



December 28, 2018

Submitted Electronically Via Federal Rulemaking Portal: www.regulations.gov

Attention: CC:PA:LPD:PR
REG-13674-17
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Health Reimbursement Arrangements and Other Account-Based Group Health Plans

To Whom It May Concern:

The U.S. Chamber of Commerce (the Chamber) submits these comments to the Department of Treasury's Internal Revenue Service, the Department of Labor's Employee Benefits Security Administration, and the Department of Health and Human Services' Center for Medicare & Medicaid Services (collectively referred to as the "Departments") in response to a notice of proposed rulemaking.¹ The Proposed Rule published in the Federal Register on October 29, 2018 expands opportunities for workers and their families to access affordable, quality health care through proposed changes to regulations under various provisions of the Public Health Service Act (PHS Act), the Employee Retirement Income Security Act (ERISA), and the Internal Revenue Code regarding health reimbursement arrangements (HRAs) and other account-based group health plans.

Overview

We appreciate the new path taken by the Proposed Rule and support the common-sense distinction between HRAs and traditional group health plans. Additionally, we wish to reiterate our strong and unwavering support of the current robust employer-sponsored insurance system (ESI) where over 181 million individuals receive health coverage. Finally, we offer some recommended modifications to the Proposed Rule in order to better assimilate the ability of employers to offer these account-based group health plans on an integrated basis into the current framework of the individual market.

¹ Proposed Rule, 83 Fed Reg. 54,420-54,477. (October 29, 2018) (to be codified at 26 C.F.R. pts. 1 and 54, 29 CFR pts. 2510 and 2590 and 45 CFR pts. 144, 146 and 147) [hereinafter referred to as the "Proposed Rule"]
<https://www.govinfo.gov/content/pkg/FR-2018-10-29/pdf/2018-23183.pdf>

Appropriate Distinction: Account-Based Group Health Plans vs. Traditional Group Health Plans

The Chamber welcomes the Proposed Rule particularly in light of the concerns and frustrations we and our members had regarding previous sub-regulatory interpretations of the interplay between such account-based group health plans and the Patient Protection and Affordable Care Act's (PPACA or ACA) insurance market reform rules under §2711 and §2713.² As our comments filed in response to the 2013 guidance stated, we believe that health reimbursement arrangements are a tax-preferred employer health subsidy and more of financing mechanism or employer-sponsored account than a traditional employer-sponsored group health plan.³ To be sure, an HRA does not include a network of health care providers, particular benefits with varying copayments or coinsurance amounts, or tiered formularies. Instead, as the Proposed Rule recognizes, HRAs are very different from a "traditional group health plan" which the PPACA requirements under §2711 and §2713 were designed to reform.

As we urged in 2013, we strongly support the Departments' decision to permit account-based group health plans like HRAs to be used by employees to purchase PPACA-compliant individual market insurance policies. We believe that this balanced approach better promotes the ability of employers to provide financial assistance to employees in accessing minimum value coverage on an affordable basis.

This approach is particularly helpful and appropriate to facilitate assistance for part-time employees. Under the PPACA's employer shared responsibility provision, applicable large businesses are not required to provide affordable minimum value coverage to part-time employees. Under the 2013 guidance, employers were prohibited from offering these part-time employees a tax-preferred HRA to help them purchase coverage on the individual market. This more commonsense interpretation will appropriately allow businesses to provide *some* financial assistance to those employees whom may otherwise have been left bare and fallen through the cracks.

Importance of the Employer-Sponsored Insurance System

The Value Proposition of ESI

For decades, businesses have offered and subsidized health care coverage to millions of employees and their families. With 181 million individuals covered by ESI, the employer-sponsored system's covered lives surpass the number of individuals enrolled in Medicare, Medicaid and dwarf the number covered in the individual market. As health plan sponsors, employers play a critical role in the healthcare system, by leveraging purchasing power, market efficiencies, and plan design innovations to provide comprehensive health coverage at a fraction of the cost to government compared to federal programs.⁴ Employers recognize that providing health coverage to their employees is not only helpful for attracting and retaining talent, it also has a measurably positive impact on their business.

