

Date: 6/29/18

2018 Summer National Meeting
Boston, Massachusetts

HEALTH INSURANCE AND MANAGED CARE (B) COMMITTEE

Sunday, August 5, 2018

3:30 – 5:30 p.m.

Hynes Convention Center—Ballroom C—3rd Level

ROLL CALL

Dean L. Cameron, Chair	Idaho	John Elias	New Hampshire
Jessica Altman, Vice Chair	Pennsylvania	Mike Causey	North Carolina
Lori K. Wing-Heier	Alaska	Larry Deiter	South Dakota
Nancy G. Atkins	Kentucky	Todd E. Kiser	Utah
Al Redmer Jr.	Maryland	Osbert E. Potter	Virgin Islands
Jessica Looman	Minnesota	Mike Kreidler	Washington
Mike Chaney	Mississippi	Ted Nickel	Wisconsin
Matthew Rosendale	Montana		

NAIC Support Staff: Jolie H. Matthews/Brian R. Webb/Jennifer R. Cook

AGENDA

1. Hear Presentation on Issues Paper: “Non-ACA-Compliant Plans and the Risk of Market Segmentation”
—*Sarah Lueck (Center on Budget and Policy Priorities—CBPP)*
2. Hear Update from the U.S. Department of Health and Human Services (HHS) on Short-Term, Limited-Duration Plans (STLDPs) and Other State Approaches—*William Brady (HHS)*
3. Hear Panel Presentation on STLDPs—*Gavin Southwell (Health Insurance Innovations), Brad Burd (GoHealth), Cameron Girouard (Simple Health Plans) and Jan Dubauskas (IHC Carrier Solutions, Inc.)*
4. Hear Briefing on the U.S. Department of Justice’s (DOJ) Determination Regarding *Texas v. United States* and Potential Effects on the Market and Enforcement—*Anthony Shelley (Miller & Chevalier Chartered)*
5. Discuss Various Market Approaches and State Actions Related to Market Stabilization
—*Director Dean L. Cameron (ID)*
6. Discuss Any Other Matters Brought Before the Committee—*Director Dean L. Cameron (ID)*
7. Adjournment

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Agenda Item #1

Hear Presentation on Issues Paper: “Non-ACA-Compliant Plans and the Risk of Market Segmentation”—*Sarah Lueck (Center on Budget and Policy Priorities—CBPP)*

Agenda Item #2

Hear Update from the U.S. Department of Health and Human Services (HHS) on Short-Term, Limited-Duration Plans (STLDPs) and Other State Approaches—*William Brady (HHS)*

Agenda Item #3

Hear Panel Presentation on STLDPs—*Gavin Southwell (Health Insurance Innovations), Brad Burd (GoHealth), Cameron Girouard (Simple Health Plans) and Jan Dubauskas (IHC Carrier Solutions, Inc.)*

Short-Term, Limited-Duration Plans

Gavin Southwell
CEO & President
Health Insurance Innovations

Bradley Burd
General Counsel
GoHealth

Jan Dubauskas
General Counsel
IHC Carrier Solutions

Cam Giroaurd
Chief Compliance Officer
Simple Health Plans



HEALTH INSURANCE
INNOVATIONS

INTEGRATING OUR EXPERIENCE, DIVERSE PRODUCTS, & CLOUD-BASED
TECHNOLOGY AS A MEMBER OF THE INDUSTRY VANGUARD

Short-Term, Limited-Duration Insurance

On 8/1/2018, the final rule entitled “Short-Term, Limited-Duration Insurance” was released. HIIQ welcomes the much-anticipated final rule restoring the maximum duration of Short-Term, Limited-Duration Insurance (STLDI) from 3 months to less than 12 months from the original effective date, with the ability to be renewed or extended for a maximum duration of up to 36 months in total.

As a result of this final rule, STLDI plans can help decrease the number of currently uninsured Americans while increasing choice and competition in the individual market. STLDI plans are far more affordable than comparative ACA plans, and tend to have lower deductibles as well.

Current and Projected Plan Comparison

Current			
	3-month STLDI Plan	Exchange Plan - Silver	
Monthly Premium	\$ 79	\$ 477	
Average Deductible	\$ 3,434	\$ 4,033	
Average OOP Max	\$ 8,206	\$ 6,863	

*Premiums shown are for a 30-year-old individual

2019 Projection				
	6-month STLDI Plan	12-month STLDI Plan	Exchange Plan - Silver	
Monthly Premium - Low	\$ 79	\$ 107	\$ 534	
Monthly Premium - High	\$ 79	\$ 115	\$ 630	
Average Deductible	\$ 3,434	\$ 3,434	\$ 4,315	
Average OOP Max	\$ 8,206	\$ 8,206	\$ 7,343	

*Premiums shown are for a 30-year-old individual



HIIQ Analysis: Current Exchange Plan Data sourced from the plan year 2018 Individual Medical coverage landscape available at data.healthcare.gov, accessed 11/20/2017, then applied low and high premium increase estimates of 12% and 32%, respectively. Current STLDI plan premiums sourced from <https://www.aghilehealthinsurance.com/health-insurance-learning-center/five-myths-about-short-term-insurance> then applied rating factors applicable to 12-month duration STLDI plans. Assumed individuals are generally healthy and non-smoking.

About STLDI Plans

STLDI plans typically provide coverage for all major benefits, such as: doctor and specialist visits, preventative/wellness care, emergency care, x-rays, lab tests, transplants, intensive care, and hospitalization. In addition, plans can include benefits for mental disorders, substance abuse, physical therapy, speech therapy, home health care, ambulance, and other covered medical expenses.

STLDI plans are typically sold with PPO networks, which are much broader than what is increasingly being found in non ACA plans. In addition, plan benefits are paid for covered expenses from any provider in the U.S., regardless of network acceptance.

STLDI plans can be purchased with a variety of deductible options including \$0, \$250, \$500, \$1,500, and at higher increments for reduced premiums. In 2017, the average deductible for STLDI plans was about \$3,434.

Most consumers moving from ACA plans to Short-Term plans will do so based on affordability. With the repeal of the individual mandate having already taken place as part of tax reform, consumers now have the freedom to choose the plan that works best for them. There is another significant increase in premiums on the way for plan year 2019, and consumers will be looking for another way to get coverage to continue to access the healthcare they need. STLDI will be of vital importance in 2019, giving Americans a path to financial stability, without taking the risks of going uninsured.

