Washington Health Benefit Exchange Comments: Proposed Federal Rule – Health Reimbursement Arrangements and Other Account-Based Group Health Plans

The Washington State Health Benefit Exchange (WAHBE or the Exchange) appreciates your consideration of the following comments regarding the proposed Health Reimbursement Arrangement (HRA) rules, published by the United States Departments of the Treasury, Labor, and Health and Human Services (Departments) on October 29, 2018 (83 FR 54420).

WAHBE has significant concerns about the changes proposed in this rulemaking and urges the Departments not to finalize the rules as proposed. The proposed rules would cause significant consumer confusion and harm, with the impact being felt primarily by middle and lower-income Americans and those with more significant health care needs. The Departments should reconsider the proposed rules in light of the disparate impact that they will have on vulnerable populations of Americans.

WAHBE is concerned that the contemplated changes will further segment risk and destabilize the individual market, causing premiums to increase for all consumers in that market. In addition, the Exchange emphasizes the importance of preserving states' well-settled authority to regulate their insured health insurance markets, which would be undermined by the proposed rules.

The Proposed Rules are Likely to Cause Significant Harm to Consumers

Affordability

The proposed rule directly harms all middle and lower-income employees who are offered an integrated HRA by their employer. Consumers with incomes under 400% of the federal poverty level (FPL)[1] would generally be eligible for a tax credit to purchase a qualified health plan (QHP) through the ACA marketplace, if not for the HRA contribution. The ***offer*** of the HRA, however, would eliminate most consumers' eligibility for a tax credit entirely, making them financially worse off than if there had been no HRA offered. Consumers who can keep their tax credits – which only applies to consumers whose premium after accounting for the HRA contribution would be **more than ~10% of their income[2]** – can do so only if they give up their employer's HRA contribution. These employees can keep their tax credit but are no better off than they are today. The proposed rules, therefore, would have a neutral or negative impact on any individual making less than 400% of FPL per year, a group which includes 52% of the residents of Washington State.[3] Only consumers who earn more than 400% of FPL per year could see any benefit from these proposed rules.

[1] Four-hundred percent of FPL is equivalent to $48,560 a year for a single person, or $100,400 a year for a family of four.

[2] The affordability threshold for determination of whether an employee has been offered an affordable employer-sponsored plan and is therefore ineligible for tax credits through an exchange is 9.86% of income for plan year 2019.

[3] Kaiser Family Foundation report of U.S. Census Bureau American Community Survey data, 2017. https://www.kff.org/other/state-indicator/distribution-by-fpl/?currentTimeframe=0&selectedDistributions=under-100percent--100-199percent--200-

The proposed rule creates two unequal standards of "affordability" with respect to individual market plans sold through the Exchange. Under the ACA, affordability in an exchange plan is determined by a maximum percentage that consumers are expected to contribute to their insurance premiums, so that lower-income consumers are expected to pay a smaller percentage of their income on premiums. For example, consumers up to 150% FPL are expected to contribute a maximum of 4% of their income toward the monthly premium in a benchmark plan (the second lowest-cost available silver plan).

The proposed rule, however, applies a different standard of affordability to any consumer seeking an individual market plan whose employer has decided to offer an integrated HRA. **These consumers are expected to pay as much as 9.86% of their income toward their monthly premium for an exchange plan, regardless of their income, before being eligible for tax credits in an exchange plan.** Where a single person earning $18,210 annually would be expected to pay 4% of their income - or $728 annually – toward their premium under current rules, the same individual would be expected to pay almost 10% of their income – $1,785 annually – toward their premium if their employer were to offer them an HRA under the proposed rule. This different definition of "affordable" that would apply to consumers with the same income seeking to buy the same exchange plan based on whether their employer offers an HRA is inequitable and harms the most vulnerable consumers.

The proposed rule upends the ACA's intent to base the definition of affordability in an individual health plan available through the exchange on a consumer's ability to pay a statutorily defined percentage of their income. Instead, the rule determines that all consumers, regardless of income, should be expected to pay up to 10% of their income toward their individual plan premium before they can qualify for tax credits. This interpretation is inconsistent with the intent of the ACA and causes targeted harm toward the lowest-income consumers seeking coverage in the individual market.

WAHBE strongly urges the Departments to remove their definition of affordability from the proposed rule and adopt a definition of affordability that is consistent with the ACA and the current interpretation of affordability in individual market health plans.

