American Cancer Society Cancer Action Network

September 8, 2023

Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
P.O. Box 7604
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Washington, D.C. 20044

Re: CMS-9904-P–Short-Term, Limited-Duration Insurance; Independent, Non-coordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance
88 Fed. Reg. 44596 (July 12, 2023)

Dear Secretary Becerra, Assistant Secretary Gomez, and Deputy Commissioner O'Donnell:

The American Cancer Society Cancer Action Network (ACS CAN) appreciates the opportunity to comment on short-term, limited-duration (STLD) insurance proposed rule offered by the Department of Health and Human Services (HHS), the Department of Labor (DOL) and the Internal Revenue Service (IRS) (collectively "the Departments"). ACS CAN is making cancer a top priority for public officials and candidates at the federal, state, and local levels. ACS CAN empowers advocates across the country to make their voices heard and influence evidence-based public policy change, as well as legislative and regulatory solutions that will reduce the cancer burden. As the American Cancer Society's nonprofit, nonpartisan advocacy affiliate, ACS CAN is more determined than ever to end cancer as we know it, for everyone.

ACS CAN supports the regulations proposed by the Departments. We have long been concerned about the availability of short-term plans[1] that traditionally have low premiums but fail to provide the kind of comprehensive coverage an individual would need if they were diagnosed with a serious and unplanned disease such as cancer. Issuers offering short-term plans are permitted to engage in medical underwriting - denying coverage to people with pre-existing conditions like cancer, charging more based on a person's health status, or refusing to cover services related to an individual's pre-existing conditions. They are also permitted to impose lifetime and annual limits on coverage and are not required to provide coverage for the Affordable Care Act's (ACA's) essential health benefits. For example, many of these plans do not cover any prescription drugs, or preventive services – benefit categories that are crucial to preventing cancer, detecting it at earlier stages, and treating it. These plans are a throwback to a time when many people with serious conditions like cancer could not get or keep health insurance.

[1] American Cancer Society Cancer Action Network. Inadequate coverage: An ACS CAN examination of short-term health plans. May 2019. Available at https://www.fightcancer.org/policy-resources/inadequate-coverage-acs-can-examination-short-term-health-plans.

STLD policies can leave individuals with diseases like cancer financially vulnerable. For example, an ACS CAN report estimated that an individual who was diagnosed with non-Hodgkin's Lymphoma in 2020 while enrolled in a 12-month STLD policy could face more than $51,000 in out-of-pocket costs, which was more than 4 times what other cancer patients with comprehensive insurance coverage would have paid.[2]

Additional research has shown that in states with a proliferation of STLD plans there was a decreased rate of early-stage cancer diagnoses meaning that more cancers were found at a later stage when the disease is often harder and more expensive to treat.[3] Conversely, in states that have enacted legislation prohibiting or severely limiting access to STLD plans there was an increased rate of early-stage cancer diagnosis, when more treatment options may exist and when cancer is often less expensive to treat. Unfortunately, since the 2018 rule was promulgated, the availability of STLD plans has increased significantly. It is well documented that STLD plans are often marketed and sold to consumers in a manner that is confusing and misleading.[4,5,6]

Finally, since the 2018 rule was promulgated,[7] the health care landscape has changed significantly such that a reinterpretation of the existing rules is warranted. Those seeking individual coverage have more affordable options for comprehensive coverage. Since 2019, issuer participation in ACA marketplace plans has increased,[8] providing consumers with more plans from which to choose. Since 2020, the generosity of the tax credits and subsidies for marketplace plans has increased, resulting in more consumers enrolling in Marketplace coverage that is more affordable, and in some cases, even free.[9] Most recently the Administration promulgated new regulations that would fix the so-called "family glitch" resulting in an estimated 1 million more individuals having access to subsidies in the Marketplace.[10]

III. OVERVIEW OF THE PROPOSED RULES ON SHORT-TERM, LIMITED-DURATION INSURANCE AND FIXED INDEMNITY EXCEPTED BENEFITS COVERAGE

A. Short-Term, Limited-Duration Insurance

The Departments are proposing several amendments to short-term, limited-duration (STLD) insurance that would apply to new policies issued or sold on or after the effective date of the proposed rule (e.g., 75 days

