Center for Transgender Equality

National Coalition for LGBT Health

National Consumers League

National Council of Jewish Women

National Family Planning & Reproductive Health Association

National Partnership for Women & Families

National Patient Advocate Foundation

National Rural Social Work Caucus

National Viral Hepatitis Roundtable

Organizing for Action

One Colorado Education Fund

Our Family Coalition

Out2Enroll

Project Inform

Residential Eating Disorders Consortium

Sargent Shriver National Center on Poverty Law

Service Employees International Union

Trans Pride Initiative

ZERO TO THREE

State-Based Organizations

AIDS Action Baltimore

Anti-Poverty Network of New Jersey

Asian Americans Advancing Justice- Los Angeles

BlueWaveNJ

California LGBT Health and Human Services Network

Center for Independence of the Disabled, NY

Children Now (California)

Colorado Consumer Health Initative

Colorado Children's Campaign

Community Legal Services of Philadelphia

Consumer Health First (MD)

Consumers for Affordable Health Care (ME)

Desert AIDS Project (CA)

Equality North Carolina

Everthrive Illinois

Florida Health Justice Project, Inc.

Florida Policy Institute

Georgians for a Healthy Future

Health Access California

Health Care For All (MA)

Health Justice Project, Beazley Institute for Health Law and Policy, Loyola University Chicago School of Law

Health & Medicine Policy Research Group (IL)

Health Reform Resource Project (KS)

Heartland Alliance (IL)

Indivisible Illinois

JCD LGBTQ Caucus (Oregon)

Kentucky Equal Justice Center

Kentucky Voices for Health

Latin American Legal Defense and Education Fund (NJ)

Legal Council for Health Justice

Missouri Health Care for All

Nebraska Appleseed

New Yorkers for Accessible Health Coverage

Northwest Health Law Advocates

Montana Human Rights Network

National Association of Social Workers, West Virginia Chapter

The New Jersey Association of Mental Health and Addiction Agencies, Inc.

New Jersey Citizen Action

NorCal Mental Health America

North Carolina Justice Center

Office of the Health Care Advocate, Vermont Legal Aid, Inc.

Protect Our Care Alaska

Protect Our Care Illinois Coalition

Resource Center, Dallas TX

SC Appleseed Legal Justice Center

Tennessee Health Care Campaign

Tennessee Justice Center

Thresholds (IL)

Universal Health Care Action Network of Ohio

Virginia Organizing

Virginia Poverty Law Center

Voices for Utah Children

Western Center on Law & Poverty

West Virginians for Affordable Health Care

West Virginia Center on Budget and Policy

Women's Law Project (PA)