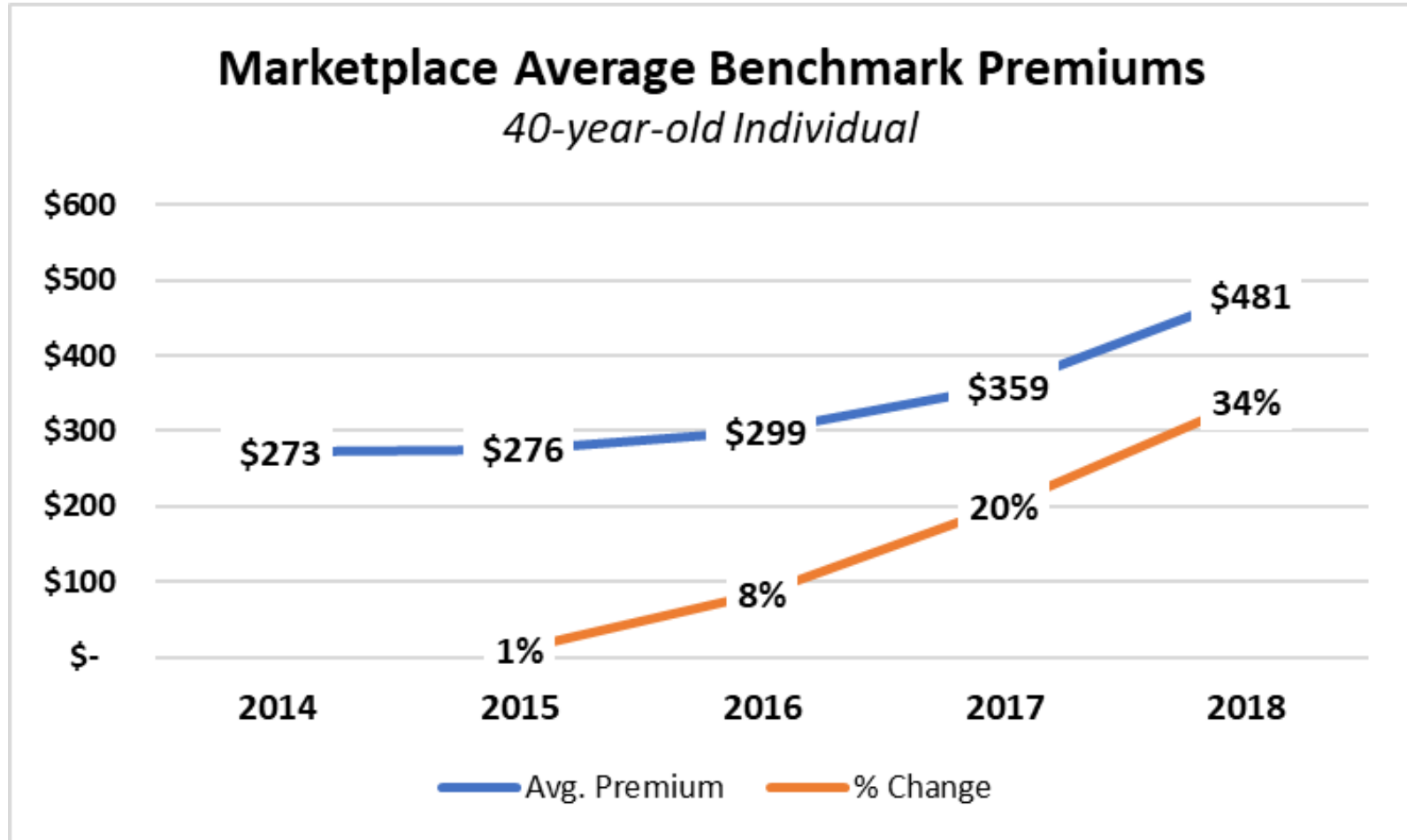
Decreasing Affordability

Rising health insurance costs and reduced ability to pay for those costs have always created a growing need for increased choice and competition in the market. However, costs have risen even further. For people who are ineligible for premium tax credits, this means they will either need to go uninsured or seek more affordable insurance off the marketplace.

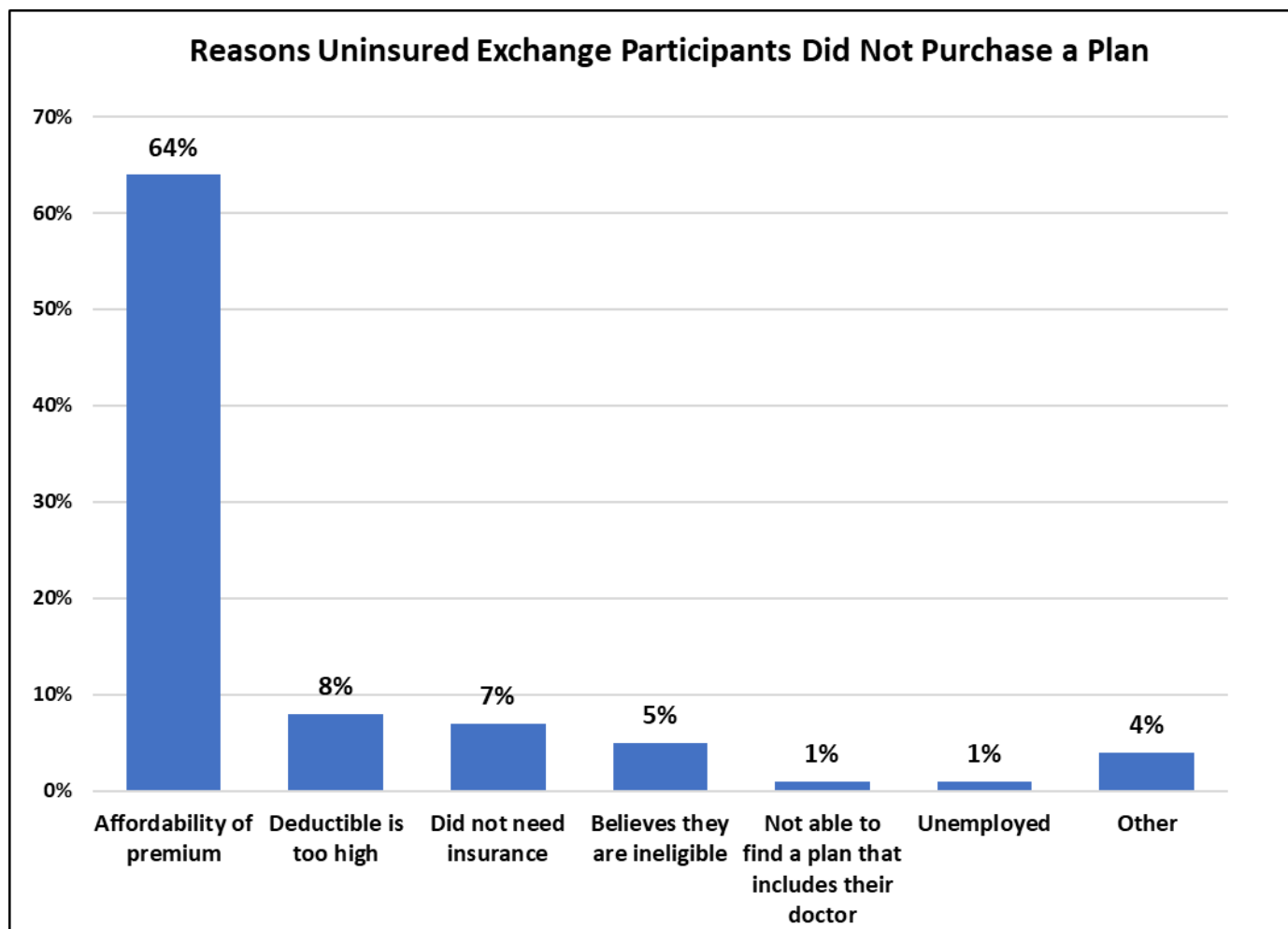
Couple+1 Child – Counties w/ Affordable Plans						
Bronze		Household Income				Available Counties
		\$ 82,000	\$ 83,143	\$ 103,000	\$ 200,000	
Age	30	7	8	285	2423	2673
	40	0	0	94	2279	2673
	50	0	0	0	1434	2673
Silver		Household Income				Available Counties
		\$ 82,000	\$ 83,143	\$ 103,000	\$ 200,000	
Age	30	0	0	14	1883	2729
	40	0	0	0	1365	2729
	50	0	0	0	370	2729



