July 28, 2021

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9906-P
P.O Box 8016
Baltimore, MD 21244-8016

VIA ELECTRONIC SUBMISSION

Re: Comments on Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond Proposed Rule (CMS-9906-P; RIN 0938-AU60)

The Center for Reproductive Rights respectfully submits the following comment on the Notice of Proposed Rulemaking ("the proposed rule") on Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond, published by the Department of Health and Human Services ("HHS" or "the Department") on July 1, 2021. We commend the Centers for Medicare & Medicaid Services ("CMS") for its proposal to repeal the 2019 Separate Billing Regulation ("the 2019 Rule") and revert to and codify the prior policy set forth in the 2016 Payment Notice.

Founded in 1992, the Center for Reproductive Rights uses the power of law to advance reproductive rights as fundamental human rights worldwide. Our litigation and advocacy over the past 29 years have expanded access to reproductive health care around the nation and the world. We have played a key role in securing legal victories in the United States, Latin America, Sub-Saharan Africa, Asia, and Eastern Europe on issues including access to life-saving obstetrics care, contraception, abortion services, and comprehensive sexuality information. We envision a world where every person participates with dignity as an equal member of society, regardless of gender; where individuals are free to decide whether or when to have children and whether or when to get married; where access to quality reproductive health care is guaranteed; and where every person can make these decisions free from coercion or discrimination.

Abortion is an essential component of reproductive health care. In the course of a person's life, they may need the full spectrum of reproductive health care, from contraception and abortion to maternal health care or infertility care. We fundamentally disagree with the segregation of abortion insurance coverage from other health insurance coverage. Such a practice goes against industry practice, creates consumer confusion, and further stigmatizes an essential component of reproductive health care. However, we recognize that the Department is nonetheless obligated to implement Section 1303 of the Affordable Care Act ("ACA").

We therefore applaud and strongly support the Department for its proposal to completely repeal the 2019 changes to the Separate Billing Regulation at 45 C.F.R. §156.280(e)(2) which unlawfully reinterpreted Section 1303. The regulation was not implemented due to pending litigation and the COVID-19 pandemic, but if it had been implemented, it would have required qualified health plan ("QHP") issuers to send a separate premium bill for abortion services to

consumers and instruct consumers to pay a premium for abortion services in a separate transaction.

Section 1303 does not require issuers offering coverage of abortion services for which federal funds are prohibited to collect the required separate payment through a separate bill and instruct consumers to pay for such bill in a separate transaction. Efforts to interpret the law in the least burdensome manner, such as the policy proposal in the current NPRM, are consistent with both the Department's mission to "enhance the health and well-being of all Americans"[1] and President Biden's Executive Order 14009, which directed HHS to review all existing regulations to determine whether they are inconsistent with the Administration's policy priority of "eliminating unnecessary difficulties to obtaining health insurance."[2]

I. We Applaud the Administration's Repeal of the Harmful and Burdensome 2019 Separate Billing Regulation That Would Have Impeded Access to Abortion Care and Impacted Individuals and Families.

We appreciate that the Department has recognized that the 2019 Rule is excessively burdensome and potentially harmful. The 2019 Rule imposed by the Trump administration targeted abortion coverage with onerous regulations, creating a backdoor ban on abortion that would have ultimately pushed coverage out of reach for many individuals, including low-income families, undermining the very purpose of the Affordable Care Act.

Restrictions on abortion care, such as restrictions on insurance coverage of abortion, amplify existing health disparities, disproportionately harming those who already face barriers to accessing quality health care due to their place of residence, socioeconomic status, gender, sexual orientation, and race. Here, in addition to the serious risks of delays or terminations of coverage, the 2019 Rule threatened to introduce increased consumer confusion and new logistical obstacles, which would have disproportionately harmed communities that already face enormous barriers to accessing care. Those with Limited English Proficiency and those with low health care system literacy, who are disproportionately people of color, would have faced added burdens in navigating an already complex health insurance process.

The consumer confusion caused by the 2019 Rule could also have led to coverage gaps for individuals and reduced access to health care. Enrollees who missed the second bill or payment, or who may have believed it to be spam or a hoax, would have experienced delays in health insurance coverage or outright coverage denials, the impact of which would have been especially devastating for individuals who already face barriers in navigating health insurance. According to the Federal Reserve Board, almost 40% of Americans do not have enough savings to pay for a $400 emergency expense like an abortion.[3] Based on a 2014 study, the average costs to patients for first-trimester abortion care was $461 and anywhere from $860 to $1,874 for second-

[1] *Introduction: About HHS – Mission Statement*, DEP'T OF HEALTH AND HUMAN SERVS., https://www.hhs.gov/about/strategic-plan/introduction/index.html#:~:text=The%20mission%20of%20the%20U.S.,public%20health%2C%20and%20social%20services.
[2] Exec. Order No. 14,009, 86 Fed. Reg. 7793 (Feb. 2, 2021).
[3] *Report on the Economic Well-Being of U.S. Households in 2018 – May 2019*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (last updated May 28, 2019), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm.

trimester abortion care.[4] Transferring these costs to enrollees would disproportionately impact low-income people who may already face barriers to accessing quality health care due to their socioeconomic status, gender, sexual orientation, nationality, or race. Complying with this rule would also have imposed new costs on issuers, states, and State Exchanges, and federally-facilitated exchanges. These costs would have been passed on to consumers in the form of higher premiums—further impacting individuals who are struggling to make ends meet. We support the proposed repeal of the Separate Billing Regulation, as it would promote health equity by removing these unnecessary barriers to health care coverage.

