National Association of Insurance Commissioners
& The Center for Insurance Policy and Research

August 6, 2020

Internal Revenue Service
United States Department of the Treasury
1111 Constitution Avenue NW
Washington, DC 20224

Re: REG-109755-19

Via Regulations.gov

To Whom It May Concern:

The following comments on the proposed regulation "Certain Medical Care Arrangements," published June 10, 2020, are submitted on behalf of the members of the National Association of Insurance Commissioners (NAIC). NAIC represents the chief insurance regulators in the 50 states, the District of Columbia, and the five United States territories.

The proposed rule would allow payments for direct primary care (DPC) and health care sharing ministries (HCSMs) to be deductible for qualifying taxpayers and allow health reimbursement arrangements (HRAs) to support the cost of DPC and HCSMs. State insurance regulators urge IRS not to rely on an interpretation that classifies health care sharing ministries as insurance. Insurance is regulated to provide important protections for consumers and other market participants. HCSMs claim to be exempt from regulation as insurance.[1] They should not be permitted to at once maintain exemption from the laws that regulate insurance and at the same time derive benefits from an IRS classification that conflates them with insurance. We further urge IRS to more fully consider the difficulties in using the Affordable Care Act's definition of "health care sharing ministry" and to take steps to assure that any definition is useful for its intended purpose.

HCSMs strongly deny that they provide insurance; they are not licensed as insurers in any state where they operate; and they fail to provide some of the most fundamental protections that insurers are required to provide. The proposed rule finds that the term insurance should be "read broadly" for the purposes of deductibility of medical care expenses. Finding HCSMs to be an acceptable form of "insurance," however, is too broad. It contradicts HCSMs' own terms, and also the ACA and the laws of most states. HCSMs claim that they do not provide insurance in exchange for payment of a premium, but rather share funds among members. When there are not enough funds, members' medical expenses often go unpaid. Insurance is a contractual arrangement, an exchange of a premium payment for a promise to pay if a fortuitous risk occurs. State insurance law generally forbids insurers from making their promises to pay contingent on the collection of adequate funds from other members. In fact, insurers are required to maintain surplus funds sufficient to assure payment even if revenue falls short or claims are significantly higher than expected.

State laws, too, generally define HCSMs as arrangements that are not insurance if they meet certain specified conditions. No HCSM has obtained or applied for an insurance license in any state in which it operates. Thirty states explicitly exempt health care sharing ministries that meet applicable standards from their laws that regulate

[1] Insurance regulators are aware of entities claiming to be health care sharing ministries that do not meet the requirements of applicable law. Such entities are typically transacting unauthorized insurance. A health care sharing ministry can legitimately maintain exemption from state insurance laws by adhering to applicable standards, which vary by state.

insurance. So does the Affordable Care Act, which treats HCSM membership as an exemption from the requirement to maintain minimum essential coverage, not as an acceptable form of minimum essential coverage.

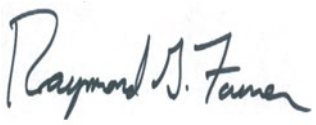
State regulators further have concerns with the potential effects of allowing taxpayers to use tax-advantaged HRA funds for unregulated HCSMs. First, regulators find HCSMs often offer inadequate protection for consumers. Nearly every HCSM excludes far more medical services than traditional health insurers, including treatment for substance use disorder and most prescription drugs. While these exclusions enable HCSMs to offer a superficially lower monthly cost, they also necessarily expose consumers to tremendous financial risk. Again, HCSMs should not be both free from insurance regulation and eligible for privileged tax status.

Second, allowing employees to choose to use their HRAs to pay HCSM fees could result in adverse selection against the risk pools of comprehensive coverage, especially in the small group market. Employers may offer employees a choice between an excepted benefit HRA and a more traditional health plan. Under the proposed rule, employees could use the excepted benefit HRA for a HCSM without enrolling in any health coverage. This arrangement may be more attractive to employees with lower expected health costs, leaving those with higher expected costs in the employer plan and in the state's single risk pool. With excepted benefit HRAs already available for less-regulated short-term, limited duration plans, this risk selection could contribute further to degradation of the small group market risk pool in states where enough small employers allow such choices. The tax advantages of an HRA should not be used as additional incentive for such risk selection.

State regulators also warn IRS that determining which entities are bona fide HCSMs under the proposed definition may prove difficult. Regulators are not aware of any state or federal authority that maintains a list of the HCSMs that were operating at the end of 1999, that are operating currently, or that have operated without interruption in the interim. Organizational splits and mergers among HCSMs have left it unclear which entities operating today are authentically derived from entities in operation since 1999. State regulators agree that any tax advantages, if provided at all, should be limited to bona fide HCSMs, but the IRS would need to take active steps to identify such entities and their successors so that this element of the definition of HCSM can be enforced and enrollees' options would be clearly defined. State regulators also urge the IRS to increase oversight of HCSMs to determine how funds are used and enrollees are protected. Annual reporting and regular audits would be a good start.

Thank you for this opportunity to comment. As state regulators continue to review the Department's regulations and policies and their impact on market competition, premiums, and consumer protections, we will continue to provide comments. We are available to discuss these or other issues as the regulation is finalized.

Sincerely,



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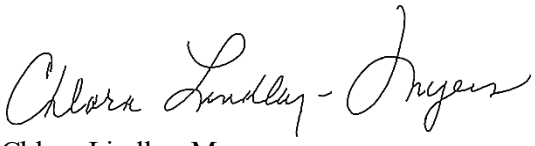

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