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August 5, 2016

The Honorable Jacob Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Proposed Regulations Amending the Conditions for Certain Excepted Benefits

Dear Mr. Secretary:

On behalf of the National Conference of Insurance Legislators (“NCOIL”), I am writing in response to the invitation for public comment appearing in the *Federal Register* on June 10, 2016, by the Federal Tri-Agencies (DOL, HHS, Treasury) with joint jurisdiction over implementation of the ACA (“the Departments”) in connection with a notice of proposed rulemaking (“NPRM”) entitled “Expatriate Health Plans, Expatriate Health Plan Issuers, and Qualified Expatriates; Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance.”

NCOIL is a legislative organization comprised principally of legislators serving on state insurance and financial institutions committees around the nation. Founded in 1969, NCOIL writes Model Laws in insurance, works to both preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act seventy years ago, and to serve as an educational forum for public policy makers and interested parties.

In particular, our comments are offered in connection with the excepted benefits provisions of the NPRM that: (1) propose restrictions on short-term medical insurance; (2) propose changes to current regulations for hospital indemnity or other fixed indemnity insurance offered in the group market; (3) request information for specified disease or illness insurance offered in both the group and individual insurance markets; and (4) request information on aligning the treatment of hospital indemnity or other fixed indemnity insurance offered in the individual market compared to the same type of coverage offered in the group market. This portion of the regulatory proposals represent an abrogation of longstanding State authority in the area. This authority has protected US consumers well and produced a vibrant industry and millions of American jobs.

An over-arching principle and consideration for the Departments is the role of the States. As you are well aware, federal law and regulations provide that the States have primary enforcement authority for the regulation of insurance.

The NPRM, with no empirical evidence, expresses concern with the manner in which certain excepted benefits products are marketed and that some individuals may incorrectly understand these policies to be comprehensive medical coverage that would be considered minimum essential coverage. A basic tenet of State insurance regulation is protecting consumers. To this end, State laws and regulations have long addressed disclosure and the associated advertising and marketing of these and other types of insurance products (including providing State regulators with prior review, market conduct examination as well as enforcement tools). State legislators and State insurance regulators thus already have effective means – that we would strongly argue are effectively used – for addressing the agencies’ concerns.

In this instance, the federal conditions for the “excepted benefits” products that are the subject of this NPRM and inquiry were established in statute by Congress in the 1996 Health Insurance Portability and Accountability Act (“HIPAA”). These insurance products were in existence and regulated by the States prior to the enactment of HIPAA and the types of insurance that were listed as “excepted benefits” in HIPAA were borrowed from model State laws and regulations.

Importantly, the enactment of the Patient Protection and Affordable Care Act (“ACA”) did not alter the treatment of “excepted benefits” or the primary role of the States in establishing standards and regulating these insurance products. As the U.S. Court of Appeals for the District of Columbia recently affirmed in *Central United Life, Inc. v. Burwell*, the ACA did not give even the slightest indication that the definition of “excepted benefits” was debatable, and that Congress has never changed course or put its original definition in any doubt. The court found that HHS had no basis in the statutory text it purported to interpret for a certain rule and as a result the agency exceeded the scope of the statutory language. The court explained that the text of the statute itself unambiguously foreclosed the agency’s interpretation which amounted to the invention of a completely new meaning and exceeded the permissible range of interpretive discretion.

The excepted benefits provisions and short-term medical insurance restrictions in this NPRM head in this same fatal direction. There is no statutory text that limits the benefits payable under fixed indemnity insurance policies to a “per day” basis or that prohibits benefits paid on a “per service” basis. There is no statutory text for a limitation on the number of specified diseases or illnesses covered in a policy. Also, the general rule for all of the “excepted benefits” categories includes statutory language stating explicitly that the term means “benefits under one or more (or any combination thereof)” of the listed “excepted benefits” coverage types. There is no statutory directive to eliminate or restrict private insurance plans such as short-term medical insurance that is offered in the market regulated by the States outside of Exchanges.

As the body vested with primary authority for insurance legislation and enabling regulation, we stand ready to work with you to address any concerns the agencies may have. If the agencies

continue to have concerns they can engage NCOIL to consider Model State legislation to address these concerns, not engage in pre-emptive rulemaking. The proposed changes to the excepted benefits conditions in this NPRM should be withdrawn in light of the limitations in longstanding federal law and the proscriptions expressed in the *Central United Life* decision. This NPRM proposes new “conditions” that are not expressly included in the statutory text adopted in the 1996 HIPAA and that remained unchanged by the ACA. The text of the federal statute necessarily governs and limits the scope of any federal regulations for these insurance products.

Thank you for the opportunity to provide comments on these important matters. Please let us know if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Tom Condit". The signature is written in a cursive, slightly slanted style.

CC: The Honorable Sylvia Mathews Burwell
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