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December 29, 2020

VIA ELECTRONIC SUBMISSION

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-9914-P  
P.O. Box 8016  
Baltimore, MD 21244-8016

**RE: CMS-9914-P: Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations**

Dear Administrator Verma:

Thank you for the opportunity to comment on the Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates to State Innovation Waiver (Section 1332 Waiver) Implementing Regulations proposed rule. Medicare Rights is a national, nonprofit organization that works to ensure access to affordable health care for older adults and people with disabilities through counseling and advocacy, educational programs, and public policy initiatives. Each year, Medicare Rights provides services and resources to nearly three million people with Medicare, family caregivers, and professionals.

As the current COVID-19 public health emergency continues to reveal, the need for health care can arise at any moment and may be the difference between life and death. People without comprehensive health coverage may delay or forgo care, worsening their own and public health

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outcomes. Those who do seek treatment may face extreme financial hardships, impacting patient, program, and taxpayer costs.

The interdependent nature of the nation's health care system means that improving coverage and care will not only help individual people and programs, but the system as a whole. Medicare, for example, benefits when new enrollees are insured. These beneficiaries tend to be in better physical and financial shape than their un- or under-insured counterparts, who are more likely to have unmet health care needs. The absence of quality pre-Medicare coverage can lead to reduced well-being for entire families;<sup>1</sup> poorer health;<sup>2</sup> lack of access to care;<sup>3</sup> economic devastation;<sup>4</sup> and higher Medicare costs when they are ultimately eligible.<sup>5</sup> Accordingly, Medicare Rights supports efforts to ensure that all Americans who come to Medicare are transitioning from and have long experienced high quality, affordable coverage.

These factors and perspectives have influenced our comments below. We have significant concerns that as written, the proposed rule would undermine efforts to improve coverage rates and quality. It must not be finalized without major changes and assurances that it would not put individual or public health and economic security at risk.

### **Privatizing Marketplaces**

CMS proposes to allow states to follow Georgia's harmful footsteps<sup>6</sup> and end participation in HealthCare.gov, a one-stop-shop of centralized, unbiased information on comprehensive coverage available to state residents. In such instances, those seeking coverage and information would be forced to rely on a jumble of private insurance companies and brokers to compare plans, apply for financial assistance, and enroll in coverage. These entities may have incentives that do not align with the consumer's best interest.

As with the deeply flawed Georgia waiver, CMS asserts this proposed change is meeting a need. However, it is unclear what that need may be. Based on our extensive experience counseling

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<sup>1</sup> Committee on the Consequences of Uninsurance, Board on Health Care Services, "Health Insurance is a Family Matter," INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, Chapter 5 (2002), [https://www.ncbi.nlm.nih.gov/books/NBK221016/pdf/Bookshelf\\_NBK221016.pdf](https://www.ncbi.nlm.nih.gov/books/NBK221016/pdf/Bookshelf_NBK221016.pdf).

<sup>2</sup> David W Baker, et al., "Changes in Health for the Uninsured After Reaching Age-eligibility for Medicare," J GEN INTERN MED. 2006 Nov; 21(11): 1144–1149 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831646/>.

<sup>3</sup> Committee on the Consequences of Uninsurance, Board on Health Care Services, "Health Insurance is a Family Matter," INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, pp 91-106 (2002), [https://www.ncbi.nlm.nih.gov/books/NBK221016/pdf/Bookshelf\\_NBK221016.pdf](https://www.ncbi.nlm.nih.gov/books/NBK221016/pdf/Bookshelf_NBK221016.pdf).

<sup>4</sup> Rohan Khera, et al., "Burden of Catastrophic Health Expenditures for Acute Myocardial Infarction and Stroke Among Uninsured in the United States," CIRCULATION, 2018;137:00–00 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5780190/>.

<sup>5</sup> David W Baker, et al., "Changes in Health for the Uninsured After Reaching Age-eligibility for Medicare," J Gen Intern Med. 2006 Nov; 21(11): 1144–1149 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831646/>.

<sup>6</sup> Medicare Rights Center, "Comments on Georgia's Proposed Section 1332 Waiver" (September 16, 2020), <https://www.medicarerights.org/policy-documents/comments-on-georgias-proposed-1332-waiver>.

Medicare beneficiaries and others about their coverage options, it is likely this policy shift would only heighten confusion about where, when, and how to obtain affordable, high-quality health insurance—hindering active and informed enrollment decisions. Rather than increasing coverage rates, such a shift could result in more Americans becoming un- or under-insured. Some may lose coverage entirely, while others may make sub-optimal choices, such as enrolling in a non-ACA-compliant plan that would put them at extreme financial risk if they were to become sick or injured.<sup>7</sup>

Currently, most consumers have the option of using HealthCare.gov, state-based Exchanges, or private brokers to learn more about and select a plan. Eliminating consumer access to a source of government-sponsored information and assistance, as CMS is proposing, does not equal more consumer choice. CMS attempts to justify doing so by noting the government-sponsored information sources can lack “ability to frequently refresh and update the consumer experience”; even so, CMS notes they compete well enough that they “may crowd out market players such as web brokers, licensed agents and brokers, and issuers, dampening commercial investments in outreach and marketing by these market players to reach new consumers.”<sup>8</sup>

This is contradictory—and revealing. Barring governmental competition may indeed benefit private entities, but there is no evidence it would benefit consumers. Many consumers express their preference by choosing the unbiased one-stop-shop of government sites, despite the potential for a less up-to-date “consumer experience.” If the agency is truly concerned about the functionality of these websites, a strategy to improve them would be a more appropriate solution than the one proposed. As written, CMS’s plan would prevent consumers from obtaining information in a preferred manner. This would not better meet their needs. We strongly urge CMS to center consumers, rather than insurers and brokers, in proposed changes to consumer-facing tools and materials.

