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Submitted via www.regulations.gov

April 23, 2018

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9924-P
P.O. Box 8010
Baltimore, MD 21244-8010

SUBJECT: Comments on CMS-9924-P: Short-Term, Limited-Duration Insurance

Dear Administrator Verma:

The proposed rule, *Short-Term, Limited-Duration Insurance*, 83 Fed. Reg. 7437 (proposed Feb. 21, 2018), is yet another attack on the integrity of the nation's health insurance markets. This rule attempts to replace comprehensive coverage compliant with the Affordable Care Act (ACA) with skimpy health insurance that had previously driven some consumers to bankruptcy.

As California's Insurance Commissioner, I lead the largest consumer protection agency in the state, and am responsible for regulating the California insurance market, which is the nation's largest. My responsibilities include maintaining a vibrant insurance market, while assuring that health insurance consumers in California can obtain, and California's health insurers provide, meaningful, comprehensive, health insurance coverage. I strongly oppose the proposed rule, *Short-Term, Limited-Duration Insurance* (proposed Rule), because it further erodes the protections provided under the ACA, poses significant risk to health insurance markets in California and the nation, and offers consumers skimpy health insurance policies that cannot be relied upon to cover necessary health services when they need them most.

Short-term limited-duration insurance is not individual health insurance under federal law and, therefore, does not have to comply with the ACA. As a result, short-term limited-duration insurance policies can legally exclude coverage for essential health benefits, impose annual or lifetime dollar limits on care, deny coverage or charge individuals more based upon their pre-existing conditions or health status, and fail to provide guaranteed renewability of coverage. Although touted as being an affordable alternative to ACA-compliant coverage, these policies return us to a race to the bottom rather than providing a meaningful alternative.

For these reasons, and those discussed below, I strongly oppose the proposed Rule and urge the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (together, the Departments) to withdraw it.

The Proposed Rule Increases the Likelihood of Adverse Selection and Further Destabilizes the ACA-Compliant Individual Market

If adopted, the proposed Rule would harm consumers by degrading affordability and likely the choice of offerings in the ACA-compliant individual market through adverse selection. Extending the duration of short-term limited-duration insurance policies to up to 12 months, with options to renew, allows these policies to mimic comprehensive ACA-compliant coverage. However, as the Departments acknowledge, these policies typically lack the consumer protections available in the ACA market by utilizing underwriting based upon health status, denying coverage for individuals with preexisting conditions, or pricing those individuals out of these products. As such, under federal law, an insurer could deny coverage or charge higher premiums based on any factor the insurer deems relevant, including pre-existing conditions, gender, gender identity, or age, unless prohibited by state law.¹ Additionally, short-term limited-duration policies do not cover the same essential health benefits required of an ACA-compliant policy. Short-term limited-duration policies can exclude coverage of benefits such as maternity care, prescription drugs, mental health care, and preventive care.² Finally, even if a consumer is able to obtain some coverage under a short-term limited-duration policy, if they get sick, become pregnant, or develop a new condition, they could be denied renewal of that policy and be left without insurance when they need it most.

For example, Consumer Reports reported on a consumer who had retired early and did not qualify for Medicare, nor did he qualify for a tax credit to assist with premiums, and so purchased a short-term limited-duration policy. He was then diagnosed with oral cancer which required surgery, chemotherapy, and radiation. His claim was denied by his carrier, leaving him with over \$200,000 in unpaid medical bills. Additionally, he had to put off reconstructive surgery until he becomes eligible for Medicare.³ ACA-compliant individual health policies are required to cover treatment for cancer as an essential health benefit and include a cap on the insured's out of pocket expenses.

Sustainable health insurance markets require sufficient enrollment numbers and a balanced risk pool that includes both healthy and less-healthy participants. Without such a balance, premiums spiral upwards, burdening the remaining people in the ACA market. By cutting benefits and denying older, sicker consumers, "short-term limited-duration insurance" policies reject or avoid individuals who are less healthy, leaving those individuals in the ACA market.

The Departments characterize the products in the proposed Rule as an alternative, affordable coverage option to ACA-compliant coverage. However, the affordability of these products is an

¹ Pollitz, Karen, *Understanding Short-Term Limited Duration Health Insurance*, Feb. 9, 2018, Kaiser Family Foundation <https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/>.

