



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

Scott Walker, Governor
Theodore K. Nickel, Commissioner

Wisconsin.gov

125 South Webster Street • P.O. Box 7873
Madison, Wisconsin 53707-7873
Phone: (608) 266-3585 • Fax: (608) 266-9935
E-Mail: ociinformation@wisconsin.gov
Web Address: oci.wi.gov

August 9, 2016

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Wisconsin Office of the Commissioner of Insurance (OCI) Comments on proposed regulation 135702-15

To Whom It May Concern:

OCI opposes the definition of “short-term, limited duration (STLD) insurance” included in the proposed regulation related to “Expatriate Health Plans, Expatriate Health Plan Issuers, and Qualified Expatriates; Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance (Proposed Rule).” OCI also has concerns with the proposed notice required to be included in STLD insurance application materials, as well as all provisions related to fixed indemnity insurance.

Short-Term Limited Duration Insurance

State insurance departments are the primary regulators over the insurance industry. State regulatory authority has withstood the test of time and was reconfirmed with the enactment of McCarran-Ferguson 15 U.S.C. §1011 *et.seq.* As such, OCI supports state regulation over STLD insurance and strongly believes federal agencies named in the Proposed Rule are overstepping their authority in limiting STLD insurance coverage terms to less than three months. STLD insurance is not subject to the Affordable Care Act (ACA) market reforms and the ACA does not direct nor give authority to HHS to modify the definition of STLD insurance. The current federal definition of STLD insurance, which limits coverage terms to less than twelve months, was developed as a result of the Health Insurance Portability and Accountability Act (HIPAA) and has been in effect since 1997.

Limiting coverage of STLDs to three months restricts consumer options in meeting their health care needs. Consumers seek coverage from short term policies for a number of reasons and eliminating this option for consumers who need coverage for more than three months may leave these consumers uninsured. For example, some employers require new employees to work for several months, sometimes six to twelve months, before qualifying for health care coverage. Short-term policies are a resource for these individuals as a means for accessing health care coverage until they are eligible for employer sponsored coverage. Students studying abroad represent another

group of consumers benefiting from STLDs. It is our understanding there are many plans sold to students studying in a foreign country are regulated as short term plans. As a result, the proposed regulation would limit a student's coverage in a foreign country to only three months. This creates a significant burden on these students and their families. HHS has also decreased the available Special Enrollment Periods. While this change was necessary, it will increase the potential number of consumers who are not able to obtain coverage from a Qualified Health Plan with comprehensive coverage until the next open enrollment and start of a new plan year. These and similar issues demonstrate the impact of this proposal is further reaching than HHS may have anticipated or intended.

In addition to acting outside of its authority, HHS is unnecessarily singling out STLD insurance as a means to increase the health of the risk pool for ACA compliant coverage. The Proposed Rule asserts, "healthier individuals may be targeted for this type of coverage, thus adversely impacting the risk pool for ACA compliant coverage." A CMS fact sheet on the Proposed Rule says, "the proposed changes will help strengthen the risk pool by ensuring short term limited duration plans are used only as intended..."¹ However, the Proposed Rule lacks an explanation of the data used to support these assertions. In fact, the Proposed Rule indicates the departments are seeking data on the number of STLD insurance policies offered for sale in the market, the types of individuals who typically purchase them and the reason for purchase. The nature of these questions suggests the effort to reduce access to STLD insurance is premature and proposed without an understanding of the prevalence of these policies in the marketplace. Furthermore, it should not be assumed reducing access to STLD insurance will result in individuals instead purchasing comprehensive coverage through the Exchange and in enough volume to positively impact the risk pool. In the end, implementation of the proposed definitional change will result in fewer consumer options available to meet unique coverage needs. Market demand should influence access to these products, not the federal government forcing consumers to purchase ACA compliant coverage.

Also of concern is the proposal requiring insurers to provide in any application or enrollment materials, the following notice:

"THIS IS A SUPPLEMENT TO HEALTH INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL COVERAGE. 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."

