



Secretary Yellen  
 Secretary of the Treasury  
 U.S. Department of the Treasury

Acting Secretary Su  
 Acting Secretary of Labor  
 U.S. Department of Labor

Secretary Becerra  
 Secretary of the Department of Health and Human Services  
 Department of Health and Human Services

September 11, 2023

**Re: Short-Term, Limited-Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance (CMS-9904-P)**

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

Thank you for the opportunity to submit comments on the above-titled proposed rule, issued by the Treasury Department, the Department of Labor, and the Department of Health and Human Services (the Departments). We write to express our strong support of this proposal, which would reduce the risk that products not subject to the insurance market rules of the Affordable Care Act (ACA) will be marketed and sold to consumers as a substitute for ACA-compliant comprehensive coverage.

The undersigned organizations represent millions of patients and consumers facing serious, acute and chronic health conditions across the country, including individuals who rely on the patient protections provided under the ACA. Our organizations have a unique perspective on what patients need to prevent disease, cure illness and manage chronic health conditions, including, most importantly, comprehensive health care insurance coverage. Our breadth enables us to draw upon a wealth of knowledge and expertise that can be an invaluable resource in this discussion.

In March of 2017, our organizations agreed upon three overarching principles<sup>1</sup> to guide any work to reform and improve the nation's healthcare system. These principles state that: (1) healthcare should be accessible, meaning that coverage should be easy to understand and not pose a barrier to care; (2) healthcare should be affordable, enabling patients to access the treatments they need to live healthy and productive lives; and (3) healthcare must be adequate, meaning healthcare coverage should cover treatments patients need, including all the services in the essential health benefit (EHB) package.

In 2018, the prior administration chose to loosen rules governing short-term, limited-duration insurance (STLDI) to encourage the uptake of these products (the 2018 policy). We opposed this decision, which we believed was at odds with our commitment to accessible, affordable, and comprehensive health coverage and put patients at risk.<sup>2</sup> In the years since, the insurance market instability that the prior administration identified as justification for deregulating STLDI has ended, while comprehensive coverage has become far more affordable. At the same time, the effects of this policy choice have become apparent: consumers have had a more difficult time distinguishing between STLDI and full-year ACA-compliant coverage, to the detriment of both those who enroll in STLDI and the consumers and patients who rely on the ACA-compliant individual market.<sup>3</sup>

Given the failure of the 2018 policy, the change in market conditions since 2018, and lessons learned regarding coverage policy during the COVID-19 pandemic, we believe it is appropriate and necessary to reestablish consumer protective rules for STLDI. For the same reasons, and considering the similar risks posed by other products not compliant with the ACA's individual and small group market rules, we also believe it is important for the Departments to clarify

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<sup>1</sup> Consensus Health Reform Principles. Available at: <https://www.lung.org/getmedia/0912cd7f-c2f9-4112-aaa6-f54d690d6e65/ppc-coalition-principles-final.pdf>.

<sup>2</sup> Partnership to Protect Coverage. Comments Re: Short-Term, Limited-Duration Insurance Proposed Rules. <https://www.lung.org/getmedia/e5f084fc-cea9-44d3-918b-fe08f41434ad/coalition-comments-to-hhs-re-stld-plan.PDF.PDF>. Published April 2018.

<sup>3</sup>See, for example, Partnership to Protect Coverage. Under-Covered: How 'Insurance-Like' Products are Leaving Patients Exposed. [https://www.ils.org/sites/default/files/National/undercovered\\_report.pdf](https://www.ils.org/sites/default/files/National/undercovered_report.pdf). Published March 2021. A discussion of the risks of STLDI continues in the body of our comment letter.

federal requirements governing excepted benefits and to consider promulgating additional safeguards for other similarly risky arrangements.

