September 11, 2023

Submitted Electronically via https://regulations.gov

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

The Honorable Julie Su
Acting Secretary of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

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

cc: Cam Clemmons, CMS, Geraldine Doetzer, CMS, Elizabeth Schumaker, EBSA, Rebecca Miller, EBSA

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

Dear Secretaries Bacerra, Su, and Yellen:

On behalf of the National Association of Insurance and Financial Advisors (NAIFA), thank you for the opportunity to provide comments on the proposed rule titled "Short-Term, Limited Duration Insurance; Independent Non-Coordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements, etc." and published in the Federal Register on July 12, 2023.

Founded in 1890 as The National Association of Life Underwriters ("NALU"), NAIFA is the oldest, largest, and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate

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for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

NAIFA members help millions of people and businesses purchase, administer, and utilize health insurance coverage. The coverage options our members work with include short-term limited duration insurance coverage (STLDI), excepted benefit plans and level-funded health plan arrangements, all of which are extensively addressed by the proposed rule. To address our concerns with each of these areas, we have organized our concerns by addressing each proposal separately.

Proposed Changes to the Structure of Short-Term Limited Duration Coverage

In 2016, the Obama administration issued significant new requirements for STLDI. These requirements changed the federal definition of STLDI in effect since the passage of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, providing that the maximum term for an STLDI policy is three months instead of the previous federal maximum term of 12 months.

In accordance with the original HIPAA STLDI rules, states could determine the length and availability of short-term policies within the federal maximum 12-month coverage period. Despite the fact that the availability and duration of these policies varies from state to state, agents who sold them directly and through online enrollment mechanisms reported that, before the current federal rules were enacted, short-term policies had an average duration of five to six months on average.

In 2017, the Trump administration made a major shift in the definition of STLDI, ultimately leading to the expansion of the short-term coverage marketplace. Under the revised definition, 12-month duration STLDI policies are now allowed to be sold as long as they are approved by the applicable state and a consumer disclosure notice accompanies the product's sale. This has opened the door to more than just those seeking temporary coverage in between jobs or other gaps in coverage. Consumers now have access to a wider range of options for short-term health insurance, making it easier to find a plan that meets their needs and fits their budget. In states allowing expanded short-term coverage, STLDI is often purchased instead of traditional individual coverage by many consumers.

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In accordance with feedback from current STLDI sellers, it is evident that the consumers of these policies often lack group coverage options and are ineligible for premium tax credit subsidies in the individual market. Consequently, they seek lower-cost alternatives. It should be emphasized, as the Departments have acknowledged in the preamble to this proposed rule, that short-term coverage does not offer comprehensive benefits. Consequently, the consumer and market protections associated with these policies have proved inadequate for many individuals who choose STLDI instead of traditional individual coverage. Moreover, despite the existing disclosure notices and the best efforts of reputable health insurance producers offering this coverage, the STLDI marketplace is vulnerable to dishonest practices, and some consumers do not fully comprehend the limitations of the coverage they purchase.

The proposed regulation would essentially revert the STLDI marketplace back to its state in 2016. STLDI policies would be limited to a maximum initial coverage period of three months, with the possibility of renewal for a maximum total coverage period of four months. NAIFA acknowledges the intentions of the Departments in aiming to eliminate STLDI coverage that closely resembles traditional individual insurance coverage. However, instead of a drastic shift in available STLDI options, we advocate for a middle-ground approach.

These proposed changes do not prevent an individual from obtaining a new STLDI plan from a different issuer once a current plan expires; however, there are limitations that would prevent an individual from "stacking" policies from the same issuer. This means that an individual could not obtain a new STLDI plan from the same issuer within 12 months from the effective date of a previous STDLI plan from the same issuer. An individual could purchase another STDLI plan from an issuer that has not provided the individual with STLDI coverage within the previous 12-month period.

In recent years, the importance of short-term limited duration insurance (STLDI) for individuals and families has become increasingly recognized. STLDI plans, which have existed since the introduction of HIPAA-based rules nearly two decades ago, are designed to bridge the gap between comprehensive coverage options. As such, they can be a great fit for those looking for individual coverage, waiting for the start of group plan enrollment, having gaps between different employment opportunities, or waiting for their next open enrollment opportunity.

STLDI plans can also serve many other individuals and populations, including those transitioning between jobs, those who have purposely reduced hours or taken unpaid leave and cannot afford or do not qualify for COBRA, newly retired people seeking a bridge to Medicare, Americans studying abroad, and individuals temporarily in the United States on VISA programs.

