JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW

April 23, 2018

Submitted electronically via regulations.gov

Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington, DC 20201

Internal Revenue Service
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Public Comments on Short-Term, Limited-Duration Insurance (CMS–9924–P)

Justice in Aging appreciates the opportunity to respond to the Notice of Proposed Rule Making entitled Short-Term, Limited Duration Insurance issued by the Department of Health and Human Services (HHS), the Department of Treasury, and the Department of Labor ("the Agencies"). For the reasons below, we strongly urge the Agencies not to finalize the proposed rule. This submission supplements comments by the Consortium for Citizens with Disabilities and by the Oral Health Community, which we co-signed.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Medicare and Medicaid, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBTQ individuals, and people with limited English proficiency.

Expanding the availability of Short-Term, Limited Duration Insurance (STLDI) plans and allowing for streamlined re-applications would negatively impact access to health care for older adults and their families by:

WASHINGTON
1444 Eye Street, NW, Suite 1100
Washington, DC 20005
202-289-6976

LOS ANGELES
3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
213-639-0930

OAKLAND
1330 Broadway, Suite 525
Oakland, CA 94612
510-663-1055

- Undermining the Affordable Care Act (ACA) Marketplaces, which would increase costs for older adults and individuals with greater health care needs and eventually limit, or even eliminate, their ability to find comprehensive health care coverage.

- Exposing consumers to higher costs due to medical underwriting, annual and/or service-specific limits and possible coverage denials.

- Encouraging consumers to rely on short-term plans as primary insurance, which could cause both serious financial harm to consumers who do receive health care services and long-term gaps in coverage.

- Creating confusion about the difference between ACA-compliant plans and STLDI plans, which could lead consumers to purchase plans that do not meet their needs.

For these reasons, as explained more fully below, we urge the Agencies not to finalize this proposed rule.

I. The Proposed Rule Would Undermine the ACA Marketplaces, Weaken Important Consumer Protection and Benefits Standards, and Expose Older Adults to Higher Health Care Costs.

We are deeply concerned that the proposed rule will undermine the Affordable Care Act (ACA) Marketplaces, which are a critical source of coverage for older adults and others with pre-existing health conditions. Older adults need and want access to comprehensive health coverage. This is illustrated by the fact that nearly a third of 2018 Marketplace enrollees are over age 55.[1] Almost three out of four adults ages 50-64 have at least one chronic condition, and over a third have multiple chronic conditions.[2] These individuals are especially reliant on the ACA's strong consumer protections and guarantee of comprehensive coverage through the Essential Health Benefits.

First, ACA protections prohibit most plans from basing premiums on health status or gender and limit the amount they can charge older adults to three times the amount they charge younger adults. STLDI plans, however, are allowed to engage in medical underwriting, which means they can deny coverage or charge higher premiums, without limit, to individuals based on health status, gender, and age.

Expanding the availability of STLDI plans that are not subject to these ACA protections means that more consumers will be exposed to discrimination. For example, before the ACA took effect, 92 percent of best-selling plans on the individual market charged women higher

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[1] Centers for Medicare & Medicaid Services, Health Insurance Exchanges 2018 Open Enrollment Period Final Report (Apr. 3, 2018), www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2018-Fact-sheets-items/2018-04-03.html?eType=EmailBlastContent&eId=f09d566e-5131-4b95-aa7a-2b82d9533835.
[2] AARP, Chronic Conditions Among Older Americans (2009), at 11, 16, *available at* https://assets.aarp.org/rgcenter/health/beyond_50_hcr_conditions.pdf.

premiums than men, costing women approximately $1 billion a year.[3] This practice is still commonplace among insurers selling short-term plans. Similarly, prior to the ACA, older adults in the individual market faced two and a half times higher average out-of-pocket premium and health care costs than those with employer coverage, where premiums do not vary by age.[4]

Furthermore, the ACA's Essential Health Benefits (EHB) provisions ensure that older adults, especially those living with chronic health conditions and disabilities, have access to the medically necessary care and treatment they require. These individuals need a minimum benefits package that includes the range of services and treatments necessary to manage their conditions, including prescription drug benefits, substance use and mental health treatments, habilitative and rehabilitative services, and preventive services. STLDI plans are not required to, and most do not, provide EHB or any minimum level of benefits.

