Insight

New HHS Rulemaking Destroys HSAs

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INTRODUCTION

A recently published final rule from the Department of Health and Human Services (HHS) will undermine one of the few functional and market-oriented provisions in the Affordable Care Act (ACA). The rule will make it functionally impossible for Health Savings Account (HSA) compatible insurance plans to be sold through the exchanges. The rule guarantees the evisceration of these popular consumer-owned accounts by adjusting plans' out-of-pocket limits to preclude HSA eligibility, and by requiring first-dollar coverage for yet more benefits—a benefit arrangement, which is currently incompatible with HSA designs.

THE RULE

New Benefits

The first barrier to HSA availability in the rule is the addition of new 'standard benefits' that will receive first-dollar coverage, such as additional primary care visits, specialists, and generic drugs. These changes will be optional in 2017, but will be fully implemented in the 2018 plan year.

The result of this rule will be to prohibit the sale of HSA-qualified High Deductible Health Plans (HDHPs) on the exchanges. HDHPs are not permitted to cover any services pre-deductible other than preventive services. None of the proposed standard benefits are preventive services, and the rule includes no exception for HDHPs.

The exemption of these benefits from the deductible is likely the reason HHS found it necessary to mandate higher out-of-pocket limits: to maintain the proper metal-tier actuarial value, even if it means hurting the consumers.

New Out-of-Pocket Limits

The second impediment to the sale of HSAs is more insidious. Buried in 500 pages of regulations that describe the new (temporarily optional) standardized benefit design are new mandatory out-of-pocket spending limits for Bronze, Silver, and Gold plans. Currently plans are given a range in which they may set their deductibles. Plans that set a low enough out-of-pocket maximum are eligible to be termed HDHPs and be paired with HSAs.

HHS is *raising* the out-of-pocket max, and then effectually prohibiting the use of HSA funds to pay those increased deductibles. By standardizing the out-of-pocket max at a higher level, and thereby balancing the actuarial values with the new benefit mandates according to metal tier, it makes it impossible for plans to qualify as HSA compatible HDHPs.

Though this rule is not a direct attack on HSAs, the difference between inflation adjustments and out-of-pocket maximum requirements will bring about this preclusive effect within a year. When this problem was raised during Notice and Comment, HHS blamed the Internal Revenue Service (IRS) for relying on the Consumer Price Index (CPI) rather than HHS' own "premium adjustment percentage" to arrive at their respective inflation adjustments and out-of-pocket limits.

Should the IRS find a way to delay the effect by raising the HSA out-of-pocket limit to match the HHS limit, it will likely be too late—the IRS regulations are not released until April, mere weeks before finalized plan bids must be submitted to the exchanges for open enrollment in October.

Hiding HSA Plans on the Exchanges

To add insult to injury, the rule includes language providing that Navigators should be given resources to help consumers understand concepts such as out-of-pocket costs and limitations, yet elsewhere in the rule HHS asserts that individual consumers are capable of determining whether a plan is HSA-qualified on their own, by studying the plan's cost-sharing amounts and comparing it with their personal or family HSA out-of-pocket limitations as finalized in the IRS rulemaking. Therefore, HSA-qualified plans will no longer be designated as such in the plan name or on the exchange website.

FALLOUT

The final rule may be surprising as this type of action is exactly the threat to market-based HSAs that proponents of HSAs have feared since the introduction of the ACA. The Obama Administration has repeatedly promised a rule of this type would not be issued.

For example, in early March 2010, just weeks before signing the ACA into law, President Obama sent a letter to leaders in Congress who were concerned about the effect of the law on the health insurance market. In an attempt to ease their fears, he wrote "I believe that high-deductible health plans could be offered in the exchange under my proposal, and I'm open to including language to ensure that is clear. This could help to encourage more people to take advantage of HSAs."[1]

Only a year later, during the height of rulemaking and implementation, HHS Secretary Sebelius published an article in the Washington Post which stated, "The Affordable Care Act puts states in the driver's seat because they often understand their health needs better than anyone else […] States have discretion, for example, to offer a wide variety of plans through their exchanges, including those that feature health savings accounts."[2]

CONCLUSIONS

The administration's actions in the recent rulemaking belie the promises made during passage and implementation. The sneaky way in which HHS is eliminating HSAs from the exchanges emphasizes the

desperation within the agency to make exchange plans attractive to consumers by adding new benefits and to shifting the responsibility for rising premiums and out-of-pocket costs onto the IRS and insurers.

[1] https://www.whitehouse.gov/blog/2010/03/02/president-obama-follows-thursdays-bipartisan-meeting-health-reform-0.

[2] http://www.washingtonpost.com/wp-dyn/content/article/2011/02/09/AR2011020905682.html.