STATE OF NEW MEXICO
OFFICE OF SUPERINTENDENT OF INSURANCE

SUPERINTENDENT OF INSURANCE
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BULLETIN 2021-007

May 13, 2021

TO: EVERY PERSON WHO OFFERS, OR INTENDS TO OFFER, A HSA OR MSA ELIGIBLE HEALTH CARE PLAN IN NEW MEXICO ON OR AFTER JANUARY 1, 2022

RE: SENATE BILL 317

Senate Bill 317 was signed into law by Governor Michelle Lujan Grisham on April 8, 2021 and will become effective January 1, 2022. Among other advancements, SB317 prohibits cost sharing, including imposition of a deductible, for behavioral health services covered by a New Mexico health care plan. The New Mexico Office of Superintendent of Insurance ("OSI") is responsible for evaluating whether a health care plan complies with New Mexico law, and must approve a health care plan before it can be offered or sold in this state. To ensure compliance with SB317, numerous health plan issuers have asked OSI for guidance concerning its applicability. Specifically, issuers have asked whether it will be permissible to sell a high deductible health plan ("HDHP") that satisfies health savings account ("HSA") or medical savings account ("MSA") eligibility requirements on or after January 1, 2022. As explained below, this office believes SB317 does not prohibit the offer or sale of any such plan.

HSA eligibility requirements are governed by Internal Revenue Code ("IRC") Section 223. Generally, to be HSA-eligible, a health care plan must require the insured person to satisfy a specified high deductible before receiving any covered benefits, *other than benefits for preventative services*. *See generally* Internal Revenue Service Publication 969 (https://www.irs.gov/publications/p969). A person enrolled in such a plan may deposit funds, up to a specified maximum, into a HSA. HSA contributions are tax deductible, even if the contributor does not itemize deductions. Also, funds held in a HSA, including any interest or gain, can be withdrawn tax and penalty free to pay health care expenses, including insurance premiums.

Behavioral health services are not considered preventative for purposes of IRC Section 223. Because SB317 does not allow a health care plan to impose a deductible for behavioral health services, and those services are not preventative, a health care plan subject to SB317 is not HSA eligible. Such a stance, however, would undermine longstanding New Mexico public policy favoring MSAs and HSAs, and certainly does not reflect the intent of the bill sponsor.

The New Mexico public policy finds original expression in Chapter 59A, Article 23D NMSA 1978; the Medical Care Savings Account Act (the "MCSAA"). Enacted in 1995, the MCSAA allows a self-employed person to purchase a high deductible "catastrophic" health plan and obtain favorable tax treatment by depositing funds into a MSA. A MSA, coupled with a catastrophic health plan, entitles the account holder to favorable tax treatment, including deductibility of contributions into the MSA and tax free withdrawals to pay for medical expenses. The MCSAA was intended to allow New Mexicans to receive these benefits to the fullest extent allowed by federal law.

Because a self-employed person must maintain a high deductible catastrophic health plan to contribute to a MSA, and a catastrophic plan requires the policyholder to pay significant medical expenses before a health plan pays benefits, the MSA program discouraged utilization of health services and reduced overall health insurance costs. Buoyed by the success of the MSA program, Congress expanded the availability of the tax benefits associated with a MSA by enacting IRC Section 223 as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. IRC Section 223 allows any person, not just someone who is self-employed, to obtain the same tax benefits of a MSA by purchasing an HSA-eligible HDHP. A state enables its residents to obtain the advantages of IRC Section 223 simply by authorizing the sale of HSA-eligible HDHPs. Since 2003, the OSI has approved the sale of hundreds of such products, including HSA eligible plans available for purchase through the New Mexico Health Insurance Exchange on beWellnm.com.

