TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

September 11, 2023

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW Washington, DC 20201
Attention: CMS-9904-P

Via electronic submission: htttps://www.regulations.gov

Re: File code CMS-9904-P; Comments on proposed rules concerning Short-Term, Limited Duration Insurance; Independent Noncoordinated Excepted Benefits Coverage; Level-funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance

Dear Secretary Becerra:

The Texas Medical Association (TMA) is a private, voluntary non-profit association of more than 57,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is "Improving the health of all Texans." TMA's diverse physician members practice in all fields of medical specialization.

Consistent with its vision, TMA has a keen interest in:

- supporting the development of health insurance plans that balance affordability with meaningful coverage;
- advocating vigorously in favor of state and federal protections for people with preexisting conditions; and
- pursuing legislation and regulation requiring health benefit plan issuers to provide consumers with sufficient information to make informed decisions regarding their health plan options.[1]

[1] See TMA Policy 145.042 Framework for Evaluation Health Insurance Benefit Design.

To that end, TMA appreciates the opportunity to comment on the respective rule proposals of the Treasury Department, the Department of Labor, and Health and Human Services (collectively, "the Departments") concerning short-term, limited duration insurance (STLDI).

Background on the Rule Proposal

As the Departments know, STLDI is limited insurance that was traditionally meant to serve as temporary coverage, often used by workers transitioning from one job to another. However, over the years, these plans started being sold as a substitute for comprehensive coverage and for much longer periods than their name would imply.

Consequently, in October of 2016, the Departments reduced the maximum coverage period for STLDI to less than three months in order "to address the issue of short-term, limited-duration policies being sold as a type of primary coverage, as well as [to address] concerns regarding possible adverse selection impacts on the risk pool for [ACA-complaint] plans… ."[2]

More specifically, in the October 16, 2016 final rule publication, the Departments stated their rationale for the rule adoption, in part, as follows:

> Before enactment of the Affordable Care Act, short-term, limited duration insurance was an important means for individuals to obtain health coverage when transitioning from one job to another (and from one group health plan to another) or when faced with other similar situations. However, with guaranteed availability of coverage and special enrollment period requirements in the individual health insurance market under the Affordable Care Act, individuals can purchase coverage with the protections of the Affordable Care Act to fill in the gaps in coverage.
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> The Departments have become aware that short-term, limited duration insurance is being sold in situations other than those that the exceptions from the definition of individual health insurance coverage was initially intended to address. In some instances, individuals are purchasing this coverage as their primary form of health coverage and, contrary to the intent of the 12-month coverage limitation in the current definition of short-term, limited-duration insurance, some issuers are providing renewals of the coverage that extend the duration beyond 12 months. *Because short-term, limited-duration insurance is exempt from certain consumer protections, the Departments are concerned that these policies may have significant limitations, such as lifetime and annual dollar limits on essential health benefits (EHB) and pre-existing condition exclusions, and therefore may not provide meaningful health coverage.* Further, because these policies can be medically underwritten based on health status, healthier individuals may be targeted for this type of coverage, thus adversely impacting the risk pool for Affordable Care Act-compliant coverage.[3]

[2] 83 FR 7438.
[3] 81 FR 75317-75318 (emphasis added).

In August 2018, the Departments reversed their maximum coverage period decision from 2016. This resulted in permitting STLDI policies to provide coverage for an initial term of up to 364 days with extensions and renewals of up to 3 years (provided that state law did not impose more stringent requirements). The stated purpose of this change was to "provide more affordable consumer choice for health coverage."[4]

Prior to the August 2018 rule change, TMA submitted comments in March 2018 **opposing** the Department's proposed expansion of the maximum coverage period for STLDI. In that comment letter, TMA noted that consumers considering purchasing these STLDI policies are unlikely to know the limitations of the policies and the non-applicability of numerous critical consumer protections to these policies (which would subject consumers to potentially severe financial risks). Additionally, consumers may confuse STLDI policies with more comprehensive major medical coverage that is ACA-compliant (especially if health plan issuers currently offering ACA-complaint coverage offer STLDI policies).

TMA further emphasized in March 2018 that the return to a less-than-12-month maximum coverage period would likely exacerbate consumer confusion concerning the limitations of short-term, limited-duration policies. (See, e.g., the Departments' statement that: "….short-term, limited-duration insurance policies that provide coverage lasting almost 12 months may be more difficult for some individuals to distinguish from [ACA-compliant] coverage which is typically offered on a 12-month basis.")[5].