In addition to harming consumers, the proposed rule clearly violates the letter and the spirit of the law. As outlined, CMS would generally permit states to replace their current, robust online information and enrollment systems with a rudimentary website that displays basic plan information and offers no means to enroll. Instead, consumers would be directed to private websites to complete their applications. This is in direct conflict with Section 1311(d)(2) of the ACA, which requires a marketplace to “make available qualified health plans to qualified individuals.”

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<sup>7</sup> Tara Straw, “Tens of Thousands Could Lose Coverage Under Georgia’s 1332 Proposal,” Center on Budget and Policy Priorities (September 1, 2020), <https://www.cbpp.org/research/health/tens-of-thousands-could-lose-coverage-under-georgias-1332-waiver-proposal>.

<sup>8</sup> 85 Fed. Reg. 78572, 78619.

It would also run afoul of Section 1332(b)(1) of the ACA, which limits CMS’s authority to allow states to make insurance changes to those that cover as many people, with coverage as affordable and comprehensive, as without the waiver.<sup>9</sup> That CMS is attempting to bypass the Section 1332 waiver process does not change the underlying statute. CMS has failed to plausibly explain how its proposal would lead to as many people having coverage as without it, or how such coverage would be as affordable and comprehensive as it is today. The absence of such analysis underscores the proposal’s likely impacts. Curbing consumer access to clear, accurate enrollment assistance cannot be expected to improve informed decision-making. It can, however, be expected to worsen it, by causing more people to select no or inadequate coverage.

Circumventing the Section 1332 waiver process would also unlawfully circumvent its public engagement requirements. CMS does not have the authority to remake a statute by fiat, to eliminate waiver processes unilaterally, or to deny the citizenry their voice.

For these reasons, Medicare Rights opposes this proposal and urges its immediate withdrawal. CMS must instead encourage states to increase consumer outreach and to adopt the ACA’s Medicaid expansion, a proven strategy to improve coverage and well-being.<sup>10</sup>

### **Reducing the User Fee**

CMS proposes to cut the federal marketplace user fee from 3 percent to 2.25 percent and the user fee for state-based marketplaces that use the federal platform from 2.5 percent to 1.75 percent. We oppose this provision. The marketplace user fee supports critical functions, including the operation and improvement of the HealthCare.gov website, the Marketplace call center, the Navigator program, consumer outreach, and advertising.

The proposed rule’s rationale for the cut is that the lower user fee would be sufficient to fund current marketplace activities. But current activities are inadequate. In recent years CMS has virtually ceased marketing and outreach and has slashed funding for Navigators, a core marketplace function that is funded by user fees.

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<sup>9</sup> Patient Protection and Affordable Care Act, Pub. L. 111-148, Sec. 1332(b) (“(1) IN GENERAL—The Secretary may grant a request for a waiver under subsection (a)(1) only if the Secretary determines that the State plan—(A) will provide coverage that is at least as comprehensive as the coverage defined in section 1302(b) and offered through Exchanges established under this title as certified by Office of the Actuary of the Centers for Medicare & Medicaid Services based on sufficient data from the State and from comparable States about their experience with programs created by this Act and the provisions of this Act that would be waived; (B) will provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as the provisions of this title would provide; (C) will provide coverage to at least a comparable number of its residents as the provisions of this title would provide; and (D) will not increase the Federal deficit.”)

<sup>10</sup> Hailey Mensik, “Medicaid expansion key indicator for rural hospitals’ financial viability” (June 2, 2020), <https://www.healthcarediver.com/news/medicaid-expansion-rural-hospitals-health-affairs/579005/>.

At the same time, coverage decisions are becoming more necessary—and more complicated. The ongoing COVID-19 pandemic and its attendant economic fallout mean millions can no longer rely on, or afford, job-based or other private coverage. Now and in the future, many will need help evaluating their insurance options, perhaps on short notice and at irregular, unpredictable intervals as their circumstances change. As discussed above, people who are un- or under-insured can face serious health and financial consequences. Further reducing already insufficient support for consumer assistance during an unprecedented global pandemic would all but guarantee more Americans would experience this risk.<sup>11</sup>

Accordingly, we urge CMS to increase the user fee to the amount needed to restore outreach and enrollment assistance programs and meet growing needs, and to fund continued improvements to HealthCare.gov, including technological and consumer service enhancements.

Thank you again for the opportunity to comment. For additional information, please contact me at [LCopeland@medicarerights.org](mailto:LCopeland@medicarerights.org) or 202-637-0961 and Julie Carter, Senior Federal Policy Associate at [JCarter@medicarerights.org](mailto:JCarter@medicarerights.org) or 202-637-0962.

Sincerely,



Lindsey Copeland  
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<sup>11</sup> Katie Keith, “CDC 2019 Coverage Numbers Show Increase In Uninsurance Rate, With Caveats” (September 14, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200914.60859/full/>.