

**Authors: Meredith Kimelblatt,
Tamara Killion, Jon Breyfogle**

**If you have questions, please
contact your regular Groom
attorney or one of the
attorneys listed below:**

Kathryn Bjornstad Amin
kamin@groom.com
(202) 861-2604

Jon W. Breyfogle
jbreyfogle@groom.com
(202) 861-6641

Lisa M. Campbell
lcampbell@groom.com
(202) 861-6612

Thomas F. Fitzgerald
tfitzgerald@groom.com
(202) 861-6617

Christine L. Keller
ckeller@groom.com
(202) 861-9371

Meredith Kimelblatt
mkimelblatt@groom.com
(202) 861-5412

Tamara S. Killion
tkillion@groom.com
(202) 861-6328

Rachel Leiser Levy
rlevy@groom.com
(202) 861-6613

Mark C. Nielsen
mnielsen@groom.com
(202) 861-5429

Seth T. Perretta
sperretta@groom.com
(202) 861-6335

Christy A. Tinnes
ctinnes@groom.com
(202) 861-6603

Vivian Hunter Turner
vturner@groom.com
(202) 861-6324

Allison Ullman
aullman@groom.com
(202) 861-6336

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

The Departments Release Final Rule Aimed at Expanding Short-Term, Limited-Duration Insurance Coverage

On August 3, 2018, the Departments of Health and Human Services (“HHS”), Labor (“DOL”), and Treasury (together, “the Departments”), issued the Short-Term, Limited-Duration Insurance (“STLDI”) [Final Rule](#) (“Final Rule”). 83 Fed. Reg. 38212 (Aug. 3, 2018). This Final Rule responds to the President’s October 12, 2017, [executive order](#) (No. 13813), [directing](#) the Departments to consider issuing guidance or proposing regulations regarding Association Health Plans (“AHPs”), STLDI, and health reimbursement arrangements (“HRAs”). DOL [issued](#) its AHP proposed rule on January 4, 2018, and HRA guidance has yet to be released.

Background

STLDI fills temporary gaps in coverage. While STLDI is not considered an excepted benefit under the Public Health Service Act (“PHSA”), it is also not considered individual health insurance coverage and is therefore generally exempt from the Affordable Care Act (“ACA”) market reform requirements.

Prior to 2017, the Departments defined STLDI as health insurance coverage that expires less than 12 months after the original effective date of the contract. However, in late-2016, the Departments issued a final rule shortening the permitted duration of STLDI to be less than three months, including any potential renewal periods. 81 Fed. Reg. 75316 (Oct. 31, 2016). The final rule provisions were effective January 1, 2017. The President’s recent executive order directed the Departments to consider allowing STLDI to cover “longer periods” and be renewed.

Because the length of coverage for STLDI is not defined in statute, the Departments have had broad latitude to define it. The Final Rule largely adopts the proposal, with some modifications.

Key Provisions

The Final Rule adopts the following provisions:

- **Extends the duration of STLDI to be less than 12 months.** The Departments extended the duration of STLDI to allow this coverage to have an initial contract term of less than 12 months after the contract’s original effective date.

GROOM COMMENT: The extension of the duration for STLDI to less than 12 months was expected. As the preamble notes, less than 12 months was the maximum duration of STLDI for nearly twenty years before the maximum duration was limited, effective for 2017.

- **Renewability.** Although the new rule does not impose a guaranteed renewability requirement, it does allow issuers to renew or extend STLDI policy up to a maximum total duration of 36 months and still have such coverage be considered STLDI. To facilitate this option, the rule requires that each individual contract last no longer than 36 months, including the initial contract term and any renewals or extensions.

GROOM COMMENT: The ability to renew or extend an existing STLDI policy expands upon the proposal, where the Agencies asked whether STLDI should be continued for 12 months or longer with the issuer's consent, including whether expedited reapplication would be appropriate.

- **Locked in rates.** Under the Final Rule, the Departments noted that individuals have the option to “lock in” premium rates on STLDI policies that they can then purchase in the future. Coverage under such policies would not count toward the 36-month maximum duration limit. The ability to guarantee future premium rates allows consumers to maintain STLDI coverage for extended periods without taking on financial risk in the event that they develop a costly medical condition or other such event.

GROOM COMMENT: The preamble to the Final Rule explains how rate lock-in would work to allow an enrollee to string together essentially renewable STLDI policies for longer than 36 months. As the Departments explain,

to the extent a contract does not provide health insurance coverage and instead consists of a separate transaction or other instrument under which the individual can, in advance, lock in a premium rate in the future or the ability to purchase a new, separate short-term, limited-duration insurance policy at a specified premium rate at a future date without re-underwriting, such subsequent periods of coverage under the new, separate short-term, limited-duration insurance policies would not count toward the 36-month maximum.

83 Fed. Reg. 38222.

- **Notice language.** The rule requires that notice language appear in the STLDI contract and any application materials in at least 14-point font. The language states that the coverage is not required to comply with federal requirements for health insurance, particularly those contained in the ACA, and that the coverage is not minimum essential coverage.
- **State preemption.** Notwithstanding the Final Rule, the preamble is clear that states are still able to issue and apply their own laws and requirements regarding STLDI, under the familiar PHSA preemption standard (e.g., states remain free to adopt a definition with a shorter maximum initial contract term or shorter maximum duration including renewals and extensions.)

GROOM COMMENT: Because PHSA preemption is generally narrow, the requirements for STLDI, including the means for extending or renewing coverage, may vary from state to state. For example, a state could have a law where STLDI must have a shorter duration than the duration finalized in the Departments' final rule, or require additional information in the notice, although the state could not extend the maximum duration beyond the 36-month federal standard.

- **Federal subsidies and 1332 waivers.** The preamble to the Final Rule suggests that states may be able to subsidize STLDI with federal funds provided under waivers authorized by section 1332 of the ACA.

GROOM COMMENT: Generally to obtain a section 1332 waiver, a state’s plan must demonstrate the ability to provide coverage that is as comprehensive and affordable to a comparable number of residents as coverage that is ACA-compliant. Because STLDI is by definition not designed as a substitute for ACA-compliant coverage, it may be challenging to design a 1332-compliant plan while using federal funds for STLDI coverage.

- **Prohibition for discrimination.** Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age or disability in certain health programs or activities. Although comments to the proposed rule suggested that section 1557 might limit issuers’ flexibility in designing STLDI or pose barriers to entry in the STLDI market, the Departments declined to address this possibility on the grounds that the HHS Office for Civil Rights administers section 1557 and the issue is therefore outside the rule’s scope.

GROOM COMMENT: Because section 1557 applies only to recipients of federal financial assistance, e.g., providers participating in Medicaid or insurers participating in the marketplaces, institutions that do not participate in such programs should not encounter any issues in this regard.