TMA Recommendations Regarding the Proposed Reduced Maximum Coverage Period and Notices of Short-term, Limited Duration Policy Limitations

1. **Maximum Coverage Period Reduction**

In the instant rule proposal, the Departments now propose to shorten the initial term for STLDI to no more than 3 months (with a total duration, including renewals, of four months). The stated rationale for that proposal is, among other things, that:

- since the 2018 final rule adoption:
    - comprehensive coverage for individuals has generally become more accessible and affordable. The Departments note there have been increased options for comprehensive coverage with multiple issuer options for individual health insurance coverage on the Exchanges growing consistently since 2018;
    - final rules were adopted by the IRS and Treasury Department to address the "family glitch," which should increase the number of individuals with premium tax credit-subsidized Exchange coverage by approximately 1 million per year for the next 10 years. The Departments indicate that anticipated enrollment trends and the availability of the enhanced subsidies allay some of the concerns expressed by the Departments in the preamble to the 2018 final rules regarding the availability of affordable options for comprehensive coverage;

[4] https://www.govinfo.gov/content/pkg/FR-2018-08-03/pdf/2018-16568.pdf page 4, middle column
[5] 83 FR 7439.

  - research has substantiated concerns about the negative impact that the shift of healthier individuals form comprehensive coverage to STLDI has had on individuals remaining the individual market risk pools; and

- although affordability concerns continue to persist more generally, STLDI is not a complete solution to the larger issue of affordability and those who enroll in STLDI as a substitute for comprehensive coverage are at risk of being exposed to significant financial liability in the event of a costly or unexpected health event, often without knowledge of the risk associated with such coverage.[6]

While TMA can see the utility of STLDI in certain short-term temporary scenarios, TMA agrees with the Departments that these plans serve better as a short-term bridge between comprehensive coverage than as a substitute for comprehensive coverage. TMA also agrees that the landscape has changed since 2018 making STLDI less important as a cheaper alternative to comprehensive coverage.

Accordingly, TMA supports the Departments' proposal to reduce the maximum coverage period for STLDI to an initial term of three months (with a total duration, including renewals, of four months) for all the reasons previously stated in TMA's March 2018 comment letter (as stated above). TMA remains concerned about the lack of critical consumer protections contained in STLDI plans and the potential for consumers to mistake these plans for ACA-compliant comprehensive coverage. TMA strongly contends that the longer coverage period increases the risk of consumers confusing STLDI plans with comprehensive coverage.

STLDI policies typically have not covered essential benefits (such as prescription drugs) and are permitted to exclude or limit coverage for preexisting conditions (including conditions the consumer did not know about when they enrolled in the plan). This can have devastating financial effects on the consumer and, as the Department notes in the rule preamble "the financial risks for consumers that encounter newly diagnosed conditions or a significant medical event while enrolled in STLDI increases with the length of their policy."[7]

TMA contends that the Departments have been thoughtful in developing the proposed three-month limitation (i.e., reviewing instances where people may experience a temporary gap in coverage, such as a college student who is not enrolled in classes in the summer, a teacher changing jobs who has to wait until the fall to enroll in new coverage, and others transitioning between comprehensive coverage). The three-month proposal is consistent with the group market rules regarding the ACA's 90-day waiting period limitation. And it aligns with supporting protections for people with preexisting conditions since there are no federal prohibitions or restrictions on preexisting condition limitations for STLDI. For all the foregoing reasons, TMA supports the proposed maximum coverage period reduction for STLDI policies.

2. **Notices of Short-term, Limited Duration Policy Limitations**

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[6] 88 Fed Reg 44605 (July 12, 2023).
[7] *Id.* at 44606 (July 12, 2023).

Next, the Departments propose strengthening the required federal notices for STLDI in both content and placement. TMA is generally supportive of those proposed changes.

For example, the rules propose the inclusion of new language in the federally required notice that would identify options for consumers to obtain comprehensive coverage (e.g., referencing employer insurance and healthcare.gov). This newly proposed addition would enable consumers to make more informed choices regarding the range of health insurance options available to them.

Additionally, in one of the newly proposed notices, the Departments include language stating that "you aren't protected from surprise medical bills" if you purchase a STLDI policy. This is important new language given: (1) the passage of the No Surprises Act after the last rulemaking effort on STLDI and (2) the non-applicability of the balance billing protections and out-of-network cost-sharing protections to STLDI.