Decreasing Affordability (cont.)



Uninsured Priced Out of the Market



Unemployment Duration

- According to the Bureau of Labor Statistics, the average length of unemployment in the United States is 24.1 weeks, or about 5.5 months, as of March 2018.
- 20.3% of unemployment durations last 27 weeks or more, which means that 6 months is often not long enough to secure gainful employment.
- Limiting the duration of STLDI plans to 3 months, or even 6 months, harms those Americans who find themselves unemployed for the average length of time or longer.



Closing Remarks

- STLDI or STM is not the solution for everyone
- But the evidence is clear that declining ACA enrollment, both on and off-exchange, has not been resolved by measures taken in recent attempting to stabilize the individual market.
- STM plays a role in the solution by giving American consumers additional affordable options to choose from in the market.
- HIIQ is the leading distributor of STM in the market, and we are committed to providing innovative STM insurance products to the millions of uninsured or financially strained individuals and families for whom STM is the right fit.



Health Insurance & Short Term Medical

Jan Dubauskas - General Counsel & Chief Regulatory Affairs Officer

August 5, 2018

Independence Holding Company

- ▶ Standard Security Life Insurance Company of New York
 - ▶ Domiciled in New York
 - ▶ Licensed in all 50 states
- ▶ Madison National Life Insurance Company, Inc.
 - ▶ Domiciled in Wisconsin
 - ▶ Licensed in 49 states
- ▶ Independence American Insurance Company
 - ▶ Domiciled in Delaware
 - ▶ Licensed in all 50 states



Not Your Mama's STM

- ▶ Short Term Medical

- ▶ Evolution:

- ▶ Greater state regulation on association products
 - ▶ Broad in-network and out-of-network solutions
 - ▶ State mandates: maternity, mental nervous



Not Your Mama's STM

► Connect Plus

- First of Its Kind - Pre-existing condition coverage - up to \$25,000
 - Underwriting questionnaire
 - Deductibles \$2,500-\$10,000
 - 20/30/50 Coinsurance
 - \$2M Max Benefit



Connect Plus




Short-Term Medical
Coverage with a Pre-Existing
Condition Benefit

Contact me to learn more >>



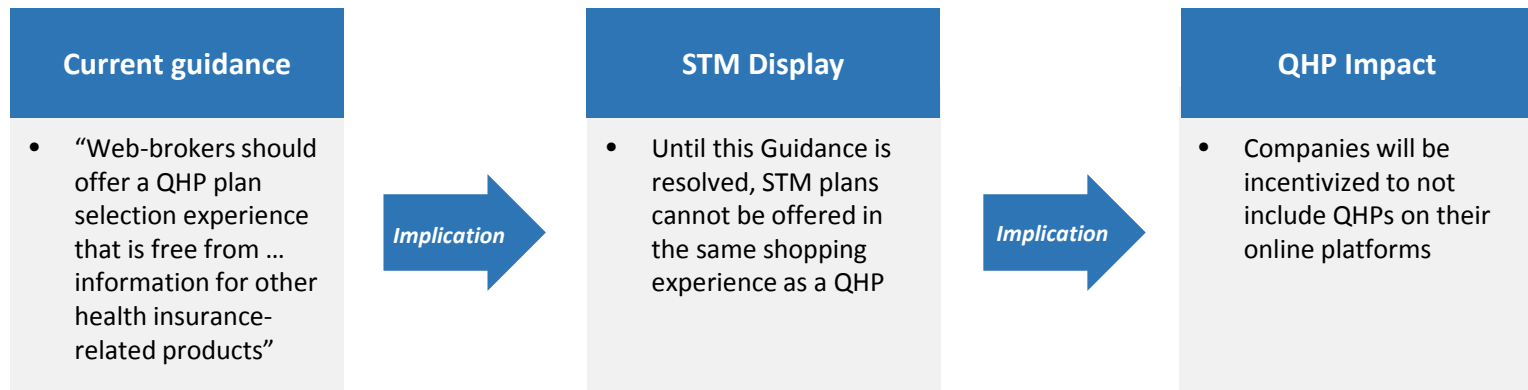
Bradley M. Burd
General Counsel

Ways to Innovate

	Process	Standardize the processes <ul style="list-style-type: none">▪ Standardize rates and benefit templates, eApplications, Summary of Benefits, etc.▪ Standardize rules for underwriting
	Education	Enable better decision support tools <ul style="list-style-type: none">▪ Assist Consumers in identifying the product that matches their needs▪ Assist Consumers to identify product bundles
	Consumerism	Make consumers' interest central to the shopping process <ul style="list-style-type: none">▪ Create a unified shopping experience▪ Give consumer the choice to create a benefit package that uniquely meets their needs

