



December 28, 2018

The Honorable Steven T. Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Alex Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

Re: REG-136724-17, Health Reimbursement Arrangements

Dear Secretaries Mnuchin, Acosta and Azar:

The Pennsylvania Insurance Department (the Department) appreciates the opportunity to submit these comments on the notice of proposed rulemaking titled “Health Reimbursement Arrangements and Other Account-Based Group Health Plans” (83 Fed. Reg. 54420 - 54477, Oct. 29, 2018) (“HRA Proposed Rule”). Certain aspects of the HRA Proposed Rule are to be commended, as they seek to safeguard against the risks of discrimination based on health status or other characteristics, and adverse selection that would negatively impact the individual health insurance markets through which millions of citizens purchase health care coverage. However, these comments strongly caution against finalization of other aspects of the HRA Proposed Rule that would do the reverse: increase the risks of discrimination and adverse selection. Finally, we draw attention to aspects of the HRA Proposed Rule that would contribute to the “bewildering array of complexity and inefficiency [for] consumers, employers, workers and taxpayers” in our country’s healthcare system.¹

Integrated HRA/Individual Market Plan

We commend the Departments of the Treasury, Labor and Health and Human Services (Tri-Agencies) for the thoughtful approach taken regarding what is described as an “Integrated HRA”, that is, an HRA

¹ Reforming America’s Healthcare System Through Choice and Competition, p. 4, Tri-Agencies’ Report to the President, released December 3, 2018, available at <https://www.hhs.gov/about/news/2018/12/03/reforming-america-healthcare-system-through-choice-and-competition.html> (“Tri-Agencies’ Report to the President”).

integrated with an individual health plan, as discussed in Part II of the Preamble (83 Fed. Reg. at 54427 *et seq.*) and contemplated to be added as 45 C.F.R. §146.123².

The HRA Proposed Rule includes several safeguards to prevent discrimination and promote market stability and invites comments on them. The guardrails protect consumers and the individual market, and build on the very significant efforts the states, including Pennsylvania, have taken to stabilize their markets, and to offer more choices and competitive costs for comprehensive coverage available to consumers. The Department particularly encourages the Tri-Agencies to adopt the following proposed approaches:

- *The requirement to permit integration with individual health insurance only if covered persons are actually enrolled in individual health insurance coverage.* This approach to integration reflects the Congressional intent to prevent health status discrimination against those who may have pre-existing conditions, and to maintain options for comprehensive and affordable coverage. That intent was expressed in the Affordable Care Act (ACA) to assure that individuals have no annual or lifetime limits on essential coverages (§2711 of the Public Health Service Act (PHSA), 42 U.S.C. §300gg-11), and are able to access preventive services without cost-sharing (§2713 of the PHSA, 42 U.S.C. §300gg-13). Integrating an HRA with comprehensive individual health insurance coverage accomplishes that goal.
- *The requirement of the well-reasoned guardrails regarding treating classes of employees similarly.* Likewise, this approach avoids the risks of health status discrimination and adverse selection. Prohibiting the side-by-side offering of both a traditional group health plan and an Integrated HRA to a single class of employees – particularly where the classes of employees may not be easily manipulated – will act to prevent an obvious means of discriminating.³ Regarding the request for comment on other variations – geographic rating, age, and family size – the Department encourages the Tri-Agencies to allow variations consistent with those permitted by the ACA: this approach was vetted during the legislative process, has worked well through the regulatory process, and, by its familiarity to the industry, employers, and consumers, would allow for ease of administration of those factors in all aspects of health insurance. Moreover, limiting the variations will “mitigate adverse selection and health status discrimination concerns”, and so satisfy the goal articulated by the Tri-Agencies. (83 Fed. Reg. at 54432.)
- *The prohibition against integrating an HRA with other types of non-group health coverage, such as short-term limited duration insurance (STLDI).* Policies not in the individual market are not required to comply with PHSA §2711 and §2713, and, as the Tri-Agencies note, if integration

² For ease of reference, since the Department’s comments focus on insurance requirements, citations are to the Public Health Service Act (PHSA) and the Health and Human Services regulations relating to health insurance requirements, codified in Title 45 of the Code of Federal Regulations.

