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Dear Members of the Senate Health and Human Services Committee:

Center of the American Experiment is a local public policy organization focused on creating and advocating policies that make Minnesota a freer, more prosperous and better-governed state. We appreciate the opportunity to comment on the bills before the committee that would add new benefit mandates on health insurance plans.

Overall, health benefit mandates undermine the flexibility to design and deliver affordable health plans. While any single mandate might not add much cost, they collectively lead to substantially higher premiums. Each new mandate makes it harder for families and employers to afford rising premiums. Mandates also lock in standards of care that can change and can force people to purchase coverage that violates deeply held beliefs.

Higher premiums are especially problematic for small employers that can't self-insure to avoid premium hikes in the fully insured market like most large employers can. Unfortunately, enrollment data suggests the Minnesota small group market is facing challenges. According to the most recent risk adjustment data from the Centers for Medicare & Medicaid Services (CMS), enrollment in Minnesota's small group market dropped by 25 percent from 2017 to 2022. This is substantially higher than the 4 percent drop nationally.

States must also pay the extra cost that new benefit mandates impose on qualified health plans sold through MNsure. The Affordable Care Act (ACA) requires states to defray the cost of benefits that the state requires in addition to the essential health benefits (EHBs) required by the federal law. Under current federal regulations, states must defray the cost for "[a] benefit required by State action taking place on or after January 1, 2012, other than for purposes of compliance with Federal requirements …."[1] Under this policy, most and possibly all of the benefit mandates before the committee will be subject to defrayal.

After reviewing the coverage mandate evaluations and fiscal notes, the Minnesota Department of Commerce appears to be misapplying federal law and regulations on defrayal for some of the mandates. This is the case for the benefit mandates included in SF3511 and SF3926. I previously worked for CMS and oversaw how the agency administered the defrayal process. In my experience, determining when states must defray the cost of benefit mandates is not always straightforward. Understandably, states did not always get things right.

For the benefit mandates in SF3511 and SF3926, Commerce has concluded that they do not require defrayal because the benefits are already included in the EHB-benchmark plan. It might make some sense that benefits in the EHB benchmark would not trigger defrayal. After all, the

[1] 45 CFR 155.170.

benefits are already being paid and therefore the mandate would not increase the cost to the plan. However, federal regulations quoted previously only provide one exception for when defrayal is not required for a new state benefit mandate. This exception applies to mandates enacted for the purpose of complying with Federal requirements. Therefore, states cannot rely on a benefit being covered by their EHB benchmark to avoid defrayal.

Nonetheless, the fiscal note to SF3511 asserts that the bill's benefit mandates "are not related to any specific care, treatment or services *not already covered by the benchmark plan* and other issuers offering EHBs, and thus do not constitute a new benefit mandate requiring defrayal by the state" (emphasis added). Yet CMS has specifically rejected this conclusion. In 2018, CMS finalized rules that provide states with more flexibility to choose a different EHB benchmark. In this rule, CMS clarified that the defrayal policy remained the same and that state benefit mandates enacted on or after January 1, 2012 "would continue to be considered in addition to EHB even if embedded in the State's newly selected EHB-benchmark plan."[2]

CMS is currently considering a change to this defrayal policy in the Notice of Benefit and Payment Parameters for 2025 proposed rule. Here, CMS again rejects the Commerce conclusion and affirms: "Under our current policy, benefits mandated after December 31, 2011, other than for compliance with Federal requirements, are considered in addition to EHB (and thus not EHB) without regard as to whether the mandated benefits are embedded in the State's EHB-benchmark plan."[3] However, the proposed rule would "amend § 155.170(a)(2) to codify that 'a covered benefit in the State's EHB-benchmark plan' is considered an EHB."[4] Under this framework, defrayal would no longer be required for the benefit mandates in SF3511 and SF3926.

Though CMS may soon finalize amendments to current regulations that would allow states to not defray new benefit mandates when they are already embedded in the state's EHB benchmark, this is not guaranteed. Moreover, nothing will stop a new presidential administration from reversing this policy. A reversal would then require Minnesota to defray the cost of these newly enacted benefit mandates.

One of the great weaknesses of the ACA is the level of regulatory instability the law created. During the ACA's short history, a pattern has emerged of major regulations getting implemented in one presidential administration only to be quickly reversed by the next. This instability is an inevitable product of the broad discretion the law gives to federal regulators. Therefore, even if a new defrayal policy is finalized, Minnesota should expect and plan for CMS to reverse this policy when political leadership changes.

Sincerely,

/s/ Peter Nelson

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[2] 83 FR 16930, 16977.
[3] 88 FR 82510, 82553
[4] Id.