² www.irs.gov/pub/irs-drop/n-13-54.pdf;

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/13-03>;

<https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/cms-hra-notice-9-16-2013.pdf>;

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-xi.pdf>

³ <https://www.uschamber.com/sites/default/files/documents/files/HRA%2520FAQ%2520-%2520USCC%2520comments.pdf>

⁴ <https://www.mercer.us/our-thinking/healthcare/new-report-employer-innovations-in-health-coverage.html>

Furthermore, employers are at the forefront of advancing innovative strategies to provide their own employees with effective and sustainable health coverage. For example, some of the innovative strategies that ESI incorporates include:

- Adopting “pay for value” strategies that financially incent providers to deliver high quality care in the right setting;
- Identifying and using centers of excellence for certain health care services or conditions, sometimes through directly contracting with providers;
- Incorporating data and technology to better personalize treatment and disease management.

The efficiencies, innovation, and coveted coverage provided by the employer-sponsored system are unparalleled. On behalf of our members and their employees, we will continue to advocate in favor of policies that advance this system.

The Need to Protect ESI

The Chamber supports the provisions in the Proposed Rule designed to protect against adverse selection, market segmentation and health factor discrimination.⁵ We support the Proposed Rule’s “same terms requirement” which states that an HRA must be offered on the same terms to all participants within a class of employees and also agree that individuals in a class may not be permitted to choose between an HRA and a traditional group health plan.⁶

However, we have concerns about the Proposed Rule’s recommended class for individuals under age 25 as well as the recommended class based on geographic rating area. It is unclear why the Departments proposed these two classes. While traditional large group plans are permitted to make different benefit offerings to different employment classifications of employees, neither of these two employee classes are currently permitted. Unlike part-time employees who may currently fall between the cracks of not being offered a traditional group health plans, full-time employees under age 25 and those within different geographic rating areas must be offered minimum value, affordable group coverage. We urge the Departments to strike these two classes for purposes of non-discrimination and employment classes to whom the “same term requirement” applies.

Suggested Modifications

In reviewing the Proposed Rule, there were three particular details that seemed inconsistent with the current shared responsibility and individual market frameworks. Perhaps there are reasons for these variations but we recommend some modifications to preserve consistencies. These inconsistencies involve:

- The minimum value required for purposes of establishing when an HRA integrated with individual health insurance coverage provides minimum value;
- The benchmark plan for purposes of determining affordability of an HRA integrated with individual health insurance coverage;

⁵ Proposed Rule, 83 Fed Reg at 54,460-54,463.

⁶ Proposed Rule, 83. Fed. Reg. at 54,461.

- Allow employers to “do no harm” by permitting employees to choose between an affordable HRA and a premium tax credit.

Inconsistent Benchmark for Minimum Value

Under both the employer shared responsibility requirement and the individual requirement to maintain minimum essential value, the threshold level of minimum coverage required is 60%. The PPACA specifies that “a plan in the *bronze* level shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to 60 percent of the full actuarial value of the benefits provided under the plan”⁷ (emphasis added) However, the minimum value benchmark used in the proposed rule seems inconsistent with this.

Despite the Proposed Rule’s preamble discussion and references to 36B and minimum essential coverage, the Proposed Rule ties an integrated HRA’s minimum value determination to a silver plan, which provides 70% actuarial value:

“The lowest cost *silver* plan is the lowest cost exchange plan for which the plan’s share of the total allowed costs of the benefits provided under the plan is certain to be at least 60 percent of such costs, as required by Section 36(c)(2)(C)(ii) of the code for a plan to provide MV.” (emphasis added)

This further seems to conflict with the PPACA itself at Section 1302(d)((1)(B) which states that “a plan in the silver level shall provide a level of coverage that is designed to provide benefits that are actuarially equivalent to 70 percent of the full actuarial value of the benefits provided under the plan.”

To remain consistent with the PPACA’s coverage thresholds and other definitions, we suggest that the Departments tie the minimum value determination to the bronze plan in the individual market.

