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THE VOICE FOR HEALTH CARE CONSUMERS

March 8, 2018

The Honorable Alex M. Azar
Secretary, U.S. Department of Health and Human Services
The Honorable Seema Verma,
Administrator, Center for Medicare and Medicaid Services
The Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Azar and Administrator Verma:

Families USA is greatly concerned about the Idaho executive order and subsequent new health insurance guidelines allowing insurance carriers to sell "state-based plans" that are not compliant with federal law under the Affordable Care Act in Idaho's individual market. Families USA is a national nonprofit, nonpartisan organization dedicated to high-quality, affordable health care and improved health for all. By implementing these new guidelines, Idaho state officials' lawless action would impede access to high-quality, affordable health care for state residents and create a dangerous precedent for individual market insurance plans to defy federal law, and to allow insurance carriers to deny coverage for consumers based on preexisting conditions. The effects of Idaho's proposal would be devastating for all consumers: younger, healthier individuals who purchased a non-ACA compliant "state-based plan," would find that when they need health insurance, their plan lacks essential services and leaves them with high out-of-pocket costs; and sicker, older individuals, left behind in the market with comprehensive coverage needs, would face rising premiums and additional health care costs.

The Affordable Care Act is federal law and governs the individual markets across all states. While states have the primary responsibility for monitoring the compliance and enforcement of the individual market rules established under the Patient Protection and Affordable Care Act, states may impose additional requirements on insurance carriers and the health plans they offer, as long as the state requirements do not conflict with federal law, or prevent the implementation of federal market reforms. Idaho's executive order and insurance guidelines are in direct conflict with federal law. If HHS does not uphold federal law in Idaho's individual market, a dangerous precedent could be set for other states to follow, undermining the federal rights of consumers under the Affordable Care Act—or indeed other federal legal protections that are dependent on state regulatory action-- and critical access to comprehensive health insurance for consumers.

The Idaho Department of Insurance's issuance on January 24, 2018 in Bulletin 18-01 announces that the Department intends to approve "state-based" health insurance plans that violate federal law. Specifically, the Idaho Department invited issuers to file plans that would violate the Affordable Care Act (ACA) as incorporated into the Public Health Services Act ("PHSA") in numerous respects:

- The Idaho bulletin (¶ 5) permits up to a 50% increase in rates for individuals with preexisting conditions, but the PHSA prohibits premium rates based on an individual's health status (42 U.S.C.§ § 300gg & 300gg-4);

- The Idaho bulletin (¶ 3) permits exclusions for individuals with preexisting conditions who lack coverage in the prior 63 days, but the PHSA prohibits issuance of insurance policies with preexisting condition exclusions (42 U.S.C. § 300gg-3) or continuous coverage requirements (42 U.S.C. § 300gg-1);

- The Idaho bulletin (¶ 5) allows plans to vary their premium rates by a 5:1 age ratio, but the PHSA prohibits premium rates that vary by more than a 3:1 age ratio and that vary by more than 50% for tobacco use (42 U.S.C. §§ 300gg);

- The Idaho bulletin (¶ 4) permits plans that do not cover a number of the essential health benefits specified under federal law, but the PHSA prohibits plans that fail to cover these essential health benefits (42 U.S.C. §§ 300gg-6 & 300gg-13), such as:

    - pediatric vision and dental care; and habilitative services;
    - contraceptive services as preventative care;
    - preventive care, such as physicals and immunizations, without cost-sharing (as federal law requires); and
    - maternity services

- The Idaho bulletin (¶ 6) permits an issuer to set an annual limit of $1 million per person (or more) on the amount it will pay under a policy, but the PHSA prohibits such annual limits (42 U.S.C. § 300gg-11);

- The Idaho bulletin (¶ 7) applies the out-of-pocket cost ceiling to the Bulletin's more restrictive list of essential health and in addition permits separate maximums for different types of services (*e.g*, one for prescription drugs and another for other services), which permit payments by consumers greater than the maximum out-of-pocket cost limit established by federal law (42 U.S.C. § 18002(c));

- Federal law imposes single risk pool requirements for the individual market (45 CFR § 156.80), but the Idaho bulletin ((¶ 5) creates special treatment for these state-authorized plans that will effectively exclude them from a single risk pool; and

- Federal law requires all health insurance issuers in the individual market to participate in a risk adjustment program. (42 U.S.C. § 18063) The Idaho Bulletin would, according to public reports, excuse state-based plans from participation.