Items to Resolve

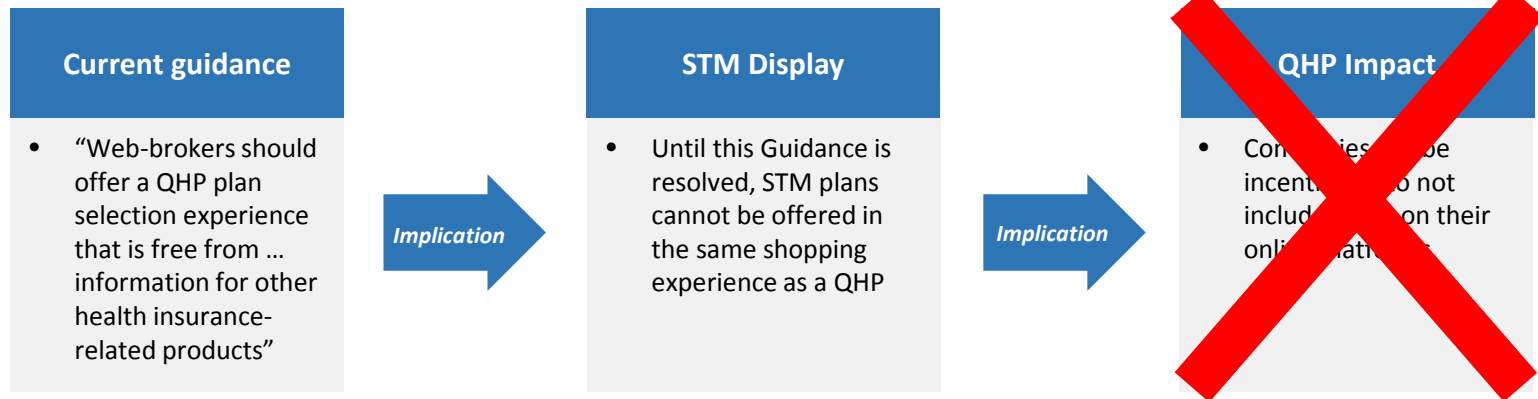
Resolve the Oct 17, 2016 Guidance



We need a different strategy to incentivize the broker community to create a shopping experience that promotes positive outcomes for the customer

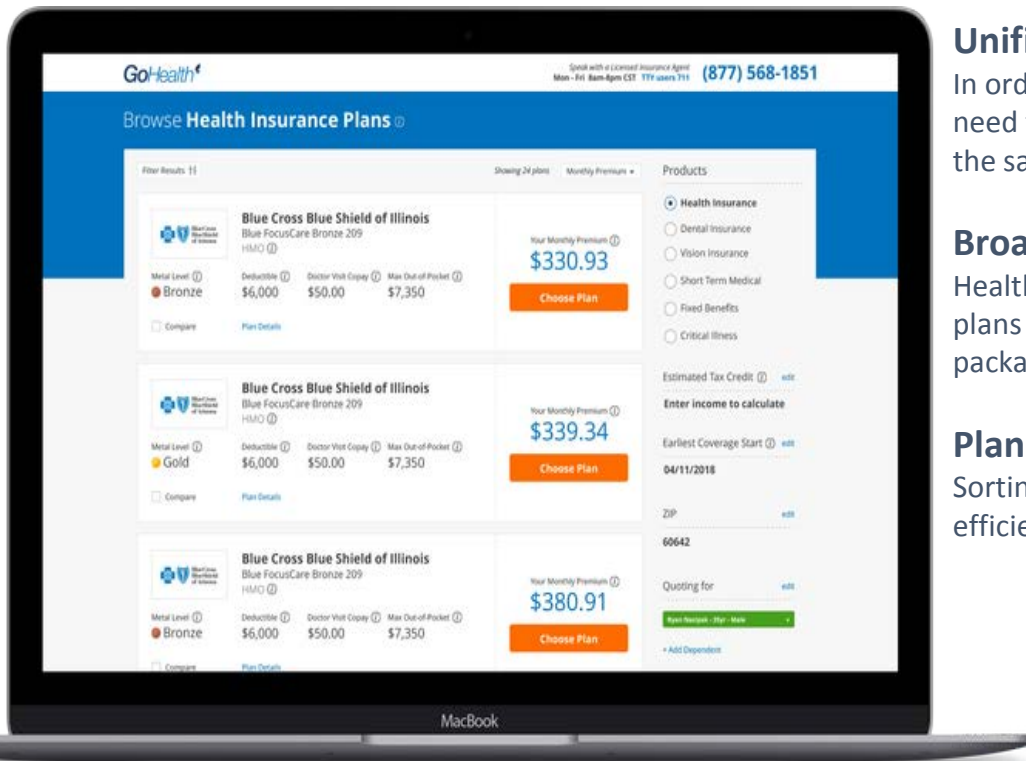
Items to Resolve

Resolve the Oct 17, 2016 Guidance



We need a different strategy to incentivize the broker community to create a shopping experience that promotes positive outcomes for the customer

STM Shopping Experience



Unified shopping experience

In order for this rule to provide consumers real value, consumers need the option to review STM plans in conjunction with QHPs in the same shopping experience