### ***STLDI: Risks to Consumers***

STLDI does not have to adhere to the consumer protections and market standards of the ACA. Issuers take advantage of this lack of oversight to offer products with significant limitations and gaps that put consumers at risk of catastrophic financial hardship. Although there was an expectation by some that the 2018 policy would spur sellers of STLDI to change their business model and offer products with more robust protections, that never happened.<sup>4</sup> STLDI products continue to discriminate against people with preexisting conditions and leave customers exposed to high and unexpected costs. They continue to do this in a host of ways: by excluding coverage of preexisting conditions or declining to issue a plan to a person with such a condition; By excluding commonly used and relied upon benefits, such as mental health, prescription drugs, and preventive care; and by imposing massive cost-sharing obligations far in excess of what is allowed under the ACA.<sup>5</sup>

Since the 2018 policy change, a significant shift has occurred: there is now a greater likelihood that consumers will be sold a STLDI product masquerading as comprehensive coverage. The 2018 policy erased a straightforward distinction between full-year ACA-compliant coverage and STLDI by empowering industry to sell short-term products that can last for what is, in effect, a full-year (and then be renewed a year at a time). Even as this difference disappeared, evidence has emerged showing that STLDI is often sold in ways that do not disclose or obscure the limitations of these products. Though STLDI is most certainly not comprehensive and should never be confused with such coverage, STLDI marketing frequently does just that. Since the rule change, study after study has documented aggressive and misleading sales practices that downplay or ignore critical distinctions between comprehensive coverage and products that are not.<sup>6</sup> This has compounded the danger posed by STLDI, making it far more likely that a consumer will enroll in a short-term plan only to discover later that it does not cover what they thought it would and that their cost exposure is far greater than they expected it to be.

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<sup>4</sup> Palanker D and Curran E. Limitations of Short-Term Health Plans Persist Despite Predictions That They'd Evolve. The Commonwealth Fund. <https://www.commonwealthfund.org/blog/2020/limitations-short-term-health-plans-persist-despite-predictions-theyd-evolve>. Published July 22, 2020.

<sup>5</sup> See Giovannelli J, Lucia K, and Goe C. Biden Administration Sets Limits on Use of Short-Term Health Insurance Plans, But States Can Do More to Protect Consumers. The Commonwealth Fund. <https://www.commonwealthfund.org/blog/2023/biden-administration-sets-limits-use-short-term-health-insurance-plans-states-can-do-more>. Published August 2, 2023 (collecting literature on STLDI risks).

<sup>6</sup> Schwab R and Volk J. 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. <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>. Published August 2023; Palanker D and Volk J. Misleading Marketing of Non-ACA Health Plans Continued During COVID-19 Special Enrollment Period. Georgetown University Center on Health Insurance Reforms. <https://ccf.georgetown.edu/2021/11/08/misleading-marketing-of-non-aca-health-plans-continued-during-covid-19-special-enrollment-period/>. Published October 2021; Young CL and Hannick K. Misleading Marketing of Short-Term Health Plans Amid COVID-19. The Brookings Institution. <https://www.brookings.edu/articles/misleading-marketing-of-short-term-health-plans-amid-covid-19/>. Published March 24, 2020; Corlette S, Lucia K, Palanker D, and Hoppe O. The Marketing of Short-Term Health Plans. Robert Wood Johnson Foundation. <https://www.rwjf.org/en/insights/our-research/2019/01/the-marketing-of-short-term-health-plans.html>. Published Jan. 31, 2019.

### ***STLDI: Limits on the Maximum Duration of Coverage, Including Extensions and Renewals***

In light of the ongoing risks posed by STLDI, the Departments emphasize the importance of ensuring consumers are able to distinguish between these products, on one hand, and ACA-compliant comprehensive coverage, on the other. To this end, the Departments propose to reestablish limits on the contract length and renewability of STLDI that allow these products to continue to cover short gaps in comprehensive coverage but minimize the chance that they will be passed off as a long-term substitute for such coverage.