Permitting Idaho issuers to market these products will inflict very significant harm on Idaho patients and consumers and will seriously destabilize Idaho's insurance market. As 15 organizations representing millions of patients facing serious, acute, and chronic health conditions across the country explained in their February 14 letter to Secretary Azar:

> "Individuals and families who purchase these plans may not have insurance coverage for essential health services and would likely pay more out of pocket for the services that are covered—while older Americans and individuals with pre-existing conditions, because of premium surcharges, would likely pay more for less coverage. Further, older Americans could be charged up to five times the premiums for younger Americans—much more than the three-to-one limit in federal law. People with pre-existing conditions could be charged up to 50 percent on top of what they otherwise would pay. And a person who is both older and has a pre-existing condition could be charged premiums up to ***fifteen times*** more than a young, healthy American." Letter from 15 Patient Organizations, February 15, 2018, available at http://bit.ly/2nZbnLu

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Moreover, individuals with preexisting conditions, older Americans, and others who need the protections provided by federal law will pay more—and the federal government will pay more in premium tax credits—as premium costs rise. As the Georgetown University Health Policy Institute has explained:

> "While young, healthy consumers may find these plans attractive, older, sicker ones will gravitate to ACA-compliant plans both on and off the exchanges. This adverse selection will result in higher premiums for ACA-compliant plans, rendering coverage unaffordable for many Idahoans who don't qualify for the ACA's premium tax subsidies and aren't young or healthy enough to afford the state-based plans. Further, taxpayers will need to pick up the tab for the higher federal subsidies needed to pay for the more expensive exchange plans." (Georgetown University Health Policy Institute Center for Children and Families, Feb. 1, 2018, *available at* https://ccf.georgetown.edu/2018/02/01/idaho-goes-rogue-state-authorizes-sale-of-health-plans-that-violate-the-affordable-care-act/.)

The American Academy of Actuaries concluded that "[p]remiums for ACA coverage would increase, threatening sustainability of the ACA market and its pre-existing condition protections" and "[a]s a result, ACA premiums would increase, and options for individuals with pre-existing conditions would narrow." March 2 Letter from American Academy of Actuaries, available at http://actuary.org/files/publications/Idaho_030218.pdf.

Physicians, clinics, hospitals, pharmacies, and other health care providers in Idaho may also be harmed. They may not realize that their patient's plan does not cover federally required benefits, does not adhere to the federal limit on out-of-pocket costs, and imposes an annual dollar cap on paid benefits. Large bills not paid for by the insurance company could lead to medical debt or bankruptcy for the patient and uncompensated care for the providers.

Finally, as discussed in more detail below, issuers that issue these "state-based plans" face significant solvency risks. Even the substandard coverage promised by these plans may not be available when needed by those who purchase them or their families.

One company—Blue Cross of Idaho—has already filed products with the Idaho Department of Insurance that violate a number of federal law requirements and announced its intention to start marketing these products as soon as they are approved by the Idaho Department.

On February 22, 2018, the company submitted a legal memorandum arguing that the state of Idaho can approve health insurance plans that violate federal law and that the Department of Health and Human Services therefore should take no action to enforce the federal law requirements.

Those arguments are meritless. The Department has an obligation to protect consumers against violations of federal law—and to protect the federal government against the increased federal expenditures that inevitably will result from Idaho's plan. The Department should take enforcement action against issuers that issue such products if Idaho is unwilling to do so.

Insurance Products Issued Pursuant to the Idaho Bulletin Violate Federal Law

Any health insurance plans issued pursuant to the Idaho Bulletin would plainly violate federal law and would therefore be unlawful.

The PHSA and ACA prohibit a "health insurance issuer" from offering "individual health insurance coverage" that fails to comply with the requirements set forth in federal law (which are cited and discussed above). *See, e.g.* 42 U.S.C. § 300gg.-1, 300gg-11..

There is no doubt that the Idaho Bulletin purports to authorize the issuance of policies by health insurance issuers in the individual market. Indeed, the Bulletin is addressed to "Health Insurance Carriers in Idaho's Individual Market."