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[2] American Cancer Society Cancer Action Network. Short-term limited duration health plans leave cancer patients vulnerable to extremely high out-of-pocket costs. June 2022. Available at https://www.fightcancer.org/sites/default/files/stld_costs_of_cancer_factsheet_update_june_2022.pdf.
[3] Barnes JM, Kirchhoff AC, Yabroff KR, Chino F. **Association of state policies regulating short-term limited-duration insurance plans and cancer stage at diagnosis.** Journal of Clinical Oncology 2023 41:16_suppl, 1589-1589.
[4] Linke Young, C., & Hannick, K. *Fixed indemnity health coverage is a problematic form of "junk insurance."* Brookings. October 2020. https://www.brookings.edu/articles/fixed-indemnity-health-coverage-is-a-problematic-form-of-junk-insurance/. Government Accountability Office. *Private Health Coverage: Results of Convert Testing for Selected Offerings*. August 2020. https://www.gao.gov/products/gao-20-634r.
[5] R. Schwab and J. Volk, *The Perfect Storm: Misleading Marketing of Limited Benefit Products Continues as Millions Losing Medicaid Search for New Coverage*, Georgetown University Center on Health Insurance Reforms, August 2023.
[6] D. Palanker and J. Volk, *Misleading Marketing of Non-ACA Health Plans Continued During COVID-19 Special Enrollment Period*, Georgetown University Center on Health Insurance Reforms, October 2021.
[7] Department of Health and Human Services, Department of the Treasury, and Department of Labor. Short-Term, Limited-Duration Insurance. Final Rule. 83 Fed. Reg. 38212 (Aug. 3, 2018) [hereinafter "2018 rule"].
[8] Hempstead K. *Marketplace pulse: Participation in 2022*. Robert Woods Johnson Found. Jan 18, 2022. Available at https://www.rwjf.org/en/insights/our-research/2022/01/marketplace-pulse--participation-in-2022.html.
[9] *Count Estimates of Zero- and Low-Premium Plan Availability, HealthCare.gov States Pre and Post ARP.* April 2021. https://aspe.hhs.gov/reports/count-estimates-zero-low-premium-plan-availability-healthcaregov-states-pre-post-arp.
[10] Keith K. *Family glitch fix provides new affordable coverage option*. The Commonwealth Fund. Nov. 3, 2022. Available at https://www.commonwealthfund.org/blog/2022/family-glitch-fix-provides-new-affordable-coverage-option.

following the publication of the final rule). Policies sold or issued prior to the effective date would be subject to the existing rules (e.g., could have a contract term of less than 12 months and a maximum duration of up to 36 months).

ACS CAN applauds the Departments for recognizing the changing health care landscape that necessitates a re-examination to limit the availability of STLD policies. As discussed in more detail below, we support many of the proposals offered by the Departments. While we recognize that enacting changes that would impact existing policies may have some administrative challenges, we are concerned about the potential for confusion under the bifurcated approaches offered by the Departments. We urge the Departments to work with State Departments of Insurance to ensure that agents and brokers are complying with the appropriate STLD rules and their effective dates.

1. *"Short-Term"*

Under current regulations, STLD policies are allowed to be marketed and sold so long as their expiration date is less than 12 months after the effective date of the contract and, including renewals and extensions, must have a duration of less than 36 months in total. The Departments propose to reinterpret the phrase "short-term" to refer to a contract of no less than 3 months after the effective date. This proposal would apply to policies issued after the effective date of the final rules.

ACS CAN applauds the Departments proposal to amend the definition of "short-term" to refer to a contract of no more than 3 months. As discussed in more detail above, we agree with the Departments that it has become increasingly challenging for consumers to differentiate between STLD products and comprehensive coverage. Prohibiting STLD products from lasting more than 3 months will help distinguish them from full-year, comprehensive coverage.

2. *"Limited-Duration"*

Under current regulations, the phrase "limited-duration" was interpreted to allow for policies that could be renewed or extended up to 36 months. Under the proposal, an individual STLD plan's contract term could be no more than 3 months. However, the Departments propose to set the maximum coverage period of no longer than 4 months in total, taking into account any renewals or extensions.

As noted above we strongly support the Departments' proposed regulations reinterpreting the phrase "short-term" to include contracts of no less than 3 months. In order to minimize consumer confusion, we urge the Departments to set the maximum coverage period (including any extensions or renewals) of no more than 3 months. We believe this reinterpretation is more in line with the intent of these policies, which is to provide temporary health insurance coverage and a bridge to comprehensive coverage.

Stacking: The Departments propose to add to the definition of "limited-duration" new language providing that a renewal or extension of a new STLD policy, contract, or certification only applies to products issued by the same issuer to the same policyholder within the 12-month period beginning on the original effective date of the policy.

ACS CAN appreciates the Departments' attention to the issue of "stacking" (e.g., the ability of an issuer to sell back-to-back STLD policies which taken together exceed the maximum allowable duration of coverage). While the proposal would prohibit stacking offered by the same issuer, we are concerned that under the proposal an agent or broker could stack policies from different issuers or even from issuers that have common corporate ownership. Stacked policies could be marketed in a manner that could mimic comprehensive coverage and thus could be confusing to consumers. Allowing STLD policies to be stacked runs counter to the intent of the Department's proposed rule, which is to ensure STLD policies are distinguishable from comprehensive health insurance coverage.

We urge the Departments to clarify that the prohibition on stacking would apply to issuers regardless of whether or not the plans are offered by the same issuer. We also would urge the Departments to work with applicable agencies to maintain rigorous oversight of agents and brokers to ensure they are not selling unaffiliated stacked policies to consumers.

