February 21, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Julie A. Su
Acting Secretary
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Secretary Becerra, Secretary Yellen, and Acting Secretary Su:

In 2019, then-Presidential candidate Joe Biden promised: "If you like your health care plan, your employer-based plan, you can keep it. In fact[,] if you have private insurance, you can keep it."[1] Despite this promise, the Department of Health and Human Services, the Department of the Treasury, and the Department of Labor ("the Departments") issued a proposed rule on July 12, 2023, to limit Short-Term Limited Duration Insurance (STLDI) plans and fixed indemnity benefits.

The proposed rule breaks the President's promise to the millions of patients who depend on these plans and is tone-deaf as Americans face unprecedentedly high health care costs.[2] Patients buying

[1] Nathaniel Weixel, *Biden: If you like your private health insurance, 'you can keep it'*, The Hill (July 15, 2019), https://thehill.com/policy/healthcare/453173-biden-if-you-like-your-private-health-insurance-you-can-keep-it/.
[2] *CBO's Estimates of Enrollment in Short-Term, Limited-Duration Insurance*, Congressional Budget Office (Sept. 25, 2020), https://www.cbo.gov/publication/56622. *How CBO and JCT Analyzed Coverage Effects of New Rules for*

coverage in the individual market face record-high out-of-pocket limits of $9,450 for an individual and $18,900 for a family, nearly 16% increases since 2020.[3] The annual deductible for a silver plan in the individual market is $5,000 on average, which is roughly double the cost of the average deductible in high-deductible health plans.[4] It is clear that the latest victim of "Bidenomics" is Americans' health care coverage.[5]

STLDI and fixed indemnity plans provide important options to help patients facing such high health care costs obtain essential medical care. Perplexingly, the administration seems intent on eliminating these options for patients, forcing individuals and families into plans that are more expensive and less tailored to their needs.

Short-Term Limited Duration Insurance Plans

STLDI plans provide coverage and benefits for a defined period of time, currently up to three years. This gives patients the flexibility to purchase these plans for a duration of time suited to their specific coverage needs. These plans may offer coverage for the same type of health care services as traditional insurance; however, they are able to do so at a fraction of the cost, as they are not subject to the heavy regulation imposed on plans offered on the Affordable Care Act (ACA) exchanges.

In the preamble to the proposed rule, the Departments assume that the main reason a family would choose a short-term medical plan is if a health insurance broker improperly directed them to one of these plans.[6] The Departments ignore evidence to the contrary. A U.S. Government Accountability Office (GAO) report that examined the sale of STLDI plans through representatives listed on HealthCare.gov noted that, "None of the sales representatives we

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Association Health Plans and Short-Term Plans, Congressional Budget Office (Jan. 31, 2019), https://www.cbo.gov/publication/54915.

[3] *Out-of-pocket maximum/limit*, HealthCare.gov, https://www.healthcare.gov/glossary/out-of-pocket-maximum-limit#:~:text=The%20out%2Dof%2Dpocket%20limit%20for%20Marketplace%20plans%20varies%2C,and%20%2418%2C900%20for%20a%20family. Matthew Rae et al., *ACA's maximum out-of-pocket limit is growing faster than wages*, Peterson-KFF Health System Tracker (July 20, 2022), https://www.healthsystemtracker.org/brief/aca-maximum-out-of-pocket-limit-is-growing-faster-than-wages/#Cumulative%20percent%20change%20from%202014%20in%20HSA-qualified%20maximum%20OOP%20limit,%20ACA%20maximum%20OOP%20limit,%20and%20wages.

[4] *2022 Employer Health Benefits Survey*, KFF (Oct. 27, 2022), https://www.kff.org/report-section/ehbs-2022-section-8-high-deductible-health-plans-with-savings-option/. *Explaining Health Care Reform: Questions About Health Insurance Subsidies,* KFF (Oct. 6, 2023), https://www.kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health-insurance-subsidies/#:~:text=For%20example%2C%20in%202023%2C%20the,a%20platinum%20plan%20was%20%2445.

[5] *2023 Employer Health Benefits Survey*, KFF (Oct. 18, 2023), https://www.kff.org/health-costs/report/2023-employer-health-benefits-survey/.