And there is no doubt that the Bulletin purports to authorize the issuance of health insurance that fails to comply with federal law—as already discussed in detail. The Idaho Bulletin itself recognizes that it authorizes coverage that violates federal law: it requires (¶ 8) a disclosure "on the face page of the policy that: The policy is not fully compliant with federal health insurance requirements."

Blue Cross rests its principal argument on a provision of federal law governing the process for imposing civil penalties for violations of the Affordable Care Act. That provision, 42 U.S.C. § 300gg-22, states:

> "(a)(1) Subject to section 300gg–23 of this title, [which invalidates state law provisions that prevent the application of the ACA], each State may require that health insurance issuers that issue, sell, renew, or offer health insurance coverage in the State in the individual or group market meet the requirements of this part with respect to such issuers.
>
> "(2) In the case of a determination by the Secretary that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) under subsection (b) of this section insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State."

Pointing to the clause in subsection (a)(2) stating that the Secretary shall enforce the Act within a State if he determines "that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State," Blue Cross argues that a health issuer does not violate federal law as long as its policies "substantially" comply with the Act.

That argument is plainly wrong.

The statutory provisions prohibiting the issuance of insurance with provisions violating federal law are clear and absolute; they do not confer discretion on the Secretary, a State, or an insurance company to issue policies that violate only a few federal requirements.

Indeed, the statutory text confirms this conclusion because Congress included a separate procedure for authorizing States to obtain a federal administrative waiver permitting the issuance of insurance plans that do not comply with all of the requirements of federal law. *See* 42 U.S.C. § 18052. If Idaho believes it has a better idea for insurance plans than that provided by the ACA's statutory requirements, it can request a state innovation waiver under this provision. The provision, however, includes a public process to ensure that a state's proposal is thoroughly vetted as well as substantive "guardrails" to ensure that its residents are not harmed by its proposal. Congress's decision to include in the statute an explicit process for states to establish "state-based" plans if they wish to do so further confirms that the federal law requirements are mandatory in the absence of such a waiver.

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The statutory provision governing the displacement by the federal government of a State's enforcement authority says nothing about whether particular acts violate the Act's substantive provisions. It is not surprising, given federalism and other values, that Congress would require a substantial failure to permit the displacement of state authority. But whether or not a state retains enforcement authority is irrelevant to the question whether particular conduct violates the law. And that is particularly true in light of the express statutory provision providing a procedure for waivers of ACA requirements based on a specified process and standards.

Blue Cross cites earlier HHS decisions permitting issuers to continue to impose annual limits on "mini-med" plans between 2010 and 2014 at the discretion of the Secretary. But the ACA explicitly permitted HHS to allow the continuation of annual limits through 2014, *see* 42 U.S.C. § 300gg-11, a fact Blue Cross omits.

Blue Cross also cites the Obama administration's decision to allow the continuation of "grandmothered" plans beyond 2013. But the legality of the Obama administration's decision to permit the continuation beyond 2013 of existing health plans that were not in full compliance with the ACA was challenged in litigation; the courts did not reach the merits, dismissing the complaints for lack of standing. *See West Virginia v. HHS*, 145 F.Supp.3d 94 (D.D.C., 2015), affd. 827 F.3d 81 (D.C. Cir, 2016), cert.den. 137 S.Ct. 1614 (2017); *American Freedom Law Center v. Obama*, 106 F.Supp.3d 104 (D. D.C. 2015). Many observers, including the plaintiffs in these actions, asserted that the Obama administration's decision was unlawful.

Moreover, that "administrative fix" was not a decision not to enforce the ACA's substantive requirements indefinitely, but rather a decision as to the timing of implementation. *See* Timothy Jost and Simon Lazarus, Obama's ACA Delays — Breaking the Law or Making It Work? 370 New Eng. J. Med. 1970 (2014), available at http://www.nejm.org/doi/full/10.1056/NEJMp1403294 . The article cited by Blue Cross quotes an administration official who justified the decision as resting on the need to provide a reasonable transition period for implementation of the new ACA requirements:

> "Agencies may exercise . . . discretion in appropriate circumstances, including when implementing new or different regulatory regimes, and to ensure that transitional periods do not result in undue hardship." Greg Sargent, White House Defends Legality of Obamacare Fix, Washington Post, November 14, 2013, available at https://perma.cc/KBZ5-Z8YB

Moreover, the Idaho Bulletin cannot possibly be justified as a temporary measure easing the transition to the ACA's rules: it was issued years after the ACA's rules had fully taken effect. (And, as explained below, Idaho's supposed policy justifications for its Bulletin are baseless.)

