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February 20, 2018

**MEMORANDUM**

TO: CIAB

FROM: Scott Sinder  
Kate Jensen  
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RE: Proposed Rule on Short-Term, Limited Duration Insurance

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Today, the Departments of the Treasury, Labor, and Health and Human Services (collectively the “Departments”) released their proposed rule expanding the availability of short-term, limited-duration insurance (“STLDI”).<sup>1</sup> Specifically, the proposed rule would:

- Lengthen the maximum coverage period for STLDI from less than 3 months to less than 12 months (i.e., a return to the maximum coverage period before the Obama-era regulations); and
- Revise the notice required in STLDI plan materials.

Comments on the proposed rule are due by **April 23, 2018**. We would appreciate hearing from Council members with thoughts on the proposal by **April 2, 2018**.

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<sup>1</sup> Proposed Rule, *Short-Term, Limited-Duration Insurance* (scheduled to be published in the Federal Register on Feb. 21, 2018) [hereinafter Proposed Rule].

The Departments welcome comments on all aspects of the proposed rule, but the following are likely of particular interest to Council members:

- Whether the length of STLDI should be some other duration;
- Under which conditions issuers should be able to consent to allow STLDI to continue for 12 months or longer; and
- Whether there should be processes and/or federal standards for expedited/streamlined reapplication for STLDI that simplifies the process and eases burdens on consumers.

Additionally, the proposed rule acknowledges that young, healthy people will likely be the primary purchasers of STLDI and that this may further destabilize the individual market (particularly in the aftermath of the individual mandate repeal).<sup>2</sup> To the extent this presents concerns or Council members would like to weigh in on the likelihood and/or overall impact of this potential outcome, we would be interested in hearing your feedback.

A full list of the issues on which the Departments request comments is included in the Appendix below.

### **Background**

STLDI is designed to fill temporary gaps in coverage that may occur when an individual is transitioning from one plan or coverage to another. It does not qualify as individual health insurance coverage and is therefore exempt from the Affordable Care Act's ("ACA") individual market requirements (e.g., the preexisting condition exclusion prohibition, coverage of essential health benefits without annual or lifetime dollar limits, preventive care, maternity and prescription drug coverage, rating restrictions, etc.).<sup>3</sup>

In 2016, to address the sale of STLDI as a type of primary coverage (as well as concerns regarding possible adverse selection), the Obama Administration finalized regulations that:

- Revised the definition of STLDI to reduce the allowable coverage period from less than 12 months to less than 3 months;

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<sup>2</sup> *Id.* at 16.

<sup>3</sup> The Public Health Service Act provides that "[t]he term 'individual health insurance coverage' means health insurance coverage offered to individuals in the individual market, but does not include short-term limited-duration insurance." 42 U.S.C. § 300gg-91(b)(5); see *a/so* Proposed Rule, at 7, 22.

- Required contracts for STLDI policies to prominently display a notice explaining that STLDI is not minimum essential coverage; and
- Prevented any extensions or renewals elected by the policyholder beyond 3 months of total coverage.<sup>4</sup>

Today’s proposed rule was issued in response to President Trump’s Executive Order on “Promoting Healthcare Choice and Competition Across the United States,” which instructed the Departments to expand the Obama Administration’s narrow definition of what constitutes STLDI. Doing so, per the Departments, will allow individuals to purchase more affordable policies than the now-expensive exchange plans and increase options for “individuals unable or unwilling to purchase [ACA]-compliant plans.”<sup>5</sup>

### **Overview of the Proposed Rule**

#### **I. STLDI Definition**

The proposed rule would redefine STLDI to be “health insurance provided pursuant to a contract with an issuer that:

- Has an expiration date specified in the contract (taking into account any extensions that may be elected by the policyholder without the issuer’s consent) that is less than 12 months after the original effective date of the contract;” and
- Comports with the notice requirements detailed below.<sup>6</sup>

#### **II. Revised Notice Requirements**

The Departments recognize that STLDI policies that provide coverage lasting almost 12 months may be more difficult to distinguish from ACA-compliant coverage.<sup>7</sup>

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<sup>4</sup> Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75316 (Oct. 31, 2016) (codified at 26 C.F.R. § 54.9801-2; 29 C.F.R. § 2590.701-2; 45 C.F.R. § 144.103). Specifically, the rule required the following notice to be prominently displayed, in 14-point type, in the contract and in any application materials provided with enrollment in STLDI:

THIS IS NOT QUALIFYING HEALTH COVERAGE (“MINIMUM ESSENTIAL COVERAGE”) THAT SATISFIES THE HEALTH COVERAGE REQUIREMENT OF THE AFFORDABLE CARE ACT. IF YOU DON’T HAVE MINIMUM ESSENTIAL COVERAGE, YOU MAY OWE AN ADDITIONAL PAYMENT WITH YOUR TAXES. *Id.* at 75318, 75324-26.

