African Services Committee ☙ Actors Fund ☙ Children's Defense Fund-New York Community Service Society of New York ☙ Consumers Union ☙ Empire Justice Center
Make the Road New York ☙ Medicare Rights Center ☙ Metro New York Health Care for All Campaign
New Yorkers for Accessible Health Coverage ☙ New York Immigration Coalition ☙ Project CHARGE
Public Policy and Education Fund of New York/Citizen Action of New York
Raising Women's Voices-New York ☙ Schuyler Center for Analysis and Advocacy ☙ Small Business Majority
Young Invincibles

September 20, 2018

Ms. Colleen Rumsey
Department of Financial Services
One Commerce Plaza
Albany, NY 12257
Comments submitted electronically to Colleen.Rumsey@dfs.ny.gov

Re: Addition of section 52.1(r); amendment of sections 52.17(a)(36), (37), 52.18(a)(11) and (12) of Title 11 NYCRR.

Dear Ms. Rumsey,

Health Care for All New York (HCFANY) is pleased to submit comments in support of the proposed rule regarding the additions to Title 11 NYCRR: *Minimum Standards for Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure.*

HCFANY is a statewide coalition of over 170 organizations dedicated to achieving quality, affordable health coverage for all New Yorkers. We strive to bring consumer voices to state and federal policy conversations, ensuring that the concerns of real New Yorkers from across the state are heard and reflected in policy decisions. As active influencers of health reform in New York State, and with member organizations ranging from women's health care advocates to organizations that unite faith and labor communities to ensure affordable health care for New Yorkers, we are well positioned to submit comments on the proposed rule. In addition, it was HCFANY Steering Committee member, Raising Women's Voices-New York (RWV-NY), which coordinated 2014 and 2016 research by women's health organizations that identified numerous instances of New York insurers lack of compliance with federal ACA contraceptive coverage requirements (findings outlined below).[1]

[1] Letter from Lois Uttley, RWV-NY & New York Alliance for Women's Health, to Donna Frescatore, NY State of Health & Troy Oechsner, NYS Department of Financial Services, Re Non-Compliance by NYSOH QHPs with HHS Guidance on Contraceptive Coverage (Mar 1, 2016).

Fundamental to equality and economic empowerment is the ability to decide whether or when to have children. Expanded access to contraception is a critical tool for advancing educational and economic opportunities and improved maternal and infant health outcomes – in short, when we break down barriers to contraception we see physically and economically stronger individuals, families and communities. Despite the great strides that have been made in New York and nationally to improve access to care and coverage of reproductive health care services, barriers remain. Nearly 55% of all pregnancies in New York are unintended.[2] Our maternal mortality rate – 30th in the country - is unacceptably and disastrously high – disproportionately impacting the lives of women of color.[3] These statistics bear witness to the coverage and access gaps that exist today. This proposed rule, which seeks to clarify and expand access to affordable contraception through insurance coverage, takes us one step closer to achieving a vision where every New Yorker has the power to determine their reproductive future and chart their own destiny.

The use of contraception is nearly universal. It is estimated that 99% of sexually active heterosexual or bisexual women have used contraception at one point in their lifetime.[4] When access barriers – such as cost - are removed, women are able to select the method of contraception that works best for them, improving consistent and correct use of the method. This in turn significantly reduces the chance of unintended pregnancy.[5] Since 2012, the ACA – a foundational component of these proposed regulations – has fostered greater access to affordable contraception by requiring insurers to cover a broad range of Food and Drug Administration (FDA) approved contraceptives for women without cost-sharing.[6] It is estimated that in 2013, this coverage provision saved women approximately $1.4 billion on birth control pills.[7] However, national research, as well as research conducted by RWV-NY here in New York, indicate that on-the-ground barriers remain, impacting women's ability to obtain the coverage protections afforded under the ACA and existing state regulations.