OCI's concern is not with the overall message to consumers but with the lack of state flexibility to allow alternative verbiage that delivers a similar message.

¹ CMS Fact Sheet, "Strengthening the Marketplace-Actions to Improve the Risk Pool; released June 8, 2016. <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2016-Fact-sheets-items/2016-06-08.html>

Fixed Indemnity Insurance

Wisconsin is opposed to the proposed provisions related to fixed indemnity coverage. It appears to us the proposed language violates the holding in *Central United Life Insurance Co. v. Burwell* and should be deleted. It remains Wisconsin's position the federal agencies proposing this regulation have no authority to regulate fixed indemnity coverage provided: benefits are provided under a separate policy, certificate or contract of insurance; there is no coordination of benefits; and benefits are paid with respect to an event. Fixed indemnity coverage is not major medical coverage, and is entirely subject to state regulation.

Wisconsin issued a December 15th bulletin stating the following:

Wisconsin is the primary regulator of all insurance sold in the state. It remains our position these policies are excepted from regulation under federal law. Insurers must meet all state requirements, such as providing all required disclosures to consumers. Consumers should also be made aware fixed indemnity and hospital indemnity policies do not meet the "individual responsibility" requirements under the ACA.

Furthermore, it is our view fixed indemnity policies pay benefits on a "per period" basis or pay benefits on a "per service" basis are exempt from federal regulation provided the policy in question otherwise qualifies as an "excepted benefit" under federal law.

As a result, Wisconsin has worked pro-actively to ensure consumers in Wisconsin are protected, including actions against agents and insurers who are selling policies in violation of our laws and regulations.

This regulation's attempt to impact fixed indemnity coverage and limit access to STLD insurance is akin to HHS attempting to limit the sale of fixed indemnity plans to individuals with minimum essential coverage through the regulation "Exchange and Insurance Market Standards for 2015 and Beyond." On July 1, 2016, the D.C. Circuit Court affirmed the ruling of a lower court, prohibiting HHS from enforcing this regulation.² Through application of the Chevron check on administrative overreach, the court determined HHS was attempting to amend the Public Health Services Act through regulation.³ According to the details of the decision, "Agencies may act only when and how Congress lets them. To vindicate that important principle, Chevron requires courts to determine first whether Congress authorized the agency to act."⁴

² U.S. Court of Appeals for the District of Columbia; *Central United Life Insurance Co., Et Al., v. Sylvia Mathews Burwell, in her official capacity as Secretary of U.S. Department of Health and Human Services, (No. 15-5310) (D.C. Cir. 2016)*.

³ *Id.*, The Court utilized the finding in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), that presented a two-step check on administrative overreach is explained in the court decision as process involving a determination as to whether Congress authorized the agency to act, indicating that agencies may act only when and how Congress lets them.

⁴ *Id.*

Page 4
IRS
August 9, 2016

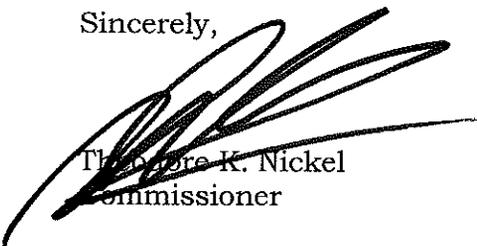
Congress has not given HHS the authority to regulate fixed indemnity coverage nor to restrict access to STLD insurance.

Closing

We are concerned the federal agencies proposing this regulation ignore the critical role states have as the primary regulator of insurance in their markets. The ACA does not give the federal government authority to infringe on a state's duty as primary regulator. The Wisconsin OCI has a better understanding of insurance issues because we license the insurance companies, review their financial data, evaluate rate and form filings, perform market conduct examinations, license the agents selling insurance products, and respond to consumer complaints on these issues. The radical changes proposed in the structure of STLD plans are too important to be implemented without a complete understanding of the direct and indirect impact, not just on issuers subject to the ACA, but also on the consumers who are served by this market.

Thank you for your consideration of these comments.

Sincerely,



Theodore K. Nickel
Commissioner