IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, et al., *Plaintiffs*, v. UNITED STATES DEPARTMENT OF TREASURY, et al., *Defendants*.	Civil Action No. 18-cv-2133

DECLARATION OF JESSE MILAN, JR., JD

I, Jesse Milan, Jr., hereby declare as follows:

1. I have personal knowledge of the following facts, and if called as a witness I could and would testify competently as to their truth.

2. I am the President & CEO of AIDS United. In that capacity, I am familiar with the full scope of AIDS United's operations. I have led AIDS United since 2016.

3. AIDS United is an organization whose mission is to end the HIV/AIDS epidemic in the United States. Its Public Policy Counsel of 49 HIV/AIDS service organizations and national and regional coalitions is the largest and longest-running community-based HIV/AIDS domestic policy coalition in the country. AIDS United additionally represents more than 200 grantee and sub-grantee AIDS Service Organizations who serve people living with HIV/AIDS throughout the United States.

4. AIDS United is a member of the HIV Health Care Access Working Group, a coalition of over 100 national and community-based HIV service organizations representing HIV

medical providers, public health professionals, advocates, and people living with HIV who are all committed to ensuring access to critical HIV- and hepatitis C-related health care and support services. AIDS United was a signatory to the Working Group's comments in response to the proposed STLDI Rule. Attached as Exhibit A is a true and correct copy of the Working Group's comments.

5. STLDI insurers generally do not accept individuals living with HIV. In one recent study, researchers submitted applications for coverage to 38 different STLDI plans on behalf of an applicant with HIV. All 38 applications were rejected.[1] By contrast, ACA-compliant plans are not permitted to discriminate on the basis of preexisting conditions, so they provide a key source of coverage for individuals living with HIV/AIDS.

6. In addition, individuals living with HIV/AIDS often require extensive, and expensive, medical care. As such, they would be practically excluded from STLDI plans, which are exempt from the Affordable Care Act's prohibition of annual and lifetime caps on medical care, even if those plans were willing to approve the application of an individual living with HIV/AIDS.

7. HIV/AIDS treatment is expensive, so individuals living with HIV/AIDS often rely on their health insurance to obtain the treatment they need to save their lives and maintain their quality of health.

8. Some AIDS United members are associations of individuals living with HIV/AIDS. When the cost of insurance for these individuals is increased, those members are forced to either

[1] Dawson, Lindsey and Jennifer Kates, "Short-Term Limited Duration Plans and HIV," Issue Brief, Kaiser Family Foundation, http://files.kff.org/attachment/Short-Term-Limited-Duration-Plans-and-HIV p.3 (June 2018).

pay higher provider costs, seek alternative and uncertain sources of funding to provide healthcare, or—if treatment is no longer affordable—cease providing necessary care. In any of these situations, those members are injured, and other AIDS United members who work to obtain treatment for such individuals must divert resources to finding replacement care for these individuals that could otherwise be used on their other advocacy and public health efforts.

9. Other AIDS United members are organizations that provide treatment to individuals living with HIV/AIDS. When individuals are not able to afford treatment, these AIDS United members must provide for treatment by diverting other scarce financial resources such as grant funding, be forced to decline to treat these individuals, or must treat them for free without compensation. These members of AIDS United will be harmed in all these circumstances because they will not able to obtain necessary and appropriate compensation for their services to people living with HIV.

10. The STLDI Rule allows insurers to cherry-pick healthy individuals away from the individual insurance market, worsening the risk pool for individuals who remain in the ACA-compliant insurance markets. As a result, insurers will raise premiums for the individuals who comprise the membership of AIDS United's members and must remain on the ACA marketplace. These individuals will be forced to choose between being harmed by losing their medical coverage or being harmed by paying increased premiums. Many members of AIDS United organizations are not eligible for premium tax credits, meaning they will bear the full burden of the premium cost increases.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief. Executed on September 28, 2018, at Moorea, French Polynesia.

