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DEPARTMENT OF JUSTICE

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April 23, 2018

<u>Via e-filing at www.regulations.gov</u>

Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9924-P
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue S.W.
Washington, D.C. 20201

RE: Proposed Rule, "Short-Term, Limited-Duration Insurance," CMS-9924-P, 83 Fed. Reg. 7437 (Feb. 21, 2018)

Dear Administrator Verma:

As the Attorney General of the State of California, I respectfully submit the following comments in opposition to the Proposed Rule: "Short-Term, Limited-Duration Insurance," 83 Fed. Reg. 7437 (Feb. 21, 2018) (Proposed Rule). The Proposed Rule could inflict serious harm on California's healthcare system which as the Attorney General, I have a constitutional duty to protect for California's 39 million residents. Cal. Const., art. V, § 13. Consistent with this duty, and because it conflicts with multiple laws to the detriment of Californians, I urge that the Proposed Rule be withdrawn.

The Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (Departments) propose to amend the current definition of "Short-Term, Limited-Duration Insurance" (STLDI) that presently limits short-term coverage to no more than three months, with no extensions. 26 CFR 54.9801–2, 29 CFR 2590.701–2, 45 CFR 144.103. The justification for the Proposed Rule is to provide consumers additional choice and a more "affordable" option to ACA-compliant insurance policies, yet the Proposed Rule does the exact opposite, making care less affordable and limiting consumer's choices. It may also have the effect of destabilizing the individual market and increasing expenditures on healthcare costs. The Departments acknowledge that individuals may experience "reduced access to some services and providers" and "increased out-of-pocket costs for some consumers, possibly leading to financial hardship" as a result of the Proposed Rule. 83 Fed. Reg. at 7442, 7443. Further, the Departments note that the majority of those likely to switch to STLDI would be relatively young and healthy, weakening states' individual market risk pools and increasing premiums for individuals with ACA plans. *Id*. at 7441, 7443. Accordingly, the increased premiums will disproportionally impact those who most need comprehensive coverage guaranteed by the ACA. Average monthly premium tax credits will also increase due to the higher ACA-premiums, increasing the burden on the federal budget. *Id*. at 7441.

Short-term plans provide temporary coverage, such as during transition periods between jobs; they are not required to adhere to the requirements of the Patient Protection and Affordable Care Act (ACA). Thus, these plans don't provide all essential health benefits such as emergency services, maternity and newborn care, mental health and substance abuse treatment or prescription drugs, or protect patients from being denied coverage based on a preexisting condition. Under the Proposed Rule, coverage would be expanded to up to 364 days, taking into account any extensions that may be elected by the policyholder without the issuer's consent. 83 Fed. Reg. at 7439.

As a result of the ACA, California reduced its uninsured rate by more than half, resulting in about 93% of Californians now being insured (as of 2016).[1] Further, coverage has become more affordable as a result of the ACA's premium tax credits and the expansion of Medi-Cal. This represents the largest coverage gain of any state in the country.[2] Covered California is integral to the state's healthcare system and has helped serve over 3 million Californians since it began offering coverage in 2014.[3] In fact, "California has the biggest individual market in the nation, and Covered California is the largest state-based exchange."[4]

Despite these gains, California, like all states, is at risk of significant cumulative premium increases in 2019-2021 due to recent federal healthcare actions, including the elimination of the insurance mandate penalty, end of cost-sharing subsidy payments, and the proposed expansion of short-term and association health plans.[5] As discussed further below, the Proposed Rule underestimates the numbers of individuals likely to switch to these short-term plans, as a study by the Urban Institute estimates that about 4.3 million individuals would enroll in these plans in 2019 if the Proposed Rule is finalized (compared to the approximate 100,000 to 200,000 individuals estimated by the Departments).[6] For California, the isolated impact of the STLDI expansion would result in an estimated 9.4 percent increase in those individuals without minimum essential coverage, and a projected premium increase of 17.8% in 2019 due to the expansion and the loss of the individual mandate penalty.[7]

