COVERED CALIFORNIA

July 30, 2014

The Honorable Dave Jones
Insurance Commissioner
California Department of Insurance
300 Capitol Mall, Suite 1700
Sacramento, CA 95814

Dear Commissioner Jones,

Thank you for your recent letter regarding the implementation of the Insurance Rate Public Justification and Accountability Act (Proposition 45) and for meeting with us recently to share your analysis of how Proposition 45 could be implemented, should it be approved by the voters this coming November.

As you know, Covered California has been undertaking an operational analysis of Proposition 45 in order to prepare for possible implementation. As a part of that process, we presented a list operational considerations and questions to the California Health Benefit Exchange Board at its June 19, 2014 meeting. Your written responses to those questions that we received at the July 2, 2014 legislative information hearing concerning Proposition 45, your testimony before the legislature on that same date, and our productive meeting on July 17, 2014, have offered important clarifications to those questions.

As a follow-up to our fruitful exchange, we have identified a few areas in which additional clarification would be helpful to prepare for implementation of Proposition 45, should it pass in November. We plan to provide the Covered California board with an update on our analysis at its August 21, 2014 meeting.

Timeline for a Final Decision from the Commissioner

One area of continued concern is that a rate could be filed, but not receive a final determination in time for open enrollment. The concern for Covered California is that the proposed proposition does not set maximum timelines for the administrative review process, and from our conversation with you, we understand that if a rate filing is over 7%, the Commissioner does not have the authority to issue a final ruling until the administrative review is complete. Thus, if administrative due process requirements

result in a rate review extending past the deadline for open enrollment, plans could be left without a final decision on their rate in time for open enrollment. In that event, it is our understanding that a plan would only be able to offer its product at the previously approved rate – effectively resulting in no rate change due to procedural requirements.

We now understand that your department has analyzed the initiative and believes that the California Department of Insurance could issue emergency regulations such that a Commissioner would be able to issue a final determination on all health rates filed with the Insurance Commissioner under Proposition 45 within "a little over" 60 days. Such regulations would require completion of all administrative hearings under Proposition 45, including those requested by intervenors. We understand this to mean that all aspects of the administrative hearing process would occur within that 60-day time period (i.e., hearing scheduled, Notice of Defense filed, discovery completed, motions to compel discovery filed and heard, written briefs filed, requests for continuance for good cause filed and heard, hearing held and completed, ruling by an Administrative Law Judge issued, and the Insurance Commissioner's final determination served on the parties).

We appreciate your expertise and how you believe an Insurance Commissioner could implement the intervenor requirements in regulations. Our preliminary review of the California Administrative Procedures Act (APA), however, makes it unclear how required due process can be achieved in approximately 60 days.[1] Because this issue is

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[1] Questions related to due process considerations that suggest a longer timeline include:

- *Does the envisioned 60-day timeframe include the time it will take the Commissioner to deem whether an application is complete?* Under current Proposition 103 regulations the Commissioner has 14 days to review whether an application is complete. The current timeframes also allow a carrier to request a hearing if the completeness of the application is challenged by the Commissioner.
- *Does the proposed timeframe take into consideration the right of a respondent to file a Notice of Defense?* Regulations cannot shorten the timeframe to schedule a hearing without also observing the APA requirement to allow for the filing of a Notice of Defense by the carrier. The APA allows a respondent to file a Notice of Defense within 15 days of the Notice of Hearing issued by CDI.
- *How is discovery factored into the proposed timeline?* The APA allows any party to the hearing to issue a written request of discovery to the other party within 30 days from the initial pleading or within 15 days of an additional pleading.
- *How are discovery disputes factored into the proposed timeline?* Assuming a discovery request is made during a hearing, a party also has a right to file a motion to compel discovery within 15 days of when the respondent party first evidences failure or refusal to comply, or within 30 days after the request was made and the party failed to reply to the request, or within another time provided by stipulation, whichever is longer.
- *Does the Insurance Commissioner expect to reduce the timeframe for an Administrative Law Judge to render a decision by regulation? If so, by how many days?* The APA and the Insurance

important for our analysis of the initiative and its impacts on our operational timelines, we would like to reiterate our request that you share with us your proposed timeline for an administrative review process under Proposition 45 that can in all cases reach a resolution in close to 60 days from the date of filing. In the event the process would take longer than 60 days, we appreciate your willingness to work collaboratively to identify what the appropriate deadline for filing rates with the Department would need to be in order to accommodate the Covered California open enrollment calendar, but we need to understand what the possible changes might be.