³ The Department appreciates that the Tri-Agencies have proposed to require the classes of employees to be consistent with tax code provisions, which appear to be far less able to be manipulated than those contemplated by the Department of Labor in 29 C.F.R. §2510.3-5(d) (*see, e.g.*, 29 C.F.R. §2910.3-5(d)(5) Example 8, allowing, for purposes of association health plans, premium disparities between cashiers and stockers, which may quite reasonably be presumed to be a subterfuge for discrimination against older females and in favor of young males).

were to occur with other types of non-group health coverage, “integration would not be sufficient to ensure that the combined benefit package satisfies” those PHSA requirements. 83 Fed. Reg. at 54436. The potential for health status discrimination and adverse selection in the individual market, not to mention the administrative complexity, would be heightened were such integration to be permitted.

Excepted Benefit HRA

Disconcertingly, following the discussion of Integrated HRAs in Part II of the Preamble (83 Fed. Reg. at 54427-54436), the brief discussion of “excepted benefit HRAs” (83 Fed. Reg. at 54436-38, contemplated to be added to 45 C.F.R. §146.145) employs a rationale that is completely contrary to the preceding analysis. That is, the HRA Proposed Rule would allow employers to offer an “excepted benefit HRA” alongside an *offer of* – but not required enrollment in – a traditional group health plan. This non-integrated arrangement is inimical to the well-reasoned guardrails extensively discussed in the portion of the HRA Proposed Rule concerning Integrated HRAs. For example:

- Because an Excepted Benefit HRA is linked to merely an offer of group coverage – which may be affordable and minimum value (MV) for shared employer responsibility requirements but configured so it is not practicably affordable for an employee – an employee may be effectively precluded from accessing, on a tax-advantaged basis, health care coverage that includes statutorily required protections of no annual or lifetime limits on EHBs and preventive services without cost sharing (PHSA §§2711, 2713).
- Because an Excepted Benefit HRA is linked to merely an offer of group coverage – which may be affordable and MV for shared employer responsibility requirements, but configured so it discriminates against employees perceived as expensive risks (due to health status or age) – an employee may be effectively precluded from accessing, on a tax-advantaged basis, health care coverage that includes statutorily required protections of no annual or lifetime limits on EHBs and preventive services without cost sharing (PHSA §§2711, 2713).

In keeping with the goals described by the Tri-Agencies at the outset – preventing discrimination and promoting market stability – the Department encourages the Tri-Agencies to reject the concept of an “excepted benefit HRA” except in connection with effectuated enrollment in comprehensive coverage. Employers should not be encouraged to facilitate the purchase of coverage, such as limited benefit or STLDI⁴, that may not be comprehensive and can easily avoid coverage of pre-existing conditions.⁵ The

⁴ As explained in my comments to the STLDI Proposed Rule, STLDI is designed to be temporary, may exclude coverage for pre-existing conditions, and may not even be affordable after accounting for the lack of comprehensiveness of the coverage. Moreover, encouraging a general migration into STLDI may be expected to destabilize the individual market for ACA-compliant plans, making them a *de facto* high risk pool. See Letter from Jessica K. Altman, Commissioner, to Secretary Azar and Administrator Verma, April 20, 2018 (<https://www.regulations.gov/document?D=CMS-2018-0015-8526>). Of course, “limited benefit” coverage is also, by definition, “limited”.

⁵ Indeed, the Notice mandated by HHS (and DOL) to be on each STLDI policy specifies that it is not required to be comprehensive, and is not required to cover pre-existing conditions. 45 C.F.R. §144.103 (definition of “short-term, limited-duration insurance”).