While TMA appreciates these proposed additions to the required federal notice, TMA contends that the contemplated federal notices do not go far enough to prevent potential consumer confusion. In TMA's March 2018 comments, we stressed that prospective consumers must be armed with sufficient information to effectively perform an apples-to-apples comparison of an ACA-compliant plan and a STLDI policy. Otherwise, consumers may select a STLDI policy based upon a premium comparison alone without knowing or assessing the potential trade-offs (e.g., lower premium for less coverage and higher out-of-pocket cost-sharing).

To that end, TMA recommends that the Departments amend their proposed rules so that, in addition to the proposed notice, applications for STLDI are required to include a plain language explanation of the general limitations of STLDI as compared to ACA-compliant plans.

In our March 2018 comments, we noted that, for example, the plain language explanation could be modeled after an issue brief published by the Henry J. Kaiser Family Foundation entitled "Understanding Short-Term Limitation Duration Health Insurance"[8] which states as follows and provides a nice overview of the limitations of a short-term, limited duration policy:

> The Affordable Care Act (ACA) exempted short-term policies from market rules that apply to most major medical health insurance policies sold to individuals in the non-group market: rules that prohibit medical underwriting, pre-existing condition exclusions, and lifetime and annual limits, and that require minimum coverage standards. By contrast, short term policies:
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> - are often medically underwritten – applicants with health conditions can be turned down or charged higher premiums, without limit, based on health status, gender, age, and other factors;

[8] Karen Pollitz, "Understanding Short-Term Limited Duration Health Insurance," published Feb. 9, 2018 on the Henry J. Kaiser Family Foundation website; *available at*: https://www.kff.org/health-reform/issue-brief/understanding-short-term-limited-duration-health-insurance/ (last visited March 19, 2018).

- exclude coverage for pre-existing conditions – policyholders who get sick may be investigated by the insurer to determine whether the newly-diagnosed condition could be considered pre-existing and so excluded from coverage;
- do not have to cover essential health benefits – typical short-term policies do not cover maternity care, prescription drugs, mental health care, preventive care, and other essential benefits, and may limit coverage in other ways;
- can impose lifetime and annual limits – for example, many policies cap covered benefits at $1 million or less; (Table 1)
- are not subject to cost sharing limits – some short term policies, for example, may require cost sharing in excess of $20,000 per person per policy period, compared to the ACA-required annual cap on cost sharing of $7,350 in 2018 (Table 1); and
- are not subject to other ACA market requirements – such as rate review or minimum medical loss ratios; for example, while ACA compliant non-group policies are required to pay out at least 80% of premium revenue for claims and related expenses, the average loss ratio for individual market short-term medical policies in 2016 was 67%; while for the top two insurers, who together sold 80% of all short-term policies in this market, the average loss ratio was 50%.[9]

In March 2018, we also recommended that in addition to a plain-language explanation of the limitations of STLDI policies (similar to the issue brief excerpt, above), **the application form be required to prominently list any essential health benefits not covered by the particular STLDI, as many consumers would be surprised to learn that coverage they expected to be part of a basic plan (e.g., prescription drug coverage) is excluded from their STLDI policy.**

Finally, we recommended in March 2018 that the application be required to include a signature line for the consumer's signed acknowledgment of receipt and understanding of the plain language explanation of the limitations of STLDI policies.

While many of our March 2018 recommendations were not included in the required federal notice, Texas passed legislation (SB 1852) in 2019 regulating STLDI policies. In the Texas Department of Insurance's (TDI) rulemaking, TDI incorporated many elements consistent with our March 2018 recommendations. The required TDI disclosure form contains a wealth of information for consumers in a concise, plain language format. We recommend that the Departments review the required TDI disclosure form when considering comments to the current rule proposal.

Once again, TMA thanks you for the opportunity to provide these comments. If you have any questions, please do not hesitate to contact Kelly Walla, Vice President and General Counsel, at kelly.walla@texmed.org.

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[9] *Id* at pages 1-2. (Note that in the issue brief, the second bullet contains a footnote #4, which describes how pre-existing conditions are often defined and the final bullet contains a footnote # 5, which is to the National Association of Insurance Commissioners, Accident and Health Policy Experience Report for 2016, available at http://www.naic.org/prod_serv/AHP-LR-17.pdf).

Sincerely,

Richard W. “Rick” Snyder, II, MD
President, Texas Medical Association