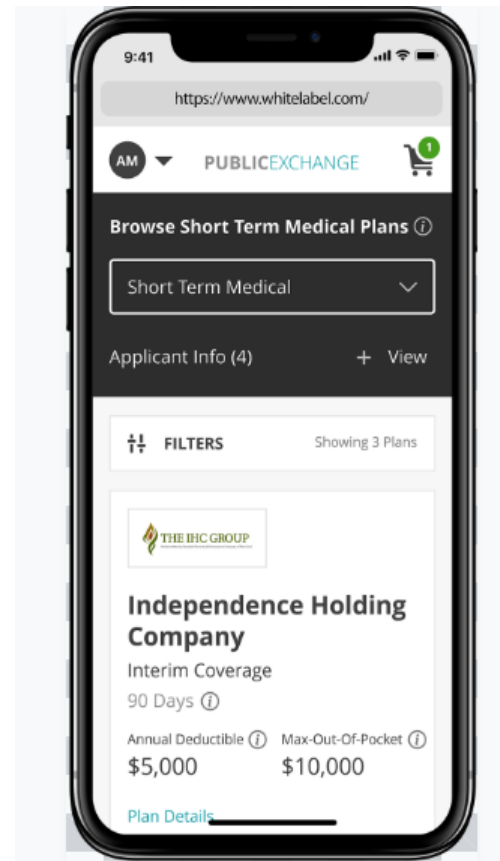
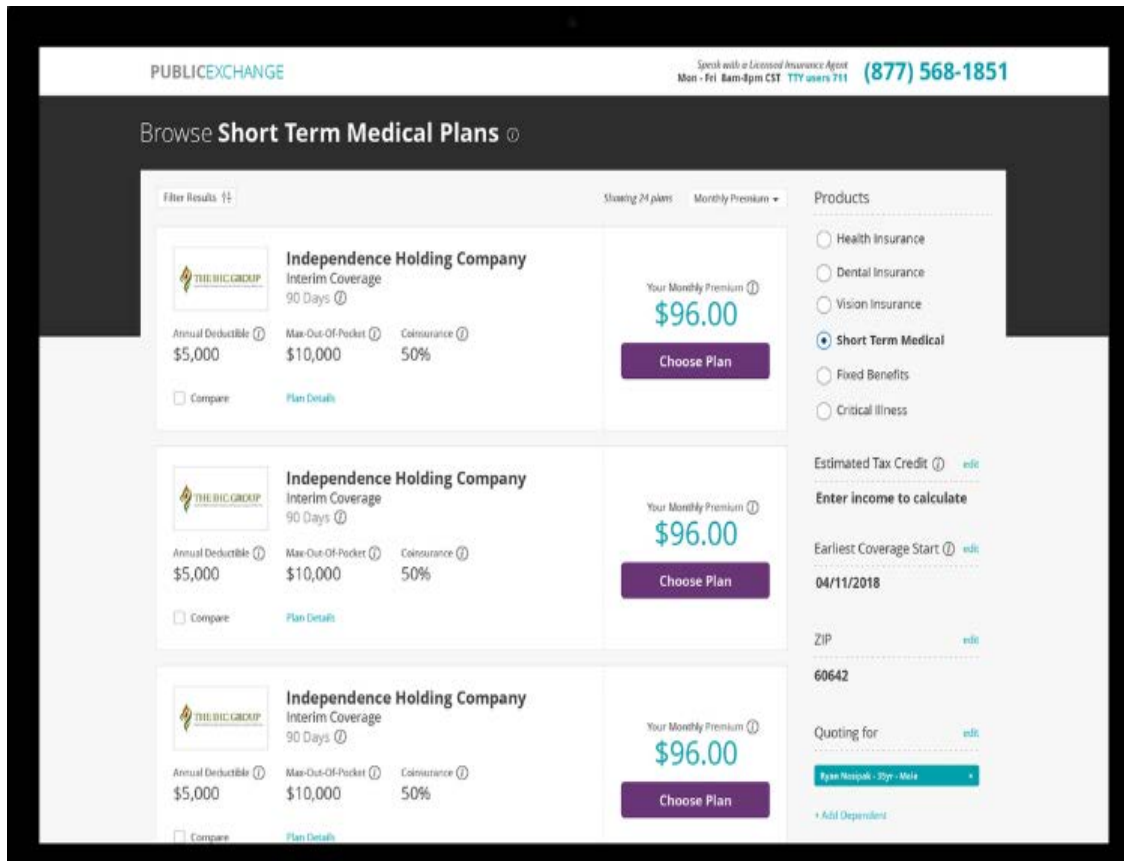
Broad product suite

Health plans can be supplemented with a variety of ancillary plans to offer consumers the ability to design a robust benefit package

Plan selection tools

Sorting, filtering, and automated proposals create a more efficient sales process

Requires an Easy-To-Use Solution





Website Objectives

Provide a user friendly, consumer centric, online healthcare marketplace for Florida residents.

Leverage proprietary technology to provide a secure, compliant & content rich website which will inform and guide the Florida consumer through a health plan shopping experience.

Empower the consumer by providing best in class decision driving tools. Our experience will enable them compare multiple plan options side by side and easily allow them to select the plan that best fits their needs.



2018 Open Enrollment is over. Still need health insurance?

You can enroll in or change plans if you have certain life changes, or qualify for Medicaid or CHIP

[SEE IF I CAN ENROLL ►](#)
[SEE IF I CAN CHANGE ►](#)

Looking for coverage for a small business? [Learn more](#)



NEED TO SUBMIT DOCUMENTS?

Click the button on the right to find out more.

[SEE HOW](#)

What we can do for you

We pride ourselves in being able to understand our customers' needs and to find the best solutions.



Find Local Help

[SEARCH NOW](#)


Get Contacted

[HELP FROM AN AGENT](#)


1095 & Tax Info

[SEE NOW](#)

GET IMPORTANT NEWS & UPDATES

Sign up for email and text updates to get deadline reminders and other important information.

[SIGN UP TODAY](#)

