MEMORANDUM

To: **Maryland Health Insurance Coverage Protection Commission**

From: **Health Insurance Consumer Protections Workgroup**

Date: **December 17, 2019**

Re: **Consumer Protections Legislation**

The Health Insurance Consumer Protections Workgroup was created by Chapters 417 and 418 (House Bill 697 and Senate Bill 868) of the Acts of 2019. The purpose of the workgroup was to "carry out the finding and declaration of the General Assembly that it is in the public interest to ensure that the health care protections established by the federal Patient Protection and Affordable Care Act (ACA) continue to protect Maryland residents in light of continued threats to the ACA."

Specifically, the workgroup was required to:

(1) monitor the appeal of the decision of the U.S. District Court for the Northern District of Texas in *Texas v. United States* regarding the ACA and the implications of the decision for the State;

(2) monitor the enforcement of the ACA by the U.S. Department of Health and Human Services (HHS); and

(3) determine the most effective manner of ensuring that Maryland consumers can obtain and retain quality health insurance independent of any action or inaction on the part of the federal government or any changes to federal law or its interpretation.

This memo outlines the workgroup's actions regarding item (3), above. The workgroup met four times during the interim to review HB 697 and SB 868 of 2019, as introduced, and to make recommendations for legislation for the 2020 session. The meetings were open to the public, and video recordings of the meetings as well as meeting materials can be found at http://dls.maryland.gov/policy-areas/md-health-insurance-coverage-protection-commission.

The starting point for this legislation was § 15-137.1 of the Insurance Article (see **Appendix 1**). This section lists provisions of the ACA that are incorporated by reference into Maryland law. Since the statute cross-references the ACA, workgroup members were not confident that the statute would adequately protect Maryland consumers if the ACA was repealed or found to be unconstitutional. The workgroup used the § 15-137.1 list to draft a new subtitle that would more specifically codify these protections in Maryland law. **Appendix 2** identifies the sections in the new legislation that correspond to items in § 15-137.1.

The attached legislation represents the workgroup's best effort to draft language that mirrors the ACA and come to consensus on the bill's technical requirements. The items listed below merit special consideration by the Maryland Health Insurance Coverage Protection Commission and the General Assembly.

Funding

All members of the workgroup agreed that the ACA provides substantial federal funding[1] to maintain market stability and make coverage affordable for consumers. These funding streams include, among other things, (1) Medicaid expansion up to 138% of the Federal Poverty Level (FPL), (2) premium subsidies for individuals and families between 133% and 400% FPL; (3) reinsurance pass-through dollars; and (4) Small Business Health Options Program tax credits. If the ACA is repealed or found to be unconstitutional, this funding would be jeopardized. In addition to these specific funds, State regulatory agencies such as the Maryland Insurance Administration (MIA) and the Maryland Health Benefit Exchange (MHBE) may require additional funds and resources to effectively administer new regulatory and operational tasks imposed by State implementation of other ACA provisions currently administered by the federal HHS such as risk adjustment.

Additionally, members of the workgroup acknowledged that perpetuating the ACA's consumer protections in the absence of ACA funding sources or an adequate substitute will likely cause premiums to become unaffordable. The significance of the impact to premiums will depend on whether consumers currently receiving federal subsidies elect to drop coverage once these subsidies end or federal funding for Maryland's reinsurance program is not replaced by State funding. The conversation around funding dominated workgroup discussions, and the opinions of workgroup members were not reconciled by the conclusion of the workgroup.

Some workgroup members firmly believe that the draft legislation should be enacted in 2020 to demonstrate a commitment to ensuring Maryland citizens remain covered by ACA consumer protections regardless of federal or court action or inaction, interpretation, or whether funding is provided for in the draft legislation. One member expressed concern that by not enacting these protections because there is no funding source, "a message will be sent to women that maternity benefits will not be available unless the federal government subsidizes individual coverage," for example, and that carriers would be able to reduce the medical loss ratio required for individual coverage. Other members noted that a number of other states have passed legislation enacting the ACA's consumer protections without a funding component and suggested that a loss of federal funding would have to be addressed in any instance and should not prevent the legislation from moving forward.

[1] A recent Urban Institute study concluded that the loss of 2019 federal funding for Advanced Premium Tax Credits, Medicaid/Children's Health Insurance Program, and reinsurance only would be $2.94 billion in Maryland (a loss of 42.4% of current federal health funding under the ACA).