Finally, Blue Cross references the recent proposed rule on short-term plans. But that rule has not been finalized and is likely to be subject to judicial challenge if finalized in anything close to its proposed form. It therefore does not provide a precedent helpful to Blue Cross.

In sum, there is no serious question that plans issued pursuant to the Idaho Bulletin are unlawful because they violate federal law.

The Idaho Bulletin is Preempted by Federal Law

The PHSA expressly preempts "any provision of State law which establishes, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with individual or group health insurance coverage . . . to the extent that such standard or requirement prevents the application of a requirement" of Part A of the PHSA, which includes the provisions described above that establish federal requirements for health insurance plans. 42 U.S.C. § 300gg-23.

In addition, the ACA specifically provides that the insurance reforms in the ACA, including those listed above, preempt state laws "that prevent the application of the provisions of this title." 42 U.S.C. § 18041(d). *See generally St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016 (8th Cir. 2015); *Coons v. Lew*, 762 F.3d 891 (9th Cir.2014).

Blue Cross contends that because Idaho will continue to approve the marketing of some products that comply with the PHSA and ACA, it is not preventing the application of the law. That assertion is nonsensical.

Idaho's Bulletin purports to bar the application of federal requirements to insurance products issued pursuant to the Bulletin. Federal law does not apply to only some issuers some of the time; it applies to all "health insurance issuer[s] offering . . . individual health insurance coverage." *See, e.g.*, 42 U.S.C. § 300gg-3. The Bulletin therefore plainly and directly prevents the application of federal law.

Unlawful Contract Provisions Generally Are Unenforceable as Written

The inescapable conclusion that insurance products issued pursuant to the Idaho Bulletin contain unlawful provisions has important consequences.

Generally, contract provisions that violate the law will not be enforced. *See, e.g., Restatement (Second) of Contracts* § 178. But a party not in the wrong may assert a claim for performance or restitution. *Id*. § 198.

That means that an issuer who violates federal law by issuing an insurance product that fails to comply with federal requirements may not be able to enforce the contract—it may not be able to collect unpaid premiums and may not be able to enforce illegal limits on its obligation to pay benefits. Indeed, an issuer who issues such products may face a severe, unanticipated solvency threat: shortfalls in revenues combined with unexpected payment obligations.

In addition, the issuer's solvency would be put at risk for the additional reason that the issuer would be exposed to civil penalties of $100 per enrollee per day if the federal government assumes enforcement of the PHSA, as explained below.

HHS Must Make Clear that the Idaho Bulletin is Preempted and that Insurance Policies Issued Pursuant to the Bulletin Are Unlawful

HHS has a duty to make clear to issuers, consumers, providers, and other participants in the health care system that insurance products issued pursuant to the Idaho Bulletin are illegal, and pose a threat to customers and to issuers themselves.

The threats to customers are discussed earlier in this letter – the risk that coverage limitations will mean that families will not be protected against common medical expenses. Issuers that issue these "state-based" products face serious solvency risks. And issuers that issue ACA-compliant policies—and their customers—face premium increases.

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Providers face the risk that they will not receive compensation for services provided, because those services may not be covered by the "state-based" insurance, or because the patient will not be able to pay the increased out-of-pocket costs required under those policies.

Federal taxpayers also face increased costs: as the risk pool for ACA-compliant policies declines, and premiums therefore increase, federal premium tax credits will increase as well. As stewards of federal tax dollars, HHS has a strong obligation to prevent the issuance of illegal insurance products that will increase federal government expenditures.

HHS Should Take Over Enforcement of the ACA in Idaho and Bring An Action Against Blue Cross and Any Other Issuer That Issues Insurance Products Under the Idaho Bulletin

Prior to Idaho's issuance of the Bulletin, all but four states in the United States exercise primary responsibility for enforcing the PHSA. HHS directly enforces the requirements of the PHSA in Texas, Oklahoma, Wyoming, and Missouri. https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/compliance.html

HHS must now also undertake direct enforcement in Idaho.