[6] Short-Term, Limited Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance, (proposed July 12, 2023) (to be codified at 26 C.F.R. pt. 1, 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 144, 45 C.F.R. pt. 146, 45 C.F.R. pt. 148).

contacted engaged in potentially deceptive marketing practices that misrepresented or omitted information about the products they were selling."[7]

Patients are not coerced into purchasing these plans. In direct contrast to the Departments' assumption, American patients opt for this type of coverage because it meets their needs or provides greater value than the other health care options on the market – even heavily-regulated ACA plans. STLDI plans are not for every patient, but they are hardly "junk insurance." They can offer equivalent coverage with lower premiums, cover a larger share of medical costs than the individual market, have lower deductibles or wider provider networks than plans in the fully regulated nongroup market, and attract higher-quality providers through higher payment rates.[8]

The Departments also raise the concern that STLDI plans negatively impact the individual market risk pool and raise premiums for all patients. However, an analysis following the implementation of the Trump administration's 2018 final rule found that in states that fully permitted STLDI plans, all patients experienced improvements in 1) their states' individual markets, 2) the choice of plans available, and 3) the cost of plan premiums on the ACA exchanges.[9]

Paradoxically, the Departments' proposed rule will lead to *fewer* protections for patients, especially those who develop health conditions while enrolled in these plans. Under current rules, a patient with STLDI who develops a costly health condition can renew for 12, 24, or 36 months, ensuring continued health coverage at agreed-to costs. Under the Departments' proposed rule, a patient would be limited to three months of coverage, a one-month renewal, and then coverage is terminated until the next open-enrollment period begins. When the Obama administration enforced similar limitations, patients were unable to obtain additional coverage after the expiration of their STLDI plan, in certain cases racking up hundreds of thousands of dollars in medical bills as a result.[10]

Independent, Non-coordinated Excepted Benefits ("Fixed Indemnity") Coverage

Fixed indemnity plans are a type of voluntary insurance intended to help individuals bridge the gap between coverage provided by major medical insurance and the total out of pocket costs faced by individuals after insurance benefits are applied. The benefits of fixed indemnity plans are critical for patients who experience an unexpected medical emergency or life-threatening

[7] *Private Health Coverage: Results of Covert Testing for Selected Sales Representatives Listed on Healthcare.gov*, U.S. Government Accountability Office (Aug. 10, 2021), https://www.gao.gov/assets/gao-21-568r.pdf.
[8] Chris Pope, *Renewable Term Health Insurance: Better Coverage Than Obamacare*, Manhattan Institute (May 16, 2019), https://manhattan.institute/article/renewable-term-health-insurance. *How CBO and JCT Analyzed Coverage Effects of New Rules for Association Health Plans and Short-Term Plans*, Congressional Budget Office (Jan. 2019), https://www.cbo.gov/system/files/2019-01/54915-New_Rules_for_AHPs_STPs.pdf.
[9] Brian Blase, *Individual Health Insurance Markets Improving in States that Fully Permit Short-Term Plans*, The Galen Institute (Feb. 2021), https://galen.org/assets/Individual-Health-Insurance-Markets-Improving-in-States-that-Fully-Permit-Short-Term-Plans.pdf.
[10] Michael Cannon, *Biden's new plan threatens health coverage for more than half a million people,* The Hill (July 10, 2023), https://thehill.com/opinion/healthcare/4087396-bidens-new-plan-threatens-health-coverage-for-more-than-half-a-million-people/.

diagnosis. In a recent survey, 90 percent of respondents indicated that a fixed indemnity plan helped pay for necessary medical expenses and eased concerns about financial security.[11]

The Departments' proposed rule restricts the way patients can use fixed indemnity benefits, prohibiting their course of treatment or hospitalization from factoring into the benefit received. Additionally, the Departments propose to prevent patients from coordinating these benefits with other health coverage. These changes disregard the very purpose of fixed indemnity plans and reflect a basic misunderstanding as to how patients use these plans.

Regardless of the aforementioned objections to the proposed changes to fixed indemnity excepted benefits, the Department of the Treasury ("Treasury") lacks the necessary authority to unilaterally propose changes to the tax treatment of fixed indemnity benefits.[12]

Treasury has noted in administration budget proposals not once, but twice, that such changes require legislation rather than regulation. Given that Congress has not taken legislative action to achieve such proposal, it is not within Treasury's authority to now promulgate regulations in what has been previously acknowledged as requiring a legislative change.[13] We urge Treasury to reevaluate what authority it possesses in promulgating regulations for purposes the agency has noted as needing a legislative solution enacted by Congress.