For many, coverage for abortion care means the difference between getting the health care they need and being denied that care. The impact of such a denial of care can have long-term, devastating effects on a woman and her family's economic future. Research shows that a woman who seeks but is denied abortion care is more likely to fall into poverty than a woman who is able to get the care she needs.[5] Additionally, women who are denied access to an abortion have been found to suffer adverse physical and mental health consequences. For example, according to a longitudinal study that is frequently cited in peer-reviewed journals, women denied abortions are more likely to experience eclampsia, death, and other serious medical complications during the end of pregnancy, and more likely to remain in relationships where interpersonal violence is present.[6]

As discussed in the preamble to the proposed rule, court decisions invalidating the 2019 Rule focused on the harm that the rule would have caused to enrollees if it went into effect.[7] The United States District Court for the District of Maryland held that the separate billing requirement imposed an unreasonable barrier to accessing health care services because it would have made it harder for enrollees to pay for insurance, as they would have had to keep track of two separate bills—in conflict with Section 1554 of the ACA.[8] The United States District Court for the Northern District of California also issued an opinion holding that the 2019 Rule was arbitrary and capricious and focused on the substantial costs of the rule to states, issuers, and enrollees "without any corresponding benefit."[9]

Despite the fact that Section 1303 of the ACA unfairly segregates abortion from other health care coverage and imposes additional burdens on issuers covering abortion services, Congress always intended Section 1303 to retain availability of abortion coverage, including allowing states to require abortion coverage.[10] The 2019 Rule ran contrary to Congress' intent and the purpose of the ACA, as it would likely have had the net effect of reducing abortion coverage where issuers decide to eliminate coverage due to the regulatory burden. During the ACA debates and negotiations, Congress rejected amendments aimed at more stringent restrictions or prohibitions

[4] *See* Sarah Roberts, Heather Gould, et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24 WOMEN'S HEALTH ISSUES 2 (2014).
[5] Diana Greene Foster, Sarah C.M. Roberts & Jane Mauldon, Presentation at Am. Pub. Health Ass'n 140th Annual Meeting on Socioeconomic Consequences of Abortion Compared to Unwanted Birth (Oct. 30, 2021), available at https://apha.confex.com/apha/140am/webprogram/Paper263858.html.
[6] *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/research/turnaway-study.
[7] "Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond," 86 Fed. Reg. 35156, 35,177 (July 1, 2021).
[8] *Id.; see also* Sec. 1554 of the ACA, prohibiting the Secretary from promulgating regulations that create any unreasonable barriers to obtaining medical care or impede timely access to health care services.
[9] 86 Fed. Reg. at 35,177.
[10] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (March 30, 2010) (collectively the "Affordable Care Act (ACA)").

of abortion coverage.[11] Congress ultimately adopted the Nelson Amendment to replace all other proposed amendments, permitting insurers to cover abortions so long as they comply with the provisions of Section 1303.[12]

II. We Strongly Support the Department's Proposed Codification of the Policy Set Forth in the 2016 Payment Notice and Urge the Department to Implement Sec. 1303 in the Manner Least Burdensome to Consumers.

We commend the Department for repealing the Separate Billing Regulation and reverting to and codifying at §156.280(e)(2)(ii) the prior policy set forth in the preamble of the 2016 Payment Notice. As discussed in the preamble of the 2021 proposed rule, in making such a change, the Department evaluated the burdens the 2019 Rule imposed on consumers, issuers, states, and Exchanges and the need to "remove[] unreasonable barriers to obtaining appropriate medical care."[13] Under this proposal, QHP issuers offering coverage of abortion services for which federal funds are prohibited have flexibility in choosing a method to comply with the separate payment requirement in Section 1303, including the options of sending the policy holder: "a single monthly invoice or bill that separately itemizes the premium amount for coverage of abortion services"; "a separate monthly bill for these services; or "a notice at or soon after the time of enrollment that the monthly invoice or bill will include a separate charge for such services and specifies the charge."[14]

We appreciate the flexibility this proposal provides. Because the third method—sending the consumer a notice at or shortly after time of enrollment—is the least burdensome to consumers and would reduce potential confusion, we encourage the Department to emphasize this option to issuers offering coverage of abortion services. Further, we are pleased to see the Department explicitly state in the proposed rule's preamble that "an enrollee could make the payment for coverage of such abortion services and the separate payment for coverage of all other services in a single transaction."[15] This approach is efficient, practical, and in line with the Department's focus on reducing the burdens on consumers and is consistent with industry practice. It is common and widespread industry practice for consumers who have multiple insurance policies—life, disability, or homeowners insurance—to make each of the separate payments using a single transfer of funds. This industry practice was the backdrop against which Congress created Section 1303 and which prior to the 2019 Rule shaped the Department's implementation of the statute. We recommend that the preamble language affirming that issuers could collect the required separate payment in a single transaction be included in the text of the final rule.