² *Id.*

³ Metcalf, Nancy, *Is 'Short-Term' Health Insurance a Good Deal?*, Dec. 22, 2017, Consumer Reports, available at <https://www.consumerreports.org/health-insurance/is-short-term-health-insurance-a-good-deal/>.

illusion based on the often drastic cuts in coverage, resulting in insufficient benefits to purchasers, and massive out of pocket costs.

The negative impact of the proposed Rule on the ACA-compliant individual market is a cumulative downward spiral. As the premiums increase in the individual market, more people, especially the young and healthy, will be driven towards skimpy “short-term limited-duration” policies. In return, short-term limited-duration policies will exclude the elderly and sick, driving them to the ACA-market and further increasing the costs.

Enrollment in short-term limited-duration coverage had been limited under the ACA by the requirement that each individual maintain minimum essential coverage or pay a tax penalty (the individual mandate). However, with the elimination of the individual mandate penalty, there will be an increase in the number of people purchasing these skimpy, inadequate products, particularly if they are not fully informed as to the type of coverage these policies do and do not provide. The Departments acknowledge that the proposed Rule could weaken the individual market risk pools, but underestimate the impact. The Departments claim that approximately 100,000 to 200,000 additional consumers would shift from the ACA-compliant market to short-term limited-duration policies. However, other research indicates that this number will be much higher.

For example, the Urban Institute estimates that the combined impact of the Administration’s policy changes, including the loosening of the short-term limited-duration insurance rules and the elimination of the individual mandate penalty, will cause a further 9 million people to be without minimum essential coverage.⁴ Of this number, approximately 2.6 million consumers, who would otherwise have had health insurance of some type, are likely to enroll in short-term limited-duration policies.⁵ Additionally, in combination with the elimination of the individual mandate penalty, the proposed Rule will degrade the risk pool for ACA individual markets and result in premium increases nationally of approximately 18%.⁶

If the Administration and the Departments are truly concerned, as they claim to be, about individuals being harmed by increased premiums in the ACA market, they would work to shore the ACA markets up, rather than tear them down. This proposed Rule only exacerbates the very problem the Administration and Departments purport to address.

The Duration of Short-Term Limited-Duration Insurance Policies Should Not be Extended

I strongly oppose extending the duration of short-term limited-duration policies to periods of up to 12 months. The intent of the proposed Rule, according to the preamble, is to provide greater flexibility to consumers who need to fill a gap in insurance coverage. However, as the

⁴ L.J. Blumberg, M. Buettgens, and R. Wang, *Updated: The Potential Impact of Short-Term Limited-Duration Policies on Insurance Coverage, Premiums, and Federal Spending*, (March 2018) Urban Institute, p.6.

⁵ *Id.*

⁶ *Id.* at 15.

Departments noted in the previous rulemaking (CMS-9932-F), finalized in 2016, they had become aware that short-term limited-duration insurance was:

“[B]eing sold in situations other than those that the exception from the definition of individual health insurance coverage was initially intended to address. In some instances, individuals are purchasing this coverage as their primary forms of health coverage ...”⁷

The Departments further noted that limitations, such as lifetime and annual dollar limits on essential health benefits (EHB) and pre-existing condition exclusions, resulted in short-term limited-duration policies that would not provide meaningful health coverage and would adversely impact the risk pool for ACA-compliant coverage.⁸ Nothing in the current market has changed to remedy these problems. The proposed Rule exacerbates these problems and furthers the downward slide towards degraded, inadequate coverage.

For the reasons listed above, I urge the Departments to withdraw the proposed Rule. If, however, the Departments decline to withdraw the proposed Rule, I ask that the Rule incorporate the following amendments.

States Must Remain the Primary Regulator of Short-Term Limited-Duration Insurance.

Foremost amongst my concerns is the ability of States to continue to take the lead on regulating short-term limited-duration insurance. In the analysis regarding federalism, the proposed Rule provides:

Federal officials have discussed the issue of the term length of short-term, limited duration insurance with State regulatory officials. This proposed rule has no federalism implications to the extent that current State law requirements for short-term, limited-duration insurance are the same as or more restrictive than the Federal standard proposed in this proposed rule. States may continue to apply such State law requirements.⁹

I support the proposed Rule’s current approach of leaving additional, stricter regulation of short-term limited-duration policies up to the States. Any further requirements including, but not limited to, the duration, renewability, rating, notices, sale, or design of these policies should be left to the States.