In a letter to the NYS Department of Financial Services dated March 1, 2016, RWV-NY and other leaders of New York Alliance for Women's Health outlined problems they identified with contraceptive coverage compliance on the part of New York insurers, including apparent failure to cover some methods of contraception, descriptions of cost-sharing that violate the requirements spelled out in the 2015 HHS FAQ guidance on ACA implementation[8], confusing and conflicting information about cost-sharing "tiers"

[2] State Facts About Unintended Pregnancy: New York. (2017, September 07). Retrieved from https://www.guttmacher.org/fact-sheet/state-facts-about-unintended-pregnancy-new-york.
[3] Maternal Mortality in New York in 2018. (2018). Retrieved August 23, 2018, from https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality/state/NY. New York City: Fields, R. (n.d.). New York City Launches Committee to Review Maternal Deaths. Retrieved from https://www.propublica.org/article/new-york-city-launches-committee-to-review-maternal-deaths.
[4] Contraceptive Use in the United States. (2018, July 26). Retrieved from https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.
[5] Unintended Pregnancy in the United States. (2017, September 20). Retrieved from https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states.
[6] Birth control benefits and reproductive health care options in the Health Insurance Marketplace. (n.d.). Retrieved from https://www.healthcare.gov/coverage/birth-control-benefits/
[7] The Affordable Care Act's Birth Control Benefit: Too Important to Lose. (n.d.). Retrieved from https://nwlc.org/resources/the-affordable-care-acts-birth-control-benefit-too-important-to-lose/
[8] 26 CFR 54.9815-2713, 29 CFR 2590.715-2713, 45 CFR 147.130; Departments of Labor, Department of Treasury, Health and Human Services, FAQS About Affordable Care Act Implementation, May 11, 2015. *Available at;* https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/downloads/aca_implementation_faqs26.pdf

and generally poor customer service by plan representatives who were ill informed and unable to answer our callers' questions. They also noted a universal problem in the on-line statements of benefits that a woman would likely first refer to in trying to determine a plan's contraceptive coverage. The Alliance for Women's Health called on DFS to investigate and take action to address the failure of health plans to comply with the ACA's contraceptive coverage requirements.

Specifically, the Alliance for Women's Health requested that DFS and NSYOH 1. ensure that all plans are, in fact covering 18 distinct methods of contraception and that at least one form of each method is being provided without cost-sharing; 2. require that QHP on-line information clearly spell out coverage and actual dollar costs for all forms of birth control within the 18 contraceptive methods, as well as the process enrollees can use to seek exceptions to cost-sharing requirements; 3. require training of plan customer service representatives in providing accurate and timely information to enrollees and prospective enrollees about contraceptive coverage and costs, as well as the exceptions process; and 4. condition the certification of QHPs on demonstrated compliance with the contraceptive coverage requirements spelled out in the 2015 HHS FAQ guidance.

In 2017, DFS issued proposed regulations that clarified the ACA's coverage requirement that insurers cover at least one type of each of the 18 FDA approved forms of contraception without cost sharing, and issued a report that that corroborated much of the research conclusions of the Alliance for Women's Health. Their investigation found that 75 percent of surveyed plans were out of compliance with the ACA's coverage requirements.[9]

HCFANY is pleased to see many of the recommendations made by the New York Alliance for Women's Health reflected in these expanded measures, and commends the Department of Financial Services (DFS) for putting forth these regulations that will enhance access to affordable contraception through insurance coverage. It is the mission of HCFANY to ensure that all New Yorkers have access to the health care they need, including comprehensive reproductive health care. These proposed regulations not only reflect that mission but embody the state's longstanding legacy of advancing reproductive autonomy. In the face of unrelenting and insidious federal attacks on our reproductive health and rights, policy makers should explore all options for safeguarding existing coverage protections and further strengthening access to care here in New York. HCFANY wholeheartedly supports these proposed regulations and offers the following comments and recommendations.