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[11] See Amendment to H.R. 3962, 111th Cong. (2009) (offered by Rep. Stupak and Rep. Pitts), 155 CONG. REC. H12,921 (Nov. 7, 2009), available at http://documents.nytimes.com/the-stupak-amendment; see also 155 CONG. REC. S12,665 (2009) (statement of Sen. Patty Murray): "All Americans should be allowed to choose a plan that allows for coverage of any legal health care service, no matter their income, and that, by the way, includes women. But if this amendment were to pass, it would be the first time that Federal law would restrict what individual private dollars can pay for in the private health insurance marketplace." https://www.congress.gov/congressional-record/2009/12/08#daily-digest-senate; id. at S, 12,666 (statement of Sen. Ben Cardin): "The Nelson-Hatch amendment would go beyond that. It would restrict a woman's ability to use her own funds for coverage to pay for abortions. It blocks a woman from using her personal funds to purchase insurance plans with abortion coverage. If enacted, for the first time in Federal law, this amendment would restrict what individual private dollars can pay for in the private insurance marketplace."

[12] ACA § 1303(b)(2)(A), 42 U.S.C. § 18023(b)(2)(A).

[13] 86 Fed. Reg. at 35,177.

[14] *Id*. at 35,176.

[15] *Id*.

Section 1303 explicitly required issuers to segregate funds and accounts for abortion coverage; it did not pass on that burden to consumers. The entirety of the rule should reflect that principle. For that reason, we also support the Department's proposal to change the section heading of 156.280 to "Segregation of funds for abortion services."

III. The Proposed Rule Would Further Health Equity and Racial Justice as Required by EO 13985 and International Human Rights Obligations.

Governments have an obligation to facilitate health equity. International human rights bodies and experts have repeatedly voiced concern over disparities in access to health care in the U.S., including sexual and reproductive health care. In 1994, the U.S. ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), agreeing to "undertake to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of… [t]he right to public health [and] medical care."[16] During the CERD Committee's most recent (2014) review of U.S. compliance with the Convention, the Committee called on the U.S. to "[e]liminate racial disparities in the field of sexual and reproductive health."[17]

During the United Nations Human Rights Council's most recent review of the United States' human rights record under the Universal Periodic Review, the United States supported each of the recommendations that it received related to sexual and reproductive health and rights. Included in the recommendations that the United States supported was Finland's recommendation that the United States "[m]ake essential health services accessible for all women and girls, with special attention paid to those who face multiple and intersecting forms of discrimination."[18]

On January 20, 2021, President Biden issued Executive Order 13985, "On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," directing HHS to assess whether, and to what extent, its programs and policies "perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups."[19] The Executive Order directs that, as a policy matter, the federal government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.

As described in greater detail above, individuals who already face systemic discrimination and other barriers to accessing affordable, high quality health care coverage—people of color, Limited English Proficient speakers, rural residents, low-income people, people with disabilities, and those with inconsistent or no access to the internet and those with low levels of health care

[16] Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iv), opened for signature Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195.
[17] U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 15(b), U.N. Doc. CERD/C/USA/CO/7-9 (Sep. 25, 2014).
[18] UN Human Rights Council, 46th Session, Report of the Working Group on the Universal Periodic Review, United States of America, A/HRC/46/15, Para. 26-305, Dec. 14, 2020; UN Human Rights Council, 46th Session, Report of the Working Group on the Universal Periodic Review, United States of America, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/46/15/Add.1, Para. 12, March 4, 2021.
[19] Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

system literacy—are those most likely to have suffered under the 2019 Rule. Consumer confusion caused by separate billing processes could also lead to a complete loss of coverage, exacerbating the already existing health disparities for these communities. Although we fundamentally disagree with Section 1303 of the Affordable Care Act as a policy matter and believe that it contributes to health inequities, we are pleased that the Department is proposing a rule that would interpret Section 1303 in accordance with health equity principles and Executive Order 13985.

IV. Conclusion

We appreciate the opportunity to comment on the proposed rule's policy proposal for compliance with Section 1303 and its impacts on access to and coverage of reproductive health care. If you require any additional information about the issues raised in this letter, please contact Katherine Gillespie, Acting Director, Federal Policy and Advocacy, at kgillespie@reprorights.org.

Signed,

The Center for Reproductive Rights