Effect of State Health Insurance Benefit Mandates on Health Savings Accounts’ (HSAs) Contribution Eligibility and Qualifying High-Deductible Health Plans (HDHPs)

ABA HSA Council Presentation to the NCSL Insurance Task Force
Denver, CO
July 2022
HSA Market Penetration

Privately Insured Americans\(^1\)
(Employer / Non-Group)

Estimated HSA\(^2\)
Covered Lives

Total HSAs\(^3\)

181,519,000
67,358,000
32,515,000

Sources:
1. Health Insurance Coverage of the Total Population | KFF
3. 2021 Year-End Devenir HSA Research Report

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Estimated Total HSAs by State

Total HSAs by State

<table>
<thead>
<tr>
<th>State</th>
<th>Estimated Total HSAs</th>
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<tbody>
<tr>
<td>Vermont</td>
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</table>
Estimated People Covered by an HSA by State

Sources:
Devenir & U.S. Census Bureau
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Estimated Privately Insured Population HSA Penetration by State

HSA Penetration by State

<table>
<thead>
<tr>
<th>State</th>
<th>Estimated Privately Insured Population Penetration</th>
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<tbody>
<tr>
<td>Vermont</td>
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<tr>
<td>DC</td>
<td>39%</td>
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</tbody>
</table>

Sources:
Devenir, Kaiser Family Foundation, & U.S. Census Bureau
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HSAs & HSA-Qualified Plans

• Health Savings Accounts (HSAs) are trust/custodial bank accounts similar to Individual Retirement Accounts

• Adults may contribute to an HSA only if they are enrolled in an “HSA-qualified plan” and do not have other coverage that disqualifies them*

• “HSA-qualified plans” must apply:
  – a minimum deductible to all covered benefits (medical + pharmacy) that are not “preventive care” under IRS rules (which generally follow the ACA definition)
  – an annual limit on out-of-pocket expenses (including all cost-sharing for covered benefits)

*Includes most “lower deductible” plans and Medicare, but also employer-sponsored programs like health flexible spending accounts (FSAs) and health reimbursement accounts (HRAs)
HSA-Qualified Plans

- Minimum annual deductible for HSA-qualified plans (2022)*
  - Self-only coverage - $1,400
  - Family coverage - $2,800
- Annual limits on out-of-pocket expenses cannot exceed (2022)*
  - Self-only coverage - $7,050
  - Family coverage - $14,100

NOTE: ACA borrowed concepts of first-dollar coverage of preventive care and annual limits on out-of-pocket expenses from HSA-qualified plans
  - But ACA OOP limits are now almost 25% higher ($8,700 / $17,400 for 2022) and growing

*Adjusted annually for inflation
Health Savings Accounts

• Contribution limits for eligible adults are based on their coverage and age
  – Self-only coverage - $3,650* (2022)
  – Family coverage - $7,300* (2022)
  – Age 55+ - $1,000 “catch-up” contribution (annually)

• Contributions are tax-deductible from income and/or “pre-tax” when made by an employer or via payroll deduction by employees

• Deposits never expire, accumulate annually, and may be invested like IRAs

• HSA funds may be used tax-free for IRS-approved health expenses

• HSA funds belong to the account owner; accounts are completely portable

*Adjusted annually for inflation
Defining the Problem

• **The Problem**: State health insurance mandates can conflict with Federal requirements for HSA-qualified plans.

• **Effect on consumers**: HSA owners lose access to their desired health insurance plan and the financial benefit from contributing to their HSAs.

• **Current example**: “Copay accumulator” laws, some of which don’t coordinate with federal HSA rules.

• **Implication**: Millions of HSA owners could be forced to withdraw mistaken contributions to their HSA and re-file tax returns.
For Consideration

• NAIC, DOIs can have an impact.

• What can DOIs do before HSA-qualified plans are sold?

• You may have health plans in your state marketed as HSA-qualified plans that are not, or would not be, qualified.
  – This increases confusion and raises consumer disclosure and protection issues.
Potential Solutions

• Recommendations:
  – Encourage regulators and legislators to be aware of federal rules for HSAs and HSA-qualified plans.
  – Identify available regulatory authority with respect to mediating between state law and federal law/regulation.
  – Issue a bulletin if appropriate to educate consumers, insurers and financial institutions.

• HSA-qualified plans are in a position similar to private flood insurance.
Benefit Mandates

• Benefit Mandates/Limits on Cost-Sharing

– Bills that seek to protect consumers from out-of-pocket health care costs under their state-regulated insurance coverage sometimes inadvertently threaten HSAs.

