NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

May 11, 2023

The Honorable Janet Yellen
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Danny Werfel
Commissioner of the Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20024

Dear Secretary Yellen and Commissioner Werfel:

On behalf of NAIC's members—the chief insurance regulators in 50 states, the District of Columbia, and U.S. territories—we write on two important ways tax policy affects health insurance.

First, we want to thank you for Treasury Department's action to address the family glitch in the implementation of the Affordable Care Act (ACA). Second, we renew our request for additional clarity on the regulation of Health Savings Accounts (HSAs). We believe the tax rules around HSAs should be updated to provide more certainty for stakeholders and to accommodate key consumer protections established by states.

Thank you for recognizing and addressing the barriers to health coverage created by the IRS's former interpretation of the ACA's affordability test for employer coverage, which created a "family glitch." The former policy prevented families from accessing premium tax credits when an employer offered affordable coverage to an employee, but unaffordable coverage for other family members. The revised interpretation allows the full cost of family coverage to be taken into account and has made premium tax credits available to more who need them. We appreciate this action to address what was a frustrating limitation on the availability of tax credits for families.

As we wrote to you in April 2022, states and consumers have also been frustrated by the impact of IRS interpretations related to HSAs, which are a valuable tool for millions of Americans, helping participants grow their savings while keeping premium costs in check through the use of high deductible plans (HDHPs). Under current tax law, deductible levels are a key determinant of a qualified HDHP which will allow HSA contributions by the enrollee. At the same time, deductible levels and other cost sharing provisions fall under concurrent state regulation due to their use in health insurance. We urge you to examine and, where necessary, update HSA regulations to prevent conflict between federal rules and state insurance regulations. We also believe that more clarification is needed in IRS communications regarding HSAs. Varying guidance has been offered as stakeholders seek to understand the rules of the road.

A qualified HDHP may not, except in a few instances outlined in federal law, cover services before the deductible is met. State legislatures have sought to protect consumers by requiring insurance plans to cover certain services before a deductible is met or to count payments made by drug manufacturers or other third parties toward a consumer's deductible in certain circumstances. These consumer protections are most often intended to apply to a broad range of consumers in the state, regardless of whether they are enrolled in an HDHP or another type of plan. Some have interpreted HSA rules to disallow HSA contributions by enrollees in HDHPs that are subject to these state regulations. This can prevent many consumers from accessing the benefits of an HSA or lead to a state exempting HDHP enrollees from important protections for which they would otherwise be eligible.

For instance, after Kentucky enacted legislation to require insurers to count co-payment assistance toward an enrollee's deductible, the state exempted enrollees in HDHPs from this protection due to IRS's HSA guidance from 2004. In addition, some have interpreted HSA law to consider not the deductible set by the terms of an enrollee's health plan, but the "minimum annual deductible" referenced in the HSA statute in Section 223 of the Internal Revenue Code. This can lead to confusion among regulators as well as enrollees and the health plans and banks who serve them.

State insurance regulators seek greater clarity from Treasury and IRS on HSA contributions when state cost sharing regulations are in place. Section 223 clearly defines a high deductible health plan as a plan with a deductible in excess of $1,000 (for self-only coverage and as adjusted by the Secretary), but it does not define "deductible." We believe a reasonable interpretation would look to the terms of the health plan itself in defining a plan as an HDHP. Thus, when a plan has a deductible greater than the qualifying amount it should be considered a high deductible health plan. What amounts count toward that deductible is a separate consideration that should be left to state insurance law. When a state law requires certain amounts to count toward a deductible, that does not change the terms of the plan and we do not believe there is justification for interference with state laws that direct how to count spending toward a deductible.

We ask IRS to preserve state flexibility in health plan regulation. As the use of deductibles in health insurance markets has evolved since HSAs were created and the initial IRS guidance was issued, state legislatures and state insurance regulators have worked to establish valuable consumer protections that in some cases involve insurance payments prior to the deductible or third-party payments of a portion of the deductible. These protections do not fundamentally alter the balance between premium and deductible in an HDHP and should not prevent an enrollee from contributing to an HSA. HSA rules should be flexible enough to allow reasonable state regulation of cost sharing and we request that you update the rules to build in such flexibility.

State insurance regulators would appreciate the opportunity to work with you and your staff to further develop guidance or regulation on HSAs and the deductibles of qualifying HDHPs. We believe taxpayers, insurance consumers, and state insurance markets would all benefit from an adjustment to current guidance. Thank you for your consideration.

Sincerely,

Chlora Lindley-Myers

Chlora Lindley-Myers
NAIC President
Director
Missouri Department of Commerce and Insurance

Andrew N. Mais *(He/Him/His)*
NAIC President-Elect
Commissioner
Connecticut Insurance Department

Jon Godfread
NAIC Vice President
Commissioner
North Dakota Insurance Department

Scott White
NAIC Secretary-Treasurer
Commissioner
Virginia Insurance Department