November 23, 2022

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Department of Veterans Affairs
Ptarmigan at Cherry Creek, Denver, CO 80209

Attention: RIN 2900-AR55

VIA ELECTRONIC SUBMISSION

Re: Comments on Notice of Proposed Rulemaking on Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA (RIN 2900-AR55)

The Center for Reproductive Rights ("the Center") respectfully submits the following comment on the Notice of Proposed Rulemaking ("the proposed rule" or "NPRM") on CHAMPVA Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA, published by the Department of Veterans Affairs ("VA" or "the Department") on October 24, 2022.

Since 1992, the Center for Reproductive Rights has used the power of law to advance reproductive rights as fundamental human rights worldwide. Our litigation and advocacy over the past 30 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 obstetric care, contraception, safe 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.

We write in support of the proposed rule with some recommendations, which will greatly improve access to contraception for CHAMPVA beneficiaries by eliminating cost sharing for most forms of contraceptives. Given the Center's focus on reproductive health care access, our comment is limited to that portion of the rule. Below, we discuss contraception's role as essential health care, emphasize the proposed rule's importance in advancing access to care at a time when reproductive health care is under attack, and make recommendations to further strengthen the final rule by eliminating cost sharing for *all* contraceptives to ensure parity with health insurance plans in the private marketplace.

I. Contraception is essential health care, and the proposed rule takes vital action to ensure all CHAMPVA beneficiaries can access this essential care.

Contraception is essential health care for people of reproductive age. As of 2008, more than 99% of women in the United States who have been sexually active have used at least one form of contraception in their lifetime.[1] Across the United States, the Centers for Disease Control (the "CDC") estimates that in recent years, among people between the ages of 15 and 49 who have the capacity for pregnancy, 14% used oral contraceptives, 18.1% used a form of sterilization, and 10.4% used long-acting reversible contraception for pregnancy prevention.[2]

Contraception can also be used for a variety of non-contraceptive benefits, including treating pre-menstrual dysphoric disorder, menstrual migraines, and endometriosis, as well as suppressing menstruation. Additionally, contraception can be a critical form of gender-affirming care for transgender men and non-binary people who menstruate.[3] For example, certain types of contraceptives are often used to help minimize gender dysphoria by suppressing menstruation or preventing pregnancies.[4]

The CDC considers contraception to be one of the 10 greatest public health innovations during the twentieth century, noting that contraception has many significant health benefits.[5] People use contraception to promote their overall health, to engage in family planning, and to exercise full autonomy over decision-making in their lives. The proposed rule takes an important step forward to ensuring all CHAMPVA beneficiaries have access to this essential care.

II. The NPRM's proposal to eliminate cost sharing for contraception is vital at a time when reproductive health care is under attack across the country.

Access to reproductive health care is in crisis. Since 2011, states have passed more than 500 laws restricting access to reproductive health care, closing clinics and creating a shortage of abortion providers. Following the Supreme Court's overturning of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* in June 2022, bans on abortion have left large swaths of the country without access to abortion care at all. As a result, there has also been a stark increase in demand for many forms of birth control.[6]

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[1] GUTTMACHER INST., FACT SHEET: CONTRACEPTIVE USE IN THE UNITED STATES (May 2021), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states (referencing women, specifically).
[2] CTRS. FOR DISEASE CONTROL AND PREVENTION, Contraceptive Use, CDC, https://www.cdc.gov/nchs/fastats/contraceptive.htm (last visited Nov. 9, 2022).
[3] Maggi LeDuc, *How Birth Control Can Help with Gender Dysphoria***,** POWER TO DECIDE (Aug. 10, 2020), https://powertodecide.org/news/how-birth-control-can-help-gender-dysphoria.
[4] *Id.* (explaining how menstruation and pregnancy can be a source of dysphoria for some transgender and non-binary people).
[5] Ctrs. for Disease Control and Prevention, *Ten Great Public Health Achievements -- United States, 1900-1999*, 48 MORBIDITY & MORTALITY WEEKLY (1999) https://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm (referencing "smaller family size and longer interval between the birth of children," "increased opportunities for preconceptional counseling," "fewer infant, child, and maternal deaths," and the use of barrier contraceptives to prevent pregnancy and transmission of human immunodeficiency virus and other STDs").
[6] *See, e.g.*, Zach Blanchard, *Planned Parenthood Sees 20% Increase in Birth Control Appointments in Maine*, NEWS CENTER MAINE (Sept. 1, 2022, 11:03 PM), https://www.newscentermaine.com/article/news/health/planned-parenthood-sees-20-increase-in-birth-control-appointments-in-maine-reproductive-services-contraception-roe-v-wade-ruling/97-e3a317c4-0449-45be-a93a-a61a56023fc6; THE NETWORK FOR PUB. HEALTH LAW, LEGAL AND ETHICAL IMPLICATIONS OF INCREASED STERILIZATIONS POST-DOBBS (Oct. 18, 2022), https://www.networkforphl.org/news-insights/legal-and-ethical-implications-of-increased-rates-of-sterilizations-post-dobbs; Virginia Langmaid,

