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September 30, 2020

Submitted via Email to:

DORA_INS_RulesandRegulations@state.co.us

Colorado Department of Regulatory Agencies
Division of Insurance
1560 Broadway, Suite 110
Denver, CO 80202

Attention: Ms. Debra Judy

Re: Division of Insurance: Request for Information:
Costs and Benefits of Requiring Health Insurance Coverage of
Annual Mental Health Wellness Exam

Dear Ms. Judy:

The American Bankers Association's Health Savings Account Council provides these comments in response to the Department of Regulatory Agencies/Division of Insurance Request for Information ("RFI") concerning the costs and benefits of requiring health insurance coverage for an annual mental health wellness examination without consumer cost-sharing. The RFI centers around a possible response by the Division of Insurance to address a vexing problem: affordable mental health screening. We appreciate the State's interest in combatting mental health problems, which have been exacerbated by the COVID-19 pandemic. The RFI requested comments on the effect of the proposed changes, including "the estimated change in utilization as a result of providing the coverage" and "the extent to which the proposed benefit would result in changes to existing benefits and/or reduce access to other health benefits." The purpose of these comments is to inform you of our concerns that requiring an annual mental health wellness examination without cost-sharing could prevent a *consumer from contributing to a health savings account ("HSA")in order to pay health plan deductibles and other cost-sharing on a pre-tax basis* – unless there is an exception to the cost-sharing prohibition for HSA-qualified plans.

The Health Savings Account Council represents financial institutions overseeing just under 95 percent of all of the HSAs in the United States. The accounts are held by millions of Americans who finance their healthcare deductibles on a pre-tax basis. As such, our members have a keen interest in the viability of those accounts and the ability of Colorado account holders to remain

qualified for their use, to help pay for rising health care costs. There are about 286,000 Coloradans currently with Health Savings Accounts, which hold about $475 Million in funds.

Health Savings Accounts

The Internal Revenue Code[1] allows a deduction from income up to a certain annual amount for an individual's contributions made to a HSA as long as the individual is enrolled in a "HSA-qualified" health insurance plan. The individual can then use the HSA funds to pay plan deductibles. The general rule is that to be HSA-qualified, there are two requirements: First, a plan must be a high-deductible health plan. Second, the plan cannot require first-dollar coverage for any benefit (that is, no cost-sharing) unless the affected benefit is considered "preventive care." The addition to a plan of even a single benefit that requires first-dollar coverage without the benefit constituting preventive care would prevent the health plan from being a HSA-qualified plan – denying the individual the ability to use HSA funds to pay any deductible with respect to that plan.

While it appears that an annual mental health wellness examination may be preventive care, and thus would not be problematic, it is not clear from our review of the existing, definitive IRS guidance on what constitutes preventive care services.[2] Therefore, to ensure that a requirement that a plan provide mandatory coverage for an annual mental health wellness examination not cause the plan to be HSA-*ineligible*, language along the following lines would need to be added to the requirement:

> An HSA-eligible HDHP (high deductible health plan) is exempt from the requirement that a health plan include coverage for an annual mental health wellness examination without cost-sharing, but only to the extent necessary to allow the policy to satisfy the criteria for a high deductible health plan as implemented and interpreted by the U.S. Department of the Treasury under 26 U.S.C. Section 223.

Doing so would ensure that the addition of required mental health coverage does not prevent an HSA accountholder from contributing to their HSA so that they are able to pay any plan deductibles or other cost-sharing from the HSA and realize the significant savings from doing so.

Several months ago, representatives of the HSA Council met with Commissioner Conway on the need to be vigilant for any requirement that would cause a high-deductible health plan not to be HSA-eligible, and we provided him with the attached checklist for what state insurance regulators can do to ensure that does not happen. It provides useful information on the issue, including links to relevant IRS guidance on what constitutes preventive care.

We would look forward to further, continued discussions on HSA issues in general with the Division as it goes through the regulatory process.

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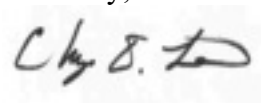
[1] 26 U.S.C. § 223.

[2] IRS Notices 2004-23, 2004-50, 2013-57, and 2019-45; and the Affordable Care Act, https://www.healthcare.gov/coverage/preventive-care-benefits/.

We are also filing similar comments with respect to the RFI on requiring Certain Substance Use Disorder Coverage without cost-sharing.

Thank you for the opportunity to comment.

Sincerely,



Chrys D. Lemon

Health Savings Accounts

Checklist for State Legislators and State Insurance Department Officers

Background

Health Savings Accounts (HSAs) are an important part of many consumers' approach to health insurance. However, consumers cannot benefit from an HSA unless they are enrolled in a health plan that meets certain IRS requirements to be an "HSA-qualified" health insurance plan. There are two ways a new state law or regulation could prevent a health plan from being an HSA-qualified plan:

1. The first way would require first-dollar coverage of benefits without an exception for HSA-qualified plans, because HSA-qualified plans must apply the policy deductible to any benefit that is not considered "preventive care."

2. The second way would create a new benefit, or designate an existing benefit, as "preventive care," to which no cost-sharing (i.e., deductible) would apply. This way is more challenging because it is subject to a determination by the IRS as to whether the benefit would be considered "preventive care" and, therefore, exempt from cost-sharing by HSA-qualified insurance plans.

Checklist

1. *First-dollar Coverage Mandate*

___ Does the bill (or proposed regulation) impose a *benefit coverage mandate* on fully-insured plans? If yes, a potential problem for HSAs may exist.

___ Does the mandate require first-dollar coverage of the new benefit? If yes, has legislative or regulatory counsel determined whether the mandate is "preventive care" under IRS rules? If the mandate is not "preventive care"—

___ Does the bill or regulation provide a specific exception from the requirement for first-dollar coverage for HSA-qualified insurance plans so that the insurance policy deductible may be applied to the new benefit? If no, the ABA HSA Council and the state bankers association will likely oppose the bill or regulation, because of the detrimental effect on HSAs.

2. *"Preventive Care" Benefit*

___ Does the bill (or proposed regulation) require fully-insured plans to cover an existing or new benefit as "preventive care"? If yes, a potential problem for HSAs may exist.

___ Does the benefit meet the definition of "preventive care" as determined by the IRS? (See the IRS notices listed below.) If yes, the benefit may be covered without cost-sharing; if no, then the bill (or proposed regulation) would disqualify HSA plans in the state and make HSA owners ineligible to contribute to their accounts. OR—

___ Does the benefit meet the definition of "preventive care" as determined under the Affordable Care Act? If yes, then certain services must be covered by HSAs without cost sharing. IRS Notice 2013-57 and IRS Notice 2019-45 clarify that a High Deductible Health Plan (HDHP) used to establish an HSA must provide certain preventive care services or screenings without satisfying the minimum deductible requirement for HSAs. This rule was originally detailed in IRS Notice 2004-23 and clarified in IRS Notice 2004-50.

Sources:

26 U.S.C. § 223(c)(2)

IRS Notice 2004-23

IRS Notice 2004-50

IRS Notice 2013-57

IRS Notice 2019-45

ACA: https://www.healthcare.gov/coverage/preventive-care-benefits/