Jesse Milan, Jr., JD

Exhibit A

April 23, 2018

Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8010
Baltimore, MD 21244

Attention: CMS-9924-P

To Whom It May Concern:

We are writing on behalf of the HIV Health Care Access Working Group (HHCAWG) – a coalition of over 100 national and community-based HIV service organizations representing HIV medical providers, public health professionals, advocates, and people living with HIV who are all committed to ensuring access to critical HIV- and hepatitis C-related health care and support services. We appreciate the opportunity to provide comments to the proposed rule, *Short-Term, Limited-Duration Insurance*, issued by the Departments of Health and Human Services, Labor, and Treasury ("the Departments"). Standards and protections governing individual and small group private insurance markets must ensure access to comprehensive and affordable coverage for people living with HIV, hepatitis C (HCV), and other chronic conditions. We are concerned that the proposal to expand coverage under short-term, limited duration plans will harm vulnerable populations, and we urge HHS to consider the recommendations and comments detailed below.

Coverage Lasting up to 364 Days Is Not Short-Term

Prior to 2016, some short-term, limited duration plans covered individuals for periods up to or exceeding 12 months. The Departments took regulatory action in 2016 to limit short-term plan duration to under three months because they found that plans were being sold in situations other than those the rules were intended to address.[1] Short-term, limited duration plans are intended as temporary coverage for individuals facing short gaps in insurance—for example, in between jobs—and are not a substitute for long-term coverage. However, consumers were purchasing these plans as a primary form of health coverage for periods up to or exceeding one year. The Departments expressed concerns that short-term, limited duration plans were not "meaningful health coverage"[2] due to limitations such as annual and lifetime benefit limits and

[1] Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg 75,316, 75,317-18 (Oct. 31, 2016).
[2] *Id*.

pre-existing condition exclusions, and therefore imposed a plan duration of under three months in order to protect consumers from financial harm. In keeping with the purpose of short-term coverage, we urge the Departments to maintain the current federal standard to ensure this coverage is actually short-term.

The Rule Would Weaken Important Consumer Protection and Benefits Standards, and Would Restore Pre-ACA Practices That Harmed People with High Health Needs

The proposal to change current rules by allowing issuers to sell short-term plans with a maximum coverage period of less than 12 months would jeopardize important consumer protections. The proposal would allow plans that bypass important Affordable Care Act (ACA) protections, such as essential health benefits (EHBs), rating restrictions, guaranteed issue, the federal medical loss ratio, and the pre-existing condition exclusion prohibition, to be marketed to consumers as a long-term alternative to ACA-compliant coverage. This proposed rule would especially harm people living with HIV, HCV, and other chronic conditions, particularly given the ways that issuers have historically designed short-term, limited duration plans to explicitly discriminate against these populations.

Short-term plans have historically engaged in post-claims underwriting in order to rescind coverage or deny claims for services that may be associated with a pre-existing condition. One analysis of popular short-term plans found that issuers have denied claims for enrollees who experienced symptoms within the prior five years "that would cause a reasonable person to seek diagnosis, care, or treatment," even if the person never received care—for example, because they were uninsured or underinsured.[3] We are concerned that this broad discretion for issuers to deny claims may lead to financial hardship for consumers who purchase short-term plans and later learn that they have an untreated medical condition. Consumers who develop chronic conditions after they enroll in short-term coverage are also unprotected under the proposed rule, which does nothing to strengthen coverage standards under short-term plans or restrict issuer discretion to rescind coverage based on post-claims underwriting.

Short-term plans also often exclude important EHBs such as prescription drug coverage, mental health, and substance use, and it is not always apparent to consumers which benefits are covered and which are excluded. A recent report from the Kaiser Family Foundation examining existing short-term plans found that 71% do not cover prescription drugs, a key EHB for people living with HIV, HCV, and other chronic conditions.[4] Furthermore, short-term plans have historically placed annual and lifetime limits on coverage, including condition-specific caps for chronic illnesses, and tend to have higher consumer cost sharing without annual out-of-pocket maximum caps. Consumers may not know the limits of their plan until after they develop a medical condition or otherwise require a higher level of services. Since health status is not

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[3] Dania Palanker, Kevin Lucia, and Emily Curran, *New Executive Order: Expanding Access to Short-Term Health Plans Is Bad for Consumers and the Individual Market*, THE COMMONWEALTH FUND (Oct. 11, 2017), http://www.commonwealthfund.org/publications/blog/2017/aug/short-term-health-plans.

