

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

June 13, 2018

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

The Honorable Seema Verma  
Administrator  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

Dear Secretary Azar and Administrator Verma:

We write to you with serious concerns regarding the U.S. Department of Justice's (DOJ) decision not to defend in federal court key patient protections contained in the Affordable Care Act (ACA), and to seek information regarding the U.S. Department of Health and Human Services' (HHS) and the Centers for Medicare & Medicaid Services' (CMS) involvement in DOJ's decision. The DOJ decision in *Texas v. United States* to decline to defend ACA provisions guaranteeing coverage regardless of health status ("guaranteed issue") and prohibiting insurers from charging higher premiums based on health status ("community rating") breaks with DOJ's longstanding tradition of defending laws enacted by the United States Congress, and constitutes yet another attempt by the Trump Administration to sabotage the ACA at the expense of consumers across the nation.<sup>1</sup>

Approximately 130 million individuals live with pre-existing conditions in the United States, such as cancer, diabetes, and asthma.<sup>2</sup> Prior to the ACA, insurers in the individual market could deny or charge these individuals more for insurance coverage—locking millions of Americans out of accessible health coverage. The guaranteed issue and community rating provisions of the ACA prohibited insurers from discriminating on the basis of these pre-existing conditions. In declining to defend these protections in the *Texas v. United States* lawsuit, the Trump Administration is seeking to invalidate these critical patient protections, and once again subject millions of Americans with pre-existing conditions to the discrimination they faced before the ACA.

Efforts by the Trump Administration and congressional Republicans to sabotage the ACA are already driving up the uninsured rate and costs for consumers across the nation.

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<sup>1</sup> Federal Defendants' Memorandum In Response To Plaintiffs' Application For Preliminary Injunction (June 7, 2018), *Texas v. United States of America*, N.D. Tex. (Civ. No. 4:18-CV-00167-O); 42 U.S.C. § 300gg-1, 300gg-3, 300gg-4(a), 300gg-(a)(1), 300gg-4(b).

<sup>2</sup> Center for American Progress, *Number of Americans With Pre-Existing Conditions By Congressional District* (Apr. 5, 2017).

According to the Congressional Budget Office, the Republican tax bill will increase premiums by an average of 15% for individuals in the individual market, and result in 3 million more uninsured.<sup>3</sup> HHS's ongoing efforts to erode the ACA's consumer protections through regulatory actions, such as short-term and association health plans, will also result in increased costs and reduced coverage.<sup>4</sup> The decision to decline to defend the law in *Texas v. United States* is just the latest attempt to accomplish what the Administration and the Republican Congress failed to accomplish through legislation—to repeal the ACA and take health care away from tens of millions of Americans.

Although this latest effort to target the constitutionality of critical patient protections is of dubious legal merit, it will nonetheless have a damaging impact on our nation's health care system and directly threaten the well-being of millions of Americans. While the case is pending, potentially for years, the legal uncertainty will result in additional instability in the individual marketplace, resulting in higher premiums and fewer choices for consumers. This is on top of the double-digit premium hikes Americans are already facing due to the Administration's ongoing sabotage of the law.

The potential implications of DOJ's decision raise serious concerns regarding how HHS and CMS under President Trump intend to fulfill their obligations "to enhance the health and well-being of all Americans."<sup>5</sup> Therefore, please provide the following documents by June 27, 2018:

1. Any analysis HHS and/or CMS has performed to evaluate the effects that the elimination of the guaranteed issue and/or community rating provisions of the ACA will have on cost and coverage of health insurance in the United States.
2. Any analysis HHS and/or CMS has performed to evaluate the effects that the elimination of the guaranteed issue and/or community rating provisions of the ACA will have on individuals with pre-existing conditions and their access to affordable health insurance.
3. Any analysis HHS and/or CMS has performed to evaluate the effects of the legal uncertainty from *Texas v. United States* on premiums in the individual market during the pendency of the lawsuit, including in the upcoming (2019) plan year.

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<sup>3</sup> Congressional Budget Office, *Federal Subsidies for Health Insurance Coverage for People Under Age 65: 2018 to 2028* (May 2018).

<sup>4</sup> Urban Institute, *Updated: The Potential Impact of Short-Term Limited-Duration Policies on Insurance Coverage, Premiums, and Federal Spending* (Mar. 14, 2018).

<sup>5</sup> U.S. Department of Health and Human Services, About HHS ([www.hhs.gov/about/strategic-plan/introduction/index.html](http://www.hhs.gov/about/strategic-plan/introduction/index.html)).

