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April 07, 2020

Via email to Bradley Humphreys (Bradley.Humphreys@usdoj.gov)

Secretary Alex M. Azar II
Secretary of Health & Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Re: Request to Suspend Implementation of the Final Rule, *Patient Protection and Affordable Care Act; Exchange Program Integrity*, 84 Fed. Reg. 71,674 (Dec. 27, 2019), in light of Coronavirus (COVID-19) pandemic and OMB Directive M-20-16.

Dear Secretary Azar:

We, the undersigned Attorneys General (the States), urge the U.S. Department of Health and Human Services (“HHS”) to immediately suspend the planned implementation of HHS’s Final Rule that reinterprets Section 1303 of the Affordable Care Act to require separate abortion billing. 84 Fed. Reg. 71,674 (December 27, 2019) (to be codified at 45 C.F.R. pt. 155, 156) (the “Final Rule”). Despite five years of compliance with the separate payments and segregation of funds requirement of Section 1303, HHS has now finalized a rule which significantly alters how insurance companies bill consumers and how consumers pay for healthcare. The Final Rule requires two separate bills, one for \$1 for abortion coverage, and one for an amount attributable to all other health benefits, where if either payment is missed, coverage is lost. As a result, on January 30, 2020, we filed a lawsuit challenging the legality of this rule. The Final Rule is not only unnecessary, but administratively onerous and significantly expensive for States and their healthcare systems to implement mid-plan year. Moreover, the novel coronavirus (COVID-19) has taken an unprecedented toll on the States’ public health and economy. The response to this pandemic—including the national emergency declared by the President of the United States on March 13, 2020, and the multiple states of emergency declared since then—demands that states and the federal government devote all possible resources to pandemic response and recovery efforts to safeguard the nation’s public health. Distracting the States’ health and insurance

agencies with implementation obligations related to HHS's non-time sensitive separate-billing Rule by June 27, 2020, is unwarranted, unnecessary, and jeopardizes public health and safety.¹

It is unclear how long the COVID-19 pandemic will last, and the full extent of its impact on the healthcare systems of the various states remains to be seen. Addressing this immediate crisis will require the States' health and insurance agencies to focus on the mission-critical functions of assuring access to and maintenance of health coverage, and not on implementing costly and onerous new billing systems that will lead to consumer confusion and coverage termination.

Implementation of the Final Rule during this public health and economic crisis is irresponsible and harmful to the residents of the States and the rest of the country as it will divert attention and resources from fighting the pandemic and saving lives. Over the past several weeks, this country has experienced a significant increase in the need for aid, funding, and other support to help various states respond to the pandemic. Congress recently enacted three separate relief bills in order to address the COVID-pandemic, including a two trillion-dollar relief package aimed to combat the economic fallout of the outbreak. By March 27, 2020, the Centers for Medicare & Medicaid Services ("CMS") approved thirty-four states waivers of Section 1135 of the Social Security Act² intended to expand access to care. Additionally, according to the National Conference of State Legislatures, at least thirty-five states have "introduced legislation to support state action related to COVID-19, including...bills that involve funding, workforce protections or medical coverage, disease surveillance, isolation or quarantine, or are related to actions taken by the Governor in a state of emergency."³ Across the country, states are taking action to respond to the COVID-19 pandemic by prioritizing access to healthcare, namely disease-management and preventive care.

Pressing ahead with implementation of this non-time sensitive Final Rule notwithstanding this public health crisis plaguing the country would impose additional financial burdens on state agencies, requiring countless administrative burdens—personnel hours, funds, and resources to come into compliance—jeopardizing the health of consumers in need of health coverage more than ever. HHS itself recognized that implementation of the Final Rule will have significant economic consequences: implementing the Rule mid-plan year, by June, would cost each issuer an additional \$4.1 million in higher contracting costs for system changes and overtime personnel payments. 84

¹ According to the National Governors Association, state emergency / public health emergency declarations have been issued for each state, as well as the District of Columbia. In addition, 32 states, including, New York, California, Maryland, and Washington have been approved for a major disaster declaration, with four more states' major disaster declarations pending. All fifty states have implemented their National Guard activations. *See* <https://www.nga.org/coronavirus/#states>.

² *See* <https://www.cms.gov/newsroom/press-releases/trump-administration-approves-34th-state-request-medicare-emergency-waivers>

³ *See* <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>.

Fed. Reg. at 71,699. According to HHS’s own estimates, one-time costs to bring all affected issuers (94 total) across the country into compliance with the Final Rule and implement the necessary technical changes would require over 2.9 million hours of work and cost approximately \$385 million for all issuers. *Id.* at 71,697.

In addition, implementation would cost over \$100 million for all issuers—approximately \$1.07 million per issuer annually, putting further pressure on the care system. *Id.* at 71,698. On average, each state Exchange will incur one-time costs of \$750,000. For state-based Exchanges that permit the sale of qualified health plans offering abortion coverage, those one-time costs will approximate \$9 million, with ongoing costs of \$2.4 million for 2020 alone. *Id.* at 71,705.

As we continue to navigate this challenging time, any effort by HHS to implement the Final Rule on June 27, 2020 or in the coming months, would be inconsistent with the Office of Management and Budget’s (OMB) Directive M-20-16, “Federal Agency Operational Alignment to Slow the Spread of Coronavirus COVID-19,” issued on March 17, 2020. Directive M-20-16 instructs federal agency heads to “prioritize all resources to slow the transmission of COVID-19” and otherwise focus exclusively on mission-critical functions.⁴ There is no plausible argument that implementation or enforcement of the Final Rule, which puts at risk consumers’ health coverage, would slow the transmission of COVID-19; nor can implementation of separate billing procedures be considered mission-critical. By forcing the States’ to prioritize altering their billing systems and processes—despite suggesting enforcement will not occur until plan year 2021—HHS unnecessarily detracts from the States’ abilities to prioritize responding to the national crisis of COVID-19, and contravenes the White House’s Directive to federal agencies “to ensure that available resources can be re-prioritized to mission-critical activities.” *Id.*

The Rule’s high expense and serious risk of health insurance coverage termination for millions, during a pandemic, significantly undermines the States’ concerted efforts on the mission-critical functions of assuring access to and maintenance of health coverage for treatment and testing of COVID-19. In keeping with the OMB Directive, HHS should immediately focus all resources on the critical issues surrounding the provision of healthcare to individuals affected by this pandemic. We urge that you immediately suspend implementation of the Final Rule pending successful containment of COVID-19 and the expected prolonged economic recovery.

Sincerely,

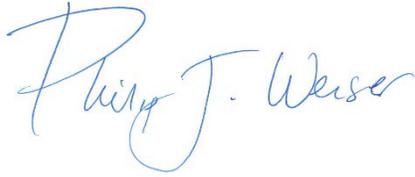


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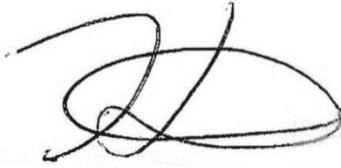


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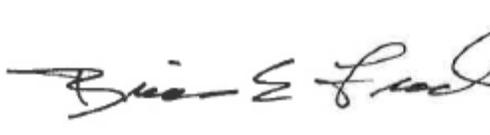
⁴ See <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>.



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