December 23, 2020

President-elect Joseph R. Biden, Jr.
c/o The Honorable Edward E. "Ted" Kaufman
Office of the President-elect
Suite 38038
1401 Constitution Avenue, NW.
Washington, D.C. 20230

Re: Priorities to Strengthen Insurance Coverage and the ACA

Dear President-elect Biden:

As a group of the nation's state insurance commissioners who share your vision for improving our nation's health care system, we would like to congratulate you on your election to the United States presidency, express our support for your health care agenda, and commit to work with you throughout your administration. While states have many priorities for health care, and more broadly as our nation continues to grapple with the COVID-19 crisis, access to affordable, comprehensive health insurance coverage is more important than ever.

We share your vision that no American should have to go without health care coverage or have coverage that fails them when they need it most. It is in the spirit of this shared priority that we outline some of our thoughts and recommendations with you and for potential use by your transition team.

First, let us recognize the comprehensiveness and progressiveness of your health care plan. The steps you propose to improve the affordability of coverage, including the creation of a public option, the removal of the cap on Affordable Care Act (ACA) financial assistance at 400 percent of the Federal Poverty Level (FPL), and the benchmarking of the premium subsidy to a gold plan rather than silver, would be life changing for many Americans. Your prioritization of our most pressing public health priorities in COVID-19 and the opioid crisis, and in pursuing equity by striving to address the racial disparities that exist in our health care system, is both necessary and admirable. Other elements of your plan, such as ending surprise balance billing and ensuring enforcement of mental health and substance use disorder parity are near and dear to the hearts of many state insurance commissioners. We are grateful for your leadership.

Unfortunately, much remains uncertain. The final make-up of the Senate is unknown and *Texas v. California*, the prominent litigation that could end the ACA and rip health care away from millions of people, continues to inch its way towards a Supreme Court ruling. We must prepare for so many scenarios and potential outcomes, knowing that we cannot afford to allow our health care system to be moved backwards or progress stagnated because of partisan divides. We stand ready to partner with you in this fight for the health care of all Americans.

As so much starts to take shape through your transition process, we ask that you consider some of the priorities of our states. We start with areas that may require immediate

implementation even before your inauguration day, then recommend critical issues for you to focus on, and end by highlighting longer-term policy priorities of significant importance to states.

I. Policy recommendations with immediate implementation considerations

Ensure immediate access to the Marketplace

We hope that you are considering immediately opening a special enrollment period (SEP) for the federal marketplace, Healthcare.gov, and make significant efforts to reach and provide comprehensive health insurance to any American currently going without health care coverage. We encourage you to do so, recognizing that this is even more important in light of COVID-19 and that enrollment has been discouraged in recent years by many actions taken by the administration. To redress these harms, an immediate SEP could be paired with restoring outreach funding, restoring flexibility on eligibility rules like failure to reconcile, and immediately revoking public charge rules, as discussed further below.

We also note that many of our states run our own state-based marketplaces and we would like to work with you to ensure that any effort to encourage marketplace enrollment is truly national and therefore inclusive of state-based marketplaces, in addition to Healthcare.gov. We ask you, as soon as possible, to coordinate with state-based marketplaces on the timing of any SEP, the messaging you intend to use, and key strategies you will employ to reach the uninsured so that we can align our plans with yours.

Provide immediate relief from potential ACA subsidy clawbacks amid COVID-related uncertainty

ACA Marketplace subsidies are generally advanced month-by-month based on projected income and then must be reconciled at tax time based on actual income for the year. Subsidy clawbacks may be thousands of dollars. This year, unique circumstances beyond consumers' control may have led to inaccurate advance subsidies. The federal administration chose to apply unprecedented and confusing rules in determining how pandemic-related supplemental unemployment compensation (under the CARES Act and the August 8, 2020 presidential memorandum) affect subsidies. Both the federal Marketplace and many state marketplaces were unable to immediately reprogram their eligibility systems to incorporate these new rules. This created the potential for inaccurate subsidy determinations. More broadly, the pandemic made it impossible for many consumers to accurately predict their income. Without relief, millions of Americans will owe clawback payments during the 2021 tax filing season through no fault of their own. These payments will be coming due just as consumers are hopefully regaining an economic footing.

The Treasury Department and Internal Revenue Service (IRS) have several options for relieving this hardship, including broad-based reconciliation relief, clarifying that additional unemployment compensation is excluded from income for subsidy purposes, and providing streamlined procedures for receiving existing IRS relief, such as reducing liability through offers in compromise.