Consumer confusion

The proposed regulations introduce complex new rules governing employee benefits, making it harder for employees to choose the best health insurance plan for their needs. The proposed rules create two new forms of HRA: an HRA that must be integrated with an individual market plan, and a limited-purpose HRA that may not be integrated with an individual market plan. These new forms of HRA would join the currently-available HRA options: an HRA integrated with an employer-sponsored group health plan, and a qualified small employer health reimbursement arrangement (QSEHRA) that may be integrated with an individual market plan. All four of these HRAs have different participation rules and tax implications, and may (or must) be paired with very different forms of health insurance. The new rules place a significant burden on consumers to understand precisely what kind of HRA they may have been offered by their employer and to report this accurately to an exchange when seeking coverage in a health insurance plan.

It would be difficult to overstate the confusion that these new rules are likely to cause for consumers. Today, many of the Exchange's consumers have difficulty understanding whether they have received an affordable offer of employer-sponsored insurance that meets "minimum value" requirements, understanding how affordability in a self-only employer plan translates to "affordability" when buying coverage for their whole family in the Exchange, and understanding the impact of their employer's plan

on their eligibility for tax credits in a QHP. These new rules will exacerbate that confusion considerably and result in consumer frustration, inaccurate eligibility determinations, appeals, and very likely abandonment of enrollment in individual market coverage. Put simply, consumers are likely to give up on seeking coverage altogether.

The Proposed Rules are Likely to Further Segregate Risk, Encourage Discriminatory Impacts, and Destabilize the Individual Market

The proposed rules allow large employers to offer HRAs integrated with an individual market health plan in lieu of a group health plan, departing significantly from current requirements for coverage offered to large employee groups. The proposed rules offer large employers a choice they have never before had: to provide group health plan coverage that is either self-insured or subject to experience rating in the large group market, or to send their employees to the community-rated individual market for insurance. Employers would be permitted to make this choice on a firm-wide basis or on a "class" basis, permitting employers to offer different coverage types to different segments of their work force.

Allowing large employers to choose whether their employees (or specific classes of their employees) will be subject to experience-rated premiums or community-rated premiums opens the door to adverse selection. It would benefit employers with a younger and healthier employee base to remain in the self-insured and large group markets, while it would be advantageous to employers with older or sicker employees to send these employees to the individual market, allowing the employer to shed responsibility for their employees' "bad risk." Creating a system that allows large employers to shift high-cost employee groups to the individual market concentrates bad risk in the individual market, which increases premiums and destabilizes the entire market.

The protections included in the proposed rules intended to prevent employers from discriminating between employees based on health status are necessary, but not sufficient, to ensure fair treatment of employees. The requirement for employers to treat all employees in a certain class equally is important, but leaves room for employers to use valid classifications (e.g., geographical location, collectively bargained status, under age 25) as proxies for health status factors. Large employers should not be permitted to choose between participation in the large group/self-funded market or the individual market, as this will encourage differential treatment of groups of employees in a way that could have the effect of discriminating based on health status.

Employer choice to send employees to the individual market rather than offer a group health plan will, on average, result in a transfer of benefits from older and sicker employees to younger and healthier employees. Most HRA contributions are made in the form of flat dollar, per employee per month contributions, which result in a higher percentage contribution toward a younger employee's individual market premium compared to an older employee's premium. Moreover, the ability of employers to segment risk by offering a group health plan to one class of employees while sending another class to the individual market will exaggerate this impact.

The regulation's proposal to allow large employers to choose between offering their employees coverage in the large group market or through the individual market endangers states' ability to regulate their health insurance markets. Permitting large employers to choose experience rating for certain groups of employees and community rating for other employee groups will result in market distortions that will be

beyond states' ability to control and will result in market segmentation and increasing premiums in the individual market.

Exchanges Would Need Significant Time to Implement Proposed Rules

The Exchange would need significantly more time to implement the proposed rules than allowed under the proposed January 1, 2020 effective date. The Exchange would need to make eligibility system changes to capture HRA information from consumers, calculate affordability in the benchmark plan, and deny consumers eligibility for tax credits, and make corresponding screen changes to try to alleviate consumer confusion. These significant system changes would result in a cascade of increased operational costs, including increased Exchange call center and consumer correspondence costs. Washington State insurance brokers, navigators, and carriers would experience similar customer service and operational impacts. The Exchange and our state partners would not be able to implement these proposed changes in time for the 2020 plan year.