We applaud the Departments for revisiting this issue and support the proposal, with modifications that we believe align with the Departments' approach while further reducing consumers' exposure to the dangers of these products.

As discussed above, post-2018 experiences show that STLDI's limitations and gaps have persisted, such that these products continue to offer only limited value — and great risk — to most individual market consumers, particularly those in less-than-perfect health. At the same time, by allowing STLDI to last for 364 days at a time and be renewed for an additional two years, the 2018 policy has increased consumer confusion and exacerbated the risk that consumers will be diverted from full-year comprehensive coverage to long-term STLDI.

We strongly support the Departments' proposal to limit STLDI contract terms to no more than 3 months. We believe doing so will reduce the likelihood that these products will be confused with full-year ACA-compliant plans and will make it more likely that STLDI serves the purpose for which it is best suited: to bridge a temporary gap in comprehensive coverage.

For the same reasons, we suggest that the maximum coverage period, including any extensions or renewals, should be capped at 3 months (rather than 4 months, as proposed). We believe a 3-month period is appropriate and adequate to cover short coverage gaps experienced, for example, by individuals switching between job-based plans or by students during summer break. We note that individuals in these circumstances, as well as others who are transitioning from comprehensive coverage and may anticipate a longer gap, typically would have at least one other coverage option in addition to STLDI: they would likely be eligible for a special enrollment period in the ACA marketplaces and potentially could qualify for federal premium tax credits to defray the cost of that coverage.<sup>7</sup>

### ***STLDI: Closing the Stacking Loophole***

The Departments seek to bolster compliance with these duration limits by curtailing "stacking," a practice in which a consumer is sold multiple consecutive STLDI policies that, taken together, exceed the maximum allowable duration of such coverage. We thank the Departments for their attention to this loophole and support a prohibition on stacking that would prevent those selling and marketing STLDI from circumventing federal rules. While we appreciate that the anti-stacking provision in the proposed rule is a step in the right direction, it would not prohibit all forms of stacking. We believe the final rule should.

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<sup>7</sup> Of course, for individuals in these situations who also have a preexisting condition, STLDI itself may not be an option.

We urge the Departments, first, to clarify that the prohibition on stacking by the same issuer extends to all issuers that are part of the same controlled group. Issuers with shared ownership should not be able to exploit their corporate structure to avoid consumer protective regulations.

Second, the Departments should also prohibit the stacking of STLDI policies issued by unaffiliated issuers, subject to a safe harbor. Troublingly, the proposed rule would not prevent brokers from selling stacked policies from multiple issuers, even though, from a consumer standpoint, the risks of this form of stacking are similar to those posed by single-issuer stacking. (Indeed, by banning one form of stacking but not the other, the proposed approach might have the unintended consequence of encouraging stacking of policies from multiple issuers.) To address these risks, the proposed rule should bar all stacking of STLDI policies, whether or not the policies are from the same issuer.

We recognize that it may be difficult for issuers to determine independently whether a consumer is or recently has been insured by a STLDI policy from a different issuer. Accordingly, those marketing and selling STLDI should be obligated to ask all applicants to attest that they have not been insured by a STLDI policy (from another issuer) within the last 12 months. A seller of STLDI that obtains such an attestation would be presumed to be in compliance with the prohibition on stacking by multiple issuers.<sup>8</sup> To reduce the risk of consumer confusion, the language of any attestation form should be developed by the Departments. If the Departments adopt this approach, it is important to clarify that a consumer's attestation is relevant only for the limited purpose of assessing compliance with the anti-stacking safe harbor. Any error or inaccuracy in a consumer's attestation — for example, if they say they were not recently insured by a STLDI policy but, in fact, they were — cannot constitute a basis for a denial of benefits or rescission of coverage.

