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September 11, 2023

Center for Medicare and Medicaid Services  
Department of Health and Human Services  
ATTN: CMS-9904-P  
P.O. Box 8010  
Baltimore, MD 21244

**Re: Notice of Proposed Rulemaking, “Short-Term, Limited-Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance” (Published in Federal Register Volume 88, Number 132, page 44596 on July 12, 2023)**

***Submitted Electronically via: <https://www.regulations.gov/commenton/CMS-2023-0116-0001>***

Dear Mr. Secretary:

On behalf of the National Council of Insurance Legislators (“NCOIL”), I am writing in response to the invitation for public comment appearing in the Federal Register in July 2023, 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 “Short-Term, Limited-Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance.”

I note that in 2016, NCOIL submitted a comment letter opposing a very similar NPRM that was distributed by the Departments. NCOIL stands by the positions set forth in its 2016 letter which appears below, and we urge the withdrawal of this most recent NPRM.



WEBSITE: [www.ncoil.org](http://www.ncoil.org)



***Sound Public Policy In 50 States For 50-Plus Years***

NCOIL is a national legislative organization with the nation's 50 states as members, represented principally by legislators serving on their states' insurance and financial institutions committees. NCOIL writes Model Laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act over seventy years ago, and to serve as an educational forum for public policymakers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and longstanding insurance issues.

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.

A basic tenet of state insurance regulation is protecting consumers. To this end, State laws and regulations, as passed or reviewed by state legislators, many of whom are members of or participate in NCOIL, have long addressed disclosure and the associated advertising and marketing of these and other types of insurance products. States license the insurers which develop and sell these products and review their financial solvency. States review the rate and form filings of the products sold in their jurisdictions. States conduct market surveillance through a required "market conduct annual statement" and require market conduct examinations of insurers. States license the agents who sell the products within their borders. States respond to consumer complaints and, when warranted, take action on insurers. In short, State legislators and State insurance regulators already have effective means for addressing the agencies' concerns, which they use effectively to do so.

Additionally, the States have acted, particularly in the intervening time since the 2016 NPRM. A number of states have passed new legislation related to short term limited duration coverage, with some of those states banning the product while others have expanded availability. Similarly, a number of States have issued new regulatory guidance in the products described in the NPRM. The NPRM ignores all of this as well as NCOIL's Short Term Limited Duration Insurance Model Act, and the NAIC's updated related Model Law.

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. The States, under the express delegation of authority by Congress via the McCarran-Ferguson Act of 1945 (15 U.S.C.A. § 1011 et seq.) have acted and continue to act effectively in this area, as described above.

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 Departments may have. If the Departments 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. Only Congress<sup>1</sup>, as stated in the McCarran-Ferguson Act, may infringe on the States' exercise of their authority to regulate insurance; the Departments clearly seek in the NPRM to infringe on that State exercise in a manner not included in the relevant Congressional Acts.

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 blue ink that reads "Tom Considine". The signature is written in a cursive, flowing style.

Thomas B. Considine  
NCOIL CEO

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<sup>1</sup> Or a court of competent jurisdiction ruling on a Congressional Act.