In 2019, the New Mexico Legislature reaffirmed this state's commitment to allowing residents to purchase HSA and MSA eligible HDHPs. In its regular session that year, the Legislature passed, and the Governor signed into law HB89. That law mandates that health plans sold in New Mexico provide coverage for contraception without cost sharing. At that time, female contraception services were clearly preventative for purposes of IRC Section 223. That being so, New Mexico could mandate that a health plan cover those services without cost sharing without preventing a plan from being HSA or MSA eligible. However, it was unclear whether male contraception services were considered preventative for purposes of IRC Section 223. To ensure that HB89 would not prevent a health plan from being HSA or MSA eligible, the bill expressly exempted HDHPs from the male contraception "no cost sharing" mandate until an enrollee's deductible has been met. *See, e.g.,* NMSA 1978, § 59A-46-55 (2019).

The enactment of the MCSAA, OSI's approval of HSA and MSA eligible HDHPs, and the cautionary HDHP exception for male contraception in HB89, all reflect a strong public policy favoring the availability of HSA and MSA eligible HDHPs. Banning such plans would have significant, adverse ramifications. The American Bankers Association reports that New Mexicans currently have $66MM on deposit in HSAs. Those funds provide significant financial security against future medical expenses for the 44,000 New Mexicans who hold HSA accounts. Those account holders also received significant tax benefits for creating that security. Clearly, New Mexicans have realized the benefits of HSA and MSA eligible HDHPs. Banning HSA and MSA eligible HDHPs would deprive future generations of New Mexicans of those benefits.

Banning such plans also would represent a seismic shift in New Mexico public policy. It is implausible that the New Mexico Legislature intended to make such a shift when it enacted SB317.

To be sure, SB317 advances the laudable objective of removing cost barriers to obtaining behavioral health services. The availability of tax-free HSA and MSA savings also removes such barriers. Because HSA and MSA eligible plans allow a consumer to choose tax-free medical savings as the method of removing cost barriers to necessary health care services, the objective of SB317 would not be frustrated by the continued availability of HSA and MSA eligible plans. Conversely, the elimination of such plans would frustrate consumers who invested in HSAs/MSAs, and who depend on such accounts to ensure future financial security and could increase the cost of all health care plans in New Mexico.

Although legislative history ordinarily should not guide statutory construction, the OSI cannot ignore the lack of any consideration or discussion about HDHPs, HSAs and MSAs during debate on SB317. This corroborates the conclusion that the law was not intended to ban such products.

The language in a statute should not be applied literally if that would lead to an unintended, and absurd consequence. *State v. Maestas*, 2007-NMSC-001, ¶ 16. A literal application of SB317 would prevent New Mexicans from purchasing, and obtaining the valuable tax advantages of, a HSA or MSA eligible HDHP. Such an application of the law was unintended by the enactors and would be contrary to established public policy of New Mexico.

A literal application of SB317 would impliedly repeal the MCSAA. Because the implied repeal of a statute is highly disfavored, a statute should not be construed to effect an implied repeal of an earlier enacted statute unless absolutely necessary to give a later-enacted statute some meaning and effect. *Alvarez v. Board of Trustees of La Union Townsite*, 1957-NMSC-022, ¶ 10. SB317 will retain broad applicability even if its cost sharing mandates do not apply to HSA or MSA eligible HDHPs. The SB 317 mandates will continue to apply to myriad commercial and government health care plans that are not designed to be HSA or MSA eligible. It follows that SB317 should not be construed to impliedly repeal the MCSAA.

"The construction of statutes should be accepted which will make them effective and productive of the most good, as it is presumed that these results were intended by the legislature." *Id.* Considering the longstanding public policy favoring HSA and MSA eligible HDHPs, the consumer benefits of such plans, the ability of enrollees in such plans to pay for behavioral health services with pre-tax savings, and the absence of any consideration of the impact of SB317 on the availability of a MSA or HSA, the OSI concludes that SB317 was not intended to, and does not, apply to a HSA or MSA eligible HDHP.

Please direct any questions or comments concerning this bulletin to Todd Baran at todd.baran@state.nm.us.

ISSUED this 13th day of May, 2021

RUSSELL TOAL
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