The primary challenge for these measures is timing. Tax filing season will begin shortly after the inauguration, and by then it will be too late to modify forms, instructions, and tax

software to effect relief. That said, the IRS has handled such challenges before when Congress has made late changes in tax law. It is worth making every effort to do so in this case given the obvious unfairness and economic hardship that would result from not taking action.[1]

Provide clarity on coverage requirements related to COVID-19

Under the Families First Coronavirus Response Act, health insurance issuers and group health plans must cover diagnostic testing for COVID-19 without any member cost-sharing during the national public health emergency. To date, the Departments of Labor, Treasury, and Health and Human Services have issued two sets of frequently asked questions that help define the scope of this requirement.

Under these FAQs, insurers are generally responsible for covering COVID tests only in cases where an "attending provider" determines that a test is medically appropriate for a person. The most recent FAQ makes clear that the attending provider does not need to be "directly" responsible for a patient's care, but also states that tests performed "for public health surveillance" are outside the scope of the legislation.

These conflicting statements have led to confusion as to how the guidance applies to tests that are ordered as part of state-based contact tracing efforts, or tests that could be seen as both diagnostic and non-diagnostic. These efforts are not specifically addressed in the current guidance and, in many cases, may involve a combination of individualized diagnosis and public health surveillance. We hope that you will issue additional guidance to clarify how federal law applies in this area. In particular, we request clarification as to whether, and under what circumstances, a local public health official may act as the "attending provider" for purposes of ordering a COVID test.

II. Policy recommendations with critical implementation considerations

Equity

On the point of racial equity, we recognize the role that insurance regulators must play in addressing structural racism in the industries we regulate. Health insurance must move beyond policies of "unfair discrimination" and actively focus on the implementation of programs and practices that address the needs of historically marginalized communities. We are starting these conversations in our states and look forward to working with a federal partner that centers equity in decision-making.

2022 proposed Notice of Benefit and Payment Parameters

On the eve of Thanksgiving, the Department of Health and Human Services released the proposed Notice of Benefit and Payment Parameters (NBPP) for Plan Year 2022. This proposed rule is on an expedited timeline that could result in finalization of the rule prior to the transition to your administration. There are a number of problematic elements of this

[1] We note that this recommendation closely mirrors the request that Senator Mark Warner sent to the IRS on these issues. Senator Warner's letter can be found here.

rule that could undermine affordability and hinder enrollment. If this rule is finalized in current form, we encourage you to consider immediately issuing an interim final rule that can address some of the most harmful proposals, including:

- **Special enrollment verification requirements:** The NBPP proposes adding more stringent requirements around eligibility verifications for special enrollment periods for consumers on the Federally Facilitated Marketplace and State-based Exchanges. While program integrity is a valid goal, requiring consumers to overcome these additional hurdles can create barriers to or delays in enrollment for those who need coverage. That is especially troubling during the COVID-19 pandemic when CMS's own rationale for not opening a special enrollment period for the pandemic was that consumers have the option of using SEPs already present in law. We also note that according to CMS's own estimate, these additional hurdles for consumers will cost state-based exchanges $108 million while CMS is proposing a reduction in the exchange user fee. We believe the proposed rule goes too far, and a better balance between ensuring program integrity while facilitating ease of enrollment should be found.

- **Premium adjustment percentage:** While not new to this year's NBPP, the rule proposes continuing a methodology to calculate premium growth that results in both a higher annual limit on out-of-pocket costs and higher premiums being paid by subsidized enrollees relative to their income. We recommend moving away from this methodology.

- **Exchange user fee:** The NBPP proposes significantly lowering the user fee for the federal marketplace. While we recognize a lower user fee would result in minor premium savings, we further recognize that the user fee revenue stream is critical to ongoing marketplace operations, including funding for policies and programs that will expand enrollment and increase enrollment, which has the potential to result in greater premium savings. The user fee should be set at a level so that the core functions of the facilitated federal marketplace and state-based exchanges are fully funded, these include robust marketing, outreach, and education. We support CMS raising the user fee from the proposed level to an appropriate level. We also suggest that CMS provide a transparent accounting of where it has spent user fees in past years, as well as where funds will be spent for the 2022 plan year.