### ***STLDI: Prohibition on Sales During Open Enrollment***

Marketing that undermines the ability of a consumer to distinguish between STLDI and comprehensive coverage increases the likelihood that they will enroll in STLDI inadvertently, with potentially catastrophic consequences. Experiences since 2018 demonstrate that there are multiple aspects of STLDI marketing that contribute to this problem, and multiple policy responses are needed to address them.<sup>9</sup>

One part of the problem has to do with timing. When STLDI is marketed and sold during the annual open enrollment period for comprehensive coverage, the potential for consumer confusion is particularly acute. There is evidence that suggests sellers of STLDI take advantage of this time of year when so many more consumers are shopping for comprehensive coverage to push products that are not.<sup>10</sup> Open enrollment is also the time when the utility of STLDI is at

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<sup>8</sup> This presumption of compliance could be overcome if, for example, there is evidence that the consumer's attestation was obtained through deceptive or misleading conduct.

<sup>9</sup> New Consumer Testing Shows Limited Consumer Understanding of Short Term Limited Duration Plans and Need for Continued State and NAIC Action. NAIC. [https://healthyfuturega.org/wp-content/uploads/2019/04/Consumer-Testing-Report\\_NAIC-Consumer-Reps.pdf](https://healthyfuturega.org/wp-content/uploads/2019/04/Consumer-Testing-Report_NAIC-Consumer-Reps.pdf). Published 2019.

<sup>10</sup> U.S. House of Representatives, Committee on Energy and Commerce. Shortchanged: How the Trump Administration's Expansion of Junk Short-Term Health Insurance Plans is Putting Americans at Risk. <https://docs.house.gov/meetings/IF/IF14/20210323/111378/HHRG-117-IF14-20210323-SD023.pdf>. Published June 2020.

a low (because people can enroll without restriction in comprehensive coverage). Halting sales of STLDI during these windows, therefore, will decrease consumer confusion and facilitate access to comprehensive coverage. We respectfully suggest that this action is the bare minimum the Departments should take.

### ***STLDI: Limits on Sales Methods***

But more could — and should — be done. When sales of STLDI and other non-ACA-compliant products occur over the Internet or telephone, the information asymmetry between the seller and consumer is at its greatest. At the same time, incentives to provide reliable customer service are arguably lower via these media (for example, the possibility of a recurring business relationship seems lower in a business model where sales are initiated by a flood of “cold calls” from out-of-state sellers who obtained the consumer’s information from a lead-generating website). While there is, of course, convenience associated with shopping via these media, it is now evident that such sales methods are prone to abuse and make it especially hard for consumers to get concrete, verifiable answers about what they are being sold, before they buy it. For example, a secret shopper study conducted in June 2023 documented frequent false or misleading statements during sales calls for non-ACA-compliant products and aggressive sales tactics that pressured the consumer to sign-up immediately over the phone.<sup>11</sup> Sellers told the consumer these non-ACA compliant products would “reach capacity” or increase in price if the consumer took more time to consider other options or review their budget and most sellers of such plans refused to provide written plan information when asked. Not one representative directed the consumer to, or even told her about, the \$0 premium, \$0 deductible ACA marketplace plan for which she was eligible. In online searches, the federal marketplace, HealthCare.gov, was never the top search result, even when searching for “HealthCare.gov.”

We urge the Departments to limit the sale of STLDI via the Internet and telephone and only allow in-person encounters.

### ***STLDI: Sales Through Associations***

The proposed rule notes that STLDI issuers often sell short-term products to consumers of one state via arrangements formed out-of-state. These arrangements are nominally associations comprised of individual members. In practice, these associations frequently operate simply as a vehicle for selling insurance products. Membership and participation in the association often involves nothing more than paying association dues, which may appear as a line item accompanying the purchase of the STLDI policy itself. STLDI issuers use these arrangements to avoid state regulation.

As the Departments are aware, state regulators often have a difficult time monitoring STLDI sold through out-of-state associations for compliance with state law or, sometimes, even keeping track of the volume of such business. Indeed, in many states, products sold by these out-of-state entities are exempt from in-state consumer protections and effectively operate

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<sup>11</sup> Schwab R and Volk J. 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. <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>. Published August 2023.

beyond the reach of local state oversight. Yet, as the Departments recognize, it is not at all clear that a consumer being marketed such a plan would be made aware of any of this.