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[1] Lucia, Laurel, et. al, "Towards Universal Health Coverage: California Policy Options for Improving Individual Market Affordability and Enrollment; UC Berkeley Labor Center," March 5, 2018, at 5, http://laborcenter.berkeley.edu/ca-policy-options-individual-market-affordability/.
[2] *Id.*
[3] Covered California, "Covered California's Health Insurance Companies and Plan Rates for 2018," August 1, 2017, at 1, https://www.coveredca.com/news/PDFs/CoveredCA_2018_Plans_and_Rates_8-1-2017.pdf.
[4] *Id.*
[5] Covered California, "Individual Markets Nationally Face High Premium Increases in Coming Years Absent Federal or State Action, With Wide Variation Among States," March 8, 2018, http://hbex.coveredca.com/data-research/library/CoveredCA_High_Premium_Increases_3-8-18.pdf.
[6] Blumberg, Linda J., et al., "The Potential Impact of Short-Term Limited Duration Policies on Insurance Coverage, Premiums, and Federal Spending," March 2018, at 12-13, https://www.urban.org/sites/default/files/publication/96781/2001727_updated_finalized.pdf.
[7] *Id.*

The Proposed Rule offers no mitigation of the acknowledged risks to individual Exchange market stability, or to the real threat of increased premiums. Nor does it offer any benefit or alternative for individuals who rely on ACA coverage, or for, as the Proposed Rule describes, "consumers who purchase short-term, limited duration insurance policies and then develop chronic conditions [then] face financial hardship as a result, until they are able to enroll in PPACA-compliant plans that would provide coverage for such conditions." 83 Fed. Reg. at 7443. In light of these recognized harms, there is no reasonable justification to facilitate the creation of a secondary insurance market that fails to provide uniform consumer protections under the ACA, and thus the Proposed Rule is not in accordance with the law and is likely arbitrary and capricious under the Administrative Procedure Act (APA).

Accordingly, I urge you to withdraw the Proposed Rule.

a. The Proposed Rule is an unreasonable interpretation of the ACA and HIPAA

STLDI has never been intended to serve as an individual's primary source of health insurance coverage, and a Proposed Rule seeking to expand its availability to act as such cannot be reconciled with the text, purpose, and structure of the ACA or the other consumer protection provisions of the Public Health Service Act (PHSA). In this case, the Proposed Rule states that "action is being taken to lengthen the maximum period of short-term, limited-duration insurance, which will provide more affordable consumer choice for **health coverage**." 83 Fed. Reg. at 7437 (emphasis added). Despite touting STLDI as a coverage option for consumers, the Proposed Rule acknowledges that STLDI is exempt from the PHSA's individual market requirements, and that these "policies would be unlikely to include all the elements of PPACA-compliant plans, such as the preexisting condition exclusion prohibition, coverage of essential health benefits without annual or lifetime dollar limits, preventive care, maternity and prescription drug coverage, rating restrictions, and guaranteed renewability." *Id*. at 7437, 7443. This is directly contrary to the protections of the ACA that were specifically meant to improve the type of coverage people received while creating a healthcare system that empowered consumers, giving them rights against discrimination, underwriting policies that make care more expensive, and arbitrary denials of care.

Even before the enactment of the ACA, STLDI plans typically addressed temporary healthcare coverage gaps when an individual was transitioning from a health plan or between plans (commonly between employers or upon the loss of employment). 81 Fed. Reg. 75316, 75317 (Oct. 31, 2016). Section 2791(b)(5) of the PHSA (42 U.S.C. § 300gg-91(b)(5)), which excludes STLDI from the definition of "individual health insurance coverage," was added as part of the Health Insurance Portability and Accountability Act of 1996 or HIPAA, which mandated reforms related to health insurance access, portability, renewability, mandatory coverage, and preexisting condition exclusions (including a one-year limit on preexisting condition exclusions). PL 104-191, 110 Stat. 1936 (Aug. 21, 1996) (codified mostly in titles 18, 29, and 42 of the United States Code).[8] HIPAA, at 42 U.S.C. § 300gg–42, provides for "guaranteed renewability

[8] Section 2791(b)(5) provides: "The term 'individual health insurance coverage' means health insurance coverage offered to individuals in the individual market, but does not include short-term limited duration insurance."

of individual health insurance coverage," except for specifically enumerated circumstances, such as for nonpayment of premiums or fraud. Excluding STLDI from the definition of "individual health insurance coverage" means that STLDI plans are excluded from the guaranteed renewability provisions of HIPAA, which makes sense because they were meant to meet a specific need: temporary coverage. Following the enactment of the ACA, individuals experiencing gaps in coverage enjoyed more options and could purchase coverage with ACA consumer protections given the Act's guaranteed availability and special enrollment periods. 81 Fed. Reg. at 75317.