Workgroup members representing carriers noted that consumer protections in this bill, such as the ability to obtain coverage without consideration of pre-existing conditions as well as with guaranteed basic and essential health benefits, provide no protection for Marylanders who cannot afford coverage without subsidies. Additionally, workgroup members representing carriers recommended a number of strategies to prioritize funding. CareFirst BlueCross BlueShield recommended that in order to fully evaluate, quantify, and prioritize funding needs for the State, the commission should include language in the attached legislation to convene a workgroup in 2020 to (1) evaluate and quantify all federal funds currently being used to implement the ACA in Maryland; (2) determine which funds are necessary to maintain market stability; and (3) determine the administrative processes and funding necessary for the State to administer provisions of the ACA absent administration by the federal government. No member of the workgroup had concerns with such a study, and many agreed that is was important. Kaiser Permanente suggested language that would make the bill contingent on a state appropriation for Advanced Premium Tax Credits for individuals whose modified adjusted gross income is between 100% and 400% FPL who are purchasing individual market coverage on the exchange. Language from CareFirst and Kaiser is included as **Appendix 3**.

Members of the workgroup felt strongly on both sides of the issue. Generally, it was decided that the legislative intent for the workgroup was to craft statutory language to specifically incorporate the ACA protections that exist in § 15-137.1 and that ultimately the issue of funding was beyond the jurisdiction of the workgroup. The workgroup acknowledged that funding will be an ongoing policy discussion that will need to be addressed by the General Assembly with additional input from the full Maryland Health Insurance Coverage Protection Commission and that a workgroup to study the issue will help to frame the discussion and find a solution.

ACA § 1557 Antidiscrimination Provision

The list of ACA protections in § 15-137.1 does not include the ACA's nondiscrimination provisions, a fact that was highlighted by the workgroup discussion surrounding § 15-1A-06 of the draft legislation. Section 15-1A-06 prohibits a carrier from establishing rules for eligibility based on health status-related factors, including health condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex (as defined under contested Obama-era regulations to include gender identity, sex stereotyping, and pregnancy status), disability, and age in a broad range of health programs and activities. The majority of the workgroup determined that, since the antidiscrimination protections are not included in § 15-137.1, including these protections in the draft legislation was beyond the charge of the workgroup and would be more appropriate as a stand-alone bill if a legislator chooses to introduce legislation to address the issue.

One workgroup member noted that the President Donald J. Trump Administration has issued proposed regulations to eliminate antidiscrimination provisions currently applicable to carriers' health benefit plan designs in all markets. This member argued that if these regulations are adopted by carriers, they may implement discriminatory benefit designs such as (1) covering inpatient treatment for eating disorders in men but not women; or (2) placing all medications used to treat HIV on the highest formulary tier. This member argued that including the § 1557 provisions in this legislation would prevent this and other potential harm to consumers. In response to this concern, MIA noted that its Commissioner already has the authority to prohibit these plan designs in many markets. However, MIA agreed that the antidiscrimination provisions in current State law are not as specific and have a more limited scope than the federal provisions in § 1557.

Preventive Wellness Services

The ACA requires coverage without cost sharing for certain women's preventive care and screenings, including contraceptive coverage, and federal regulations offer certain religious exemptions. While the workgroup specifically incorporated the preventive services mandate in § 15-1A-10(a)(4), the workgroup did not draft a religious exemption. In Maryland, the existing mandates for contraceptive drugs and devices (§ 15-826), male sterilization (§ 15-826.2), in-vitro fertilization (§ 15-810), and fertility preservation procedures (§ 15-810.1) include an exemption for religious organizations that could be used as a model for a religious exemption to Maryland's preventive service mandate. Given the uncertain state of the federal exemption, the workgroup noted that most likely the General Assembly will need to decide what type of religious exemption to include for the women's preventive services benefit (specifically, for contraception, sterilization, and related education and counseling).

Summary of Benefits and Coverage Explanation

Section 15-1A-15 requires the Maryland Insurance Commissioner, in consultation with MHBE, to develop standards to be used by a carrier to compile and provide to consumers a summary of benefits and coverage explanation that accurately describes the benefits and coverage under the applicable health benefit plan. The workgroup discussed whether the summary of benefits is a core consumer protection that the group is charged with including in the bill. The majority of the workgroup concluded that it is within the scope of the workgroup, and the section is included in the draft legislation attached to this memo for the commission's consideration.

Contingency Based on Status of ACA Consumer Protections

The workgroup had lengthy discussions on whether or not to include a contingency provision in the bill based on a repeal of the ACA or a final determination in *Texas v. United States* that the ACA is unconstitutional. MIA voiced concerns that the bill could potentially require the Commissioner to adopt substantial new regulations but acknowledged that if the ACA remains

intact, additional regulations may not be necessary. As a compromise, the workgroup recommended not including a contingency and instead requiring MIA to only adopt regulations *as necessary* to implement the provisions of this legislation.