MYFLORIDASTATE.COM BLOG



March 29th
4 steps to find the provider that's right for you



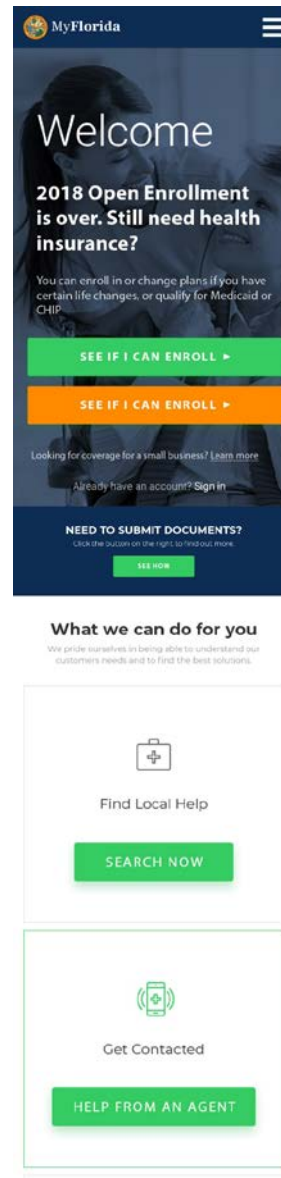
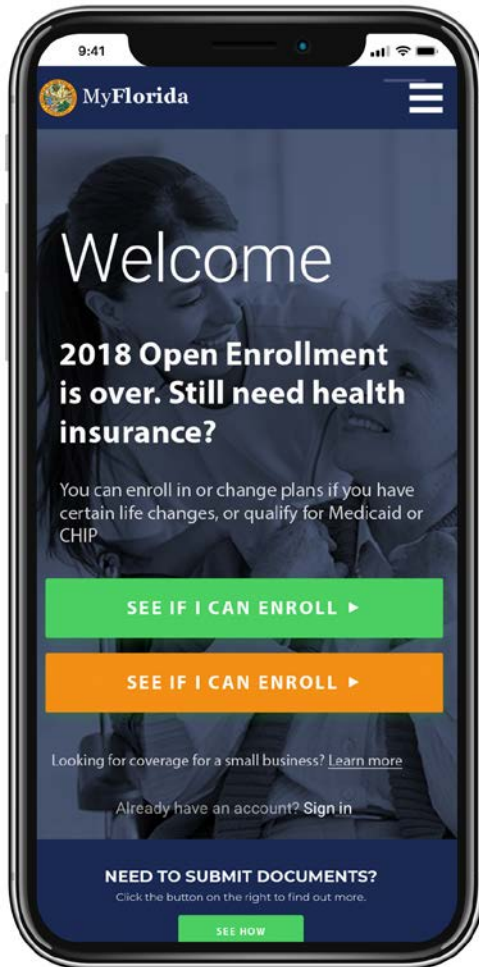
March 29th
4 steps to find the provider that's right for you

[SEE MORE](#)

HOME PAGE

- Educational content spaces which guide the consumer through a seamless shopping flow.
- Leverage data to allow consumers needs to drive the content.
- Content Management System Framework
- A/B split testing and multivariate capabilities
- Consumer centric driven architecture

HOME PAGE: Mobile view



- Fully Mobile response across apple and android devices.
- Stacked content format which enables the user to easily navigate to key sections within the website.



MyFlorida



ESPAÑOL |

LOG IN

GET COVERAGE | KEEP OR UPDATE YOUR PLAN | SEE TOPICS | GET ANSWERS

ENTER SEARCH TERM.....



Compare Health Insurance Quotes

This information is needed to get accurate short term health insurance and health benefit insurance quotes. It will be kept private, secure and never sold.

LOCATION:

Enter your zip code

APPLICANT:

Date of Birth

01/01/1975

Gender

MALE

FEMALE

PAYMENT OPTIONS:

MONTHLY

SINGLE UP-FRONT

COVERAGE START:

01/01/1975

COMPARE PLANS

QUICK QUOTE START

- The consumer will enter key pieces of information such as :

Date of birth

Gender

Location (city)

Preferred payment options

Coverage start date

- Provide the consumer with supporting educational content along the way.





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GET COVERAGE | KEEP OR UPDATE YOUR PLAN | SEE TOPICS | GET ANSWERS

ENTER SEARCH TERM....



Short Term Health Insurance Plans

Health Benefit Insurance Plans

Florida / Male / 43

Short term health insurance is major medical insurance that is purchased for a defined period of time and generally has a much lower monthly premium than other forms of major medical health insurance. Plans have varied levels of benefits and pricing based on need.

158 plans found. Showing 10 plans matching: Best Sellers OnlySee All Plans (158)

(up to 4 plans)

COMPARE (0)

NARROW YOUR RESULTS

View Plan Options ⓘ

- ☒ Best Sellers Only
☐ All Plans

Company ⓘ

- ☐ Everest Prime
☐ Lifeshield
☐ National General
☐ Standard Life
☐ UnitedHealthOne

Company ⓘ

- ☐ Everest Prime
☐ Lifeshield
☐ National General
☐ Standard Life
☐ UnitedHealthOne

HEALTH INSURANCE CARRIER NAME	Standard Life Select STM Plan 3 5000/0/1M (see details)
\$266.00/mo +fees	<div><div>Deductible \$5000 \$1,000,000 Policy Max</div><div>Coinurance 0% \$40 Office Visit Copay</div><div>Max Out of Pocket \$5000 \$40 Urgent Care Visit Copay</div></div> <div>Compare (0)</div> <div>BEST SELLER FEATURED SELECT THIS PLAN</div>
\$266.00/mo +fees	<div><div>Deductible \$5000 \$1,000,000 Policy Max</div><div>Coinurance 0% \$40 Office Visit Copay</div><div>Max Out of Pocket \$5000 \$40 Urgent Care Visit Copay</div></div> <div>Compare (0)</div> <div>FEATURED SELECT THIS PLAN</div>
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PLAN SHOPPING PAGE

- Multi faceted dynamic shopping page
- Customizable filters: enabling the consumer to toggle between options through shopping filters



Plan Comparison

Short term health insurance is major medical insurance that is purchased for a defined period of time and generally has a much lower monthly premium than other forms of major medical health insurance. Plans have varied levels of benefits and pricing based on need.

[SELECT THIS PLAN](#)
[SELECT THIS PLAN](#)

Benefits & Coverage		
MONTHLY PREMIUM	\$159.34	\$131.28
MONTHLY FEE	\$19.95	\$4.00
APPLICATION FEE	\$0	\$20
INSURANCE TYPE	Short Term Medical	Short Term Medical
COMPANY	Standard Life and Accident Insurance Company	Golden Rule Insurance Company
PLAN TYPE	PPO	
DEDUCTIBLE	Individual: \$5,000	Individual: \$5,000
COINSURANCE	0% after deductible	30% after deductible
COVERAGE MAXIMUM	\$1,000,000	\$1,000,000

NARROW YOUR RESULTS

View Plan Options ⓘ

☒ Best Sellers Only
 ☐ All Plans

Company ⓘ

☐ Everest Prime
 ☐ Lifeshield
 ☐ National General
 ☐ Standard Life
 ☐ UnitedHealthOne

Company ⓘ


☐ Everest Prime
 ☐ Lifeshield
 ☐ National General
 ☐ Standard Life
 ☐ UnitedHealthOne

PLAN COMPARISON PAGE

- Provides a high level side by side comparison between plans the consumer selects
- Heat Mapping functionality will be implemented ensuring the optimal information architecture is presented.