A sanctioned expansion of STLDI, particularly if streamlined renewals are permitted, would facilitate the creation of a parallel insurance market consisting of STLDI plans that fail to adhere to the consumer protections of the ACA. This is contrary to Congress's intent under the ACA to guarantee the availability of coverage for all consumers regardless of health status. Notably, the ACA requires, "each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage." 42 U.S.C. § 300gg-1(a).

Allowing the proliferation of a market to compete with ACA plans would also be contrary to HIPAA's intent to limit the imposition of preexisting conditions exclusions. A House Report discussing HIPAA's one-year limit on preexisting conditions exclusions and gaps in coverage summarizes the Conference Committee's resolution of the disagreement between the House and the Senate regarding the permissible gap in coverage as follows:

> The conference agreement provides that in general, group health plans, and health insurance issuers offering group health insurance coverage, would have to reduce any preexisting condition limitation period by the length of the aggregate period of prior creditable coverage. Prior coverage would not qualify under this provision if there was a break in coverage under a group health plan that was longer than a 63-day period. (Waiting periods and affiliation periods would not be considered a break in coverage.) Creditable coverage includes coverage of the individual under a group health plan (including a governmental or church plan), health insurance coverage (either group or individual insurance), Medicare, Medicaid, military-sponsored healthcare, a program of the Indian Health Service, a State health benefits risk pool, the FEHBP, a public health plan as defined in regulations, and any health benefit plan under section 5(e) of the Peace Corps Act. An individual would establish a creditable coverage period through presentation of certifications describing previous coverage, or through other procedures specified in regulations to carry out this provision. The conferees intend that creditable coverage includes short-term, limited coverage.

H.R. Rep. No. 104-736, at 180 (1996) (Conf. Rep.).

This is the only substantive discussion of STLDI in the House Reports concerning HIPAA. *Id.*; *see also* H.R. Rep. No. 104-496, Pt. 1 (1996). This reference reinforces that STLDI was intended only as gap coverage. These plans, by their very terms, were to be "short-term," and of "limited-duration," and not subject to renewability. Section 2791(b)(5) of the PHSA; 42 U.S.C. § 300gg-91(b)(5)), § 300gg–42. Also, Congress intended that STLDI would serve to limit the imposition of preexisting condition exclusions under HIPAA. H.R. Rep. No. 104-736,

at 180 (1996) (Conf. Rep.). STLDI was excluded from the definition of "individual health insurance coverage" because it was not intended to be a form of extended insurance coverage. Nor was this exclusion intended to circumvent the consumer protections afforded by HIPAA (and now the ACA). Permitting a secondary insurance market that need not comply with the ACA's prohibition of preexisting conditions exclusions is an unreasonable interpretation of HIPAA's exclusion of STLDI from the definition of "individual health care coverage."

b. The Proposed Rule is an arbitrary and capricious change in agency position

Before January 1, 2017, regulations defined STLDI as "health insurance coverage provided pursuant to a contract with an issuer that has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder without the issuer's consent) that is less than 12 months after the original effective date of the contract." 81 Fed. Reg. at 75317; 62 Fed. Reg. 16894, 16928, 16942, 16958 (April 8, 1997); 69 Fed. Reg. 78720 (December 30, 2004). In 2016, the Departments became aware of a marked increase in the purchase of STLDI. 81 Fed. Reg. at 38032 & n. 34 (June 10, 2016). In some instances, the Departments noted that "individuals [were] purchasing this coverage as their primary form of health coverage and, contrary to the intent of the 12-month coverage limitation in the current definition of short-term, limited-duration insurance, some issuers are providing renewals of the coverage that extend the duration beyond 12 months." *Id*. at 38032. The Departments were concerned about the expansion of these limited value plans and their potential impact on consumers: "The Departments are concerned that these policies may have significant limitations, such as a lifetime and annual dollar limits on essential benefits (EHB) and pre-existing condition exclusions, and therefore may not provide meaningful health coverage." *Id.*; 81 Fed. Reg. at 75317-18. The Departments were also concerned that these policies would be targeted to and attract healthier individuals, thus adversely impacting the risk pool for ACA-compliant coverage. 81 Fed. Reg. at 38032; 81 Fed. Reg. at 75318.

