DATE: February 18, 2017

TO: IIPRC Product Standards Committee

FROM: Sonja Larkin-Thorne, Brendan Bridgeland, Angela Lello, James McSpadden, and Fred Nepple, IIPRC Consumer Representatives, and Bonnie Burns, California Health Advocates

SUBJECT: Response, and Opposition to, IAC December 28 revised proposal for a "Non-duplication Clause" for Long-Term Care Insurance

We strongly urge the Product Standards Committee to repeat its recommendation that the IIPRC not adopt the IAC revised proposed "non-duplication" ("management of benefits") clause. The IAC's revised proposal does not solve the issue it purports to address, fails to address even the problems with "non-duplication" the IAC acknowledges, and disadvantages consumers. The IAC still has not provided any evidence that there is a material duplicate benefit issue. Rather than addressing a real issue the IAC proposal creates an incentive to permit sale of stacked coverage.

We also write to respond to the IAC December 28th submission:

- The IAC's self-serving restatement of your mission should be rejected. The IIPRC's purpose is effective protection for consumers that compares favorably to the alternative, federal regulation. The IIPRC's mission is NOT the unexamined implementation of the "majority regulatory view." State solvency regulation of long term care insurers is already under scrutiny. Now is not the time to drop the ball on consumer protection.

- The IAC has not provided data, or even a single example that suggests inappropriate duplication of benefits is an issue. Members of the Legislative Committee, the CAC, the PSC and the Management Committee all asked for this data. The IAC has not offered ANY data much less data that demonstrates that a material number of consumers have drawn duplicative benefits or had either their tax qualified or Partnership status jeopardized as a result. There has been no evidence offered that Medicaid authorities or the IRS have taken any steps through reporting requirements or otherwise to prevent loss of revenue due to this "issue." No complaints from consumers surprised by Medicaid or tax consequences have ever been cited.

    - We note that the IAC proposal would not solve this even if this were an issue in need of a solution. The language proposed by the IAC allows reduction of benefits on a "prorate" basis under an additional policy even if benefits will not be reduced under the other policy. Hence the insured may still draw benefits in excess of expenses. At a

minimum the language is internally contradictory: no more than total expenses are to be paid out under an additional policy with a non-duplication clause but only a prorate reduction is allowed even if the first policy has no conforming non-duplication clause so must pay in full. There is no explanation of how this is to be applied if the first policy must pay in full because it does not have a conforming "non-duplication" clause.

- The IAC's justification for disadvantaging consumers with a "non-duplication" clause is, put kindly, inconsistent with its usual contention that consumers should be free to make informed choices. Absence evidence to the contrary it appears consumers uniformly make the appropriate choice to avoid tax or Medicaid consequences, just as consumers largely make the appropriate choice regarding tax consequences for early or late withdrawal from IRA and deferred compensation accounts without being restricted by contractual provisions.

- The IAC proposal gives the insurer the right to direct "management of benefits" but its logic makes a strong case that the consumer, not the insurer, should be entitled to choose which policy to draw on:

    - The IAC contends that the premium for an additional policy with a non-duplication clause must be the same as for a stand-alone policy. If this is true it follows that the insurer issuing an additional policy is fully compensated for the insured's election to file any or all claims under that policy. It should not be entitled to require the consumer to "prorate" claims against the other coverage and to profit from that decision. At most the policyholder should be allowed to select where to file a claim. The insurer should only be permitted to reject a claim also filed under another policy. Affiliated insurers should not find it difficult to identify and reject duplicate claims.

    - The IAC represents that insurers will altruistically administer a "non-duplication" clause so the consumer maximizes the benefits of the original and additional policy. If this is the case then the IAC should support a provision that allows the consumer, not the insurer, the right to determine which policy will pay a claim. (For example the IAC represents that an insurer would allow the insured to reserve benefits that have inflation protection or reserve benefits under a life insurance LTC rider. The consumer should have the contractual right to reserve those and other benefits.)

The IAC assertion that an insurer will gratuitously make the best claim decision for the consumer is dubious at best: We question whether an insurer legally can or should administer a policy contrary to its terms. More important we question whether an insurer will always do so. The claims administration record of some long-term care insurers, particularly financially stressed insurers, establishes that "trust me" is an unacceptable regulatory strategy and should be rejected.

- The IAC proposal that "affiliation" should be determined at time of claim should be rejected. If such a clause is permitted "affiliation" should be required at time of issue AND at time of claim. Otherwise consumers will be subjected to a non-duplication clause years after the initial purchase and without their consent or even knowledge. Note again that the IAC represents that the premium for the additional coverage must be the same as for stand-alone coverage. If this is truly the case the insurer is fully compensated for bearing the cost of any and all claims regardless of whether a non-duplication clause is or is not be applied because of change of affiliation. There is no merit to the IAC assertion that the history of affiliation may be unknown. Change of affiliation requires a state insurance department filing and approval. Those records are permanent. Moreover the insurer should be retaining those records under any reasonable record retention program.

- The IAC assertion that additional coverage must be priced the same as stand alone coverage is not supported by its explanation. We urge you to ask the Actuarial Working Group to recommend appropriate rating standards. The IAC explanation fails to note that an additional policy with the same level of benefits will have a slower use of benefits if it prorates with the other policy. Moreover there would be a higher probability that the insurer will not pay out the full pool of benefits at all when prorated due the increased likelihood that the insureds will die before exhausting their "pool" of benefits. The industry's current rating practices may not reflect this distinction. The Actuarial Workgroup should be asked to develop and recommend appropriate rating practice standards if this ill-considered proposal is pursued further.