The Proposed Rule Increases the Potential for Abuse and Highlights the Need for Clear Notices

The more short-term limited-duration policies are allowed to falsely mimic comprehensive, ACA-compliant insurance by, for example, allowing the terms to be up to 12 months and renewable, the greater the risk of consumer confusion and misinformation. As noted in the 2016

⁷ 81 Fed.Reg. 75317 (Oct. 31, 2016).

⁸ *Id.* at 75317-75318.

⁹ 83 Fed.Reg. 7445 (Feb. 21, 2018).

rulemaking, short-term limited-duration insurance was “being sold in situations other than those that the exception from the definition of individual health insurance coverage initially intended to address.”¹⁰ This included consumers purchasing short-term limited-duration coverage as their primary form of health insurance.

Only this month my Department, in conjunction with 41 other State insurance departments, reached a settlement with a short-term health insurer, HCC Life Insurance Company, for deficient marketing, sales, and claim handling in its short term health insurance products. The lawsuit alleged HCC Life had fraudulently refused to pay promised insurance benefits. As I pointed out at the time of the settlement, these types of policies typically contain significant exclusions and do not contain all benefits required under the ACA. Although the California Department of Insurance strictly enforces the law regarding these policies, the scope of the applicable law, and the protections provided by that law, is much narrower than that applicable to policies compliant with the Affordable Care Act.

Unlike ACA-compliant health insurance, short-term limited-duration policies do not have to meet specified financial limitations on administrative costs, including broker fees. Federal and state laws require health insurers offering coverage in the ACA-compliant market to pay consumers an annual rebate of the premium revenue expended by the insurer on medical costs, known as the medical loss ratio, if such payments are less than a set threshold.¹¹ Health insurers offering coverage on the individual market in California must comply with a minimum medical loss ratio of 80 percent.¹² Because short-term limited-duration insurance is exempt from this requirement, insurers can spend more premium dollars on agent fees, and less on health care. As a result, insurers provide higher financial incentives to agents to encourage them to push skimpy, inadequate short-term limited duration policies on consumers.

Due to the increased likelihood that short-term limited-duration insurance would increase confusion and potential for abuse, these policies should clearly state their limitations, including that they are not ACA-compliant, may not provide comprehensive coverage, and may not cover pre-existing conditions. I strongly urge you to amend the notices contained in the proposed Rule to clarify that not only are these policies exempt from the ACA, but that this exemption specifically means that such policies do not have to provide coverage for pre-existing conditions, are not guaranteed renewable, and that essential health benefits are not covered. If for some reason the Trump Administration insists on allowing these policies to be purchased as more than a temporary form of coverage that can last no more than 3 months, as this rule proposes to do, then you should at least require this coverage to be marketed as a Skimpy Plan that Excludes Coverage for Essential Health Benefits, rather than referring to it as short-term, limited duration policies, which it will no longer be.

¹⁰ 81 Fed.Reg. at 75317.

¹¹ 42 U.S.C.A. §300gg-18 (2018); Cal. Insurance Code §10112.25.

¹² Cal. Insurance Code §10112.25.

Additionally, I would encourage the proposed Rule be amended to require that this notice appear on the first page of the policy rather than requiring that the notice be displayed “prominently.”

Effective Date of the Proposed Rule Should be Delayed

If this proposed Rule is implemented, I urge you to postpone the effective date of the Rule until 2020 due to the impact it will have on health insurance markets. A delayed effective date will allow States to review their regulations to facilitate a smooth transition and allow time to provide education to the public. If the proposed Rule becomes effective this year, it will disrupt the markets for 2018 and 2019 without providing a fair opportunity for insurers to adjust their rates to account for the change in the risk pool.

Expanding the availability and duration of short-term limited-duration insurance policies is not the answer to increasing health insurance costs, and poses significant risk to the stability of health insurance markets in California and throughout the nation. The proposals in this rule will effectively siphon off healthy lives from the ACA markets, thereby degrading the risk pool, and will expose consumers to inadequate coverage. This rule will return us to a time when people who became seriously ill learned that their health insurance policy did not cover the life-saving treatment they needed and went bankrupt as they attempted to pay out of pocket for the care they needed.

In light of the above, I urge you to withdraw the proposed Rule.

Sincerely,

A handwritten signature in blue ink that reads "Dave Jones". The signature is written in a cursive, flowing style.

DAVE JONES
Insurance Commissioner