We are deeply concerned about these practices. STLDI is not sold through associations for the benefit of consumers; it is done to evade oversight, and this tactic has been abused — to the detriment of consumers. We thank the Departments for reiterating that the sale of STLDI to or through an association does not somehow exempt the product from the ordinary application of federal law. (That is, for example, a purported STLDI product that is marketed to employers via an association is, in fact and law, group health insurance coverage subject to all ACA rules applicable to the group market.) We encourage the Departments, and other instrumentalities of the federal government, to work with states to improve oversight of products sold through out-of-state associations. This could include collecting and sharing additional data and clarifying states' broad authority to regulate these arrangements on behalf of their residents.

### ***STLDI: Disclosures***

Consumer disclosure is important but insufficient to protect against consumers enrolling in long-term STLDI without fully understanding the limits and risks of that coverage. Consumer disclosure must be paired with tighter restrictions on the duration and marketing of STLDI and robust enforcement targeted at deceptive marketing. It is critical that disclosures help consumers better understand their options. We therefore believe disclosures must help consumers:

- Distinguish between comprehensive coverage and STLDI;
- Understand the risks of STLDI and the consequences of enrolling in a plan that won't trigger a special enrollment period to enroll in comprehensive coverage when their coverage ends;
- Provide a way to obtain comprehensive coverage; and enable consumers to get help or report a problem, when needed.

We strongly support requiring disclosures to be provided in the format or manner in which sales are conducted. This means that, if phone sales are still permitted, brokers would have to read the disclosure to a consumer and record their acknowledgement. Internet sales, if still permitted, would have to include a prominent notice during the online sign-up process, and consumers provided an application and plan information by email or paper would be given notice in those formats. This is particularly important since misleading marketing often occurs by phone or Internet and consumers are often not provided any plan information before being pressured to make a decision.<sup>12</sup>

As to the content of the disclosure, we recommend the Departments adopt the second example provided in the proposed rule, with the side-by-side descriptions of comprehensive coverage and STLDI, to allow for easier comparison. We also recommend use of the word "Warning," rather than "Important," and to include the maximum permitted length of STLDI under federal rules (or state rules, where applicable). The notice should include a link to HealthCare.gov, which directs consumers to their state-based marketplace, where appropriate, and provide information on how to get help or report a problem to their Department of

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<sup>12</sup> See, for example, Schwab R and Volk J. 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. <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>. Published August 2023.

Insurance, including contact information for the state department of insurance where the consumer lives.

Furthermore, we recommend the Departments conduct consumer testing of the content and presentation of the model notice. We agree that the required notice must balance information with readability and length, so that consumers will read the disclosure and not just discard it as another impenetrable document. And because there are significant disparities in health insurance literacy rates, as the Departments note, we strongly recommend the model notice be tested with multiple audiences, including members of underserved racial and ethnic groups, individuals with income below the federal poverty line, individuals with limited English proficiency, and individuals with disabilities.

### ***STLDI: Other Requirements***

We strongly urge the Departments to include a prohibition on rescissions in STLDI, where insurers retroactively cancel coverage, often in response to a high-cost claim. Five states have enacted such a prohibition (CO, IL, ME, RI and WA).<sup>13</sup> This is a base protection all consumers enrolled in STLDI should have. No notice language can adequately prepare a consumer for the possibility of their plan being cancelled for reasons other than fraud, making a prohibition essential.