The analysis in *Dobbs* has also opened the door to further attacks on contraception, including attacks on foundational precedent establishing the constitutional right to use contraception.[7] A growing politicization of contraceptives, including emergency contraceptives, has resulted in state and national legislative efforts to ban funding for certain types of FDA-approved contraception.[8] Similarly, it has caused public confusion about the continued legality of contraception, especially as some are openly calling for elimination of the constitutional right to contraception.[9] In this moment, our government should be doing all it can to protect people's access to reproductive health care and to affirm their fundamental rights, including their right to plan or prevent pregnancies. Given the growing threats to contraceptive access post-*Dobbs*, the NPRM's proposed elimination of copays for contraception in CHAMPVA is an urgently needed removal of a significant barrier to birth control access. We strongly support the VA's efforts to bolster protections for reproductive health care, including by ensuring copay-free access to contraception.

III. The proposed rule takes critical strides to increase access to contraception by exempting certain contraceptives from cost sharing requirements, however, the final rule should eliminate cost sharing for *all* forms of contraception.

We support the Department's proposal to amend § 17.274 to eliminate deductibles and cost sharing to cover intrauterine systems and contraceptive implants, contraceptive diaphragms, prescription contraceptives, and prescription or nonprescription contraceptives used as emergency contraceptives, as well as surgical sterilization, and their associated care, counseling, and procedures. However, we urge the Department to ensure that the final rule eliminates cost sharing for *all* FDA-approved contraceptives,[10] including all nonprescription contraceptives.

The often-prohibitive cost of contraception is one of the greatest barriers to contraceptive access and services in the United States.[11] Under the proposed rule, nonprescription contraception is

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Contraception Demand Up after Roe Reversal, Doctors Say, CNN (Jul. 6, 2022, 7:42AM), https://www.cnn.com/2022/07/06/health/contraceptives-demand-after-roe/index.html.

[7] *E.g.*, JON O. SHIMABUKURO, CONG. RSCH. SERV., LSB10768, SUPREME COURT RULES NO CONSTITUTIONAL RIGHT TO ABORTION IN DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION 3 (2022) (highlighting Justice Thomas's Concurring Opinion on contraception); NAT'L WOMEN'S LAW CTR., DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION: THE COURT TAKES AWAY A GUARANTEED NATIONWIDE RIGHT TO ABORTION (Jul 12., 2022), https://nwlc.org/resource/dobbs-v-jackson-womens-health-organization-the-court-takes-away-a-guaranteed-nationwide-right-to-abortion (explaining the potential Constitutional implications for contraception post-*Dobbs*).

[8] NAT'L WOMEN'S LAW CTR., DON'T BE FOOLED: BIRTH CONTROL IS ALREADY AT RISK (Jun. 17, 2022), https://nwlc.org/resource/dont-be-fooled-birth-control-is-already-at-risk.

[9] *See, e.g.*, Oriana Gonzalez, *Post-Dobbs Birth Control Fight Heads to College Campuses*, AXIOS (Sept. 30. 2022), https://www.axios.com/2022/09/30/dobbs-roe-abortion-university-birth-control; Rebecca Boone, *Idaho Universities Disallow Abortion, Contraception Referral*, IDAHO NEWS (Sept, 28, 2022), https://idahonews.com/news/local/idaho-universities-disallow-abortion-contraception-referral.

[10] The FDA has approved a variety birth control products including, but not limited to: multiple types of hormonal birth control pills, shots and skin patches, vaginal rings, topical birth control, and long-acting reversible contraceptives, such as birth control implants or intrauterine devices, spermicides. U.S. FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE, (Jul. 14, 2021), https://www.fda.gov/media/150299/download.

