

September 11, 2023

The Honorable Xavier Becerra
Secretary of Health and Human Services
Centers for Medicare and Medicaid Services

The American Legislative Exchange Council (ALEC) is a Virginia-based nonprofit, nonpartisan membership organization of state legislators with the mission to discuss, develop, and disseminate model public policies in the Jeffersonian tradition of limited government, free markets, and federalism. Comprised of nearly one-quarter of the country's state legislators and stakeholders from across the policy spectrum, ALEC members represent more than 60 million Americans and provide jobs to more than 30 million people in the United States.

For 50 years, ALEC has served as the premier forum for state lawmakers to debate our nation's leading public policy challenges and advance trusted policy solutions that give Americans more control over their own destinies, make government more responsive to its communities, and deliver widespread economic prosperity. The ALEC model policy library is home to dynamic and innovative ideas that reduce the cost of everyday life and ensure economic freedom, offering real solutions to the top issues facing the states. Members of ALEC's Health and Human Services Task Force include legislative leaders and policy experts who believe in the proven light-touch regulatory approach to health care.

As a group with members who are state legislators from across the country, we are very concerned about the proposed rule published by the Department of Health and Human Services, Department of Labor and the Department of the Treasury (“the Departments”) on July 7, 2023.

This proposed rule improperly usurps state authority over short-term limited duration insurance (STLDI) and over Hospital and fixed indemnity plans (which are expressly excepted from federal regulation.

States are, under statutory law, the primary regulators of health insurance¹. Each state has its own definitions, limitations and other requirements for short-term, limited-duration health insurance plans and excepted benefit plans. This authority is vested to state legislators, as they best understand their constituents’ and states’ needs. Federal law only supersedes state law when there is compelling information that the state is not enforcing the Public Health Service Act (PHS) requirements.² A specific procedure is laid out to determine whether the state is in fact enforcing PHS requirements.³

The Departments proposal to amend the definition of STLDI under 26 CFR 54.9801-2, 29 CFR 2590.701-2, and 45 CFR 144.103 to reinterpret the phrase “short-term” and “limited duration.” Federal statutory law is very clear that short-term limited duration plans are not “individual health insurance.” The enactment of the Patient Protection and Affordable Care Act (ACA) did not change or alter the treatment of these plans in any way. The proposed rule would also put limitations and restrictions on fixed indemnity policies without any statutory authority.

¹ See 42 USC 300gg-23(a)(1) and 42 USC 300gg-61(a)(1); 45 CFR 150.101(a)(2)

² See 45 CFR 150.201, and 45 CFR 150.203

³ See 45 CFR 150.207-221

These types of limitations and restrictions have already been litigated in *Central United Life, Inc. v. Burwell*.⁴ The US Court of Appeals for the District of Columbia found that the Department of Health and Human Services had no statutory basis for a proposed rule limiting the sale of fixed indemnity policies to only those individuals who had “minimum essential coverage.” In its opinion, the Court of Appeals was also very clear in restating the long-standing principle that agencies may act only when and how Congress grants them authority to do so. They found that Congress had not expressly granted the agency the authority to act and that nothing in the statute left any leeway for interpretation to act in this matter. In other words, the agency had exceeded the scope of its authority.

The proposed rules published on July 7 make the same fatal mistake and will once again exceed the statutory authority of HHS. There is no statutory text that limits fixed indemnity policies to a “per day” basis or prohibits “per service” policies. Statutory language granting the authority to eliminate or restrict private insurance plans such as fixed indemnity coverage or STLDI are regulated by the states.

The Departments have expressed concern that individuals are confused by “deceptive marketing practices” and that STLDI take healthy individuals out of the ACA Exchange’s risk pool. As stated above, there is no statutory authority to limit or eliminate private insurance options to address a perceived weakness in the Exchange’s risk pool.

⁴ See No. 15-5310 (D.C. Cir. 2016)

The proposed rule also violates Executive Order 13132⁵ issued by President Bill Clinton in August 1999.

This executive order requires proposed rules to adhere to the principles of federalism set forth in Section 2 of the order which clearly states:

“(e) The Framers recognized that the States possess unique authorities, qualities, and abilities to meet the needs of the people and should function as laboratories of democracy.”

and

“(i) The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.”

In addition to complying with the principles of federalism set forth, rules must also meet the criteria laid out in Section 3 of the executive order which states:

“(a) There shall be strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action.”

and

“(b) National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means.”

⁵ 64 FR 43255; August 10 1999

It is clearly apparent that the proposed rule does not meet either condition. It does not align with the principles of federalism set forth nor does it meet the criteria for issuing a rule that affects the balance of power between the state and federal government.

States have the authority and are in a better position to detect and address many of these concerns and currently do so. States register and license insurance issuers and agents. Misconduct or deceptive practices trigger action by states to revoke or fail to renew those licenses. Many states have enacted their own consumer protections and have the authority and flexibility to change or enhance protections as needed. The proposed rule will limit states' ability to do so.

In conclusion, the proposed rule published on July 7 to address Short-Term Limited Duration and Excepted Benefit plans is an unauthorized usurpation of state authority. Allowing states to regulate these markets is a long-standing principle in federal law and is the clear intention of federal statute.