

June 11, 2012

Internal Revenue Service, CC: PA: LPD: PR
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: IRS Notice 2012-31

To Whom It May Concern:

On behalf of the members and Board of Directors of The HSA Council¹, thank you for the opportunity to comment on IRS Notice 2012-31 (“Notice”) providing guidance on how the Service intends to determine the actuarial values of employer-sponsored health plans under the Patient Protection and Affordable Care Act (PPACA).

Since the Notice incorporates the methodology specified by the Department of Health and Human Services in its February 24, 2012 guidance bulletin on Actuarial Value (AV) and Cost-Sharing Reductions, our comments will primarily address our concerns with the approach outlined in that bulletin.

To ensure that health savings accounts (HSAs) continue to be available in the employer-sponsored health plan market, the AV rule for HSA-qualified plans should be constructed so that:

1. All employer contributions are counted at 100%, and,
2. All individual employee contributions are counted at 100%.

Our concerns extend to the following statement included in the bulletin:

“However, because generally only a portion of an HSA is used in a year for health services, HSA contributions would be adjusted so that the employer receives the same credit for HSA contributions in the numerator of the AV calculation as it would receive for the same amount of first-dollar insurance coverage.”

Based on the information at hand, the proposed rule would unfairly and irrationally devalue HSA contributions for the purposes of calculating the AV of HSA-qualified plans through an undefined “adjustment” based upon an inaccurate assumption about the

¹ The HSA Council is made up of FDIC insured depository institutions, health insurers and their technology partners. The HSA Council advocates on behalf of account-based health care financing solutions in the United States and is part of the American Bankers Association.

manner in which these accounts are used. The intent of the 2003 legislation that created HSAs was to redirect dollars that would have otherwise been spent on health insurance premiums to an individual's account. The only difference between the HSA funds and premium dollars is the transfer of risk to the consumer. HSA balances are held for future health expenditures just as insured premium is designed to cover current and future liabilities (especially in a small population). An HSA is like insurance for a population of one, so the risk is quite variable and must address more than one year at a time. The HSA funds are "insurance" for payment of claims beneath the deductible of the HSA-qualified health plan; in essence, pre-paid claims.

Our objection to the proposed rule is that it ignores the treatment of IRS-qualified claims and the treatment of contributions to the HSA as pre-paid claims or, in the alternative, does not treat the contribution as payments in lieu of payments that would otherwise have been paid premiums. Absent changes, we believe the proposed AV rule discriminates against HSAs.

As you are aware, these markets are precisely the segments in need of the most relief and HSAs offer the only proven cost reductions in the marketplace. Where the MLR rule threatens the financial ability and incentive of insurers to offer fully insured HSA-qualified plans, the proposed AV rule threatens to exclude them from being offered in the Exchanges, an outcome the President specifically told the industry he would avoid.

In his March 2, 2010 letter² to Speaker Pelosi, Majority Leader Reid, Minority Leader McConnell and Minority Leader Boehner, the President assured Senator Barrasso about the viability of HSAs in the Exchanges and said,

“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.”

The availability of HSA-qualified plans in the Exchanges is essential if individuals and small businesses are to have the ability to purchase affordable coverage when they are ordered to do so, or face penalties commencing in 2014.

If we consider this issue from the perspective of premium, if left as is, the proposed rule does not “adjust” the AV of a plan simply because there are excess premium dollars not spent on claims in any given plan year. Why, then, does the rule treat unspent HSA contributions differently?

² March 2, 2010 Letter from President Obama to Majority Leader Harry Reid, Minority Leader Mitch McConnell, Speaker, Nancy Pelosi and Minority Leader John Boehner; found at: <http://www.whitehouse.gov/blog/2010/03/02/president-obama-follows-thursdays-bipartisan-meeting-health-reform-0>.

Further, the proposed rule penalizes HSA owners by creating perverse incentives to spend more money per medical good or service. HSA owners have a lower utilization rate because of the simple fact that they are spending their own money, so they spend it more prudently. Therefore, an unintended consequence of the proposed AV rule is that prudent spending is penalized, rather than rewarded.

In its comment letter to HHS dated May 16, 2012, the American Academy of Actuaries (AAA) said the following:

“This adjustment . . . could have the effect of discouraging employers from contributing to HSAs/HRAs. For a given amount of employer spending toward health insurance, a higher AV likely would be achieved by devoting more of those dollars directly toward a health insurance program than to an HSA/HRA. To the extent that HSAs encourage plan enrollees to seek cost-effective care, discouraging this option may run counter to goals of achieving more effective use of health care dollars.”

If this interpretation is correct, we find the proposed rule in direct opposition to both the President’s promise of a role for HSAs in the Exchanges and the methodology for calculating the AV of HSA-qualified plans issued by the Congressional Budget Office (CBO).

CBO said that³:

“. . . the actuarial value of consumer-directed plans would include the expected value of any contributions that an insurer or employer sponsoring the plan would make to an enrollee’s account — so that contribution could be set to make the overall actuarial value of the consumer-directed plan equal to the value of a conventional health plan.”

The explanation for AV calculation given by the CBO at the time of PPACA’s enactment evidences the original intent. AV regulation should treat dollars contributed to the account in exactly the same manner as dollars spent on premium, whether by the individual or the employer.

The proposed AV rule ignores the issue of automatic contributions to the account made by individuals or small business. While we believe contributions should be treated the same as premium payments, we requested that HHS issue clarification around the issue of automatic vs. voluntary contributions.

Lastly, we believe it is important to understand how HSAs differ from HRAs. As the Academy of Actuaries stated in its May 16 letter:

³ December 2008 CBO report, “Key Issues in Analyzing Major Health Insurance Proposals”
http://www.aba.com/aba/documents/ABIA/CBO_KeyIssuesAnalyzingMajorHealthRefor%20ProposalsDec2008.pdf

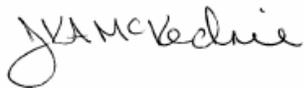
“It also is important to discern the distinctions between HSAs and HRAs. These two arrangements are treated differently both from a federal tax perspective and from an administrative perspective by the employers offering them. Employer HSA contributions are funded in separate bank accounts for the employees and are non-forfeitable. Employers are granted tax deductions for the full HSA contribution funded. Employer HRA contributions are not pre-funded and are paid from employer general revenues as eligible reimbursement requests are received. HRA amounts may or may not carry over to subsequent years. Even if carryover amounts are allowed, they might be limited. And HRAs generally are forfeited if an employee leaves the company. Employers are granted tax deductions for the amounts actually paid from the HRA. If these two accounts are treated similarly under the AV calculation, there could be an incentive to discourage the use of HSAs in favor of HRAs.”

The stakes are high for the HSA industry, since the Minimum Loss Ratio and the Actuarial Value rules inhibit the ability of insurers to offer bronze plans on the Exchanges, or outside the Exchanges, for the small group and individual markets.

It is our view that the discrimination against HSAs in the MLR rule has already created uncertainty as to whether it will even be possible to offer HSA-qualified plans. HHS’s “adjustment” rule on AV will only further push insurers out of offering bronze plans.

We understand the complexity of the task before the Service and look forward to working constructively with you to ensure that the greatest number of Americans possible have access to affordable health insurance. Preserving HSAs is the best way to do that.

Respectfully,

A handwritten signature in black ink that reads "K McKechnie". The signature is written in a cursive style with a large, looped initial "K".

Kevin McKechnie
Executive Director