We also urge the Departments to require insurers to report key data elements, including the number of covered lives by state, twice a year and to make that data available to the public. The data elements in the 2023 NAIC Market Conduct Annual Statement (MCAS) for STLDI can serve as a good basis for the data collection that is needed.<sup>14</sup> The difficulty of obtaining information on the number of covered lives in STLDI, including policies sold through associations, has hindered enforcement and made it more difficult for state and federal policymakers to pursue bad actors. Complete and current data will enable state and federal regulators to track changes and emerging issues in the STLDI market and arm policymakers with the information they need to enact policies that better protect consumers and insurance markets.<sup>15</sup>

### ***STLDI: Effective Date of New Consumer Protections and Transitional Relief***

Experiences with STLDI since 2018 demonstrate that it is critically important for consumers that the Departments' proposals take effect as soon as possible. To this end, we support the proposal to apply the new protections to all new STLDI sold or issued on or after the effective date of the final rule, and to apply the new notice and disclosure provisions to coverage periods beginning on or after that date, for all STLDI regardless of their original start date. In addition, we urge the Departments to revise the final rule so that STLDI policies sold or issued prior to the effective date of the final rule end (without the possibility of additional renewal or extension) no later than January 1, 2026. A fixed end date during an annual open enrollment

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<sup>13</sup> Palanker D, Kona M, and Curran E. States Step Up to Protect Insurance Markets and Consumers from Short-Term Health Plans. The Commonwealth Fund. <https://www.commonwealthfund.org/publications/issue-briefs/2019/may/states-step-up-protect-markets-consumers-short-term-plans>. Published May 2019.

<sup>14</sup> Short-Term Limited Duration Insurance (2023). NAIC. [https://content.naic.org/sites/default/files/inline-files/STLDI%202023.0.3\\_0.pdf](https://content.naic.org/sites/default/files/inline-files/STLDI%202023.0.3_0.pdf). Published 2023.

<sup>15</sup> D. Palanker and C. Goe. States Don't Know What's Happening in Their Short-Term Health Plan Markets and That's a Problem. The Commonwealth Fund. <https://www.commonwealthfund.org/blog/2020/states-dont-know-whats-happening-their-short-term-health-plan-markets-and-thats-problem>. Published March 27, 2020.



period will help to provide for a smooth transition into comprehensive coverage for current STLDI enrollees. We also strongly urge the Departments to establish a 60-day special enrollment period that would allow STLDI enrollees to access comprehensive marketplace coverage if their STLDI policy ends before that final date.

### ***Excepted Benefits: Fixed Indemnity Products***

In common with STLDI, excepted benefits are not intended to (and do not) provide comprehensive health coverage. Rather, they offer limited benefits in limited, delineated circumstances. Because of their narrow scope, they are exempt from the federal consumer protections and market standards that apply to comprehensive coverage.

Fixed indemnity insurance is a type of excepted benefits coverage that provides a specified amount of money to an enrollee who experiences a qualifying event (e.g., hospitalization). The policy pays the pre-determined sum regardless of the actual expenses incurred by the enrollee (if any) and whether or not the person is otherwise insured. The product is intended as a source of income replacement and is not comprehensive health insurance.

Yet consumers are frequently led to believe otherwise. As the proposed rule documents, fixed indemnity products are increasingly designed and marketed in ways that suggest a scope and set of features on par with comprehensive health insurance. This raises the risk that a product ostensibly intended as income replacement, and regulated as such, will instead be purchased as a substitute for a comprehensive plan subject to all of the ACA's protections. This is not a theoretical concern. Some individual market fixed indemnity products have adopted elaborate benefit schedules describing varying payments for such a wide variety of items and services that consumers reasonably may have the impression they are buying robust cost protection for all of one's medical needs.<sup>16</sup> Some products pay benefits directly to providers (even though the product is supposed to be income replacement for the enrollee).<sup>17</sup> Some issue plan ID cards for enrollees to present to providers or otherwise include features suggesting (or flat-out stating) that the product uses a network and that benefits are tied to the use of in-network care. The growing complexity of these products put consumers at an even greater informational disadvantage, relative to those who design and sell them (issuers and brokers). Additionally, because these products are not subject to the ACA's minimum loss ratio standards, they are able to pay significantly higher compensation to brokers and agents who sell their products, when compared with marketplace plans. This disparity is made worse when such products are bundled together and passed off as equivalent to a comprehensive plan.