[4] Karen Pollitz et al., *Understanding Short-Term Limited Duration Health Insurance*, KAISER FAMILY FOUND. (Apr. 23, 2018), https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/.

static, enrolling in a deficient plan can be devastating for someone diagnosed with HIV, HCV, or another serious medical condition after enrolling in a short-term plan.

Expanding the Short-Term Market Will Increase Fraud and Other Deceptive Practices

Short-term plans also have a long history of fraud and misrepresentation. Insurance brokers have historically engaged in deceptive sales tactics, leading consumers to purchase short-term coverage because it was falsely represented as being ACA-compliant. Consumers only learned that this was not true after their claims were denied, leaving patients and providers with substantial unpaid claims. Expanding the short-term market could lead to increased consumer confusion about coverage and substantial risk for fraudulent practices to market sub-par plans as ACA-compliant plans. We appreciate the Departments' proposal to revise the required notices that must appear in insurance contracts and application materials, specifically the addition of language clarifying that "short-term, limited duration" plans are not considered minimum essential coverage and that consumers who lose such coverage must wait until the next Open Enrollment to enroll in an ACA-compliant plan. However, we do not feel that this revised notice is sufficient to warn consumers of the value of excluded services or the financial risks associated with such plans. This lack of notice can be especially harmful to people living with HIV and HCV, for whom ACA protections such as EHBs, limits on rescission, and bans on lifetime or annual limits are crucial.

Issuers Should Not Be Allowed to Renew Short-Term Plans

The Departments seek comment on their proposal to allow issuers to renew or extend short-term coverage beyond 12 months, as well as on a proposed streamlined application process that would expedite plan renewals or extensions. We do not believe that the ability to renew or extend coverage is sufficient to make short-term plans a consumer-friendly product. This only encourages longer enrollment in these plans and further undermines the stability of the individual market. We strongly urge the Departments to support policies that encourage consumers to use short-term plans as they were intended, not as a long-term coverage option, but as an option to fill short gaps in coverage. Streamlining the reapplication process is in direct conflict with the entire purpose of a short-term plan, and it does not protect consumers from medical underwriting or pre-existing condition exclusions based on health conditions that began during the prior coverage period.[5] Additionally, federal legislative proposals that would make short-term plans renewable would similarly fail to protect consumers with health conditions. Renewability does not prevent insurers from engaging in medical underwriting and increasing premiums or denying claims for consumers who incur high costs—for example, people living with HIV, HCV, and other chronic conditions.[6] Policies requiring renewability or streamlined application would therefore yield the same result: consumers with health conditions would be denied coverage or priced out of the short-term market and would have

[5] AM. ACAD. OF ACTUARIES, COMMENTS RE: CMS-9924-P—SHORT-TERM, LIMITED DURATION INSURANCE 4-5 (APR. 6, 2018), http://www.actuary.org/files/publications/STLD_Comment%20Letter_040618.pdf.

[6] *Id*.

no choice but to enroll in ACA-compliant plans, leading to higher costs in the ACA-compliant market.

The Rule Would Make Comprehensive ACA-Compliant Coverage More Expensive

Current rules limiting contract length of short-term, limited duration plans to no more than three months are in place to prevent insurers from siphoning healthy enrollees from the individual market. The Departments took regulatory action in 2016 to limit short-term plan duration to under three months based on findings that these plans adversely impacted the risk pool for ACA-compliant coverage.[7] The justification for reversing these rules now, just two years later, is not evinced in the record. In fact, the Departments acknowledge that the proposed rule could weaken states' individual market single risk pools, increase costs to consumers and issuers, and reduce consumer choice by causing issuers to exit the individual market, but do not propose policies that would mitigate these consequences.

