



December 28, 2018

Alex Azar
Secretary of Health and Human Services
Department of Health and Human Services
200 Independence Avenue SW.
Washington, DC 20201

Alexander Acosta
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave, NW Ste. S-2524
Washington, DC 20210

Steven Mnuchin
Secretary of the Treasury
Department of Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Covered California comments on Health Reimbursement Arrangements (HRAs) and Other Account-Based Group Health Plans; CMS-9918-P (RIN 0938-AT90)

Dear Secretary Azar, Secretary Acosta, and Secretary Mnuchin:

Covered California is submitting comments in response to the proposed Health Reimbursement Arrangements (HRAs) regulations CMS-9918-P. We provide the following comments based on our experience and analysis of what efforts are necessary to ensure a viable risk mix in the individual market generally and in particular to ensure the ongoing sustainability for state-based marketplaces and states that may operate in the federally-facilitated marketplace. In summary, because of consumer confusion these proposed regulations will cause, a lack of a federal data source to appropriately verify APTC eligibility for consumers offered HRAs, and the potential adverse impact on the risk mix of the market, we do not think that, as drafted, these regulations will benefit consumers in the Exchange marketplace. To the extent these regulations are finalized, we make specific recommendations related to the need to add safeguards and provide for sufficient time to assure viable implementation. Covered California's concerns and recommendations are further explained below.

Increased Consumer Confusion

The proposed regulations require employees, who are offered an HRA, to consider the HRA offer and decide if they should seek an affordability determination from an Exchange. In order to make that decision, employees will need to distinguish and understand four different types of HRA offerings – an HRA integrated with group or other coverage, an individual-market-integrated HRA, an excepted benefit HRA, and a qualified small employer health reimbursement arrangement (QSEHRA) – and accurately communicate which type of HRA their employer is offering when seeking an affordability determination from an Exchange. Only two of these HRA options, an individual-market HRA and QSEHRA, require employers to provide employees with information about eligibility for premium tax credits. This places the burden on employees to figure out what they're offered and understand complex eligibility requirements for premium tax credits that will lead to increased employee confusion surrounding their health insurance choices. For example, employees with an offer of an HRA will not only need to understand how an HRA impacts their eligibility for tax credits, but they will also need to understand the implications of "opting out" of an HRA.

Consumers who are confused by their options may inadvertently provide inaccurate information to Exchanges, placing the consumer at risk of improperly obtaining subsidies which they would ultimately have to pay back. Additionally, confused consumers may make disallowed coverage choices.

The consumer confusion and demands on Exchange service centers as well as agents and brokers will mean time and effort is distracted from the job of enrolling consumers in affordable coverage. Consumers will contact Exchange service centers and other enrollment channels for help, putting an inappropriate burden on service channels to explain the nuanced differences of HRAs, excepted benefits HRAs, QSEHRA's to consumers, and how each option interplays with premium tax credits. Extensive training for agents and brokers who are marketing individual ACA compliant products will be necessary.

Absence of Verification Could Lead to Inappropriate APTC Determinations

To confirm that employees receive the appropriate eligibility for APTC, Exchanges are required to verify certain eligibility requirements with electronic data sources. There is no electronic data source available for state-based Exchanges, such as Covered California, and the federally-facilitated marketplace, to verify the information on HRA offerings that an employee is reporting to the Exchange. Without verification, Exchanges are at risk of inappropriately determining eligibility for APTC. Inaccurate eligibility determinations will lead to HRA-related appeals and additional employee frustration regarding repayment of APTC and the potential for tax liability.

For the reasons stated above, Covered California asks that the effective date of this regulation be delayed until viable and federally-hosted electronic data source for APTC

eligibility verification exists and to allow time for IT systems to be changed and to address employee confusion.

To the extent that these rules become finalized, the Departments of Treasury, Labor, and Health and Human Services (Departments) should consider various modifications to the rules to mitigate the consumer and operational challenges outlined above as well as to adequately prevent adverse selection to the market. Covered California offers the following recommendations:

1. Strengthen Safeguards to Prevent Market Segmentation and Health Condition Discrimination

In the proposed regulation, the Departments of Treasury, Labor, and Health and Human Services (the Departments) conclude that there is significant risk of market segmentation and health factor discrimination that justify regulations aimed at preventing employers from intentionally or unintentionally steering participants with adverse health conditions into the individual market. If employers were permitted to shift less healthy individuals or less healthy classes of employees (including creating certain classes of employees) into the individual market, individual market premiums will increase, thereby increasing subsidy costs for the federal government and premiums for unsubsidized enrollees, both on and off-Exchange. To address this concern, the proposed regulation requires individual-market-integrated HRAs to be offered to entire classes of workers (rather than to specific workers) and prohibits employers from offering workers a choice between individual market coverage and a traditional group health plan. The proposed regulation allows employers to delineate classes based on any combination of a broad set of worker characteristics.

Covered California is concerned that the proposed list of classes is so broad it may facilitate precisely what the regulation states it seeks to protect; allowing employers to create classes that steer participants with adverse health factors into the individual market. In addition to the proposed “safeguards,” the Departments should consider additional safeguards to ensure that there is not an incentive to discriminate based on a health condition. Examples of additional safeguards include:

- A 30-day maximum waiting period for employees who have not satisfied a waiting period for coverage
- Limitations on class sizes. For example, employers with less than 10 employees should not be allowed to create classes and no class of employees should be allowed to contain less than a certain number of employees. The Departments could consider a requirement that each class of employees must be a minimum of 10% of the total employer workforce

2. Complicated System Modifications Require Additional Implementation Time

The proposed regulations require Exchanges to perform a new affordability calculation for consumers who are offered an individual-market-integrated HRA and other account-based group health plans through their employer. Specifically, the regulations require that consumers who are offered this type of HRA, but wish to apply for premium tax credits, seek an affordability determination from an Exchange. To make this determination, all state-based Exchanges and the federally-facilitated marketplace must develop new system logic to support this calculation, which is based on the lowest cost silver plan in a consumer's region, consumer's household income, HRA amount and duration, employment status, availability to dependents, and the affordability percentage for that year. Exchanges must also develop new questions to support the affordability calculation, adding to the already lengthy application for health care coverage, as well as dynamically hide these new questions from consumers that are potentially eligible for Medicaid programs. Due to the complexity of the required changes, Covered California cannot fully incorporate these new questions and calculations of eligibility into its system by the proposed January 1, 2020, implementation date.

For the reasons stated above, Covered California has significant concerns about the insufficient safeguards and complexity of changes required of Exchanges in the proposed regulations. Should the Departments finalize the proposed rules, Covered California requests to delay the effective date of this regulation until at least 2021 to allow time for IT systems to be changed and to address employee confusion surrounding eligibility.

Sincerely,



Peter V. Lee
Executive Director

cc: Covered California Board of Directors