– Requiring policies to cover specific benefits without any cost-sharing can be problematic for HSAs because IRS rules only allow zero cost-sharing for “preventive care” services (as defined by the IRS)
Copay Accumulators

• Copay accumulator “adjustment” or “assistance” bills are relatively new. They change existing state law by requiring health plans to count drug coupons and certain third-party payments toward enrollees’ deductibles.

• IRS rules for HSA-qualified plans prohibit counting drug coupons and other third-party payments toward an enrollee’s deductible.

• These bills are well-intended to help patients pay for expensive prescription drugs but have the unintended consequence, due to IRS requirements, of prohibiting individuals and their employers from making future contributions to their HSAs.
Task Force’s Study of the Issue

• Discussion of the IRS position was a major impetus of Colorado Commissioner Conway’s (and former Chair here) agreeing that the Task Force study the issue.

• The IRS wrote a detailed response to the Illinois Department of Insurance dated April 16, 2021 (copy included in Task Force materials) warning of the consequences of these bills and their impact on HSA efficacy.
Summary of IRS Letter

• The IRS did not say patients could not use drug manufacturer coupons.
• The IRS did say that HSA-qualified plans must only count the amount an enrollee pays out-of-pocket for a prescribed drug toward satisfying their deductible without including the value of any drug copay coupon.
  – Example: An individual is prescribed a drug that costs $1,000, but a discount from the drug manufacturer reduces the cost to the individual to $600. Under IRS rules, an HSA-qualified plan may only credit $600 toward the individual’s deductible -- not $1,000. The IRS said, “This same principle also applies to a third-party payment, such as a rebate or coupon, that has the same effect as a discount.”

• We respectfully disagree with those contending the IRS letter is not formal guidance, or that it is open to other interpretation, as it accurately states the law.
Summary of IRS Letter

• The IRS also reiterated that IRS guidance – and not state law – determines whether a given benefit is “preventive care” and, thereby, permissible coverage without a deductible.

• Many state benefit mandate bills go well beyond even US Preventive Services Task Force recommendations.
What’s Happening?

• States that have already adopted unfavorable copay accumulator “adjustment” or “assistance” laws include:

Efforts at Reform

• Our efforts at reform:
  – NCOIL Accumulator Adjust Program Model Act (and we worked with PhRMA in that regard) in November 2021; provides a carve-out for HSA-qualified plans, with a reference to IRC Section 223.
  – Discussions with NAIC leadership, senior NAIC staff, and many of you. This includes state governments and NCOIL.
  – Bills that Passed with with favorable NCOIL or other carve-out language: Connecticut (SB 9, Public Act 22-146), Illinois (HB 4433, Public Act 102-704); Kentucky (HB 317, Chapter 49), Louisiana (HB 504/SB 366, Act 132) Maine (LD 1783, Chapter 744), Oklahoma (HB 3495), Utah (HB 31), Virginia (HB 1081/SB 433, Chapters 134, 133), Washington (SB 5610, Chapter 228).
  – Bills that were introduced but did not pass: bills with no carveouts need to be fixed upon reintroduction next sessions: Delaware (S. 265, favorable carveout); Florida S. 1480/H1063 (no carveouts); Iowa HF 2384 (no carveout); HF 536 & HF 464 (good carveouts); Minnesota SF 2136/HF 3611 (weak carveout); Missouri SB 1031 (no carveout). Mississippi HB 880 (favorable carveout); Nebraska LB 718 and LB 270 (favorable carveouts); New York S. 5299, A. 1741 (favorable carveout) and A. 1096 (no carveout); South Carolina HB 4987 (good carveout); Vermont S. 205 (no carveout); Wisconsin SB 215 and AB 184 (no carveouts).
What Should Happen?

• Relief Requested for HSA Owners

  – Good: Continued consumer education from DOIs on this subject.

  – Better: Collaboration with legislators to ensure state laws permit health plans to meet the IRS requirements for “HSA-qualified plans.”

  – Best: A **Model Bulletin or Law** that provides a safe harbor for HSAs.
Contact Information:

J. Kevin A. McKechnie – Executive Director and Founder
Jennifer Hatten – Vice President
Roy Ramthun – President, HSA Consulting Services, LLC
Jeff Klein – McIntyre & Lemon, PLLC

- J. Kevin McKechnie – kmckechn@aba.com
- Jennifer Hatten – jhatten@aba.com
- Roy Ramthun – roy@hsaconsultingservices.com
- Jeff Klein – jklein@mcintyrelf.com