



MEMORANDUM

February 8, 2019

To: Subcommittee on Health Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “Strengthening Our Health Care System: Legislation to Reverse ACA Sabotage and Ensure Pre-Existing Conditions Protections”

On Wednesday, February 13th, at 10:30 a.m., in Room 2322 of the Rayburn House Office Building, the subcommittee will hold a legislative hearing entitled, “Strengthening Our Health Care System: Legislation to Reverse ACA Sabotage and Ensure Pre-Existing Conditions Protections.”

I. BACKGROUND

The Affordable Care Act (ACA) established state and federal insurance marketplaces to increase access to high quality health insurance coverage. The ACA also included comprehensive consumer protection provisions to ensure that all Americans are able to obtain health coverage regardless of health status or a pre-existing condition.

II. H.R. 1010, RESCINDING THE SHORT-TERM, LIMITED-DURATION INSURANCE REGULATION

On August 3, 2018, the Department of Health and Human Services (HHS), the Department of Labor (DOL), and the Department of Treasury (Treasury) issued the Short-Term, Limited Duration Insurance (STLDI) final rule to expand the availability of STLDI plans.¹ The final rule extended the maximum duration of STLDI plans from three months to up to 12 months. The final rule allows insurers to renew STLDI plans further for up to 36 months.

STLDI plans are exempt from all of the ACA’s consumer protection provisions and benefit standards. These plans do not provide protections for pre-existing conditions, and are exempt from the ACA’s guaranteed availability requirement, community rating (including gender and age rating protections), and the prohibition on pre-existing conditions exclusions. STLDI plans are also not subject to the prohibition on annual and lifetime coverage limits, and

¹ Department of Health and Human Services and Department of Treasury, *Waivers for State Innovation*, 83 Fed. Reg. 53575 (Oct. 22, 2018).

the annual out-of-pocket limits that protect consumers from large health care costs. Lastly, STLDI plans are not required to cover the ACA's ten categories of essential health benefits, including prescription drugs, hospitalization, maternity coverage, and mental health and substance use disorder.

The August 2018 final rule allows STLDI plans to be sold alongside insurance plans that comply with the ACA's consumer protections, resulting in a parallel market that exposes consumers seeking comprehensive coverage to increased premiums and greater risk. In the final rule, HHS, DOL, and Treasury all conclude that the policy changes "could lead to further worsening of the risk pool by keeping healthy individuals out of the individual market for longer periods of time, increasing premiums for individual market plans and may cause an increase in the number of individuals who are uninsured."² The final rule estimated that 200,000 individuals previously enrolled in the ACA marketplace coverage will purchase STLDI instead in 2019, causing average individual market premiums to increase.

However, other nonpartisan estimates projected a more significant impact on the individual market. The Congressional Budget Office (CBO) found that 1.4 million people will enroll in SLTDI plans over a ten-year period (2019-2028).³ A study by the Urban Institute estimated that 4.3 million individuals will enroll in STLDI in 2019, under the proposed rule.⁴ The study concluded that the increase in STLDI enrollment will increase premiums and contribute to an increase in the number of uninsured Americans. The proposed rule did not include the 36-month renewal policy, which will likely exacerbate enrollment declines, premium increases, and the stability of the individual market.

The bill introduced by Rep. Castor (D-FL), Rep. Barragán (D-CA), Rep. Horsford (D-NV), Rep. Moore (D-WI), Rep. Underwood (D-IL), and Rep. DeSaulnier (D-CA) would overturn the STLDI final rule, giving it no force or effect.

III. H.R.986, THE PROTECTING AMERICANS WITH PRE-EXISTING CONDITIONS ACT

On October 22, 2018, the Centers for Medicare & Medicaid Services (CMS), HHS, and Treasury issued a guidance on Section 1332 of the ACA entitled State Relief and Empowerment

² *Id.*

³ Congressional Budget Office, *How CBO and JCT Analyzed Coverage Effects of New Rules for Association Health Plans and Short-Term Plans* (Jan. 2019) (https://www.cbo.gov/system/files?file=2019-01/54915-New_Rules_for_AHPs_STPs.pdf).