The governing statute provides that upon "a determination by the Secretary that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) under subsection (b) of this section insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State." 42 U.S.C. § 300gg-22(a)(2).

The regulations issued to implement this section, which are of course binding on HHS (*e.g.*, *Service v. Dulles*, 354 U.S. 363, 372 (1957)), provide:

> "CMS enforces PHS Act requirement to the extent warranted (as determined by CMS) in any of the following circumstances:
>
> "(a) Notification by State. A State notifies CMS that it has not enacted legislation to enforce or that it is not otherwise enforcing PHS Act requirements.
>
> "(b) Determination by CMS. If CMS receives or obtains information that a State may not be substantially enforcing PHS Act requirements, it may initiate the process described in this subchapter to determine whether the State is failing to substantially enforce these requirements." 45 C.F.R. § 150.203.

By issuing its Bulletin, Idaho has notified HHS that it is no longer enforcing the requirements of the PHSA. Indeed, that is what the Bulletin expressly states—and it requires the inclusion in any "state-based" policies of a provision making clear that the policies do not comply with federal law. Idaho Bulletin ¶ 8.

For that reason, HHS need not go through the procedures set forth in 45 C.F.R. §§ 150.207- 150.219 for determining whether a state is substantially enforcing the law—which are triggered when lack of state enforcement is suggested by a consumer complaint or media report under 45 C.F.R. 150.205. Idaho's admission that it is not abiding by federal law—which the above analysis confirms—provides a sufficient basis for HHS to take over enforcement of the PHSA in Idaho.

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If it were necessary to determine whether Idaho is "substantially enforcing the law," the answer is plain: Idaho is not coming close to substantially enforcing the law.

The substantial enforcement standard allows a State to exercise conventional enforcement discretion—it need not take action with respect to every complaint filed with the Department against an issuer or every possible infraction identified in a market conduct examination. But the "substantial" standard does not allow a State to refuse categorically to enforce some provisions of the PHSA or to enforce statutory requirements against some issuers or products (but not others). Explicit refusal to enforce numerous provisions of the law cannot possible qualify as not substantial enforcement.

This is the way HHS has long interpreted the "substantial enforcement" requirement. A 2001 GAO Report on enforcement of the PHSA states that HHS officials explained that "absent conforming laws, they consider states to be substantially enforcing the federal standards if alternative means exist, such as regulations, advisory bulletins, or other guidance issued by state regulatory agencies directing issuers to meet standards consistent with the federal requirements." https://www.gao.gov/assets/100/90726.pdf, at page 4 . Here Idaho expressly disclaims any regulations or guidance to ensure compliance with numerous requirements of the PHSA—indeed, Idaho's Bulletin expressly authorizes the violation of those requirements and Idaho states that it will permit the issuance of insurance products that violate those requirements.

The same distinction was recently recognized by Attorney General Sessions with respect to the federal government's enforcement of criminal laws relating to marijuana distribution and possession. In revoking prior Department of Justice memoranda that had effectively precluded criminal enforcement actions under these laws, the Attorney General stated that "prosecutors should follow the well-established principles that govern all federal prosecutions." *See* https://www.justice.gov/opa/press-release/file/1022196/download. Idaho does not do that with respect to the federal law requirements that the Bulletin purports to override: to the contrary, it expressly refuses to enforce those requirements.

The Blue Cross memorandum contends that even if HHS takes over enforcement of the PHSA and ACA in Idaho, it still may exercise discretion to refuse to require Blue Cross to comply with the ACA. But 42 U.S.C. § 300gg-22 provides that if a state substantially fails to enforce the PHSA, as Idaho has done, "the Secretary **shall enforce** such provision (or provisions) under subsection (b) of this section insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State." (emphasis added)

"Shall" imposes a mandatory obligation. Blue Cross cites *Heckler v. Chaney*, 470 U.S. 821 (1985) for the proposition, that despite the mandatory language of the statute, HHS has "broad discretion on decisions of when and how to enforce" the PHSA.