We seek to ensure that the Departments have considered the full consequences of the proposed policies prior to the finalization of this rule. In pursuit of this goal, please respond on a **question-by-question basis**, to the below questions, by **Wednesday, March 6, 2024.**

1. With respect to individuals whose STLDI coverage will be terminated after four months, please provide the following:
    a. Estimates of the total number of individuals enrolled in an STLDI plan who would be without coverage upon the end of the four-month contract period allowed under the proposed rule.
    b. Actions the Departments plan to take to ensure that individuals detailed in 1(a) will not be forced to go without coverage upon the end of their STLDI contract.
2. If the Departments consulted enrollees in STLDI or fixed indemnity plans about the changes included in the proposed rule, please provide specific types of coverage in which individuals were enrolled in and their feedback in a deidentified manner.
    a. If the Departments did not consult individuals currently enrolled in STLDI or fixed indemnity coverage, please detail why the Departments found it appropriate to not directly consult current enrollees affected by the proposed rule.

[11] *Measuring Satisfaction with Supplemental Insurance*, AHIP (Feb. 23, 2022). https://www.ahip.org/documents/AHIP-Supplemental-Insurance-Deck-032422.pdf
[12] Current law allows these payments to be excluded from gross income as long as the payment does not exceed the actual medical expenses.
[13] *General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals.* The Department of the Treasury (Mar. 2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf. *General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals*, The Department of the Treasury, (Mar. 2023), https://home.treasury.gov/system/files/131/General-Explanations-FY2024.pdf.

3. With respect to the Departments' concern regarding STLDI plans impact on adverse selection for risk pools in the individual market, please answer the following:
    a. Please detail the studies or analyses, excluding prospective models, that the Departments considered as sufficient evidence for the proposed changes when examining STLDI plan impact on adverse selection in the individual market risk pools.
    b. Please detail how the Departments anticipate the proposed rule to directly impact the individual market risk pool, including:
        i. The estimated number of individuals enrolling in coverage on the ACA marketplaces, and thus entering the exchange risk pool, who would have otherwise been enrolled in an STLDI plan.
        ii. The estimated change in the number of uninsured individuals, with specific regard to those who may have been previously enrolled in STLDI coverage.
    c. Please detail how the Departments expect the limitation on STLDI coverage to impact premiums for plan year 2025 in the individual market.
        i. Should the proposed rule result in higher plan premiums for the plan year following finalization of the proposed rule, will the Departments reverse the limitation on STLDI coverage?
4. How many individuals do the Departments estimate will enroll in an ACA plan and will receive enhanced premium subsidies provided under the Inflation Reduction Act (IRA), which are set to expire at the end of 2025?
5. With respect to the Treasury's change in tax treatment for fixed indemnity excepted benefits, please answer the following:
    a. The amount of increased tax revenue the Treasury expects to receive as a result of the change in the tax treatment of fixed indemnity benefits. Please also express this as the amount by which impacted individuals' take-home pay will decrease by dollar amount as a result of this change.
    b. The average amount of fixed indemnity benefits received by the plan enrollee, expressed as a dollar amount and percentage, as a result of the change in the tax treatment of such benefits.
    c. The average change in fixed indemnity benefits received by the plan enrollee, expressed as a dollar amount and percentage, as a result of the change in the tax treatment of such benefits.
6. With respect to the Treasury's authority to promulgate regulations addressing the tax treatment for fixed indemnity excepted benefits, please answer the following:
    a. Please detail the Treasury's change in interpretation of the measures required, whether legislative or regulatory, needed to achieve the proposed change of the tax treatment of fixed indemnity excepted benefits. Please ensure that this answer thoroughly elaborates on the legislative change proposed in the General Explanations of the administration's FY 2023 and FY 2024 Revenue Proposals and the subsequent regulatory change included in the Departments' proposed rule, and how the Treasury's understanding of the needed measures changed from requiring a legislative change to regulatory guidance.

b. Please provide justification for Treasury's authority to promulgate regulations that address the treatment of fixed indemnity excepted benefits under the IRC section 105(b). In your answer, please detail how the Treasury is appropriately exercising authority to implement a legislative change that it had previously delegated to Congress.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions

Mike Braun

Mike Braun
U.S. Senator