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September 7, 2023
Submitted via regulations.gov

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Blvd.
Baltimore, MD 21244-8016

Re: RIN 0938–AU67
Short-Term, Limited-Duration Insurance;
Independent, Noncoordinated Excepted
Benefits Coverage; Level-Funded Plan
Arrangements; and Tax Treatment of Certain
Accident and Health Insurance

Dear Administrator Brooks-LaSure:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the rights of low-income and underserved people. For over fifty years, we have educated, advocated and litigated to advance health equity for all without bias or barriers. Consistent with our mission, we believe that every individual should have access to high quality, affordable, and comprehensive health care and be able to achieve their own highest attainable standard of health.

We appreciate the opportunity to provide these comments on the proposed rule, *Short-Term, Limited-Duration Insurance; Independent, Noncoordinated Excepted Benefits Coverage; Level-Funded Plan Arrangements; and Tax Treatment of Certain Accident and Health Insurance* (hereinafter “the Proposed Rule”) by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department (hereinafter “the Departments”).

The previous administration greatly expanded short-term limited duration plans, misinterpreting “short-term” and “limited duration” to allow the sale longer limited benefit under the guise of providing “affordable choices” to consumers.¹ However, instead of helping consumers, the expansion of short-term limited duration insurance (STLDI) has harmed consumers.

We strongly support the Proposed Rule, which will help promote access to high quality, affordable, comprehensive coverage by limiting STLDI. At a time when millions of individuals are losing their health care during the Medicaid redetermination process, it is more important than ever that consumers be able to differentiate between the comprehensive coverage offered on the Affordable Care Act (ACA) Marketplaces, and STLDI plans that offer little protection, particularly for individuals with pre-existing conditions.

1. Short-term limited duration plans lack ACA coverage and cost protections, harming consumers

Short-term limited duration plans provide low value to consumers while exposing them to substantial risk since these plans are exempt from ACA consumer protections.² These include the prohibition on discrimination against people with pre-existing conditions, the requirement to provide coverage for ten essential health benefits, the bans on annual and lifetime benefit limits, the guaranteed availability of coverage, and more.³ These and other ACA provisions are designed to work together to shield individuals from discrimination by insurers and ensure comprehensive coverage. The elimination of any of these protections significantly undermines health care access, particularly for people with pre-existing conditions, as well as Black, Indigenous and other people of color, women, people with disabilities, and others who face structural barriers to accessing health care.⁴

For example, STLDI plans harm people who need access to sexual and reproductive health care, by allowing discrimination on the basis of gender and denying coverage of basic

¹ Dept.’s of Treasury, Labor, and Health and Human Svcs., *Short-Term, Limited-Duration Insurance – Final Rule*, 83 Fed. Reg. 38212 - 38243 (Aug. 3, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-08-03/pdf/2018-16568.pdf>.

² One study found that the implied actuarial value of short-term limited duration plans is forty-nine percent, whereas the average Marketplace plan had an implied actuarial value of eighty-seven percent. In short, less than half of the money spent by consumers on a short-term limited duration plan is actually spent on medical care, making these plans a great deal for the insurer while selling the consumer short. See Daria Pelech & Karen Stockley, *How price and quantity factors drive spending in nongroup and employer health plans* 57 HEALTH SERV. RES. 3 (2022) 624-633. <https://pubmed.ncbi.nlm.nih.gov/35211963/>; U.S. House of Representatives, Energy and Commerce Committee, *Shortchanged: How the Trump Administration’s Expansion of Junk Short-Term Health Insurance Plans is Putting Americans at Risk* (2020), <https://docs.house.gov/meetings/IF/IF14/20210323/111378/HHRG-117-IF14-20210323-SD023.pdf> [hereinafter “E&C Report”].

³ 42 U.S.C. §§ 300gg-1, gg-3, gg-11; 42 U.S.C. § 18022.