If the proposed rule were finalized in its current form, short-term plans could essentially function as long-term coverage that bypasses important ACA protections. These plans would be competing in the same market as ACA-compliant individual plans, but would be subject to different rules. Issuers could structure eligibility rules, benefit designs, and marketing practices in ways that encourage enrollment by healthier individuals while discouraging less healthy individuals, thus enabling issuers to charge lower-than-average premiums. Additionally, short-term plans are medically underwritten, meaning that individuals with pre-existing conditions or known health risks can be denied coverage or charged higher premiums. This would create an uneven playing field and lead to adverse selection because short-term plans could siphon healthy individuals from the ACA-compliant plans and leave the individual market with higher risk enrollees. Since short-term plans would not be part of the single risk pool and the risk adjustment program, there would be no transfer of funds from short-term plans to the ACA-compliant market to reflect the difference in risk between these segments.[8] People that want comprehensive coverage in the individual market could find their options dwindling or that the premiums are unaffordable. This is especially harmful to people living with HIV, HCV, and other chronic conditions who may not be able to find affordable individual coverage that is adequate to meet their health needs.

The Department predicts that the proposed rule would result in 100,000 to 200,000 young and healthy individuals leaving the ACA-compliant market and purchase short-term plans. However, we believe that plan enrollment in these short-term plans would likely be much higher. Researchers predict that as many as 4.3 million individuals would enroll in expanded short-term plans if the proposed rule is finalized in its current form.[9] Additionally, research shows that the combined effect of the proposed rule and the elimination of the individual shared responsibility

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[7] Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg at 75,318.

[8] AM. ACAD. OF ACTUARIES, *supra* note 5, at 2.

[9] Linda J. Blumberg, Matthew Buettgens, and Robin Wang, *Updated: The Potential Impact of Short-Term Limited Duration Policies on Insurance Coverage, Premiums, and Federal Spending*, THE URBAN INST. (Mar. 2018), https://www.urban.org/sites/default/files/publication/96781/2001727_updated_finalized.pdf.

payment would increase ACA-compliant individual insurance premiums by 18.3 percent on average.[10] We are concerned that the Departments' predictions are too conservative, and that the proposed rule could result in a mass exodus of healthy individuals from the ACA-compliant market that is likely to leave people with pre-existing conditions like HIV and HCV without viable coverage options.[11]

The Departments Should Focus on Ways to Stabilize the Market

We share the Departments' stated concern that policy interventions are necessary to stabilize the individual market, particularly for individuals not eligible for federal subsidies. We believe that a federal reinsurance program is the best way to stabilize the market. Instead of policies that segment the market, we urge the Departments to focus on policies that shore up the individual market, protecting people living with and at risk for HIV, HCV, and other conditions. In addition to an adequate reinsurance program, we also support increased investment in outreach, education, and enrollment to ensure robust participation by both healthy and sick individuals in the ACA's Marketplaces. We welcome the opportunity to work with the Departments on these efforts.

Thank you for the opportunity to comment this proposed rule. We urge HHS to continue its commitment to ensure that people living with HIV, HCV, and other chronic and complex conditions have access to quality, affordable healthcare coverage. Please contact Amy Killelea with the National Alliance of State and Territorial AIDS Directors at akillelea@nastad.org, Andrea Weddle at aweddle@hivma.org with the HIV Medicine Association, or Robert Greenwald at rgreenwa@law.harvard.edu with the Center for Health Law and Policy Innovation if we can be of assistance.

Respectfully submitted by:

ADAP Educational Initiative | AIDS Alabama | AIDS Action Baltimore | AIDS Alliance for Women, Infants, Children, Youth & Families | AIDS Foundation of Chicago | AIDS Research Consortium of Atlanta | AIDS United | American Academy of HIV Medicine | APLA Health | AIDS Resource Center of Wisconsin | Communities Advocating Emergency AIDS Relief (CAEAR) | Community Access National Network (CANN) | Georgia AIDS Coalition | Harm Reduction Coalition | HealthHIV | HIV Medicine Association| Housing Works | Human Rights Campaign | Legal Council for Health Justice | Michigan Positive Action Coalition | Minnesota AIDS Project | National Alliance of State and Territorial AIDS Directors | National Latino AIDS Action Network | NMAC | Positive Women's Network - USA| Project Inform | Rocky Mountain CARES | San Francisco AIDS Foundation | SisterLove | Southern AIDS Coalition | Southern HIV/AIDS Strategy Initiative | The AIDS Institute | Treatment Access Expansion Project

[10] *Id*.

[11] *See, e.g.*, AM. ACAD. OF ACTUARIES, *supra* note 5, at 5 (predicting that enrollment in short-term plans will likely exceed the Departments' projections).