Plan Comparison


Comparing 2 plans



Standard Life Select STM Plan 3 5000/0/1M

« back to plans

Select This Plan



Short Term Medical Value 5000/30/15000

Select This Plan

Benefits & Coverage

MONTHLY PREMIUM	\$159.34	\$131.28
MONTHLY FEE	\$19.95	\$4.00
APPLICATION FEE	\$0	\$20
INSURANCE TYPE	Short Term Medical	Short Term Medical
COMPANY	Standard Life and Accident Insurance Company	Golden Rule Insurance Company
PLAN TYPE	PPO	
DEDUCTIBLE	Individual: \$5,000	Individual: \$5,000
COINSURANCE	0% after deductible	30% after deductible
COVERAGE MAXIMUM	\$1,000,000	\$1,000,000

COMPARISON PAGE

➤ Side by Side plan comparison which allows consumer to select the plan that best fits their needs.

➤ Dynamic Catalog rules:

Monthly premium
Application Fee
Company
Plan Type
Deductible

What We Have Achieved Some Minor Results

 **600**
COMPLETE PROJECTS
  **485**
HAPPY CLIENTS
  **82**
AWARDS RECEIVED



APPLICATION PROCESS post plan selection



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GET COVERAGE | KEEP OR UPDATE YOUR PLAN | SEE TOPICS | GET ANSWERS

SEARCH WEBSITE



Start Your Online Application

You're almost there. Review the following information before starting your online application.

[Continue Shopping](#)

H HEALTH INSURANCE
CARRIER NAME



[View Brochure](#)

Short term Medical Value 5000/30/15000

Applicant: 33 year old female in 330202, FL [Details >](#)

Coverage Period 04/07/2018 - 07/06/2018

Monthly Base Premium \$131.26

FACT membership dues \$4.00 [What is this?](#)

■ Monthly Total **\$135.28**

(One-time payment \$20.00 application fee is required)

Fast Simple Application

1. Largest Nationwide of Doctors
2. Lifetime Maximum of \$1,000,000

All of your personal
info is protected using
industry standard (SSL)
encryption technology



powered by VeriSign

[ABOUT SSL CERTIFICATES](#)

COMPARE PLANS



Healthico

THANK YOU



Agenda Item #4

Hear Briefing on the U.S. Department of Justice's (DOJ) Determination Regarding *Texas v. United States* and Potential Effects on the Market and Enforcement—*Anthony Shelley (Miller & Chevalier Chartered)*



Miller & Chevalier

Texas v. United States Update

Presenter: Anthony F. Shelley
NAIC – 2018 Summer National Meeting

August 5, 2018

Agenda

- Current procedural posture of *Texas v. United States*
- What is likely to happen before year-end?
- DOJ's position
- Ramifications of DOJ's position on States' enforcement authority
- Prognostication regarding outcome

Current Posture

- 20 States sue the USA alleging ACA is unconstitutional, along with individual plaintiffs
- Case brought in Texas federal court
 - Other Obama-era initiatives have been successfully challenged within the Fifth Circuit
- Theory
 - Individual mandate survived an earlier constitutional challenge because it was a “tax” Congress had authority to enact
 - Repeal of the tax penalty associated with individual mandate means it is not a tax anymore
 - Because a key pillar of the ACA is unconstitutional now, the rest can’t be severed and must be declared unconstitutional as well
- Other States and DC successfully intervene as defendants, fearing Trump Administration would not defend ACA
- Looking like litigation “civil war” among States, as with other ACA-related cases
 - AHP rule challenge similar? STLD rule challenge upcoming?

What's Likely to Happen Before Year-End

- Motion for preliminary injunction filed by plaintiff States
- Briefing now complete on motion
 - DOJ files brief in partial acquiescence to plaintiff States' theory
- Many *amicus curiae* motions in support of defendant States
- District court appears ready to convert preliminary injunction motion into a summary judgment motion
 - DOJ suggested this approach in its brief
- District court likely to rule by January 1, 2019
 - Stay maneuvers probable during inevitable subsequent appeal to Fifth Circuit
- Likely headed eventually to US Supreme Court
 - Basis of some Senators for not supporting confirmation of Judge Kavanaugh

DOJ's Position

- Mostly supportive of plaintiff States
- Asserts that individual mandate will be unconstitutional as of January 1, 2019
- Asserts that two other provisions are not severable from the individual mandate and therefore are also unconstitutional
 - Community rating provisions (42 U.S.C. §§ 300gg(a)(1) and 300gg-4(b)), which forbid “charging higher premiums because of an applicant’s or enrollee’s medical condition or history”
 - Guaranteed-issue provisions (42 U.S.C. §§ 300gg-1, 300gg-3, and 300gg-4(a)), which “prohibit insurers from either denying coverage because of an enrollee’s medical condition or history”
- Disagrees with plaintiff States that *all* of the ACA is invalid
- Disagrees with plaintiff States that preliminary relief is necessary

Ramifications of DOJ's Position on States

- DOJ's position that parts of the ACA will be unconstitutional means federal government can and should refrain from enforcing those parts
 - DOJ internal memoranda from Democratic and Republican Administrations indicate that Executive Branch can, and may have obligation to, refrain from enforcing
 - First allegiance is to U.S. Constitution, not statutes, given the President's oath of office
 - Justice Scalia agreed
 - Judge Kavanaugh (for the D.C. Circuit) agrees
 - Enforcement obligation changes only upon issuance of contrary court decision in governing jurisdiction
- Affects federal officials' authority to enforce underwriting limitations, 3:1 age rating, and pre-existing conditions provisions, at least in the individual market

Ramifications of DOJ's Position on States

- States, under the PHSA, are the chief enforcers of the ACA in the individual market
 - Governors, through their oaths too, have obligation to uphold U.S. Constitution
 - States should have same enforcement power and limitations as federal authorities
- A State cannot be failing “to substantially enforce” an ACA provision, when it declines to enforce a provision that the federal government maintains is unconstitutional
 - Especially when State enforcers too have first allegiance to U.S. Constitution
 - Ramifications for federal oversight and intervention
- States would have authority to enact and enforce their own *State* requirements (greater or lesser than) the unconstitutional federal standards
 - Plainly the case if DOJ's position prevails in the Texas district court
 - Also the case if DOJ loses in Texas, until a court in the particular State's jurisdiction rules
 - Accordingly, a potentially long period of State differentiation in individual market, until a national resolution

Prognostication

- Serious and potentially mortal challenge to the ACA in the individual market
- Issues that will affect the result in *Texas v. United States*
 - Do plaintiff States have standing to sue?
 - Did Congress indicate severability of the individual mandate from the rest of the statute by repealing it without addressing the rest of the statute?
 - Or is the 2010 Congress's view of severability the view that controls?
 - Did prior ACA rulings from the Supreme Court back the courts into a corner and now necessitate a holding of unconstitutionality?
- Prediction???

