May 18, 2020

Governor Ralph Northam
Office of the Governor
1000 Bank St.
Richmond, VA 23218

Dear Governor Northam:

On behalf of our twenty-four signed organizations, who represent thousands of patients and consumers in Virginia living with serious, acute, and chronic health conditions, thank you for issuing amendments to Senate Bill 861, and Senate Bill 235/House Bill 795 during the April 22, 2020 Reconvened Session. Given that the General Assembly did not accept these amendments, which would have required each bill to be passed again in the 2021 legislative session in order to take effect, we strongly encourage you to issue a final veto of these concerning bills to protect access to care for residents of the Commonwealth, in particular those living with pre-existing conditions.

These bills have come before you every year of your term, and we are very grateful that every year, you have vetoed them. We urge you to do the same in 2020. Our organizations remain apprehensive this year, as in years past, about the sweeping changes Senate Bill 861, Senate Bill 235 and House Bill 795 would make to Virginia's commercial insurance market. As many of our groups have shared with you in the past, our primary concern regarding all three bills is unchanged: they increase availability of types of coverage that will destabilize Virginia's health insurance market by siphoning healthier consumers away from the larger marketplace risk pool, which could trigger significant premium hikes. Virginians with pre-existing conditions will suffer the greatest harm, as their lives quite literally depend on access to affordable, comprehensive coverage. These Virginians represent a significant portion of the Commonwealth's population: approximately 26 percent of non-elderly residents have a

pre-existing condition that could result in them being uninsurable or would face limited coverage based on their pre-existing condition.[1]

SB 861:

This bill allows a bona fide association to form a benefit consortium in order to offer a multiple employer welfare arrangement (MEWA) to its members. MEWAs, as formed in this bill, will be a new health benefit product that will not be defined as insurance and will not be regulated as insurance. These MEWAs will be required to comply with some ACA protections, such as offering essential health benefits and barring denials based on a pre-existing condition, but will be allowed to put caps and limits on services.

Additionally, the plans can adjust group rates by "each employer member's specific risk profile", which allows plans to charge groups more based on age, gender, zip code, claims data, and utilization. As such, these plans can target younger and healthier groups, drawing them out of the ACA-compliant individual and small group markets. This adverse selection will lead to market segmentation where a higher percentage of individuals with high health needs will remain in the existing individual and small groups markets, increasing those premiums.

These MEWAs will also be exempted from other critical ACA requirements that serve to stabilize the state's insurance market. They will have no medical loss ratio requirement, and they will not be subject to rate review or transparency requirements. Finally, this bill only requires AHPs to offer 60 percent actuarial value plans. All these factors will also contribute to those who need more robust healthcare remaining in ACA plans while younger and healthier individuals migrate into less comprehensive MEWAs.

Your substitute to similar 2019 bills (HB 1661, HB 2443, and SB 1689) required MEWAs to have an 85% medical loss ratio, be subject to taxes and maintenance assessments levied upon insurance companies, be subject to the Virginia Life, Accident and Sickness Insurance Guaranty Association (from which SB 861 specifically exempts them), and limit rating variations to ACA rating restrictions (3 to 1 age rating, 1.5 to 1 tobacco rating, rating areas established by the SCC, and individual versus family plan). When these amendments were ultimately rejected by the 2019 General Assembly, those bills were vetoed, citing market segmentation and premium increase concerns.[2]

It is clear that SB 861, as with similar attempts in prior years, still poses a very clear risk to Virginia's insurance market at large, and to individuals who rely on the comprehensive coverage provided by ACA-compliant plans. As such, we ask that you veto SB 861.