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Agents who sold these policies before 2017 have reported that at least half of their sales were to such people, highlighting the importance of STLDI for these populations.

Today, STLDI policies remain a vital part of the healthcare landscape, providing an option for those who need coverage on a short-term basis. From those transitioning between jobs to newly retired individuals, these plans can help bridge the gap between comprehensive coverage options and provide a viable option for those who need it.

The Affordable Care Act (ACA) has created an urgent need for a year-long short-term coverage option. The ACA's open-enrollment period (OEP) system for the individual health insurance marketplace is very brief, leaving many without access to the individual marketplace for the majority of the year. Those in a Medicaid coverage gap may opt for short-term coverage due to financial constraints, even though it may not provide the same level of protection as comprehensive coverage.

Short-term limited duration insurance provides an essential source of medical and financial protection for individuals unable to access the individual health insurance marketplace. STLDI may be the only option available to them during their coverage gap, offering a level of protection that would otherwise be unavailable.

The availability of STLDI offers individuals the peace of mind that their medical and financial needs are met year-round. It is an important safety net for those who are unable to access the individual health insurance marketplace, providing a vital layer of coverage and security.

Ultimately, STLDI provides a valuable service to those in need. It is a vital source of interim coverage that allows individuals to access the medical care they require, while also receiving the financial protection they need.

One way to strike a balance between providing affordable and adequate coverage options for people who are actually in need of a short-term policy, while avoiding individuals choosing STLDI over a comprehensive individual policy, would be to extend the duration of STLDI to six months (with a full renewal period) or the month ending January 1st for six months of renewal protection, whichever is shorter. Additional deferral options may be limited to individuals who are not eligible to purchase individual market coverage through premium tax credits. This way, consumers will still have legal financial protection and health insurance options for a reasonable period of time, and eligible individuals can purchase traditional individual market coverage during the next calendar year's OEP.

Ultimately, it is important for individuals to understand the differences between short-term plans and traditional ACA-compliant policies in order to make an informed decision. By having an expanded Summary of Benefits and Coverage (SBC) and comparison examples between the two plans, consumers can better understand the coverage and limitations of short-term health plans before purchasing and using them. Such an approach can help ensure consumers are making the best decision for their health care needs.

Proposed Rules on Tax Treatment and Substantiation Requirements for Fixed Indemnity Insurance and Certain Other Accident or Health Insurance

The Treasury Department and the IRS are proposing amendments to the rules under section 105(b) of the Internal Revenue Code of 1986. These amendments would change the tax treatment of amounts received by a taxpayer through employment-based accident or health insurance that are paid without regard to the amount of incurred medical expenses under section 213(d) of the Code and where the premiums or contributions for the coverage are paid on a pre-tax basis. In addition, the employment tax treatment of these amounts would also change. These amendments would also clarify that the substantiation requirements for reimbursement of qualified medical expenses apply to reimbursements under section 105(b) of the Code in order for those reimbursements to be excluded from an individual's gross income.

The Treasury and the IRS also state that, although the proposed changes generally reflect longstanding Treasury/IRS rules and guidance, due to the fact certain plan sponsors and issuers may not have understood the rules under Code section 105(b), the proposed changes would apply as of the later of (1) the date of publication of final regulations or (2) January 1, 2024.

NAIFA opposes these proposed amendments to the rules under section 105(b). The effect of the proposed changes is to raise taxes on individuals and businesses when the taxpayers are most vulnerable and can least afford it. Alternatively, and perhaps the more likely, effect of this proposal is that employers will amend their plans to make the employee pay for them on a pre-tax basis. It may even cause employers to drop these supplemental benefit plans entirely. Any of these results runs completely contrary to the President's avowed efforts to reduce the cost of medical care for hardworking Americans. Moreover, such a result violates the President's promise not to tax Americans earning less than $400,000. Industry surveys show the average purchaser of these insurance benefits earns $50-$75,000.[1]

[1] "Supplemental Insurance Benefits Survey"

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The Preamble to the proposed rule purports to "clarify" the application of present law to payments under these supplemental benefit plans. NAIFA notes that the proposed regulation departs from existing guidance from IRS where only the amount of the indemnity benefit in excess of the incurred medical expense was held to be taxable. While the effective date of the proposed rule is meant to be prospective, in fact the effective date may upend the terms of existing contracts. At the very least, existing contracts should be grandfathered.