Disapproval/Adequate Rates and DMHC Review

We appreciate your interpretation that the initiative would give the Commissioner the authority to create regulations allowing the Commissioner not only to "disapprove" a rate, but – as is current practice under Proposition 103 – to indicate what would be a reasonable rate and allow a plan to adopt that rate without re-filing. If implemented under an administrative process that is concluded in time for open enrollment, this approach to implementation could ameliorate concerns that a plan would face an "all or nothing" choice under Proposition 45. We also understand that you believe that any reviews that may be required by the Department of Managed Health Care could be done largely at the same time as your review, meaning that subsequent to the final determinations there would not need to be additional time for further Department of Managed Health Care review.

The 7% Rate Filing Threshold

In our meeting, you indicated that the 7% statutory threshold (for mandatory hearings upon timely filing by an intervenor) is a statewide average for all policyholders:

- Can you provide some examples of how the calculation is worked out for Proposition 103 filings?

- Can you confirm whether, under Proposition 45, a health plan with an average rate filing below 7%, but with a particular region or metal level seeing an increase above 7%, would be considered as a rate filing above 7% for the purposes of triggering a mandatory hearing upon timely filing by an intervenor?

Code both provide that an Administrative Law Judge render a decision within 30 days of the closing of the record in the proceeding.

- While not subject to the mandatory hearing process, is it your understanding that for rate change filings under 7%, the Commissioner would have the authority to "order" new rates for particular regions as well as for the statewide average?

Settlement

In your written responses to our questions, you noted that most Proposition 103 filings which are found excessive are resolved through a settlement between the parties prior to reaching a full hearing. We understand that under Proposition 45, your intention would be to immediately call a hearing on any rate over 7% as a means of expediting the hearing timeline.

- Under such a circumstance, can any member of the public intervene and have an equal role in the proceedings, or does the Commissioner still have discretion to grant or deny a petition to intervene for each intervenor, once a hearing has been noticed on the Commissioner's own motion?

- What is the deadline for someone to petition to intervene once the hearing has been noticed?

- Can another party contest a petition to intervene?

- After how many days would the Commissioner have finally ruled on all petitions to intervene?

Rates Approved Prior to 2016

We understand from your testimony and our conversation that your interpretation of Proposition 45 would be that all rates already filed for the 2015 plan year would be deemed approved because the 60-day deemer period would have passed by the time the initiative takes effect. We also understand that when assessing rates approved prior to the 2015 plan year for possible rebates under the retroactive application of the rebate provisions of the proposed initiative, your Department would only conduct review of rates that had previously been deemed unreasonable by either your department or the Department of Managed Health Care, and that you do not interpret Proposition 45 as giving any third-party intervenor rights for the administrative review related to rates enacted prior to 2016. Is this correct?

Judicial Review and Advance Premium Tax Credits

You described your interpretation that the final rate approved by the Commissioner would remain in effect during any litigation and noted both the deference courts give to regulatory actions and how rate review judicial proceedings have been adjudicated in the past. While potentially infrequent, we are seeking to assess a new scenario for rate review litigation presented by the Affordable Care Act: if a court were to order rebates for consumers in a Covered California product, how would this be processed for consumers receiving Advanced Premium Tax Credits? We recognize that these may be uncharted waters, and we look forward to working with you and with our federal colleagues at the Center for Consumer Information and Insurance Oversight to understand how this would work.

Again, I want to reiterate our thanks to you and your staff for your commitment to collaborate with Covered California to make implementation of the Affordable Care Act a success in California. Collectively, California could not be where we are today – having halved the uninsurance rate in our state – without collaboration that puts consumers first. We look forward to continuing our work together in that spirit into 2015 and beyond.

Sincerely,

Peter V. Lee
Executive Director