3. Sales and Marketing Practices

The Departments are soliciting feedback on additional ways to help consumers distinguish between STLD policies and comprehensive coverage, particularly in light of continued reports about aggressive and deceptive sales and marketing practices by STLD plan issuers.

ACS CAN encourages the Departments to enact policies that prohibit the marketing and sale of STLD policies during the Marketplace annual open enrollment period. Individuals shopping for health insurance coverage should be directed towards comprehensive health insurance, which not only protects the consumer from unintended catastrophic consequences but may also provide tax credits and subsidies depending on the individual's income.

We are also concerned about reports concerning false and misleading statements and aggressive tactics made by sellers of non-ACA-compliant products, urging consumers to immediately sign up over the phone.[11] In addition, the sale of non-ACA-compliant plans via the Internet can be challenging for state regulators to monitor. We therefore urge the Departments to limit the sale of STLD plans to in-person encounters and prohibit the sale of these products via the Internet and telephone.

4. Notice

The Departments propose to amend the notice that is required to be included on all STLD policies sold or issued after the effective date of the final rules.[12] The Departments offer two notices[13] and seek comment.

ACS CAN supports the Departments' proposal to require consumer notices to accompany the sale of STLD products. We believe the notice requirement can help consumers better understand the limitations of STLD coverage. We urge the Departments to require these notices be included on all marketing materials and on any application. However, we note that notices alone will not protect consumers. The availability of notices must be provided in tandem with tighter restrictions on the marketing of these products and robust enforcement targeted at deceptive marketing.

We particularly support the inclusion of the requirement that STLD policies provide information on the availability of health insurance options through healthcare.gov. We encourage the Departments to require STLD issuers to list the contact information for the State department of insurance where the policy was sold. Most consumers are unaware of the existence of state departments of insurance and so providing contact information will be helpful.

ACS CAN believes that the content of both the "Notice to Consumers About Short-Term, Limited-Duration Insurance" and the "Warning" Notice provide consumers with easy-to-understand information regarding the differences and limitations of STLD policies. However, we believe the format of the "Warning" Notice may be more impactful for consumers. We also encourage the Departments to use the "Warning" heading – rather than

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[11] R. Schwab and J. Volk, *The Perfect Storm: Misleading Marketing of Limited Benefit Products Continues as Millions Losing Medicaid Search for New Coverage*, Georgetown University Center on Health Insurance Reforms, August 2023.
[12] See Notice to Consumers About Short-Term, Limited-Duration Insurance. 88 Fed. Reg. at 44615.
[13] Id. and Warning Notice. 88 Fed. Reg. at 44617.

the "Notice to Consumers About Short-Term, Limited-Duration Insurance" – in the final notice.

5. Short-Term, Limited-Duration Insurance Sold Through Associations

The Departments note that most sales of STLD policies are sold through group trusts or associations that are not related to employment. In these cases, an STLD issuer files a product for approval in one state and then sells the product in another state through an association.

We share the Departments' concern that STLD policies sold through associations leave consumers vulnerable, particularly given that state regulators would only have authority over those policies filed in their state and lack authority to intervene on consumers' behalf for policies filed outside the state in which the consumer resides. We also note that both model notices proposed by the Departments specifically reference consumers to contact their state department of insurance for questions or complaints about a STLD policy. We are concerned about the potential consumer confusion that could occur when an individual seeks assistance from their state department of insurance related to a problem with their STLD policy only to be informed that no assistance is available. We discourage the Departments from permitting the sale of STLD products in the group market.

6. Applicability Dates

The Departments propose that new consumer protections provided under this regulation would apply to policies sold or issued on or after the effective date of the final rule. Policies sold prior to that date would be subject to the existing STLD requirements. The Departments also seek comment on whether the proposed notice should apply only to new STLD policies (as outlined under this proposal) or whether the notice should also apply to existing coverage.

We are concerned that the proposed applicability date would result in bifurcated rules and consumer protections applicable to STLD policies depending on when the product was sold to a consumer. We believe this will create unnecessary confusion for consumers and regulators. At the same time, we understand there may be confusion on the part of consumers who may have purchased a multi-year STLD plan immediately prior to issuance of the final rule. Therefore, we recommend the Departments set a date certain – we suggest January 1, 2026 – as the effective date for the revised STLD rules and that after this date all STLDs must be in compliance with the new rules. We believe this approach will allow issuers sufficient time to identify and contact individuals who have purchased multi-year STLD plans and provide them adequate time in which to enroll in more comprehensive health insurance coverage.

CONCLUSION

Thank you for the opportunity to comment on the collection request related to the STLD proposed rule. If you have any questions, please feel free to contact me or have your staff contact Anna Schwamlein Howard, Policy Principal, Access and Quality of Care at Anna.Howard@cancer.org.

Sincerely,

Lisa A. Lacasse, MBA
President
American Cancer Society Cancer Action Network