<sup>5</sup> Proposed Rule, *supra* note 1, at 19.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 12.

Accordingly, they propose requiring—for coverage starting before January 1, 2019 (when repeal of the individual mandate is effective)—the following notice to be displayed, in at least 14-point type, in the contract and any application materials provided in connection with the contract:

THIS COVERAGE IS NOT REQUIRED TO COMPLY WITH FEDERAL REQUIREMENTS FOR HEALTH INSURANCE, PRINCIPALLY THOSE CONTAINED IN THE AFFORDABLE CARE ACT. BE SURE TO CHECK YOUR POLICY CAREFULLY TO MAKE SURE YOU UNDERSTAND WHAT THE POLICY DOES AND DOESN'T COVER. IF THIS COVERAGE EXPIRES OR YOU LOSE ELIGIBILITY FOR THIS COVERAGE, YOU MIGHT HAVE TO WAIT UNTIL AN OPEN ENROLLMENT PERIOD TO GET OTHER HEALTH INSURANCE COVERAGE. ALSO, THIS COVERAGE IS NOT "MINIMUM ESSENTIAL COVERAGE". IF YOU DON'T HAVE MINIMUM ESSENTIAL COVERAGE FOR ANY MONTH IN 2018, YOU MAY HAVE TO MAKE A PAYMENT WHEN YOU FILE YOUR TAX RETURN UNLESS YOU QUALIFY FOR AN EXEMPTION FROM THE REQUIREMENT THAT YOU HAVE HEALTH COVERAGE FOR THAT MONTH.<sup>8</sup>

Under the proposed rule, the final two sentences of the notice would not have to be included for coverage beginning on or after January 1, 2019.<sup>9</sup>

### **III. *Effective Date and Applicability Date***

If finalized, the proposed rule would be effective 60 days after publication and would be applicable to insurance policies sold on or after the 60th day following publication.<sup>10</sup>

Additionally, if finalized, group health plans and group health insurance issuers, to the extent they distinguish between STLDI and individual market health insurance, would also be required to apply the new definition of STLDI as of the 60th day following publication of a final rule.<sup>11</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 12-13.

<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.*

## **APPENDIX**

The Departments requested comments on a series of issues related to the proposed rule. In particular, they requested comments on the following:

### ***Duration of STLDI***

- Whether the length of STLDI should be some other duration.

### ***Revised Notice Requirements***

- The content of the revised notice and whether its language (or some other language) would best ensure that it is understandable and sufficiently apprises individuals of the nature of the coverage.

### ***Reapplication or Renewal of STLDI***

- Under which conditions issuers should be able to allow STLDI to continue for 12 months or longer with the issuer's consent;
- Whether any processes for expedited or streamlined reapplication for STLDI that would simplify the reapplication process and minimize the burden on consumers (e.g., setting minimum federal standards for what must be considered as part of the streamlined reapplication process while allowing insurers to consider additional factors in accordance with contract terms) would be appropriate;
- Whether federal standards are appropriate for such processes;
- Whether any clarifications are needed regarding the application of the definition of STLDI; and
- Information on any state approaches to minimize the burden of the reapplication process for issuers and consumers.

### ***Miscellaneous***

- Whether there are any regulations or other policies that limit issuers' flexibility in designing STLDI or pose barriers to entry into the STLDI market;
- The impact that increasing access to STLDI would have on the individual market;
- STLDI's impact on the average monthly individual market premiums and the average monthly premium tax credits;
- Estimates of the increase in enrollment in STLDI and the health status and age of individuals who would purchase such policies;
- Whether the proposed fixed applicability date, which would first impose the new definition of STLDI on group health plans and group health insurance issuers on

- a date that may occur in the middle of a plan year, would cause any special challenges for group health plans and group health insurance issuers; and
- The value of such excluded services (i.e., elements of ACA-compliant plans) to individuals who switch coverage.