August 11, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Scalia, Secretary Azar, and Secretary Mnuchin:

We write to express strong concern regarding the notice of proposed rulemaking, *Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage*, published on July 15, 2020 by the Departments of Health and Human Services, the Treasury, and Labor (the Departments).[1] This proposal would allow group health plans and issuers to increase out-of-pocket costs for millions of consumers enrolled in these plans while remaining exempt from the *Patient Protection and Affordable Care Act's* (ACA)[2] core consumer protections. We are dismayed that the Administration is proposing to increase consumers' costs during the coronavirus disease of 2019 (COVID-19) pandemic, when access to affordable coverage is particularly crucial to protect the economic security, health, and well-being of families. We are deeply concerned that the proposed rule would undermine consumer protections and expose consumers to great financial risk. Due to the harmful impact this would have on access to care and affordability, we urge the Departments not to finalize this proposal.

The ACA provided comprehensive consumer protections and instituted a range of historic reforms that made health care more accessible and affordable for consumers. However, certain plans in the individual and group markets that were in existence on March 23, 2010, known as grandfathered or legacy plans, are exempt from many of the ACA's consumer protections, including those relating to essential health benefits, the requirement to cover preventive services

[1] 85 Fed. Reg. 42,782 (proposed July 15, 2020) (to be codified at 29 C.F.R. pt. 2590, 26 C.F.R. pt. 54, and 45 C.F.R. pt. 147.140) [hereinafter *Legacy Plan Proposed Rule*].
[2] Pub. L. 111-143, as amended by Pub. L. 111-152.

without cost-sharing, consumer appeals and external review, and the rate review provisions.[3] In the group market, approximatively 22 percent of employers that provide health benefits to their workers offer one or more legacy options, and 13 percent of workers receive group health benefits through such a legacy plan or coverage.[4] According to the Departments' own analysis, 17.5 million individuals are enrolled in legacy plans in the group health market, and 5.6 million individuals are enrolled in legacy plans offered by state or local governments.[5] In order to prevent excessive out-of-pocket cost increases and the perpetuation of legacy plans, the Departments previously promulgated regulations that specify that certain changes to a plan or coverage will result in the permanent loss of legacy status and automatic application of the full set of consumer protections from which legacy plans are exempt.[6] These requirements protect consumers from harmful changes to the plan design, and limit legacy status to plans that substantially adhere to the terms of the plan that were in effect as of March 23, 2010. The Departments have long acknowledged that allowing noncompliant legacy plans primarily serves as a transitional policy to minimize disruption in the health care market following enactment of the ACA, stating in 2010 that these rules exist "to ease the transition to market reforms that phase in over time."[7] However, the policies described in the Departments' proposed rule undermine that gradual transition while weakening financial protections for consumers.

First, the proposed rule would allow legacy high-deductible health plans (HDHPs) in the group market to increase fixed-dollar cost-sharing requirements at a rate that would otherwise trigger a loss of legacy status, provided such an increase is needed to maintain status as an HDHP under section 223(c)(2)(A) of the Internal Revenue Code.[8] This could result in legacy HDHPs raising deductibles to potentially unaffordable levels while such plans continue to be exempt from the core consumer protections established by the ACA. We have concerns that this policy would subject consumers to increased cost-sharing.

Second, the Departments' proposal to allows legacy plans to increase fixed amount cost-sharing based on the greater of: (1) the current method of medical inflation plus 15 percentage points, or (2) the premium adjustment percentage (as defined by the Department of Health and Human

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[3] 42 U.S.C. § 18011.
[4] Kaiser Family Foundation, *2019 Employer Health Benefits Survey*, http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2019.
[5] *Legacy Plan Proposed Rule* at 42,790.
[6] Changes that result in loss of legacy status include: (1) elimination of benefits; (2) increase in the percentage cost-sharing requirement; (3) increase in a fixed-amount cost-sharing requirement other than a copayment; (4) increase in a fixed-amount copayment; (5) decrease in contribution rate by employers and employee organizations; and (6) change in annual limits. 29 C.F.R. § 2590.715-1251(g)(1), 26 C.F.R. § 54.9815-1251(g)(1), and 45 C.F.R. § 147.140(g)(1).
[7] Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act; Interim Final Rule and Proposed Rule, 75 Fed. Reg. 34528, 34546 (June 17, 2010).
[8] *Legacy Plan Proposed Rule* (to be codified at 29 C.F.R. § 2590.715-1251(g)(3), 26 C.F.R. § 54.9815-1251(g)(3), and 45 C.F.R. § 147.140(g)(3)).

Services (HHS) in the annual *Notice of Benefit and Payment Parameters*[9]), plus 15 percentage points.[10] The addition of the premium adjustment percentage in calculating the maximum percentage increase will be particularly harmful to participants and beneficiaries. As we previously stated in our comments on the proposed rule entitled, *Patient Protection and Affordable Care Act (ACA); HHS Notice of Benefit and Payment Parameters for 2021*,[11] the recent methodological changes in calculating the premium adjustment percentage will significantly raise out-of-pocket costs for consumers.[12] Moreover, the Departments' stated intent to allow legacy plans to raise out-of-pocket costs at a rate that is *the greater of* the medical inflation adjustment or the premium adjustment percentage adjustment will, by design, result in increased out-of-pocket costs for participants and beneficiaries.

COVID-19 threatens the health and economic security of millions of Americans, and the proposed changes will have a harmful impact on access to care and affordability during the ongoing pandemic. As stated in the preamble to the proposed rule, the Departments expect these changes to contribute to potential increases in adverse health outcomes resulting from: (1) foregone treatment due to higher cost-sharing, (2) an increase in the uninsured rate among participants and beneficiaries who can no longer afford their coverage, and (3) the continued perpetuation of non-ACA compliant coverage that fails to cover certain items and services.[13] In the Departments' own words: "participants and beneficiaries who would otherwise be covered by a non-grandfathered plan could potentially face increases in adverse health outcomes if they chose to forego treatment because certain services are not covered by their grandfathered group plan or grandfathered group health insurance coverage."[14] At a time when families are facing economic uncertainty and threats to their health and safety, it is troubling that the Departments are proposing policies that would expose consumers to greater financial risk and result in reduced access to health care.

We appreciate the opportunity to comment on this issue and urge the Departments not to finalize the changes in this proposed rule.

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[9] *See* 85 Fed. Reg. 29164. Codified at 45 C.F.R. Part 156 (update to the annual premium adjustment percentage for 2021).
[10] *Legacy Plan Proposed Rule* (to be codified at 29 C.F.R. § 2590.715-1251(g)(4)(ii), 26 C.F.R. § 54.9815-1251(g)(4)(ii), and 45 C.F.R. § 147.140(g)(4)(ii)).
[11] *Supra* note 9.
[12] Letter from Chairs Frank Pallone, Jr., Richard E. Neal, Robert C. "Bobby" Scott and Ranking Members Patty Murray and Ron Wyden to Administrator Seema Verma (Mar. 5, 2020) https://edlabor.house.gov/media/press-releases/democratic-health-leaders-urge-verma-to-withdraw-proposals-that-increase-health-costs-and-kick-thousands-off-coverage.
[13] *Legacy Plan Proposed Rule* at 42,789.
[14] *Id*. at 42,791.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman
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