Additionally, the ACA's consumer protections related to out-of-pocket maximums, annual and lifetime limits, guaranteed availability and coverage of pre-existing conditions, help ensure older adults and other consumers with higher health care needs do not face unaffordable medical expenses. Because none of these critical consumer protections apply to STLDI plans, expanding STLDI availability will not provide older adults and others who need meaningful access to care with any additional coverage options. In fact, the proposed rule would greatly increase costs for older adults and individuals in less-than-perfect health and, in turn, cause insurers to leave the ACA Marketplace because the consumers who have high health care needs will make up a disproportionate share of the Marketplace risk pool.

In short, if implemented, this rule would lead us back to the days before the ACA, when plans frequently failed to meet the needs of older adults, people with disabilities and chronic conditions, and their families, and many were forced to go without coverage altogether.

II. Expanding Short-Term Coverage Could Cause Consumer Confusion, Improper Reliance on Short-Term Plans as Primary Insurance, and Gaps in Coverage

Short-term, limited duration plans are intended to provide temporary coverage for individuals facing short gaps in insurance—for example, someone who is in between jobs—and are not a substitute for primary, comprehensive coverage. However, prior to 2016, consumers were purchasing these plans as a primary form of health coverage for periods up to or exceeding one year. Therefore, the Agencies issued regulations that limit short-term plan duration to under three months.[5] In the 2016 rule, the Agencies cited concerns that short-term, limited duration plans were not "meaningful health coverage" due to limitations such as annual and lifetime benefit limits and pre-existing condition exclusions, and stated they were imposing a three

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[3] National Women's Law Center, Turning to Fairness: Insurance Discrimination against Women Today and the Affordable Care Act (2012), *available at* www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf.

[4] AARP, Protecting Affordable Health Insurance for Older Adults: The Affordable Care Act's Limit on Age Rating (Jan. 2017), *available at* www.aarp.org/content/dam/aarp/ppi/2017-01/Protecting-Affordable-Health-Insurance-for-Older.pdf.

[5] 45 C.F.R. Parts 144, 146, 147, and 148; 81 Fed. Reg. 75321.

month limit on plan duration to protect consumers from financial harm.[6] Given that over 80 percent of adults ages 50-64 have at least one pre-existing condition[7] and are more likely to actually use their insurance, these plans clearly do not provide them with "meaningful health coverage."

Moreover, because insurers can deny a new contract if the enrollee becomes sick or injured during the coverage term, consumers who enroll in STLDI are more likely to experience gaps in coverage. If a short-term plan ends before Marketplace open enrollment, the loss of coverage would not qualify for a special enrollment period.

As the preamble to the proposed rule notes, allowing short-term plans to provide coverage for just under one year will make it more difficult for consumers to distinguish between short-term plans and ACA plans.[8] We know from the Medicare context that older adults struggle to choose the best option for them when there are a lot of plan choices and the differences between the options are unclear.[9] That is why we are concerned that older adults and others who are looking for primary, comprehensive coverage may enroll in STLDI plans without realizing these plans do not meet many of their needs.

For these reasons, we urge the Agencies to maintain the current three-month federal limit to ensure this coverage is actually short-term and temporary, and to protect consumers from the financial harm that can result when they actually need health care not covered by these temporary plans or are refused coverage.

Finally, while we oppose expanding STLDI, if the Agencies do move forward with the proposal, we urge the final rule to include strong notice requirements to help consumers who purchase STLDI policies understand the coverage they are purchasing. Notice is vital for consumers to understand the limits of these plans and that they are not comprehensive coverage. We appreciate the proposed rule's specific language that clarifies that the plan does not comply with federal requirements and that enrollees might have to wait until an open enrollment period to get other health insurance coverage. We recommend, however, that the language in the notice be made clearer by listing specific ACA protections these plans do not comply with. We also recommend that plans be required to provide the notice in multiple languages.

III. Conclusion

We urge the Agencies to not finalize this rule and to work with us to identify ways to reduce health care costs, drive down premiums, and improve care. Thank you for considering our

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[6] 81 Fed. Reg. 75318.

[7] HHS Assistant Secretary for Planning & Evaluation, Health Insurance Coverage for Americans with Pre-Existing Conditions: The Impact of the Affordable Care Act (Jan. 5, 2017), at 2, *available at* https://aspe.hhs.gov/system/files/pdf/255396/Pre-ExistingConditions.pdf.

[8] 83 Fed. Reg. 7439.

[9] *See also, e.g.,* Kaiser Family Foundation, How are Seniors Choosing and Changing Health Insurance Plans (May 2014), *available at* www.kff.org/medicare/report/how-are-seniors-choosing-and-changing-health-insurance-plans/.

comments. If any questions arise concerning this submission, please contact me at jgoldberg@justiceinaging.org.

Sincerely,

Jennifer Goldberg
Directing Attorney