In light of these developments, the Departments propose to update and clarify rules governing fixed indemnity products to reduce the risk that consumers will confuse them with, and use them as a substitute for, comprehensive coverage.

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<sup>16</sup> For examples of fixed indemnity plan designs that include features mimicking comprehensive coverage, see Young CL and Hannick K. Fixed Indemnity Coverage is a Problematic Form of 'Junk' Insurance. USC-Brookings Shaeffer Initiative for Health Policy. <https://www.brookings.edu/articles/fixed-indemnity-health-coverage-is-a-problematic-form-of-junk-insurance/>. Published August 2020.

<sup>17</sup> As the Departments recognize, there may be one-off instances in which an enrollee assigns benefits to a provider and this occurrence, without more, does not raise regulatory concerns. By contrast, fixed indemnity products designed to employ direct payments to providers or that incentivize enrollees to consent to such a structure raise significant concerns.

We strongly support all of the Departments' proposals. We note, in particular:

- Trends in the design and marketing of individual market fixed indemnity products (discussed above) demonstrate it is essential to revise the rules governing these products to foreclose designs that pay on a per-service basis. Specifying that individual market fixed indemnity products may pay fixed benefits on a per-period basis. This would appropriately align with the standard for group market products and address a weakness in the current individual market regulation that, as the Departments have observed, is particularly susceptible to being exploited.
- We have been deeply concerned about the risk of confusion, and resulting consumer harm, when employers, issuers, or brokers bundle one or more fixed indemnity products with other coverage. This bundling may often exhibit a level of coordination across products that would seem to be contrary to federal statutory requirements. As a consequence, the practice often has the effect of misleading consumers to believe they are being offered a comprehensive coverage package when it is not. Given these risks, we strongly support the Departments' clarification that offering multiple products that, in effect, present to consumers as a complementary, coordinated package of benefits violates the federal statutory "noncoordination" requirements. With respect to the Departments' proposal regarding noncoordination in the individual market, we urge that noncoordination applies to all issuers that are members of the same controlled group.

More broadly, we expect the Departments' proposals regarding fixed indemnity insurance will reduce the currently significant risk of consumer confusion stemming from the design and marketing of these products. If finalized, the rules will help consumers make informed choices about their insurance needs and make it easier to distinguish between income replacement products and comprehensive health coverage.

#### ***Excepted Benefits: Specified Disease Coverage***

The Departments seek comment about whether improving consumer protections for STLDI and fixed indemnity products could have the unintended consequence that specified disease products will be designed and marketed in ways that are increasingly risky for consumers.

We do believe that the kinds of practices that put consumers at risk and that have spurred this rulemaking may migrate to other products, including specified disease coverage, where the regulatory environment is more easily exploited. For example, it is possible that the practice of bundling excepted benefits products will increasingly involve combinations of specified disease plans. We appreciate the Departments' attention to this risk going forward and suggest it will be particularly important to ensure federal and state regulators have adequate, timely data that can alert them to changes in the market that require a policy response.

#### ***Level-Funded Plan Arrangements***

We share the concerns included in the proposed rule noting the rapid growth in small employers relying on level-funded plan arrangements to provide coverage to their employees, and fully support the Departments' interest in collecting data to better understand the scope of the problem and the reasons for the rapid growth in this area. Because these products are complex and require monthly payments that resemble premiums for an insured product, many survey respondents may not realize they are in a level-funded arrangement. Thus, even the

significant growth cited in the rule may not accurately reflect the penetration of level-funded plans in the small group market.

As noted, these arrangements pose risks to employers as well as to their employees. Because they can exclude or limit coverage for pre-existing conditions and high-cost individuals, they can cherry-pick healthier groups — and cancel or price plans out-of-reach for less-than-healthy groups. The result is that the small group market is left to cover those employer groups that are more likely to incur high costs, raising premiums for all enrolled in that market.