But the Supreme Court in *Heckler* recognized that enforcement decisions are "only presumptively unreviewable" as discretionary; the

> "presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. . . . . Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities,

> or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." 470 U.S. at 832-33.

In 42 U.S.C. § 300gg-22 Congress provided guidelines for HHS to exercise its enforcement authority. Thus, 42 U.S.C. § 300gg-22(b)(2)(A) provides that an issuer "that fails to meet a provision of this part applicable to such plan or issuer is subject to a civil money penalty under this subsection." And 42 U.S.C. § 300gg-22(b)(2)(C) sets the maximum amount of the penalty at $100 per day for each enrollee to whom the violation applies. 42 U.S.C. § 300gg-22(C) then explicitly sets out the criteria for determining the amount of the penalty—previous violations, the gravity of the violation, whether the issuer knew or reasonably could have known the violation was occurring, and whether it was corrected within 30 days.

Moreover, HHS could not justify a refusal to take enforcement action against Blue Cross as a legitimate exercise of enforcement discretion. The issuance of unlawful insurance products threatens significant harm to Idaho consumers, Idaho providers, competing Idaho issuers, and federal taxpayers. Just as Idaho cannot assert that its Bulletin embodies routine enforcement discretion, HHS cannot rely on discretion to avoid its clear obligation to take action here.

Blue Cross openly admits that it intends to flagrantly violate the law and has no intention of correcting its violation. Under the standards prescribed by Congress in 42 U.S.C. § 300gg-22, HHS must impose a civil penalty if Blue Cross proceeds with its violation.

Blue Cross cites two cases that supposedly permit an administrator to deviate from strict enforcement of a statute when "unanticipated circumstances" lead an administrator to believe that strict enforcement "is frustrating the policies he is obligated to serve." The first of these cases, *Pennsylvania v. Lynn*, 501 F.2d. 848 (D.C. Cir. 1973), does not in fact involve the enforcement of a statue but rather the implementation of a spending program. The other case, *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168 (D.C. Cir. 1974), involved a brief moratorium in the approval of railroad mergers, not with a refusal to enforce statutory requirements against regulated entities.

Finally, as noted above, Idaho will reportedly will permit Blue Cross to exclude state-based plans from the requirements of the ACA's risk adjustment program, which applies to all issuers in the individual market independent of the PHSA. 42 U.S.C. § 18063. This provision is not subject to the substantial enforcement provision of the PHSA that Blue Cross relies on. Nothing in the law allows HHS to excuse an individual market issuer from participating in risk adjustment.

In sum, HHS cannot avoid its clear statutory and regulatory responsibility to take enforcement action against illegal insurance plans issued by Blue Cross.

Blue Cross's Challenges to the Validity of the ACA are Frivolous

The remaining arguments raised by Blue Cross can be quickly dispatched—they rest on Idaho's view that that the ACA is legally invalid, and therefore are directly contrary to Secretary Azar's express recognition at his confirmation hearing that the ACA is the law of the land.

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Blue Cross argues that the ACA has failed and therefore HHS should stop enforcing it. But the decision whether to repeal the ACA is one for Congress, not HHS, Idaho, or Blue Cross. Congress debated repeal of the ACA throughout the spring and summer of 2017 and repeatedly refused to do so. Significantly, one of the proposals rejected by Congress—the Cruz amendment—would have permitted similar plans to those in the Idaho bulletin. Timothy Jost, Senate GOP Leadership Unveils Latest Version of Health Reform Legislation, Health Affairs Blog, July 15, 2017, available at https://www.healthaffairs.org/do/10.1377/hblog20170714.061057/full/

Blue Cross contends that the individual shared responsibility penalty has been repealed, and that HHS should therefore declare the ACA a failure and cease enforcing the statute's requirements. Congress did repeal the shared responsibility penalty, but expressly chose to leave in place the remainder of the ACA, plainly concluding that the ACA is workable without the penalty. In addition, the penalty remains in place through 2018, while Blue Cross wants to begin selling its unlawful plans immediately.