- **Exchange direct enrollment:** The exchange direct enrollment proposals contained within the NBPP have the potential to undermine core goals of the ACA. Risks we see include: potentially diluting the risk pool in the ACA market resulting in higher premiums; consumers not being made fully aware of the subsidies available to them to purchase ACA compliant plans; not fully delivering on the promise of "no wrong door" by effectively coordinating enrollment with state Medicaid programs; and driving consumers to enrollment platforms where they are presented with only certain insurers' products, eliminating the opportunity to truly shop for coverage. We recommend your administration carefully review these policies, and work to put in place policies that maximize enrollment without sacrificing these core goals of the ACA.

- **1332 guidance:** The NBPP proposes to incorporate into the regulation the

administration's interpretation of the 1332 guardrails. However, we encourage you to rescind that guidance and return to the guidance adopted by the previous administration for the 1332 guardrails with the flexibility detailed below.

Allow flexibility for states pursuing progressive policy aims

Section 1332 State Innovation Waivers are a successful tool for states seeking to increase the benefits of the ACA in their specific state markets. While most states seeking 1332 Waivers have used them for reinsurance, additional flexibility in the deficit neutrality guardrail would allow interested states to apply for types of waivers beyond reinsurance.

This flexibility request is aligned with the Unity Taskforce's recommendation, which states:

> "Democrats will also empower the states, as laboratories of democracy, to use Affordable Care Act innovation waivers to develop locally tailored approaches to health coverage, including by removing barriers to states that seek to experiment with statewide universal health care approaches."

The deficit neutrality guardrail requires a state to show that its proposed waiver program is deficit neutral to the federal government. To date, this has been required to be calculated annually, with a state needing to show actuarial certification of deficit neutrality each year. More flexibility in the interpretation of deficit neutrality – for example, calculated over a ten-year period rather than each year – would allow states opportunity to pursue strengthening their markets through more innovative waiver designs, including a state-level public option. Furthermore, a ten-year approach to the deficit neutrality guardrail would be consistent with the requirement of states to include a ten-year budget projection in 1332 waiver applications. This will be of particular importance to states such as Colorado that are currently working on innovative approaches to expanding insurance coverage and access to health care.

III. Longer-term policy priorities

Reverse harmful policies that undermine the ACA

Numerous policies that undermine the ACA and access to health care must be reversed or overridden. First, the regulation implementing the non-discrimination provisions of Section 1557 of the ACA where protections based on gender, gender identity, and sexual orientation have been stripped away, and the public charge rule that cruelly denies health care to many that have legally immigrated to the United States. Both regulations go out of their way to deny health care to specific groups of people, and reversing them should be a top priority so that we can ensure health care is provided to all people.

Additionally, numerous actions have been taken that aim to degrade the ACA by encouraging and making available insurance options that do not have to comply with many of the ACA's most critical consumer protections, including protections for those with pre-existing conditions. These actions include the tri-agency regulation on short-term limited duration insurance, the Department of Labor (DOL) regulation on association health plans (AHPs), and Treasury regulations that allow people and employers to leverage pre-tax dollars to purchase limited benefit products, health care sharing ministries, and direct primary care arrangements instead of comprehensive, ACA-compliant coverage.

As insurance regulators, we receive thousands of consumer complaints each year and have seen firsthand the limitations and consumer protection gaps that exist with these options. We strongly encourage you to reverse these actions, which not only harm consumers but encourage market segmentation that is degrading individual and small group market risk pools in many states.

Embrace coverage and encourage enrollment in ACA programs

Our states have recognized the importance of encouraging enrollment of both individuals and small businesses on our state-based marketplaces. By employing aggressive enrollment outreach activities, including providing access to state Medicaid programs, our states have significantly reduced uninsured rates. Recognizing that no state alone has the funding to make health insurance affordable for all, we have worked to maximize federal subsidization through advanced premium tax credits and reinsurance programs.

At this critical juncture, it is important that the federal government join us to embrace and encourage enrollment in Marketplaces and Medicaid, particularly if COVID-related economic unrest continues. Proactive state exchanges have been implementing creative approaches to enroll hard-to-reach and underrepresented groups. These states have been leading the way, as the federal government has taken steps to impede outreach and enrollment on the federal exchange in recent years, particularly exacerbating racial inequities in access to health insurance. We welcome a partnership whereby states and the federal government can partner to learn from and support each other to the benefit of the entire nation.