⁴ Leukemia & Lymphoma Soc’y et al., *Under-Covered: How “Insurance-Like” Products Are Leaving Patients Exposed* (2021), https://www.ils.org/sites/default/files/National/undercovered_report.pdf; Karen Pollitz, Kaiser Fam. Found., *Pre-existing Conditions: What Are They and How Many People Have Them?* (2020), <https://www.kff.org/policy-watch/pre-existing-conditions-what-are-they-and-how-many-people-have-them/>.

health care services. One major finding from a year-long investigation by the House of Representatives' Energy and Commerce Committee into the practices of insurers and brokers offering STLDI is that these products discriminate against women by denying basic medical services, such as pap smears, maternity and newborn care.⁵ The Committee found that many of the plans' exclusions appear designed to avoid enrolling women of child-bearing age and that all of the reviewed plans discriminated against women through gender rating, coverage exclusions, and other plan limitations.⁶ These products, which are medically underwritten and include significant benefit gaps, discriminate on the basis of age, sex, and disability.

Similarly, STLDI plans can and do explicitly discriminate against people with pre-existing conditions. Research shows that STLDI plans often deny coverage entirely for people with pre-existing conditions or exclude coverage for most common medical conditions resulting from pre-existing conditions.⁷ STLDI plans also engage in extensive post-claims underwriting, requiring individuals to disclose their medical and prescription drug records from six months to up to five years. Insurers use this information to determine if the submitted claim pertains to a pre-existing condition and may thus be denied, potentially leaving individuals on the hook for hundreds or thousands of dollars in unexpected medical bills.⁸ In some instances, coverage may be retroactively canceled entirely, as the ACA's prohibition on rescissions does not apply to STLDI plans.⁹ A 2019 survey estimated that nearly thirty percent of nonelderly adults in the U.S. have a pre-existing condition, and the COVID-19 pandemic has likely greatly expanded that number.¹⁰

In addition, STLDI plans often have significant out-of-pocket costs that might not be readily apparent to the average consumer, including cost-sharing requirements, unexpected costs due to annual and/or lifetime dollar limits, and significant coverage exclusions or limitations, and the expanded use of STLDI plans allowed under current federal regulations has directly harmed many consumers. The Proposed Rule is an important step to undoing the damage inflicted by expanded access to STLDI plans.

⁵ NHeLP recognizes that in addition to cis-women, individuals who are trans, intersex, gender fluid, and gender nonconforming may experience pregnancy, and that all people have reproductive health needs. In this issue brief and throughout our policy advocacy, education, and litigation, we use the words "woman" or "women" to conform with statutory or regulatory language or when needed to accurately reflect the scope of research that focuses solely on women. See Rachel Jones et al., *Abortion Incidence and Service Availability in the United States*, 2017, Guttmacher Inst. (Sept. 2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>; E&C Report, *supra* note 2.

⁶ *Id.*

⁷ Dana Hansen & Gabriela Dieguez, Milliman, *The impact of short-term limited-duration policy expansion on patients and the ACA individual market* (2020), <https://www.ils.org/sites/default/files/National/USA/Pdf/STLD-Impact-Report-Final-Public.pdf>.

⁸ E&C Report, *supra* note 2.

⁹ Leukemia & Lymphoma Soc'y et al., *Under-Covered: How "Insurance-Like" Products Are Leaving Patients Exposed* (2021), https://www.ils.org/sites/default/files/National/undercovered_report.pdf.

¹⁰ See Gary Claxton, Kaiser Fam. Found., *Pre-Existing Condition Prevalence for Individuals and Families* (Oct. 4, 2019), <https://www.kff.org/health-reform/issue-brief/pre-existing-condition-prevalence-for-individuals-and-families/>; Eric C. Schneider & Arnav Shah, The Commonwealth Fund, *Will the Pandemic Increase the Number of Americans with Preexisting Conditions?* (Oct. 8, 2020) <https://www.commonwealthfund.org/blog/2020/pandemic-americans-preexisting-conditions>.