NAIFA is committed to ensuring that employers are able to access the resources they need to provide quality health insurance to their employees. By doing so, employers not only benefit from improved employee morale and productivity, but also from the knowledge that they are providing a valuable service to their workforce, as well as a sound investment for their business.

Consumer perceptions and satisfaction for employer provided health coverage is exceedingly favorable according to a survey conducted by Seven Letter Insight:

- Strong majorities believe that employer provided health care plans are extremely important and cite their health plan as the most important benefit provided by their employer.
    - 93% were satisfied with their employer sponsored coverage.
    - 94% agree that the health coverage from (their) employer gives (them) peace of mind.
- An overwhelming majority view their employer provided health care plan as "affordable," "convenient" and "worth what they pay for it."
- Respondents believe their employer provided health coverage is simpler, more affordable, and higher quality than plans they could find on the open markets or government provided coverage plans.

Employer-provided health insurance is a hugely valuable benefit to employees, but businesses also recognize the value in providing coverage. There are many advantages to offering quality health insurance to employees, including:

1. Improved employee retention: Studies have found that offering a comprehensive health care package to employees can reduce turnover and create a more loyal and committed workforce.

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2. Enhanced productivity: Employees who have access to quality health care are more likely to take fewer sick days, leading to a more productive and efficient workforce.

3. Increased morale: Studies have shown that offering employer-sponsored health insurance can lead to increased morale among employees by providing them with improved financial security.

4. Attraction of talent: Quality health insurance can be a powerful incentive for employees when considering job offers and can help businesses attract and retain talented individuals.

Additionally, NAIFA questions the Treasury Department's authority to make these changes under present law in light of the Administration's FY 2023 and FY 2024 Budget proposal's inclusion of a provision asking Congress to make a similar change via legislation.

In either case, NAIFA urges the Department withdraw the proposed regulation and budget proposal.

Proposed Changes to Hospital Indemnity or Other Fixed Indemnity Supplemental Coverage

Hospital indemnity and other fixed indemnity is one type of supplemental or "excepted" benefit. These plans typically pay a cash benefit directly to the insured (unless otherwise assigned) based on a medical trigger, which may be used for any purpose at the discretion of the insurer. The policy sets forth covered medical events (e.g., hospitalization, visit to a doctor, x-ray) and the fixed payment applicable to that medical event. The proposed rule, if adopted, would significantly impact the way that benefits under these plans are structured.

If finalized, the proposed rules would eliminate the ability to vary the amount of benefits by the services or items received, severity of illness or injury, or any other characteristics particular to a course of treatment. This change would apply in both the individual and group markets.

Currently, individual market regulations allow benefits to vary on a per service and/or per period basis. The group market regulations are different but still allow the ability to pay benefits that include a per period limitation and also vary the fixed payment by the specific triggering event. Benefits structured in this way reflect the fact that different health events present different risks of financial loss and varying needs for additional financial protection. States have regularly approved products structured in this way because of the value they provide to consumers.

Fixed Indemnity benefits reduce financial strain caused by copays, deductibles, coinsurance, and other out-of-pocket costs. Unfortunately, changes proposed in the proposed rule would

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significantly undermine consumers' ability to financially protect themselves and their families with Fixed Indemnity coverage and expose them to greater financial liability caused by health events. This outcome is contrary to the goals of states and the federal government.

Fixed Indemnity products have been purchased by individuals, businesses of all sizes, unions, and state and local governments. Millions are currently covered by these policies, and the proposed rule would eliminate their choice to continue receiving the same valuable coverage. The proposed drastic limitations on benefits permitted will decrease opportunity for utilization of benefits, and thereby, decrease financial protection value to consumers. These consequences of the proposed benefit limitations will result in consumers having less access to Fixed Indemnity benefits and more consumers being forced to manage out-of-pocket expenses from health events from savings or to incur health care related debt.

Conclusion

NAIFA remains committed to strengthening the employer-sponsored system on which the majority of Americans depend and rely on for coverage. We urge you to collect additional research, perform important and requisite analysis and consider the concerns as you evaluate next steps.

Thank you for the opportunity to provide input on all the changes addressed by this far-reaching proposal. If you have any questions or require additional information, please contact NAIFA's Senior Director of Government Relations, Michael Hedge, at mhedge@naifa.org or NAIFA's Director of Government Relations, Jayne Fitzgerald, at jfitzgerald@naifa.org.

Sincerely,

Bryon Holz, CLU, ChFC, LUTCF, CASL, LACP
President
National Association of Insurance and Financial Advisors

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