ACA, while allowing more flexibility in large group coverage than in small group or individual coverage, nonetheless included guardrails to assure that large group coverage offered in the context of an employer's reputation and workforce, provides minimum value.⁶ If the Tri-Agencies continue on the path of offering an "excepted benefit HRA" alongside a traditional group health plan, the Department encourages the Tri-Agencies to modify its approach so that an "excepted benefit HRA" may not be paired with a traditional group health plan unless an individual is actually enrolled – not merely eligible for enrollment – in the traditional group health plan. To do less invites discrimination, adverse selection, and consumer confusion.

Complexity and Confusion

Finally, the Department offers a few general comments cautioning against the complexity and confusion that the HRA Proposed Rule invites at all levels: to regulators, to sophisticated employers and their consultants, and, most critically, to small business owners and consumers. As the Tri-Agencies recently acknowledged, the healthcare system "imposes a bewildering array of complexity and inefficiency on consumers, employers, workers and taxpayers."⁷ This complexity is compounded when the subject is not just the healthcare system itself, but also the taxation system that is implicated in payment for that healthcare: and the HRA Proposed Rule, focusing as it does on a vehicle for excluding income from taxation, is an arrangement in that taxation system.

To point out just a few of the areas of the HRA Proposed Rule that demonstrate that "bewildering array of complexity":

- Consumers, not to mention their employers, would need to understand not just the two current HRA models, but two more, for a total of four HRA models: HRA paired with group health coverage, Qualified Small Employer HRA (QSEHRA), Integrated HRA/Individual coverage, and Excepted Benefit HRA. This would be in addition to Health Savings Accounts (HSAs), §125 Flexible Spending Accounts (FSAs), and other tax-favored arrangements already embodied in the federal tax code. Expecting consumers and employers to understand these options and their implications is likely unrealistic, and certainly "bewildering."
- Part III of the Preamble of the HRA Proposed Rule (83 Fed. Reg. at 54438-54440) includes a dizzying discussion of "lowest cost silver plan", "second lowest cost silver plan", and MV. A consumer would need to identify both the lowest cost and second lowest cost silver plans in his rating area, and know that his employer might use the language of MV of the HRA, not the terminology of "silver plans". The consumer would then need to know which silver plan costs to apply to which calculation for purposes of determining the affordability of an HRA (which would use the lowest cost silver plan) and eligibility for a premium tax credit (which would use

⁶ The suggestion (at 83 Fed. Reg. at 54438) that STLDI is similar to COBRA or other group continuation coverage for purposes of pairing with an "excepted benefit HRA" fails to recognize the very different nature of the two types of coverage. COBRA or other group continuation coverage includes all the coverage necessary to protect an employer's goodwill and reputation, while STLDI has none of those protections.

⁷ Tri-Agencies' Report to the President, at p. 4.

the second lowest cost silver plan), and correctly perform the affordability calculations. Again, “bewildering.”⁸

- Having different rules for determining employee classes (full-time, part-time, etc.), and for age and family size variations, depending on whether one is looking at the Internal Revenue Code or the Employee Retirement Income Security Act (ERISA), would needlessly complicate the lives of benefits administrators – who, in many small businesses, are the owners responsible for all aspects of the business.

Conclusion

In summary, the Department applauds the Tri-Agencies’ thoughtful crafting of guardrails to protect consumers and the integrity of the individual market implicated by the Integrated HRA approach. However, the aims of the guardrails should be extended to the entirety of the proposal – particularly any contemplation of an excepted benefit HRA. Policy choices that have the effect of foisting substandard coverage on consumers should be discouraged; and policies, such as integrating an HRA with enrollment in individual health insurance coverage, that encourage “affordable, quality healthcare” (83 Fed. Reg. at 54420) for all working Americans, should be advanced.

Sincerely,



Jessica K. Altman
Commissioner

⁸ On the other hand, the proposed revisions to the Special Enrollment Period (SEP) regulations in 45 C.F.R. §155.420 would obviate the need for a consumer to make this determination at a time of year that is off-kilter with the Open Enrollment Period; thus, the Department supports the proposed SEP provisions.