2. The Proposed Rule reasonably limits the length of time for short-term, limited duration plans

The previous administration greatly expanded the length of time for STLDIs. Under regulations currently in place, short-term, limited duration plans must have an expiration date that is less than twelve months after the original effective date of the contract, and its total duration, including renewals and/or extensions, may be no longer than thirty-six months in total.¹¹ This allowed short-term limited duration plans to resemble the comprehensive plans offered on the ACA Marketplaces, increasing the likelihood a consumer might mistakenly purchase a limited benefit plan when they intended to obtain comprehensive coverage. The Proposed Rule reasonably reinterprets “short-term” to be no longer than three months and defines “limited duration” to limit the maximum coverage period as no longer than four months in total, including all extensions or renewals from the same insurer to the same policyholder.¹²

The Proposed Rule will curtail the expanded use of STLDI plans by implementing reasonable interpretations of “short term” and “limited duration,” limiting the use of these plans to its original purpose – to serve only as gap coverage for a brief period between comprehensive coverage plans. Moreover, limiting the length of time for STLDIs is consistent with the plain meaning of “short-term” and “limited duration.” Although it did not define STLDIs, Congress clearly distinguished between the “health insurance coverage” offered to individuals and STLDIs.¹³ Given the demonstrated harms of expanding STLDIs, the Departments’ proposal to limit the length of these plans is reasonable.¹⁴

By restricting STLDI plans to this shorter timeframe, the Proposed Rule helps delineate these plans from the typical twelve-month policy period associated with comprehensive insurance plans. As the Departments correctly note, “the near-identical length of coverage for the initial contract term” of an STLDI policy is not easily distinguishable from the typical twelve-month policy year of a comprehensive plan.¹⁵

By limiting the length and duration of these plans, the Proposed Rule will protect consumers from high out-of-pocket costs and unexpected medical bills from denied claims due to the substandard coverage offered by STLDI plans.

3. The Proposed Rule will more clearly distinguish short-term limited duration plans from comprehensive coverage and combat the impacts of deceptive marketing

The Proposed Rule makes additional changes that help distinguish the differences between STLDI and comprehensive coverage. The Proposed Rule prohibits the same issuer from

¹¹ 45 C.F.R. § 144.103.

¹² 88 Fed. Reg. 44596.

¹³ See 42 U.S.C. § 300gg-91(b)(5), stating that health insurance coverage “does not include short-term limited duration insurance.”

¹⁴ See *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury*, 966 F.3d 782, 791 (D.C. Cir. 2020) “Balancing the costs and benefits of expanding the length of STLDI policies is the Departments’ bailiwick.”

¹⁵ 45 C.F.R. § 144.103 (defining policy year for non-grandfathered health plans offered in the individual health insurance market as a calendar year).

selling multiple STLDI plans to the same policyholder within a twelve-month period, which would combat a practice known as “stacking” where insurers evade duration limits by selling multiple consecutive plans to an individual.¹⁶ The Proposed Rule also makes important changes to the required notice, requiring its inclusion in all marketing, application, enrollment and/or reenrollment materials and enhancing the required notice to include clear and accessible information on the differences between STLDI and comprehensive coverage and information on where and how to enroll in comprehensive coverage. These changes significantly improve the ability of the average consumer to distinguish between STLDI and comprehensive coverage when shopping for health insurance.

Furthermore, numerous studies have documented the deceptive marketing practices used by insurers and brokers in advertising short-term limited duration plans to consumers that may result in consumers mistakenly purchasing an STLDI plan when they intended to obtain comprehensive coverage.¹⁷ Research shows that the top hits shown to consumers using online search engines to find health insurance are ‘lead-generating websites’ and paid advertisements for short-term limited duration plans, burying HealthCare.Gov in the results even when consumers specifically search for “healthcare.gov.”¹⁸

Secret shopper studies have reported that brokers, who have a documented financial incentive to push short-term limited duration plans over comprehensive coverage. They engage in deceptive practices ranging from making false or misleading claims about what a plan does or does not cover, using “high-pressure sales pitches” urging individuals to quickly purchase a plan over the phone and discouraging further research or plan comparison, and refusing to provide written information about a plan until after purchase.¹⁹ One recent study utilized a researcher posing as hypothetical consumers who recently lost Medicaid coverage and, given their annual income and household size, would be eligible for premium and cost-sharing subsidies, including silver plans with a \$0 monthly premium

¹⁶ 88 Fed. Reg. 4459.