Blue Cross also notes that the ACA's cost-sharing reduction payments are no longer being made by the federal government. But Idaho, like most other states, simply allowed issuers to raise silver plan premiums to cover the lack of cost-sharing subsidies, thus ensuring that issuers are made whole while protecting most consumers. See Insurance Department Releases 2018 Final Individual Health Insurance Rates, Idaho Insurance Department News Release, September 29, 2017, available at https://doi.idaho.gov/DisplayPDF.aspx?Id=4039&url= The defunding of cost-sharing reductions have in fact expanded premium tax credits for subsidized enrollees. See Louise Norris, The ACA's Cost Sharing Subsidies, HealthInsurance.org, December 29, 2017, available at https://www.healthinsurance.org/obamacare/the-acas-cost-sharing-subsidies/

Blue Cross further claims that Idaho's health insurance markets are collapsing and that drastic action is needed to save them. But Director Cameron reported in a September 29, 2017 press release that "[w]hile many other states have been struggling to keep even one company in the individual market, Idahoans continue to have at least four companies offering plans in each county for 2018." *See* Idaho Insurance Department September 29 news release, *supra*.

Blue Cross asserts that the number of uninsured Idahoans increased by 66,000 from 2015 to 2016, but in fact the Census Bureau found that the percentage of the Idaho population that was uninsured ***decreased*** from 11 percent in 2015 (180,000) to 10.1 percent in 2016 (168,000). See Jessica C. Barnett and Edward R. Berchick, Health Insurance Coverage in the United States: 2016, September 27, 2017 available at https://www.census.gov/library/publications/2017/demo/p60-260.html Tables A-5,

Indeed, despite the fact that Idaho was one of two state-based marketplaces that only had a 45-day open enrollment period for 2018, almost 102,000 Idahoans signed up for coverage. The Idaho marketplace issued a press release headlined "Despite Changes, Idahoans Flock to Health Insurance Exchange." https://www.yourhealthidaho.org/wp-content/uploads/News-Release_enrollment-figures_122717.pdf Idaho could further reduce its uninsured rate by expanding Medicaid. See Louise Norris, Idaho and the ACA's Medicaid Expansion, HealthInsurance.org, June 8, 2017, https://www.healthinsurance.org/idaho-medicaid/

Blue Cross claims that premiums increased by 30 percent for 2018, but that is only because silver plan premiums increased 40 percent because of CSR defunding. News reports indicate that Congress is currently considering various alternatives to address subsidies and market stabilization. Idaho could also reduce

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premiums by seeking a state innovation waiver to receive federal funding for reinsurance, using CMS's template. .

Finally, Blue Cross argues that a refusal to allow it to violate the ACA will deprive it of a reasonable rate of return and thus violate the Due Process and Taking Clauses of the Constitution. But Blue Cross is a non-profit organization. And in addition its rate filings for its 2018 marketplace products project that its premiums will allow it a medical loss ratio of 87.5 percent and a pre-tax margin of 2 percent. Actuarial Memorandum Blue Cross of Idaho Health Service, Inc. Individual Qualified Health Plans effective January 1, 2018, available at http://premiumtaxcredits.wikispaces.com/file/detail/1338534_BCI_UnifiedRateReview_Part3_Indiv_ver5_0821 2017.pdf . Idaho Blue Cross' MLR of 87.5 percent and per member per month margin of $11.35 compares favorably with industry wide individual market MLRs of 96 percent and PMPM margins of $13.54. Cynthia Cox, Larry Levitt, Gary Claxton, Insurer Financial Performance in the Early Years of the Affordable Care Act, April 27, 2017, available at https://www.kff.org/health-reform/issue-brief/insurer-financial-performance-in-the-early-years-of-the-affordable-care-act/ This argument is plainly frivolous—and, in addition, provides no authority for a federal agency to nullify an Act of Congress.

Conclusion

Health insurance products issued pursuant to the Idaho Bulletin plainly violate federal law. HHS has a legal, constitutional, obligation to make clear to Blue Cross—and to Idaho consumers and providers—that these products are unlawful. And it has an obligation to protect federal taxpayers against the increased burdens that would result from Idaho's plan. Finally, HHS must take over enforcement of the PHSA and the ACA in Idaho and take enforcement action against Blue Cross if it proceeds with its plan to offer illegal insurance plans.

Thank you for your consideration of this analysis. Please do not hesitate to contact Eliot Fishman, Senior Director of Health Policy, efishman@familiesusa.org or 202-628-3030 for more information.

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