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Title: Insurance Standards Bulletin Series -- INFORMATION

Subject: Procedural Guidance for States to Recommend Restricting Certain Excepted Benefit Health Reimbursement Arrangements from Reimbursing Premiums for Short-term, Limited-duration Insurance

This Bulletin provides guidance to applicable state authorities regarding the form and manner in which to submit a written recommendation to restrict excepted benefit health reimbursement arrangements (HRAs) from reimbursing short-term, limited-duration insurance (STLDI) premiums for certain employers in their state under 26 CFR 54.9831-1(c)(3)(viii)(F), 29 CFR 2590.732(c)(3)(viii)(F), and 45 CFR 146.145(b)(3)(viii)(F).

I. Background

On June 20, 2019, the Departments of Health and Human Services (HHS), Labor, and the Treasury (the Departments) published the final rule “Health Reimbursement Arrangements and Other Account-Based Group Health Plans”¹ (HRA rule) that, among other things, created a new limited excepted benefit, known as an excepted benefit HRA. Under the HRA rule, for plan years beginning on or after January 1, 2020, benefits provided under an HRA or other account-based group health plan (other than a health flexible spending arrangement) are excepted (and, therefore, not subject to the market requirements of title XXVII of the Public Health Service Act (PHS Act) and the corresponding provisions in the Employee Retirement Income Security Act and the Internal Revenue Code) if all of the following requirements are satisfied:²

- (1) Other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan must be made available by the same plan sponsor for the plan year to the participant;
- (2) The amounts newly made available for each plan year under the HRA or other account-based group health plan do not exceed \$1,800, adjusted annually in the manner set forth in the HRA rule;

¹ 84 FR 28888.

² See 26 CFR 54.9831-1(c)(3)(viii), 29 CFR 2590.732(c)(3)(viii), and 45 CFR 146.145(b)(3)(viii).

(3) The HRA or other account-based group health plan does not reimburse premiums for individual health insurance coverage, group health plan coverage (other than COBRA continuation coverage or other continuation coverage), or Medicare Part A, B, C, or D, except that it may reimburse premiums for such coverage that consists solely of excepted benefits; and

(4) The HRA or other account-based group health plan is made available under the same terms to all similarly situated individuals, regardless of any health factor.

The HRA rule does not prohibit reimbursement of STLDI premiums by excepted benefit HRAs. However, the HRA rule includes a special rule to address concerns regarding the potential for adverse selection in the small group market if small employers that provide fully or partially insured health coverage also sponsor excepted benefit HRAs that reimburse STLDI premiums.³ Specifically, the HRA rule provides that the Departments may restrict excepted benefit HRAs sponsored by such small employers in a state from reimbursing STLDI premiums, if five criteria are satisfied.⁴

First, the restriction applies only to excepted benefit HRAs offered by small employers, as defined in PHS Act section 2791(e)(4). Second, the restriction applies only in situations in which the other group health plan coverage offered by the small employer pursuant to the HRA rule is either fully insured or partially insured. Third, the restriction applies only if the Secretary of HHS makes a finding, in consultation with the Secretaries of Labor and the Treasury, that the reimbursement of premiums for STLDI by excepted benefit HRAs sponsored by applicable small employers in a state has caused significant harm to the small group market in the state that is the principal place of business of the small employers. Fourth, this finding may be made only after submission of a written recommendation by the applicable state authority of such state, in the form and manner specified by HHS. Finally, the restriction (or discontinuance of the restriction) must be imposed by publication of a notice by the Secretary of HHS in the Federal Register and shall be effective prospectively only and with reasonable time for plan sponsors to comply.

II. Who Can Submit a Recommendation

If a state wishes to submit a recommendation to restrict reimbursement of STLDI premiums by excepted benefit HRAs meeting the applicable criteria (or discontinue a previously approved restriction), the applicable state authority must submit a written recommendation to HHS. The submission must be signed by the state insurance commissioner or other state official(s) designated by the state to enforce the PHS Act title XXVII requirements with respect to health insurance issuers in the state.⁵

³ See 26 CFR 54.9831-1(c)(3)(viii)(F), 29 CFR 2590.732(c)(3)(viii)(F), and 45 CFR 146.145(b)(3)(viii)(F).

⁴ Id. See also 84 FR 28888, 28941-2.

⁵ In states in which the Centers for Medicare & Medicaid Services is directly enforcing one or more of the PHS Act title XXVII requirements with respect to health insurance issuers, the submission must be signed by the state insurance commissioner or other state official(s) designated by the state to enforce state law with respect to issuers in the state.