¹⁷ Rachel Schwab & JoAnn Volk, Geo.’s Ctr on Health Ins. Reforms, *The Perfect Storm: Misleading Marketing of Limited Benefit Products Continues as Millions Losing Medicaid Search for New Coverage* (2023), <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>; Sabrina Corlette et al., Urban Inst., *The Marketing of Short-Term Health Plans: An Assessment of Industry Practices and State Regulatory Responses* (2019), https://view.ckcest.cn/AllFiles/ZKBG/Pages/194/moni_stldi_final_0.pdf.

¹⁸ Lead generating websites are websites that do not actually sell health insurance but instead gather an individual’s basic information and may direct them to another website to purchase insurance or the contact information is used by brokers to call the consumer directly. See Rachel Schwab & JoAnn Volk, Geo.’s Ctr on Health Ins. Reforms, *The Perfect Storm: Misleading Marketing of Limited Benefit Products Continues as Millions Losing Medicaid Search for New Coverage* (2023), <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>; Dania Palanker & JoAnn Volk, Geo.’s Ctr on Health Ins. Reforms, *Misleading Marketing of Non-ACA Health Plans Continued During COVID-19 Special Enrollment Period* (2021), <https://chirblog.org/misleading-marketing-non-aca-health-plans-continued-covid-19-special-enrollment-period/>; Sabrina Corlette et al., Urban Inst., *The Marketing of Short-Term Health Plans: An Assessment of Industry Practices and State Regulatory Responses* (2019), https://view.ckcest.cn/AllFiles/ZKBG/Pages/194/moni_stldi_final_0.pdf; Christen Linke et al., Brookings Inst., *Misleading marketing of short-term health plans amid COVID-19* (2020), <https://www.brookings.edu/articles/misleading-marketing-of-short-term-health-plans-amid-covid-19/>.

¹⁹ See E&C Report, *supra* note 2, “brokers received up to ten times the compensation rate for STLDI plans than for ACA-compliant plans.” See also Schwab, *supra* note 18.

and no deductible. However, none of the twenty sales representatives the researcher spoke with mentioned the availability of a \$0 premium Marketplace plan, and instead “representatives frequently told both consumers that marketplace policies would be more expensive than the limited benefit plans they were selling.”²⁰

Low health insurance literacy rates worsen the impact of these deceptive marketing practices. Survey data examining consumer experiences with health insurance paint a dire picture, as over sixty percent of adults with Marketplace plans reported difficulty with understanding some part of their insurance, including nearly half (forty-six percent) reporting it was “somewhat” or “very” difficult to understand what their health insurance will or will not cover and over forty percent finding it difficult to determine their out-of-pocket costs.²¹

One 2022 survey of comprehension of basic health insurance terms found significant confusion, as more than three-quarters could not correctly define “coinsurance” and almost half failed to identify the correct definition of “copayment” or “deductible.”²² Another study found significant sociodemographic disparities in health insurance literacy rates, as women, young adults, those with Hispanic ethnicity, non-U.S. citizens, people with incomes below the federal poverty line, uninsured individuals, and people with lower levels of education were more likely to have inadequate health insurance literacy.²³ These consumers are overwhelmingly susceptible to deceptive marketing and can be severely harmed by high cost sharing in STLDI plans.