1. Improving Timely Access to Over-the-Counter Emergency Contraception.

In 2006, the FDA approved Plan B, a form of emergency contraception (EC), for over-the-counter (OTC) use. In the twelve years following approval, research and policy has underscored both the safety of OTC EC for women of all ages and the many barriers that stand in the way of affordable and timely access. EC can be used to prevent pregnancy within 120 hours of unprotected sex; however, it is most effective when used within 24 hours.[10] This efficacy timeframe requires unique policy considerations to ensure accessibility. While OTC availability facilitated timely access, it failed to address a critical barrier –

[9] New York State Department of Financial Services. *Health Plan Non-Compliance on Contraceptive Coverage in New York* (2017). *Available at;* http://www.dfs.ny.gov/reportpub/contraceptive_coverage_rpt_022017.pdf.

[10] Emergency contraception: Effectiveness of emergency contraceptives. (n.d.). Retrieved from https://ec.princeton.edu/questions/eceffect.html

affordability. It is estimated that the cost of OTC EC can range from $40-$50, unless you have a prescription and insurance coverage.[11] Under the ACA, insurers are required to cover EC without cost-sharing when a prescription is involved. Thus, for some individuals OTC EC will only be affordable when they have the ability to obtain a prescription from a provider before heading to the pharmacy – which could delay their access to EC. The proposed regulations mirror existing Medicaid policy, which enables women to access EC OTC without a prescription, and have it covered without cost-sharing by their insurance. This policy shift benefits women across the state, especially those in rural areas where transportation barriers and affordability considerations can stand in the way of one's ability to obtain EC within the short window that it is most effective. At this juncture, EC is the only hormonal contraceptive method that is FDA approved for OTC use. We interpret the proposed regulations to also contemplate the coverage of future FDA approved OTC hormonal methods without cost-sharing and without a prescription. This forward-thinking approach is welcomed and called for as we seek to foster a regulatory environment that advances access to reproductive health care services for all New Yorkers.

2. Requiring Coverage of a 12-Month Supply of Contraception Dispensed at One Time.

In 2017, the Department issued regulations that allowed for the dispensing of a 12-month supply of contraception at one time – following an initial 3-month dispensing of the same contraceptive. The proposed regulations remove the requirement for the initial 3-month supply. We applaud this action. Women, on average, spend three decades of their lives trying to avoid an unintended pregnancy.[12] This can result in individuals using the same contraceptive method over long periods of time. Uninterrupted use is critical to improving contraceptive efficacy and reducing the rate of unintended pregnancies. Studies show that dispensing a one-year supply of contraceptives, as opposed to a three- or one-month supply, is associated with a 30 percent reduction in the likelihood of an unplanned pregnancy, as well as cost savings to private insurers and the state.[13] Purely requiring coverage for a dispensed 12-month supply does not prevent medical providers from prescribing smaller dispensed amounts – if there is a clinical reason or patient preference to do so. It simply aligns insurance coverage policy with evidence-based research that underscores the public health value of dispensing a 12-month supply of contraception at one time. We support this change in the proposed rule, as it lifts an unnecessary barrier to consistent and effective contraception use and reflects evidence-based family planning recommendations.[14]

3. Establishing a Standard Exceptions Process.

Federal and state regulations require insurers to cover at least one type of each of the 18 FDA-approved forms without cost-sharing. [15,16] Further federal and state regulatory guidance has clarified that if a

[11] Emergency contraception: Cost of emergency contraceptive pills. (n.d.). Retrieved from https://ec.princeton.edu/questions/eccost.html

[12] The Guttmacher Institute. *Fulfilling the Promise: Public Policy and U.S. Family Planning Clinics*, New York: AGI, 2000. As cited in: The Guttmacher Institute. Contraceptive Use in the United States. Available at: https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states#4.