III. Content of Recommendation

The written recommendation submitted by the applicable state authority must include evidence that the reimbursement of STLDI premiums by excepted benefit HRAs established by insured or partially insured small employers in the state has caused significant harm to the state's small group market, including on small group market premiums. The evidence may include the applicable state authority's documented overall assessment of the small group market in the state. It may also include representations made by small group market issuers that an increase in the purchase of STLDI coverage by employees of small employers as a result of STLDI premiums being reimbursed by excepted benefit HRAs has caused issuers to increase premiums for small group market insurance, due to the issuers' reasonable belief about adverse selection in the small group market. The Departments will not restrict reimbursement of STLDI premiums if the state's recommendation includes only evidence of potential but not actual harm. The state may provide a recommendation regarding the date upon which the restriction should apply, as discussed in section IV.

A state can elect to have a previously-approved restriction on reimbursement of STLDI premiums by excepted benefit HRAs in its state discontinued. To do so, the applicable state authority must submit a request to discontinue the restriction, and an explanation for why the state seeks to discontinue the restriction. Additionally, the state may provide a recommendation regarding the date upon which the restriction should be discontinued. A discontinuance of a restriction will only apply prospectively and with reasonable time for plan sponsors and issuers to adjust, as further discussed in section IV.

HHS encourages state authorities that wish to submit a recommendation to do so as early as possible in advance of the requested effective date of the restriction (or discontinuation of a previously-approved restriction) to provide sufficient time for the Departments to review the request. States should ensure they have sufficient experience with applicable small employers offering excepted benefit HRAs that reimburse premiums for STLDI prior to submitting a recommendation.

The recommendation must be submitted by email to HHS at marketreform@cms.hhs.gov.

IV. Evaluation and Implementation

HHS will evaluate each recommendation on a case-by-case basis. Factors that HHS may consider in determining whether significant harm to the state's small group market has occurred include the impact on issuers' participation in the small group market, the magnitude of premium increases in the small group market, enrollment declines in the small group market, and changes to the health of the small group market risk pool, to the extent each factor is related to individuals purchasing STLDI with premiums that have been reimbursed by excepted benefit HRAs sponsored by applicable small employers.⁶ HHS may request additional information, if necessary, to assist with its review.

⁶ See 84 FR at 28942.

If the Secretary of HHS, in consultation with the Secretaries of Labor and the Treasury, makes a finding that the reimbursement of premiums for STLDI by excepted benefit HRAs sponsored by applicable small employers has caused significant harm to the small group market in the state that is the principal place of business of the small employers, HHS will publish a notice in the Federal Register announcing that excepted benefit HRAs offered by small employers that offer other group health plan coverage that is either fully insured or partially insured may not reimburse premiums for STLDI in that state. A restriction will only apply prospectively.

To provide plan sponsors with a reasonable amount of time to come into compliance with a restriction, HHS anticipates that a restriction will generally apply for excepted benefit HRA plan years that begin on or after 6 months after publication of the Federal Register notice. A state may request an expedited or delayed effective date by including in its recommendation a requested timeframe for the restriction and an explanation for why an earlier or later date is justified, or why plan sponsors in their state require either more or less time to adjust to the restriction.

If a state submits a recommendation to discontinue a previously-approved restriction, following review by the Departments, HHS will publish a notice in the Federal Register announcing that excepted benefit HRAs offered by small employers that offer other group health plan coverage that is either fully insured or partially insured will no longer be prohibited from reimbursing premiums for STLDI in that state. To provide issuers in the small group market with an opportunity to adjust rates to reflect the discontinuance of the restriction, HHS anticipates that a discontinuance will generally apply for excepted benefit HRA plan years that begin on or after the earliest date on which small group market issuers in the applicable state can adjust rates following publication of the Federal Register notice. HHS will specify in the Federal Register notice the effective date of the discontinuance taking into account the state's recommendation.

If the Secretary of HHS, in consultation with the Secretaries of Labor and the Treasury, declines to make the requested finding, HHS will notify the state of its decision in writing. Within 30 calendar days of receipt of such determination, a state may request HHS, in consultation with the Departments of Labor and the Treasury, to undertake a secondary review of the initial determination. The request must be submitted by email to HHS at marketreform@cms.hhs.gov, and additional evidence can be submitted with the request for review. If the secondary review upholds the initial determination, HHS will notify the state of its decision in writing. That notification will represent a final agency action on that single request. States will be able to submit new requests in the future.

V. Paperwork Reduction Act of 1995 (PRA)

HHS anticipates fewer than 10 states will submit these recommendations annually. Under 5 CFR 1320.3(c)(4), this collection of information will not be subject to the PRA as HHS anticipates it will affect fewer than 10 entities in a 12-month period.

Where to get more information:

If you have any questions about this Bulletin, please email HHS at marketreform@cms.hhs.gov.