SB 235 and HB 795:

SB 235 and HB 795 allow insurers to offer large group health plans to associations of small employers and individual sole-proprietors. Much like the plans that would be available through SB861, these plans would not have to comply with many crucial requirements of the ACA that protect individuals and small groups. While the bills prohibit varying premiums based on health status and gender, insurers could do so based on occupation, duration of coverage, or geography. Additionally, these AHPs would not have to participate in the ACA risk adjustment program or single risk pool, nor would they be required to offer plans with an actuarial value greater than 60 percent. Also much like SB861, allowing the proliferation of less expensive, less regulated, and less comprehensive AHPs will lead to younger and healthier individuals disenrolling from ACA-compliant plans in the individual and small group markets. The resulting market fragmentation will likely cause higher premiums in these markets. The

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[1] Claxton, Gary, Cynthia Cox, Anthony Damico, Larry Levitt, and Karen Pollitz. Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA. Kaiser Family Foundation. December 2016. http://files.kff.org/attachment/Issue-Brief-Pre-existing-Conditions-and-Medical-Underwriting-in-the-Individual-Insurance-Market-Prior-to-the-ACA.

[2] Governor's veto, May 2, 2019. http://lis.virginia.gov/cgi-bin/legp604.exe?191+amd+HB1661AG

vast majority of those who enroll in these plans will not be newly insured. In fact, the U.S. Department of Labor (DOL) estimated that 90% of those who would enroll in AHPs created in this manner would be disenrolling from other coverage, which could increase individual and small group premiums, and could increase the number of uninsured individuals. This scenario would especially hurt those who rely on the comprehensive coverage offered by ACA compliant plans such as individuals with pre-existing conditions or chronic conditions.

Implementation of these bills rely on a June 21, 2018 Department of Labor Rule that changed how ERISA interpreted its definition of employer. Twelve states, including Virginia, challenged the rule and on March 28, 2019 the Federal District Court for D.C. found major provisions of the rule invalid. The court determined the Department of Labor (DOL) "exceeded its authority under ERISA by failing to set meaningful limits on AHPs." and that the rule "was intended and designed to end run the requirements of the Affordable Care Act (ACA), but it does so only by ignoring the language and purpose of both ERISA and the ACA."[3] The Department of Labor appealed the decision, and on November 14, 2019 a three-judge panel for the D.C. Circuit Court of Appeals heard oral arguments. They have yet to issue a ruling.

To allow for this legislation to be implemented if the rule is struck down, the bills instruct the Virginia Bureau of Insurance to apply for a §1332 state innovation waiver under the Affordable Care Act. However, a §1332 waiver cannot be used in this manner. Under §1332 of the ACA, a state can waive certain limited provisions of the ACA. Proponents of these bills state that the definitions of "small employer" and "small group market" used in the ACA can be waived in this manner. However, these terms are also defined in the Public Health Service Act and small group provisions of the ACA are defined in ERISA. These definitions are not eligible to be changed through a §1332 waiver. Due to the many risks these bills pose to the individual and small group markets and the precarious legal ground they stand on, we ask that you veto SB 235 and HB 795.

Virginians rely on access to quality coverage to protect the lives and health of themselves and their families. We urge you to protect patients, small business owners and older adults throughout the Commonwealth by issuing a final veto of these harmful bills, and we stand ready to work closely with you to ensure access to affordable, comprehensive coverage. If you have any questions regarding this letter, or if we may provide further information, please don't hesitate to contact Sarah Balog with The Leukemia & Lymphoma Society at sarah.balog@lls.org or 678-852-6383.

Sincerely,

AARP Virginia
American Cancer Society Cancer Action Network
American Heart Association
American Kidney Fund
American Liver Foundation
American Lung Association
Arthritis Foundation
Crohn's and Colitis Foundation
Cystic Fibrosis Foundation
Epilepsy Foundation
Hemophilia Association of the Capital Area
Hemophilia Federation of America
Immune Deficiency Foundation
Susan G. Komen
Leukemia & Lymphoma Society
National Multiple Sclerosis Society
National Organization for Rare Disorders
National Patient Advocate Foundation
National Psoriasis Foundation
Small Business Majority
Virginia Breast Cancer Foundation
Virginia Diabetes Council
Virginia Hemophilia Foundation
Virginia Society of Rheumatologists

[3] State of New York v. U.S. Department of Labor, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, March 28, 2019. https://affordablecareactlitigation.files.wordpress.com/2019/03/5940153-0-12659.pdf