[11] *See e.g.*, ADVOCATES FOR YOUTH, BEHIND THE COUNTER: FINDINGS FROM THE 2022 ORAL CONTRACEPTIVES ACCESS SURVEY 12 (2022) https://www.advocatesforyouth.org/wp-content/uploads/2022/09/BehindTheCounter-OralContraceptivesAccessReport-2022-1.pdf (highlighting challenges and successes around youth contraceptive

still subject to cost sharing, with the exception of emergency contraception that is available over the counter. By excluding these contraceptives from no-copay coverage, the Department privileges some products over others, even though no single birth control method is inherently superior.[12]

Each birth control method has varying effective rates, benefits and side effects, and the amount of effort required for consistent use of each method varies. Not everyone can tolerate all forms of contraception, and as the FDA has said: "No one product is best for everyone."[13] Different bodies may have varying tolerances for certain birth control methods, and different methods may or may not address reasons for using birth control beyond pregnancy prevention—to manage a medical condition, or control menstrual cycles, for example.

Moreover, people who use birth control do not typically use just one method throughout all their reproductive years and may switch methods several times due to health needs, side effects, changes in lifestyle, work setting, family goals, or other needs. In fact, the median number of methods ever used by women in the United States is about three, but nearly one third of women have used five or more methods.[14] Put simply, everyone is different and at different times in their lives people may need different methods of contraception to meet their needs. For this reason, it is imperative that access to a patient's preferred method is facilitated whenever possible, including by eliminating copays for all methods of contraception, whether they are prescribed or over the counter.

Although a person's preference should determine their contraceptive method, cost and accessibility play an outsized role in selection.[15] For example, a recent survey of young people found that people who are uninsured or have health care plans that require contraceptive cost sharing frequently find that oral birth control is too expensive to access and forego using a contraception method they would otherwise choose.[16] Studies also show that when contraception is too costly to pay for out-of-pocket, people will avoid contraception altogether or use it

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access); Adele Shartzer, et al., URBAN INST., BIRTH CONTROL AT A GLANCE: LOW INCOME WOMEN 1 (Oct. 1, 2019), https://www.urban.org/sites/default/files/2019/10/01/birth_control_at_a_glance_-low_income_women.pdf (explaining that "even if women have no-cost coverage for birth control, they may find their preferred brand or method is not covered or not available the same day they ask for it").

[12] U.S. FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE (Jul. 14, 2021), https://www.fda.gov/media/150299/download.

[13] *Id.*

[14] Ctrs. for Disease Control and Prevention, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, 62 National Health Statistics Reports (Feb. 14, 2013), https://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf.

[15] *E.g.*, Emily M. Johnson, et al., URBAN INST., BEYOND BIRTH CONTROL: FAMILY PLANNING AND WOMEN'S LIVES 2 (Jan. 2017) (finding that over 70 percent of women believed it was extremely or quite important for a method to be low cost); Guttmacher Inst., *Cost-Related Barriers Prevent Low-Income Women in the United States from Using Their Preferred Contraceptive Method, New Study Finds* (May 10, 2022), https://www.guttmacher.org/news-release/2022/cost-related-barriers-prevent-low-income-women-united-states-using-their-preferred (referencing a study finding that "national data from 2015–2019 suggest that 23% of low-income female contraceptive users would prefer to use a different method if cost were not an issue"); Meghan L. Kavanaugh et al., *Associations Between Unfulfilled Contraceptive Preferences Due To Cost And Low-Income Patients' Access To And Experiences Of Contraceptive Care In The United States, 2015-201*9, 4 Contraception X 100076 (2022).

[16] ADVOCATES FOR YOUTH, BEHIND THE COUNTER: FINDINGS FROM THE 2022 ORAL CONTRACEPTIVES ACCESS SURVEY 12 (2022), https://www.advocatesforyouth.org/wp-content/uploads/2022/09/BehindTheCounter-OralContraceptivesAccessReport-2022-1.pdf.

incorrectly, inconsistently, or choose methods that may be more affordable but less effective at preventing pregnancies.[17] Eliminating cost sharing for all forms of contraception would ensure access to the full spectrum of options for CHAMPVA beneficiaries to promote and protect their health.

Additionally, principles of equity and fairness require the removal of cost sharing for all forms of contraception. Millions of people in the United States are now insured through private health care plans that are subject to the Affordable Care Act, which requires health care plans to cover contraceptives and contraceptive counseling without a copayment or coinsurance, irrespective of whether a person has met their deductible.[18] The proposed rule would eliminate cost sharing and copays for many forms of contraception, but falls short of the ACA's requirement for no-copay coverage of *all* nonprescription contraceptives.[19] We urge the VA to eliminate this coverage gap in the final rule.