[13] Shulman, L. (2011). Number of Oral Contraceptive Pill Packages Dispensed and Subsequent Unintended Pregnancies. Yearbook of Obstetrics, Gynecology and Womens Health, 2011, 296-297. doi:10.1016/j.yobg.2011.05.078

[14] Gavin, L., Moskosky, S., Carter, M. et al., Providing Quality Family Planning Services: Recommendations of CDC and the U.S. Office of Populations Affairs. MMWR 2014;63(No.4):11.

[15] United States, Center for Medicare and Medicaid Studies. (2015). FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION (PART XXVI). Washington, DC.

specific method is not covered, insurers are required to provide a clear and timely exceptions process that will enable women to access a provider-determined medically necessary method.[17,18] However, research both in New York and nationally indicates that such processes vary from insurer to insurer and are rarely clear or accessible to consumers and providers. RWV-NY's 2016 research found that seven NYS qualified health plans lacked any reference to an exceptions process on their website, and representatives from three plans stated that there was no exceptions process.[19] The lack of a clear exceptions process can delay access to a preferred method of contraception, which can cause gaps in use and exposure to unintended pregnancy.

The proposed regulations permit the Superintendent to establish a standard exceptions process – the first in the nation – enabling providers to use a single form across insurers to request coverage of a medically necessary method of contraception. The value of such a process cannot be understated. Providers will have a clear and direct pathway to ensuring their patients have access to the method of contraception they need, and the coverage benefits they deserve. New York will stand as a model for the country of how to implement an exceptions process that appropriately balances the ability of plans to use reasonable medical management techniques in developing their formularies with the needs of individual consumers whose medically necessary contraceptive method is not covered. *We commend DFS for advancing this initiative, and respectfully request that DFS include a broad range of stakeholders, including providers and advocates, in the implementation process.* Further, the proposed regulations clearly indicate that insurers should not "impose any restrictions or delays… on any mandatory contraceptive coverage." *We recommend that when implementing the standard exceptions process, DFS clearly identifies a narrow timeframe, not to surpass 72 hours, by which plans must act upon a provider's exception request.*

4. Improving Consumer Access to Information on Contraceptive Coverage.

One's ability to exercise their right to the contraceptive coverage afforded under the ACA and state regulations hinges upon their ability to clearly understand which methods are covered. Formularies and customer service representatives are a critical source of information for consumers and providers. The details they provide can shape a consumer's decision to select a particular plan or even a method. The proposed regulations require insurers to maintain an up-to-date list of contraceptive drugs, devices and other products on its formulary list, including any tiering structure or restrictions in how a method can be accessed. This requirement is particularly important given that RWV-NY's 2016 research found a universal problem in the on-line statements of benefits that a woman would likely first refer to in trying to determine a plan's contraceptive coverage. The state is taking a critical step to ensuring consumers have the necessary tools to make informed decisions about their coverage options. Detailed up-to-date formularies that include contraceptive drugs as well as devices (which are often excluded from formularies as they are considered a medical benefit) will help guide not only consumers, but also customer service representatives who are responding to questions from providers and consumers alike. This enhanced level of transparency will afford greater access to contraception and is a welcomed and necessary regulatory action.

[16] New York State Department of Financial Services. FORTY-SEVENTH AMENDMENT TO 11 NYCRR 52 (INSURANCE REGULATION 62). https://www.dfs.ny.gov/insurance/r_finala/2017/rf62a47txt.pdf
[17] Idb. (federal regulations, see citation 11).
[18] Idb (state regulations, see citation 12).
[19] Letter from the New York Alliance for Women's Health to the Department of Financial Services dated March 1, 2016.

Conclusion

HCFANY values the opportunity to comment on the proposed regulations. In short, we fully support the proposed rulemaking in its entirety, and recommend swift adoption. Further, we encourage DFS to engage advocates and providers as stakeholders in the implementation process of these proposed regulations, specifically the adoption of a standard exceptions process. Contraception is a fundamental component of women's health care. By breaking down existing barriers to preventive reproductive health care, we chip away at the structures of inequity and take steps towards improving the health and wellbeing being of New Yorkers.