Inconsistent Benchmark for Affordability

The PPACA’s premium tax credit (PTC) in the individual market exchange is benchmarked to the second lowest cost silver plan.⁸ Therefore, it seems inconsistent for the Proposed Rule to tie the affordability determination to the premium for the *lowest* cost silver plan. We recommend that the Departments modify the affordability benchmark to reflect the benchmark used for premium tax credits in the individual market.

Allow Employers to “Do No Harm”

There seems to be conflicting provisions in the Proposed Rule regarding the interplay between 36B and premium tax credit eligibility. In Notice 2018-88 (the Notice), there are initial assurances that “[a] participant must be permitted to opt out of and waive future reimbursements from the individual

⁷ PPACA §1302(d)(1)(A)

⁸ 1401(a)

coverage HRA at least annually.”⁹ Similar assurances in the Proposed Rule’s preamble promise: “[b]ecause eligibility for coverage under the HRA may affect an individual’s eligibility for the PTC and enrollment in an HRA affects an individual’s eligibility for the PTC, the proposed integration rules allow employees of employers who offer an HRA to opt out of and waive future reimbursements under the HRA.”¹⁰ We appreciate the opportunity that the Proposed Rule presents to allow an individual to opt-out of an HRA in order to instead accept a premium tax credit generally, but this assurance seems to be contradicted later in both documents.

Later the Notice states” [a]n individual is ineligible for the PTC for a month if the individual is eligible for an HRA that is affordable and provides MV for the month.”¹¹ In juxtaposition, the Proposed Rule’s preamble states: “An employee who is offered but opts out of an HRA integrated with individual health insurance coverage (is) eligible for MEC under an eligible employer-sponsored plan for any month the HRA is affordable and provides MV. Thus, these individuals are ineligible for the PTC for their exchange coverage for the months the HRA is affordable and provides MV.”¹²

We suggest that the final rule expand the opportunity for individuals to opt-out of an HRA and permit individuals whom may be better assisted financially by a PTC to remain eligible, even if the HRA is affordable under the new Propose Rule. As the Proposed Rule suggests, there may be instances where an individual is better off opting out of an unaffordable HRA and receiving a premium tax credit. However, this may be the case even when an HRA is affordable, depending on the individual’s household income. We recommend permitting an employee to opt-out of an HRA in order to receive a more beneficial premium tax credit, even when an employee is offered an HRA integrated with individual health insurance coverage that is affordable. While we understand the Proposed Rule’s intent to tie an integrated HRA that is affordable and provides minimum value to the applicable employer-sponsored coverage premium tax credit eligibility rules, we believe that some employers would be loath to leave their employees worse off by doing so.

Finally, there should be a safe harbor protecting employers that offer an affordable HRA that could be used to purchase a minimum value plan when an employee opts for the APTC on the exchange instead. An employer should have some protection from the employer mandate penalty when an employee receives APTC on the exchange in this circumstance.

Importance of a Stable Individual Health Insurance Market

Employers welcome the opportunity to expand access to HRAs for their employees but want to ensure that their employees are able to purchase affordable individual market coverage that meets their needs. Therefore, a stable and functional individual health insurance market is critical to the success of the Departments’ proposal to expand the availability of HRAs. To that end, we encourage the Departments to work with the Administration to provide additional market stabilization funding, ensure that regulations are predictable and timely, inhibit special enrollment period gaming and third party steerage of Medicare/Medicaid enrollees into the individual market, and stabilize risk adjustment.

⁹ Notice 2018-88, page 5

¹⁰ Proposed Rule, 83 Fed Reg at 54.439

¹¹ Notice 2018-88, page 7

¹² Proposed Rule, 83 Fed Reg at 54,439

Conclusion

The Chamber commends the Departments' efforts to expand opportunities for employers to offer health care benefits through HRAs to their employees. We urge the Departments to continue to work carefully, pragmatically, and cooperatively with the business community to minimize burdens placed on employers as they work to comply with the law. We remain committed to the employer-sponsored system and hope the Departments will consider the effects that various implementation choices will have on employers and their ability to continue to offer the coverage that their employees value.

Sincerely,

A handwritten signature in black ink that reads "Katie Mahoney". The signature is written in a cursive, flowing style.

Katie Mahoney
Vice President, Health Policy
U.S. Chamber of Commerce