About the Presenter



Anthony F. Shelley
Miller & Chevalier Chartered
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Washington, DC 20006
202.626.5924
ashelley@milchev.com



Office of the Attorney General
Washington, D. C. 20530

June 7, 2018

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Re: *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.)

Dear Madam Leader:

After careful consideration, and with the approval of the President of the United States, I have determined that, in *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.), the Department will not defend the constitutionality of 26 U.S.C. 5000A(a), and will argue that certain provisions of the Affordable Care Act (ACA) are inseverable from that provision. Pursuant to 28 U.S.C. 530D, I am writing to advise you of this decision.

Prior to the Tax Cuts and Jobs Act (Jobs Act), most individuals were required to make a so-called “shared responsibility payment” each year if they failed to maintain minimum essential coverage under Section 5000A(a). 26 U.S.C. 5000A(b)–(c). Shortly after the ACA’s enactment, the constitutionality of Section 5000A(a)’s “[r]equirement to maintain minimum essential coverage” was the subject of several lawsuits. In *National Federation of Independent Business v. Sebelius* (*NFIB*), a majority of the Supreme Court concluded that this requirement to purchase health insurance could not be sustained as a valid exercise of Congress’s power under the Commerce Clause. 567 U.S. 519, 572 (2012). A different majority nonetheless upheld the constitutionality of Section 5000A(a) under Congress’s taxing power. *Id.* at 570.

On December 22, 2017, the Jobs Act amended Section 5000A(c) by eliminating (effective in 2019) the penalty imposed for noncompliance with Section 5000A(a). Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. The Jobs Act did not, however, amend Section 5000A(a) itself. A coalition of 20 States and two individuals has now brought suit against the federal government, claiming that Section 5000A(a) is unconstitutional under *NFIB* in light of the Jobs Act’s amendment to Section 5000A(c).

I have determined that the plaintiffs in *Texas v. United States* are correct that Section 5000A(a) will be unconstitutional when the Jobs Act's amendment becomes effective in 2019. The Supreme Court in *NFIB* held that "our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity." 567 U.S. at 572. In his controlling opinion, Chief Justice Roberts acknowledged that Section 5000A(a) "reads more naturally as a command to buy insurance than as a tax." *Id.* at 574. But citing the duty to adopt a saving construction if "fairly possible," the Chief Justice held that Section 5000A(a) was "constitutional[] because it can reasonably be read as a tax." *Id.* at 574–575. Critical to the Court's ruling was its characterization of Section 5000A(a) as "yield[ing] the essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 564. Beginning in 2019, however, Section 5000A(a) will produce no revenue for the Government. As a result, the *NFIB* Court's saving construction will no longer be available.

As you know, the Executive Branch has a longstanding tradition of defending the constitutionality of duly enacted statutes if reasonable arguments can be made in their defense. But not every professionally responsible argument is necessarily reasonable in this context, as "different cases can raise very different issues with respect to statutes of doubtful constitutional validity," and thus there are "a variety of factors that bear on whether the Department will defend the constitutionality of a statute." Letter to Hon. Orrin G. Hatch from Assistant Attorney General Andrew Fois at 7 (Mar. 22, 1996). Weighing those considerations here, I have concluded that this is a rare case where the proper course is to forgo defense of Section 5000A(a).

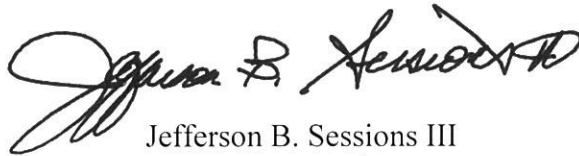
The Department in the past has declined to defend a statute in cases in which the President has concluded that the statute is unconstitutional and made manifest that it should not be defended, as is the case here. *See* Seth P. Waxman, *Defending Congress*, 79 N.C. L.Rev. 1073, 1083 (2001). My decision also adheres to the Department's longstanding respect for comity between the three branches of government. In *NFIB*, the Court concluded that Section 5000A(a) would be unconstitutional if it could not be construed as a tax. Five years later, Congress struck the financial penalty—deemed a tax by the Court—associated with Section 5000A(a). We presume that Congress legislates with knowledge of the Court's holdings. *See, e.g., United States v. Fausto*, 484 U.S. 439, 460 n.6 (1988); *cf. Harris v. United States*, 536 U.S. 545, 556 (2002) (refusing to apply the canon of constitutional avoidance where doing so would contradict the "respect for Congress" upon which "[t]he avoidance canon rests"). Moreover, the Department's decision not to defend Section 5000A(a)'s constitutionality will not prevent the court in *Texas v. United States* from resolving the question, given the posture of the case. For these reasons, the Department will decline to defend the constitutionality of 26 U.S.C. 5000A(a).

In their lawsuit, the plaintiffs further argue that Section 5000A(a) is also inseverable from the rest of the ACA, and therefore that the statute and all of its implementing regulations should be invalidated. In *NFIB*, the Department previously argued that if Section 5000A(a) is unconstitutional, it is severable from the ACA's other provisions, except those "guarantee[ing] issuance of coverage in the individual and group market" ("guaranteed issue"), 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a), and "prohibiting discriminatory premium rates" ("community rating"), *id.* 300gg(a)(1), 300gg-4(b). I concur in the Department's prior determination. Post-Jobs Act, Congress's express findings in the ACA continue to describe Section 5000A(a) as "essential" to the operation of the guaranteed-issue and community-rating provisions, because otherwise

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individuals could wait until they become sick to purchase insurance, thus driving up premiums for everyone else. *See* 42 U.S.C. 18091(2)(I). This question of statutory interpretation does not involve the ACA's constitutionality and therefore does not implicate the Department's general practice of defending the constitutionality of federal law. Outside of these two provisions of the ACA, the Department will continue to argue that Section 5000A(a) is severable from the remaining provisions of the ACA.

Sincerely,

A handwritten signature in black ink, appearing to read "Jefferson B. Sessions III". The signature is fluid and cursive, with a large initial "J" and a stylized "S".

Jefferson B. Sessions III
Attorney General

Agenda Item #5

Discuss Various Market Approaches and State Actions Related to Market Stabilization
—*Director Dean L. Cameron (ID)*

NO MATERIALS

Agenda Item #6

Discuss Any Other Matters Brought Before the Committee—*Director Dean L. Cameron (ID)*