To avoid creation of a parallel insurance market that afforded consumers limited protection and bifurcated the individual market, the Departments proposed regulations in 2016 to revise the definition of STLDI so that the coverage must be less than three months in total, including any extension periods. The Departments found that the rule change was necessary to carry out and implement "Congress' intent in the ACA to provide uniform minimum protections to consumers in every State." 81 Fed. Reg. at 75324. The regulation changes also included a requirement that a notice be prominently displayed in the contract and enrollment materials warning that the plan did not satisfy the ACA coverage requirements or its individual mandate. *Id*. at 75318. The rule also aimed to limit any negative impact these plans might have on the risk pool due to market segmentation and on the insurance premiums. 81 Fed. Reg. at 75318. The revised definition of STLDI applied for policies beginning on January 1, 2017, with a transitional allowance for plans sold before April 2017 and ending by December 2017. *Id*. at 75318-19.

Now, the Departments seek to change course, and revert back to the prior rule of allowing STLDI plans to offer a maximum coverage period of less than 12 months after the original effective date of the contract. The Departments fail to provide any reasonable justification for the change, and in fact still express concern that STLDI will harm consumers and the individual markets, as well as increasing premiums for ACA-compliant plans. For

example, the Departments acknowledge that individuals who are likely to purchase STLDI are "likely to be relatively young or healthy." 83 Fed. Reg. at 7441, 7443. The Departments estimate that in 2019, "after the elimination of the individual shared responsibility payment, between 100,000 and 200,000 individuals previously enrolled in Exchange coverage would purchase short-term, limited-duration insurance policies instead." *Id*. at 7443. The Departments further acknowledge that "[a]llowing such individuals to purchase policies that are not in compliance with PPACA may impact the individual market single risk pools." *Id*. at 7441. The Departments also acknowledge that weakening of states' individual market single risk pools could result in individual market issuers experiencing higher than anticipated costs of care and financial loss, which could cause them to leave the individual market. *Id*. at 7443. Thus, "[t]his proposed rule may further reduce choices for individuals remaining in those individual market single risk pools." *Id*.

Additionally, the Departments are concerned that the increase in premiums will result in a corresponding increase in total annual advance payments of the premium tax credit or APTC. Specifically, the Departments conclude that the Proposed Rule's "net effect on total APTC payments is uncertain, but federal outlays for APTC are estimated to increase by between $96 million ($54,948 million -- $54,852 million) and $168 million ($55,020 million -- $54,852 million) annually." 83 Fed. Reg. at 7443.

Further, the Departments acknowledge that the rule change would have serious qualitative costs for consumers, if it is finalized. 81 Fed. Reg. at 7442. Consumers could face reduced access to services and providers if they switch to STLDI from ACA-compliant plans. *Id.* They may also confront increased out-of-pocket costs, possibly leading to financial hardship. *Id*. In addition, the rule acknowledges that, "[d]epending on plan design, consumers who purchase short-term, limited duration insurance policies and then develop chronic conditions could face financial hardship as a result, until they are able to enroll in PPACA-compliant plans that would provide coverage for such conditions." *Id*. at 7443.

The Departments' concerns regarding the impact on the market and premiums are well-founded. However, their estimated figures on those likely to switch to STLDI appear to be far lower than figures in recent studies concerning the Proposed Rule. According to a March 2018 study by the Urban Institute, about 4.3 million individuals would enroll in STLDI plans in 2019 if the proposed rule takes effect, increasing the number of people without minimum essential coverage by 2.6 million.[9] The Urban Institute report also estimates that ACA-compliant premiums would increase about 16% in states that have not restricted short-term insurance plans due to the joint impact of the loss of the individual mandate penalty under the Jobs and Tax Act of 2017 and the expansion of STLDI plans under the Proposed Rule. The estimated premium increase for California is 17.8%.

Covered California also released a study in March 2018, discussing how recent federal healthcare actions, including elimination of the insurance mandate penalty, end of the cost-

[9] Blumberg, Linda J., *et al*., "The Potential Impact of Short-Term Limited Duration Policies on Insurance Coverage, Premiums, and Federal Spending," March 2018, https://www.urban.org/sites/default/files/publication/96781/2001727_updated_finalized.pdf.

sharing reduction payments, and the proposed expansion of short-term and association health plans, are expected to draw consumers out of the individual market, causing greater market instability and raising the likelihood of premium increases starting in 2019 (from 12 to 32 percent in 2019, with additional likely increases of 10 to 21 percent expected in 2020 and 2021).[10] "Cumulatively, these premium increases would average 50 percent over the three-year period, with a projected range of 36 percent to 94 percent."[11] The market risk to California under this report is listed as "significant," meaning that California could face possible 35% premium increases by 2021 due to the recent federal healthcare actions (other states face even greater risks: "high" (possible 50% premium increase by 2021) or "catastrophic" (possible 90% premium increase by 2021)).