⁴ Urban Institute, *Updated: The Potential Impact of Short-Term Limited-Duration Policies on Insurance Coverage, Premiums, and Federal Spending* (Mar. 14, 2018) (<https://www.urban.org/research/publication/potential-impact-short-term-limited-duration-policies-insurance-coverage-premiums-and-federal-spending>).

Waivers (2018 guidance).⁵ Section 1332 (State Innovation Waivers) of the ACA authorizes states to waive certain requirements of the law and experiment with health insurance reforms that could improve the well-being and health of their residents. The law has a clear statutory directive that states must maintain the level of benefits, affordability, and coverage provided to state residents by the ACA.

Section 1332 requires states to meet four statutory “guardrails” simultaneously and demonstrate that the proposed waiver will provide comprehensive, affordable coverage to a comparable number of residents as under the ACA, without increasing the federal deficit. In the 2018 guidance, HHS and Treasury revised the agencies’ interpretation of the statutory requirements, and significantly loosened the standards that states must meet in order to receive waiver approval.

The 2018 guidance set forth weaker requirements that must be met for the affordability and comprehensiveness guardrails, and adopted a new definition of what classifies as coverage. The 2018 guidance allows states to simply demonstrate that a comparable number of residents will have *access* to comprehensive and affordable coverage, regardless of whether they actually enroll in that coverage, thereby allowing the Secretaries of HHS and Treasury to approve waivers that do not provide coverage that is as affordable or as comprehensive as under the ACA. The 2018 guidance also allows states to receive waiver approval for proposals that direct the ACA’s tax credit subsidies towards STLDI plans and other types of health insurance plans that do not provide protections for pre-existing conditions.

The legislation introduced by Rep. Kuster (D-NH), Rep. Beyer (D-VA), and Rep. Courtney (D-CT) would revoke the Section 1332 guidance issued on October 2018. The bill would also prevent the Secretaries of HHS and Treasury from promulgating any substantially similar guidance or rule.

IV. H.R.987, MARKETING AND OUTREACH RESTORATION TO EMPOWER (MORE) HEALTH EDUCATION ACT OF 2019

On August 31, 2017, the Trump Administration reduced funding for the ACA’s 2018 Open Enrollment consumer outreach and enrollment educational activities from \$100 million to \$10 million, a 90 percent cut from the previous year.⁶ The Trump Administration continued to fund outreach and enrollment education activities at \$10 million during the 2019 Open

⁵ Department of Health and Human Services and Department of Treasury, *Waivers for State Innovation*, 83 Fed. Reg. 53575 (Oct. 22, 2018).

⁶ Centers for Medicare & Medicaid Services, *Policies Related to the Navigator Program and Enrollment Education for the Upcoming Enrollment Period* (Aug. 31, 2017) (<https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/Policies-Related-Navigator-Program-Enrollment-Education-8-31-2017pdf.pdf>).

Enrollment period.⁷ Studies have shown that outreach efforts expand the number of Americans with comprehensive health insurance, improving the makeup of the insurance risk pool and reducing premiums for all enrollees.⁸ About 8.4 million people enrolled in the ACA Federal marketplaces during the 2019 Open Enrollment period, compared to 9.2 million during the 2017 Open Enrollment period.⁹

There was an even more significant decline in new enrollment under the Trump Administration. Approximately one million fewer new consumers enrolled in marketplace plans during the 2019 Open Enrollment period than the final year of Open Enrollment of the Obama Administration.¹⁰ Studies have shown that reductions in funding for outreach and enrollment depresses new consumer enrollments.¹¹ A study conducted by the Commonwealth Fund found that 40 percent of uninsured adults are still unaware of the ACA marketplaces and the law's tax credits that help make coverage affordable.¹²

The legislation, introduced by Rep. Blunt Rochester (D-DE), would require HHS to conduct consumer outreach and enrollment educational activities for the ACA marketplaces, and it funds these activities at \$100 million per year. The bill further prohibits HHS from expending the funds on promoting plans that do not provide comprehensive consumer protections, including STLDI plans and association health plans.

