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

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

AGENDA


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
Agenda Item #1

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
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

<table>
<thead>
<tr>
<th></th>
<th>Current</th>
<th>2019 Projection</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>3-month STLDI Plan</td>
<td>6-month STLDI Plan</td>
</tr>
<tr>
<td></td>
<td>Exchange Plan - Silver</td>
<td>12-month STLDI Plan</td>
</tr>
<tr>
<td>Monthly Premium</td>
<td>$ 79</td>
<td>Monthly Premium - Low</td>
</tr>
<tr>
<td></td>
<td>$ 3,434</td>
<td>$ 79</td>
</tr>
<tr>
<td></td>
<td>$ 8,206</td>
<td>$ 107</td>
</tr>
<tr>
<td>Average Deductible</td>
<td>$ 4,033</td>
<td>Monthly Premium - High</td>
</tr>
<tr>
<td></td>
<td>$ 6,863</td>
<td>$ 115</td>
</tr>
<tr>
<td>Average OOP Max</td>
<td>$ 6,863</td>
<td>Average Deductible</td>
</tr>
<tr>
<td></td>
<td>$ 7,343</td>
<td>$ 3,434</td>
</tr>
<tr>
<td></td>
<td>$ 8,206</td>
<td>Average OOP Max</td>
</tr>
<tr>
<td></td>
<td>$ 4,315</td>
<td>$ 7,343</td>
</tr>
</tbody>
</table>

*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.agilehealthinsurance.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.

<table>
<thead>
<tr>
<th>Couple+1 Child – Counties w/ Affordable Plans</th>
<th>Household Income</th>
<th>Available Counties</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bronze</strong></td>
<td>$ 82,000</td>
<td>$ 83,143</td>
</tr>
<tr>
<td>Age</td>
<td>30</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>40</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>50</td>
<td>0</td>
</tr>
<tr>
<td><strong>Silver</strong></td>
<td>Household Income</td>
<td>Available Counties</td>
</tr>
<tr>
<td>Age</td>
<td>$ 82,000</td>
<td>$ 83,143</td>
</tr>
<tr>
<td></td>
<td>30</td>
<td>0</td>
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<td></td>
<td>40</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>50</td>
<td>0</td>
</tr>
</tbody>
</table>

HII Analysis of the Plan Year 2018 Individual Medical Coverage Landscape available at data.healthcare.gov, accessed on 1/5/2018
Decreasing Affordability (cont.)

Marketplace Average Benchmark Premiums
40-year-old Individual

<table>
<thead>
<tr>
<th>Year</th>
<th>Avg. Premium</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>$273</td>
<td>1%</td>
</tr>
<tr>
<td>2015</td>
<td>$276</td>
<td>8%</td>
</tr>
<tr>
<td>2016</td>
<td>$299</td>
<td>20%</td>
</tr>
<tr>
<td>2017</td>
<td>$359</td>
<td>34%</td>
</tr>
<tr>
<td>2018</td>
<td>$481</td>
<td></td>
</tr>
</tbody>
</table>

https://www.kff.org/health-reform/state-indicator/marketplace-average-benchmark-premiums/?currentTimeframe=0&selectedRows=%7B%22wrapups%22:%7B%22united-states%22:%7D%7D&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D
Uninsured Priced Out of the Market

Reasons Uninsured Exchange Participants Did Not Purchase a Plan

- Affordability of premium: 64%
- Deductible is too high: 8%
- Did not need insurance: 7%
- Believes they are ineligible: 5%
- Not able to find a plan that includes their doctor: 1%
- Unemployed: 1%
- Other: 4%

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

  - 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
GoHealth

Bradley M. Burd
General Counsel
## Ways to Innovate

<table>
<thead>
<tr>
<th>Process</th>
<th>Education</th>
<th>Consumerism</th>
</tr>
</thead>
</table>
| **Standardize the processes**  
- Standardize rates and benefit templates, eApplications, Summary of Benefits, etc.  
- Standardize rules for underwriting | **Enable better decision support tools**  
- Assist Consumers in identifying the product that matches their needs  
- Assist Consumers to identify product bundles | **Make consumers’ interest central to the shopping process**  
- 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

Current guidance
- “Web-brokers should offer a QHP plan selection experience that is free from ... information for other health insurance-related products”

STM Display
- Until this Guidance is resolved, STM plans cannot be offered in the same shopping experience as a QHP

QHP Impact
- Companies will be incentivized to not include QHPs on their online platforms

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

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QHP Impact

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Implication

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 enables them compare multiple plan options side by side and easily allow them to select the plan that best fits their needs.
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.
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.
Plan Shopping Page

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

### Benefits & Coverage

<table>
<thead>
<tr>
<th>Plan Type</th>
<th>Company</th>
<th>Monthly Premium</th>
<th>Monthly Fee</th>
<th>Application Fee</th>
<th>Deductible</th>
<th>Coinurance</th>
<th>Coverage Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPO</td>
<td>Standard Life and Accident Insurance Company</td>
<td>$159.34</td>
<td>$19.95</td>
<td>$0</td>
<td>Individual: $5,000</td>
<td>0% after deductible</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>PPO</td>
<td>Golden Rule Insurance Company</td>
<td>$131.28</td>
<td>$4.00</td>
<td>$20</td>
<td>Individual: $5,000</td>
<td>30% after deductible</td>
<td>$1,000,000</td>
</tr>
</tbody>
</table>
Start Your Online Application

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

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
- 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)*
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
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).
The Honorable Nancy Pelosi
Page 2

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
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,

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)