Furthermore, a qualitative study examining consumer comprehension of marketing materials for a short-term limited duration plan also found that not only did participants have low health insurance literacy rates, but they struggled to understand the plan’s limitations because the ACA has shaped their expectations about what “typical” health plans cover.²⁴

For example, consumers assumed the short-term limited duration plan would cover essential health benefits, like maternity care and prescription drugs, and include the same protections and coverage requirements for pre-existing conditions, when in reality it did not. Similarly, a study investigating the impact of the federally required disclosure for STLDI plans on consumer comprehension of coverage limitations found widespread

²⁰ Rachel Schwab & JoAnn Volk, Geo.’s Ctr on Health Ins. Reforms, *The Perfect Storm: Misleading Marketing of Limited Benefit Products Continues as Millions Losing Medicaid Search for New Coverage* 5 (2023), <https://georgetown.app.box.com/v/the-perfect-storm-august-2023>.

²¹ Karen Pollitz et al., Kaiser Fam. Found., *KFF Survey of Consumer Experiences with Health Insurance* (Jun. 15, 2023), <https://www.kff.org/private-insurance/poll-finding/kff-survey-of-consumer-experiences-with-health-insurance/>.

²² Les Masterson, Forbes, *Americans Confused By Basic Health Insurance Terms But Happy With Their Plans* (Dec. 8, 2022), [https://www.forbes.com/advisor/health-insurance/confused-by-health-insurance-terms/#:~:text=Nearly%20half%20\(46%25\)%20don,you%20receive%20covered%20health%20services](https://www.forbes.com/advisor/health-insurance/confused-by-health-insurance-terms/#:~:text=Nearly%20half%20(46%25)%20don,you%20receive%20covered%20health%20services).

²³ Jean Edward et al., *Significant Disparities Exist in Consumer Health Insurance Literacy: Implications for Health Care Reform*, 3 HEALTH LITERACY RSCH. & PRAC. 250 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6831506/>.

²⁴ Georgians for a Healthy Future, *Report on Testing Consumer Understanding of a Short-Term Health Insurance Plan* (2019), https://healthyfuturega.org/wp-content/uploads/2019/04/Consumer-Testing-Report_NAIC-Consumer-Reps.pdf.

misunderstanding among participants around the coverage limitations pertaining to pre-existing conditions protections and some essential health benefits, like maternity care, and the standard disclosure did not improve that poor understanding.²⁵ Generally low health literacy rates combined with potentially erroneous assumptions about minimum standards for coverage make the average consumer vulnerable to the deceptive marketing practices associated with short-term limited duration health plans.

Furthermore, the Proposed Rule amends the required notice to include an explicit statement that short-term limited duration insurance “isn’t comprehensive health insurance,” stronger language outlining potential coverage gaps pertaining to pre-existing conditions or essential health benefits, and detailed instructions on where consumers can find more information on comprehensive health insurance. In addition to improving the information provided in the notice, the Proposed Rule also requires inclusion of the notice on all application, marketing, enrollment, and reenrollment materials, including any websites that advertise, enroll, or reenroll consumers in short-term limited duration insurance plans. These changes will help to combat deceptive marketing practices and will improve consumer understanding of the different options available when shopping for insurance coverage.

Conclusion

We have included citations and direct links to research and other materials. We request that the full text of material cited, along with the full text of our comment, be considered part of the formal administrative record for purposes of the Administrative Procedure Act.²⁶ If HHS is not planning to consider these citations part of the record as we have requested, we ask that you notify us and provide us an opportunity to submit copies of the studies into the record.

Thank you for the opportunity to comment on these important issues. Please feel free to contact Cat Duffy (duffy@healthlaw.org) or Wayne Turner (turner@healthlaw.org), if you have questions.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth Taylor". The signature is written in a cursive, flowing style.

Elizabeth Taylor
Executive Director

²⁵ Ahmed Taha et al., *Improving Consumer Understanding of Short-Term Health Insurance: An Experiment*, MED. CARE RSCH. REV. (2023), <https://journals.sagepub.com/doi/abs/10.1177/10775587231172064>.

²⁶ 5 U.S.C. § 551 et seq.