A Commonwealth Fund study estimates that in a market with unregulated stop-loss insurance, premiums could rise for fully insured small group plans by up to 25 percent. The same study estimates that in a market with a minimum \$10,000 attachment point, premiums for fully insured small group plans would be 14.4 percent higher than in a market with the minimum attachment point recommended by the NAIC actuarial subgroup.<sup>18</sup>

There can also be financial risks to small employers who enter into level funded arrangements without fully understanding the liability and fiduciary responsibilities associated with self-funding. The NAIC has documented a number of concerns associated with level-funded products, including excluded benefits, deadlines that leave the employer responsible for late-submitted claims, termination clauses that give the stop-loss issuer just 30 days to end the contract, without cause, and clauses that authorize premium increases at any time, including retroactively.<sup>19</sup> These risks for employers clearly pose risks for their employees who rely on the coverage to cover their costs, including the patients we represent.

Greater data on this market can inform enforcement and policy approaches to limit their use, enact greater protections for employers and their employees, and protect the small group market.

### ***Tax Treatment of Fixed Indemnity Insurance***

The Treasury Department states that there is some confusion regarding the tax treatment of payments received from a fixed indemnity product (offered through an employer). This confusion exists, apparently, because payments that reimburse an employee for qualified medical expenses incurred are excluded from gross income.

We support the Department's proposal to clarify that payments received from a fixed indemnity product (or a product that is functionally the same, regardless of label) must be included as gross income when the premiums for the product were paid on a pre-tax basis and the benefits are not directly related to a medical expense incurred by the employee.

As discussed above, fixed indemnity coverage is designed to be and is regulated as income replacement insurance. By definition, it pays benefits without regard to the actual expenses incurred (if any) by the enrollee. This is fundamentally different from an arrangement in which

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<sup>18</sup> Buettgens M and Blumberg LJ. Small Firm Self-Insurance Under the Affordable Care Act. The Commonwealth Fund.

[https://www.commonwealthfund.org/sites/default/files/documents/\\_\\_\\_media\\_files\\_publications\\_issue\\_brief\\_2012\\_nov\\_1647\\_buettgens\\_small\\_firm\\_self\\_insurance\\_under\\_aca\\_ib.pdf](https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2012_nov_1647_buettgens_small_firm_self_insurance_under_aca_ib.pdf). Published November 2012.

<sup>19</sup> NAIC White Paper. Stop-loss Insurance, Self-Funding, and the ACA.

[https://content.naic.org/sites/default/files/inline-files/SLI\\_SF.pdf](https://content.naic.org/sites/default/files/inline-files/SLI_SF.pdf). Published 2015.

a payment is specifically contingent on an incurred expense. We therefore support the Department's clarification.

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Thank you for the opportunity to provide these comments. If you have any questions, please contact Bethany Lilly (bethany.lilly@lls.org).

Sincerely,

ALS Association  
American Cancer Society Cancer Action Network  
American Heart Association  
American Kidney Fund  
American Lung Association  
Arthritis Foundation  
Asthma and Allergy Foundation of America  
*CancerCare*  
Crohn's & Colitis Foundation  
Cystic Fibrosis Foundation  
Epilepsy Foundation  
Hemophilia Federation of America  
Lupus Foundation of America  
March of Dimes  
Muscular Dystrophy Association  
National Alliance on Mental Illness (NAMI)  
National Bleeding Disorders Foundation  
National Eczema Association  
National Health Council  
National Kidney Foundation  
National Multiple Sclerosis Society  
National Organization for Rare Disorders  
National Patient Advocate Foundation  
National Psoriasis Foundation  
Pulmonary Hypertension Association  
Susan G. Komen  
The AIDS Institute  
The Leukemia & Lymphoma Society