⁷ Inside Health Policy, *CMS Not Increasing ACA Marketing And Outreach Budget For 2019* (Sept. 21, 2018) (<https://insidehealthpolicy.com/daily-news/cms-not-increasing-aca-marketing-and-outreach-budget-2019>).

⁸ Covered California, *Marketing Matters: Lessons From California to Promote Stability and Lower Costs in National and State Individual Insurance Markets* (Sept. 2017) (https://hbex.coveredca.com/data-research/library/CoveredCA_Marketing_Matters_9-17.pdf).

⁹ Centers for Medicare & Medicaid Services, *Final Weekly Enrollment Snapshot for the 2019 Enrollment Period* (Jan. 03, 2019) (<https://www.cms.gov/newsroom/fact-sheets/final-weekly-enrollment-snapshot-2019-enrollment-period>).

¹⁰ Centers for Medicare & Medicaid Services, *Biweekly Enrollment Snapshot* (Feb. 03, 2019) (<https://www.cms.gov/newsroom/fact-sheets/biweekly-enrollment-snapshot-4>).

¹¹ Center on Budget and Policy Priorities, *Strong Demand Expected for Marketplace Open Enrollment, Despite Administration Actions* (Oct. 31, 2018) (<https://www.cbpp.org/research/health/the-outlook-for-marketplace-open-enrollment>).

¹² The Commonwealth Fund, *Following the ACA Repeal-and-Replace Effort, Where Does the U.S. Stand on Insurance Coverage?* (Sept. 7, 2017) (https://www.commonwealthfund.org/publications/issue-briefs/2017/sep/following-aca-repeal-and-replace-effort-where-does-us-stand?redirect_source=/publications/issue-briefs/2017/sep/post-aca-repeal-and-replace-health-insurance-coverage).

V. H.R.1143, EDUCATING CONSUMERS ON THE RISKS OF SHORT-TERM PLANS ACT OF 2019

Insurers that sell STLDI products are required to disclose to consumers that STLDI does not comply with the ACA's consumer protection provisions. However, a study by the Georgetown University Health Policy Institute found that insurers and brokers selling STLDI plans engage in deceptive marketing tactics, and often fail to provide consumers with detailed plan information such as medical services and benefits excluded from coverage.¹³ The study found that consumers searching to enroll in comprehensive health insurance products are most often directed to websites and brokers selling STLDI. These consumers may erroneously enroll in STLDI during the ACA's Open Enrollment period. Many state insurance departments lack the authority to engage in preemptive regulatory oversight that would help prevent deceptive marketing tactics before it occurred.¹⁴ In most states, marketing standards can be reinforced retroactively after state regulators receive consumer complaints.

The legislation, introduced by Chairwoman Eshoo (D-CA), would require STLDI to disclose the risks of STLDI to prospective consumers, including disclosure that STLDI may not cover pre-existing conditions, may not cover the costs of medical services, and that coverage may be rescinded if the individual seeks treatment for a pre-existing condition. The bill further prohibits insurers from enrolling individuals in SLTDI during the ACA's annual Open Enrollment period.

V. WITNESSES

Katie Keith, JD, MPH

Associate Research Professor and Adjunct Professor of Law
Georgetown University

Jessica Altman

Commissioner
Pennsylvania Insurance Department

Grace-Marie Turner

President
Galen Institute

¹³ Georgetown University Health Policy Institute, *The Marketing of Short-Term Health Plans: An Assessment of Industry Practices and State Regulatory Responses* (Jan. 2019) (<https://www.rwjf.org/en/library/research/2019/01/the-marketing-of-short-term-health-plans.html>).

¹⁴ *Id.*