Date of Federal Regulations for Required Consistency of State Regulations

The workgroup determined that some protections provided in the ACA and federal regulations are extremely dense and complicated and are better suited for State regulations than statute. The workgroup discussed whether to require State regulations to be consistent with federal regulations on a specific static date, or "on the day before the ACA was repealed or was no longer enforceable." The workgroup recommended that State regulations should be consistent with federal regulations in effect on December 1, 2019. Given the uncertainty about future changes to the regulations, this approach would ensure that Maryland residents continue to have the protections they enjoy today. The draft legislation provides for annual reports to the General Assembly regarding any federal statutory or regulatory changes that benefit or harm Marylanders and recommendations for legislation to address the changes.

Appendix 1

Insurance § 15-137.1.

(a) The General Assembly finds and declares that it is in the public interest to ensure that the health care protections established by the federal Affordable Care Act continue to protect Maryland residents in light of continued threats to the federal Affordable Care Act.

(b) Notwithstanding any other provisions of law, the following provisions of Title I, Subtitles A, C, and D of the Affordable Care Act apply to individual health insurance coverage and health insurance coverage offered in the small group and large group markets, as those terms are defined in the federal Public Health Service Act, issued or delivered in the State by an authorized insurer, nonprofit health service plan, or health maintenance organization:

(1) coverage of children up to the age of 26 years;

(2) preexisting condition exclusions;

(3) policy rescissions;

(4) bona fide wellness programs;

(5) lifetime limits;

(6) annual limits for essential benefits;

(7) waiting periods;

(8) designation of primary care providers;

(9) access to obstetrical and gynecological services;

(10) emergency services;

(11) summary of benefits and coverage explanation;

(12) minimum loss ratio requirements and premium rebates;

(13) disclosure of information;

(14) annual limitations on cost sharing;

(15) child-only plan offerings in the individual market;

(16) minimum benefit requirements for catastrophic plans;

(17) health insurance premium rates;

(18) coverage for individuals participating in approved clinical trials;

(19) contract requirements for stand-alone dental plans sold on the Maryland Health Benefit Exchange;

(20) guaranteed availability of coverage;

(21) prescription drug benefit requirements; and

(22) preventive and wellness services and chronic disease management.

(c) The provisions of subsection (a) of this section do not apply to coverage for excepted benefits, as defined in 45 C.F.R. § 146.145.

(d) The Commissioner may enforce this section under any applicable provisions of this article.

Appendix 2
Citations for Consumer Protections in Insurance § 15-137.1

	Insurance § 15-137.1	New Legislation
(1)	coverage of children up to the age of 26 years;	15-1A-08
(2)	preexisting condition exclusions;	15-1A-05
(3)	policy rescissions;	15-1A-21
(4)	bona fide wellness programs;	n/a*
(5)	lifetime limits;	15-1A-11
(6)	annual limits for essential benefits;	15-1A-11
(7)	waiting periods;	15-1A-12
(8)	designation of primary care providers;	15-1A-13
(9)	access to obstetrical and gynecological services;	15-1A-13
(10)	emergency services;	15-1A-14
(11)	summary of benefits and coverage explanation;	15-1A-15
(12)	minimum loss ratio requirements and premium rebates;	15-1A-16
(13)	disclosure of information;	15-1A-17
(14)	annual limitations on cost sharing;	15-1A-19
(15)	child-only plan offerings in the individual market;	n/a*
(16)	minimum benefit requirements for catastrophic plans;	15-1A-18
(17)	health insurance premium rates;	15-1A-07
(18)	coverage for individuals participating in approved clinical trials;	n/a*
(19)	contract requirements for stand-alone dental plans sold on the Maryland Health Benefit Exchange;	n/a*
(20)	guaranteed availability of coverage;	15-1A-09
(21)	prescription drug benefit requirements; and	15-1A-20
(22)	preventive and wellness services and chronic disease management.	15-1A-10

* Legislation was not needed for the items marked “n/a” because corresponding requirements are already codified in Maryland law.

Appendix 3

Language from CareFirst BlueCross BlueShield for a Workgroup Related to Funding

SECTION X. AND BE IT FURTHER ENACTED, That,

(a) On June 1, 2020, regardless of whether Section 1 is implemented, the Health Insurance Coverage Protection Commission will convene a workgroup to:

(1) Evaluate and quantify all federal funds currently being used to fund the Affordable Care Act;

(2) Determine which funds are necessary to maintain market stability if the ACA is repealed or deemed unconstitutional and the provisions in Section 1 are codified into state law; and

(3) Determine the administrative processes necessary to support the Affordable Care Act if codified into state law, including but not limited to setting up state-based risk adjustment administration and an advanced premium tax credit mechanism.

(b) The workgroup shall submit a report to the General Assembly by December 31, 2020, with its recommendations for legislation necessary to address the items in (a)(1) through (3) above.

Language from Kaiser Permanente Related to Funding

The provisions contained herein shall take effect at such time as the State appropriates funding for advanceable tax credits for individuals whose modified adjusted gross incomes are between 100 and 400 percent of the Federal Poverty Level and who are purchasing individual market coverage on the Exchange, and the State implements a plan for distributing such funding.