Given these studies, it is likely that the Departments are also underestimating the Proposed Rule's potential negative impact on premiums for ACA-compliant plans, and on the increase in APTC due to the increased premiums.

Despite acknowledging these potential outcomes from the Proposed Rule, the Departments state that "[t]his action, [to effectuate the rule change], is being taken to lengthen the maximum period of short-term, limited-duration insurance, which will provide more affordable consumer choice for health coverage." 81 Fed. Reg. at 7437. The Departments' "conclusory statements do not suffice to explain [their] decision" to propose a rule change. "This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law," and is not entitled to receive [agency] deference under *Chevron* [*U.S.A, Inc v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984)]. 5 U. S. C. §706(2)(A); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). An agency must explain the evidence, and offer a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). One aspect of that explanation would be to provide justification for rescinding a prior regulation with "reasoned analysis," which here is entirely lacking given the acknowledged risks of the Proposed Rule. *Id*. at 52.

This failure to justify the change in the Departments' position is arbitrary and capricious, and cannot stand under the APA. In sum, the Proposed Rule amounts to a significant change in policy; a policy that sought to avoid the creation of a competing insurance market that failed to provide uniform consumer protections under the ACA. The Departments fail to explain why they believe the Proposed Rule is reasonable in light of the ongoing concerns about STLDI, thus the Proposed Rule is an irrational change in agency opinion.

The Departments themselves acknowledge that short-term plans should not be viewed as a form of "primary coverage," and that this was the rationale for the definition change in 2016 which protected consumers under President Obama. 81 Fed. Reg. at 7443. The Departments

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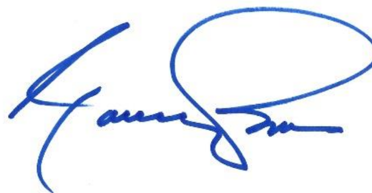
[10] Covered California, "Individual Markets Nationally Face High Premium Increases in Coming Years Absent Federal or State Action, With Wide Variation Among States," March 8, 2018, http://hbex.coveredca.com/data-research/library/CoveredCA_High_Premium_Increases_3-8-18.pdf.
[11] *Id*.

also recognize that these plans are intended to draw younger and healthier people from the marketplace. By inference, the Departments acknowledge that older individuals or those in poor health will not benefit from the Proposed Rule, and that they may be strapped with higher premiums due to younger and healthier individuals exiting the marketplace. The enhanced notice to consumers is insufficient protection against the acknowledged harms, and I share the Departments' "concern[] that short term, limited-duration insurance policies that provide coverage lasting almost 12 months may be more difficult for some individuals to distinguish from ACA-compliant coverage which is typically offered on a 12-month basis." *Id.* at 7439. By acknowledging the need for stronger disclosure, the Departments also recognize the potential for individuals to be mislead by the lower price point of these limited value plans. And to this end, opening the market to these potentially misleading plans is also inconsistent with the ACA's concept of the standardization of health plan offerings so that they are easier for consumers to understand and compare the value of plans.[12] There is no true benefit for consumers, the market place, states, or even the federal government that will face increased APTC.

It is clear that this regulation is nothing more than a furtherance of the Administration's quest to sabotage and as the President put it, "explode" the ACA at the expense of working families' access to affordable, quality healthcare coverage.[13] This is unacceptable and I therefore urge you not to finalize the Proposed Rule.

Sincerely,



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[12] *King v. Burwell*, 576 U.S. __, 135 S.Ct. 2480, 2485 (2015) (recognizing that the ACA authorized the creation of government-sponsored health insurance marketplaces or exchanges to allow consumers "to compare and purchase insurance plans.").
[13] March 25, 2017, Twitter message from Donald J. Trump (@realDonaldTrump): "ObamaCare will explode and we will all get together and piece together a great healthcare plan for THE PEOPLE. Do not worry!"