Another challenge that states have been facing is the erosion of federal support for ACA-compliant insurance coverage. Federal actions have encouraged the proliferation of what we would call "skinny" and "junk" products that fail to qualify as comprehensive health insurance. Along with the expansion of these inadequate policies that often leave people with major surprise health care bills, aggressive marketing of "junk" policies have increased to harmful levels. We would welcome coordination with states and federal action to ensure rapid response to fraudulent or deceptive marketing of non-ACA compliant products.

Modified adjusted gross income and data sharing

An additional area of flexibility for states, where increased clarity from IRS would be appreciated, is clarifying by rule that state-funded and administered subsidies that increase health insurance affordability are not counted as income for modified adjusted gross income calculations or for federal tax filings.

Finally, federal agencies should consider strategies to improve data sharing with states where that data would be used to support shared policy aims. For example, any assistance that can be provided to all for sharing data with state all-payer claims databases would assist those states who are focused on health care cost-control and transformative payment reform measures.

Extend premium tax credits to deferred action for childhood arrivals (DACA) recipients

We applaud your immigration policy platform for including protecting DACA recipients, or

Dreamers, and their families, providing them a pathway to citizenship. These Dreamers have known no home other than the United States and they deserve to be welcomed here. Not only through the granting of legal status to remain in the United States, but also through policies that support their ability to live and thrive here. We strongly urge you to allow DACA recipients and their families to access coverage on the Marketplace and the financial assistance available through the Marketplace. The ACA recognizes and provides for legally present non-citizens to access health care coverage through these means. This should include Dreamers and their families.

Modernize Department of Labor oversight of the Employee Retirement Income Security Act (ERISA)

As the primary regulators of insurance in our states, we know well both the importance and the challenges of robust enforcement of the complex laws that govern health insurance coverage in this country. Many of us have been leaders in designing and executing strategies to enforce critical protections, such as mental health parity. However, we only regulate about half of commercially offered health insurance in this country, while the DOL regulates the other half. Any self-funded employer coverage subject to ERISA is exempt from state regulation. We recommend three steps for the DOL to modernize its oversight of ERISA plans to ensure that all health coverage is held to similar standards and there is effective coordination with states.

- Increase enforcement and compliance efforts of key protections, such as mental health parity, and increase coordination with proactive states to ensure consistent enforcement across all types of commercial health coverage. Enforcement should include robust handling of consumer and health care provider complaints, as well as proactive examination of compliance.

- Ensure robust oversight of association health plans (AHP) and strong coordination with states to monitor concerning practices and act against fraudulent or illegally operating entities. While we recognize and encourage changes to the current regulations on AHPs, we also recognize AHPs will continue to be allowed in some form, and therefore clear definitions of what is or is not permissible and proper oversight must both be in place. We also recommend paying particular attention to a recent court decision. *Data Marketing Partnership, et al. v. DOL*, recently appealed by the DOL, has the potential to allow highly questionable arrangements to operate completely outside the purview of state oversight.

- Do not let ERISA pre-emption hinder employers' ability to participate in progressive state policies. Already, several state laws implementing important policies allow for self-funded employers to opt-in and receive the benefits of that participation. Such constructs may only become more common as states look to implement public options or other policies to expand coverage that could be made available to employers. To prevent ERISA pre-emption from standing as a barrier, DOL should proactively allow for such options to be made available by states.

Consider a national reinsurance program

While we recognize if your full plan to improve marketplace affordability is implemented, additional steps may not be necessary, but given the outstanding question of the Senate's political make-up, we want to highlight the value reinsurance programs have played in stabilizing many individual markets and improving affordability of marketplace coverage. Reinsurance has also garnered bi-partisan interest in recent years. As you experience what may or may not be possible to achieve legislatively, we encourage you to keep a nationally funded reinsurance mechanism under consideration.

Thank you for your consideration of these recommendations and again for your commitment to ensuring all Americans have access to affordable, comprehensive, and quality health care. We look forward to partnering with you throughout the coming years.

Sincerely,

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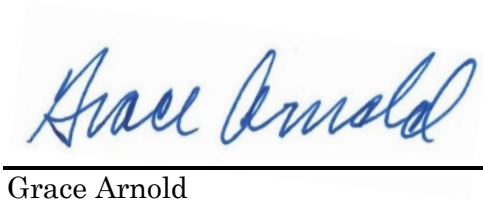

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