4. Any analysis HHS and/or CMS has performed to evaluate how the elimination of the guaranteed issue and community rating requirements, which apply to both individual and small group health insurance issuers, will affect employer-provided health insurance.
5. DOJ's brief requests a declaratory judgment that the ACA's individual mandate, guaranteed issue, and community rating requirements be declared invalid beginning on January 1, 2019. Please provide all relevant documents and communications regarding HHS's contingency planning for the possibility that these changes could go into effect as of January 1, 2019, including answers to the following questions:
  - a. If every individual who is eligible for subsidized coverage in the exchanges is to be individually underwritten and charged premiums based on their health status, how does HHS plan to designate the second-lowest cost silver plan upon which Advanced Premium Tax Credits are calibrated?
  - b. How does HHS plan to conduct risk adjustment across the individual market and small group markets without community rating?
  - c. If the community rating and guaranteed issue requirements are invalidated as of January 1, 2019, what will happen to coverage for individuals who sign up for Qualified Health Plans effective January 1, 2019, during the upcoming open enrollment season?
  - d. Does HHS believe all of the other market reforms of the ACA, such as the limitations on age rating, are severable from the individual mandate? If DOJ prevails in its request for declaratory judgment, will HHS decline to enforce the limitation on age rating or any other ACA market reforms?
6. DOJ has taken the position that the individual mandate is not severable from the guaranteed issue and community rating provisions, arguing that Congress believed that the individual mandate requirement is essential to the operation of the guaranteed issue and community rating provisions when it originally passed the ACA in 2010. However, Congress also left both market reforms intact when it passed the Republican tax bill, which reduced the individual shared responsibility payment to \$0. Moreover, it is clear from HHS's own proposed rules that the Department expects the individual market to continue to function beyond 2019, when the mandate penalty is zeroed out.<sup>6</sup>

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<sup>6</sup> See, e.g., Short-Term, Limited-Duration Insurance: A Proposed Rule by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department (Feb. 21, 2018) ("Given the prior trend and the recent increases in premiums in the individual market, the Departments anticipate that the rule, if finalized, would encourage more consumers to purchase short-term, limited-duration insurance for longer durations, including individuals who were previously insured and some who are currently enrolled in individual market plans, especially in 2019 and beyond, when the individual shared

- a. Please provide HHS's view on whether the individual market can, in fact, function with the continued existence of the guaranteed issue and community rating requirements, but with the individual shared responsibility payment set at \$0.
  - b. Has HHS changed its view regarding the effects of the reduction in the shared individual responsibility payment on the individual insurance market? If so, please provide any analysis prepared that led to this change in viewpoint.
  - c. If this viewpoint has changed, will HHS be withdrawing the proposed rule regarding short-term, limited duration health plans and reissuing it with an analysis that reflects the Administration's current position regarding the effects of reducing the shared individual responsibility payment?
7. Please provide all communications between HHS and/or CMS officials and officials from DOJ regarding the DOJ decision not to defend the guaranteed issue and/or community rating provisions of the ACA. Such communications should include, but not be limited to, emails, letters, faxes, and any other written materials, as well as a list of any meetings, calls, or other oral communications that took place between the aforementioned parties. In the case of meetings, calls, and other oral communications, please include the date, time, and location at which such communications took place, as well as a list of individuals who participated.

Thank you for your prompt attention to this matter. Should you have any questions, please contact Una Lee of the Energy and Commerce Committee's minority staff at (202) 225-3641, Melanie Egorin of the Ways and Means Committee's minority staff at (202) 225-4021, Arya Hariharan of the Judiciary Committee's minority staff at (202) 225-6906, or Udochi Onwubiko of the Education and the Workforce Committee's minority staff at (202) 225-3725.

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responsibility payment included in section 5000A of the Code is reduced to \$0, as provided under Public Law 115-97."); *id.* ("Beginning in 2019, the individual shared responsibility payment included in section 5000A of the Code is reduced to \$0, as provided under Public Law 115-97. This would compound the effects of the provisions of this proposed rule...").

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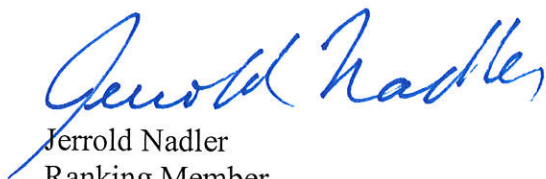
Sincerely,



Frank Pallone, Jr.  
Ranking Member  
Committee on Energy and Commerce



Richard E. Neal  
Ranking Member  
Committee on Ways and Means



Jerrold Nadler  
Ranking Member  
Committee on the Judiciary



Robert C. "Bobby" Scott  
Ranking Member  
Committee on Education and the  
Workforce