By eliminating cost sharing for intrauterine devices, contraceptive implants, and injectable contraceptives, the proposed rule would create parity between CHAMPVA and TRICARE, which removed cost sharing and copayments sharing for these contraceptives in July 2022.[20] We agree with the Department's determination that coverage under CHAMPVA and TRICARE are not required to be identical.[21] Although this rule proposes contraceptive coverage that is more generous than current policies under TRICARE,[22] coverage under CHAMPVA would remain

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[17] Lori F. Frohwirth, et al., *Access to Preferred Contraceptive Strategies in Iowa: A Longitudinal Qualitative Study of Effects of Shifts in Policy and Healthcare Contexts*, 33 Journal of Health Care for the Poor and Underserved (Aug. 2022), https://muse.jhu.edu/article/862431 (finding that as a result of Iowa opting out of federal Medicaid planning on access to contraception, when patients were unable to access their preferred contraceptive method, they switched to a non-preferred method or used no method at all.); Guttmacher Inst., *Restrictions on Contraceptive Services Interfere with People's Ability to Get Care and Use Their Preferred Contraceptive Method* (Sept. 20, 2022), https://www.guttmacher.org/news-release/2022/restrictions-contraceptive-services-interfere-peoples-ability-get-care-and-use; GUTTMACHER INST., A REAL-TIME LOOK AT THE IMPACT OF THE RECESSION ON WOMEN'S FAMILY PLANNING AND PREGNANCY DECISIONS 5 (2009), https://www.guttmacher.org/sites/default/files/pdfs/pubs/RecessionFP.pdf (finding that during a recession, women reported using birth control less consistently as a way to save money).

[18] Healthcare.gov, *Health Benefits & Coverage*, https://www.healthcare.gov/coverage/birth-control-benefits (last visited Nov. 4, 2022).

[19] There is no limitation to prescription contraceptives in the ACA, its implementing regulations, the current HRSA Women's Preventive Services Guidelines, or the HRSA Women's Preventive Services Guidelines which go into effect on Jan. 1, 2023. *See*, 42 U.S.C. 300gg-13 (2022), 45 C.F.R. 147.130. *See also*, Health Resources & Services Administration, *Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HRSA, https://www.hrsa.gov/womens-guidelines (last visited Nov. 2022) (comparing the 2019 and 2021 WPSI Guidelines).

[20] TRICARE Communications, *TRICARE Offers Contraceptive Care to Support You, Your Family, and Your Readiness*, TRICARE NEWSROOM (Sept. 29, 2022), https://newsroom.tricare.mil/Articles/Article/3174941/tricare-offers-contraceptive-care-to-support-you-your-family-and-your-readiness (explaining that beneficiaries no longer have cost sharing obligations or copays to cover reversible medical contraceptives including IUDs, hormonal shots, and slow-release hormonal rods).

[21] CHAMPVA Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA, 87 Fed. Reg. 64190, at 64195 (proposed Oct. 24, 2022) (to be codified at 38 CFR 17).

[22] TRICARE Pharmacy Program cost sharing is mandated by law. As a result, TRICARE must impose cost sharing and copayments for daily use prescription birth control pills and other drugs. This proposed rule would eliminate

largely "similar" to medical coverage under TRICARE, particularly because both programs would cover the same services and products.[23] We welcome increased contraceptive coverage under CHAMPVA, as ensuring coverage helps the Department fulfill its responsibilities to provide affordable essential health care to veterans' dependents and loved ones.

IV. Conclusion

The proposed rule is an encouraging step towards ensuring access to contraception for CHAMPVA beneficiaries, but we urge the Department to go further to ensure full coverage of all forms of contraception without cost sharing. We appreciate the opportunity to comment on this NPRM. If you require any additional information about the issues raised in this letter, please contact Freya Riedlin, Federal Policy Counsel, at friedlin@reprorights.org.

Signed,
The Center for Reproductive Rights

cost sharing for such medications for CHAMPVA beneficiaries, making it more generous than TRICARE coverage. TRICARE Communications, *TRICARE Offers Contraceptive Care to Support You, Your Family, and Your Readiness*, TRICARE NEWSROOM (Sept. 29, 2022), https://newsroom.tricare.mil/Articles/Article/3174941/tricare-offers-contraceptive-care-to-support-you-your-family-and-your-readiness.

[23] CHAMPVA Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA, 87 Fed. Reg. 64190, at 64195 (proposed Oct. 24, 2022) (to be codified at 38 CFR 17).