MEMORANDUM

Date: October 26, 2018
TO: REDC Members
FROM: Katrina Velasquez and Allison Ivie, Center Road Solutions
RE: Health Reimbursement Arrangements Proposed Rule and State Waiver Guidance

I. Executive Summary

This past week, the Trump Administration, through the Secretary of Health and Human Services and the Secretary of the Treasury (collectively, the Secretaries), released two ACA-related guidance/proposals that will likely have a negative effect on REDC Members' patient populations. This includes the October 22nd released federal guidance to provide supplementary requirements that must be met for the approval of an ACA State Innovation Waiver (Section 1332) and the October 23rd released a proposed rule to loosen restrictions on Health Reimbursement Arrangements (HRAs)- both offering flexibility and incentives for states and employers to provide non-ACA comprehensive coverage (i.e. coverage that doesn't offer Essential Health Benefits of mental health and substance use disorder), While these are separate guidance and rules, to best understand the implications, they must be read and analyzed together.

- **ACA State Innovation Waiver Guidance**: This guidance permits a new flexibility for states to allow them to submit more expedited waivers to adjust baseline ACA insurance plans, and for the first time, allow states to go below the ACA Essential Health Benefits baseline requirements- permitting both Association Health Plans and Short-Term, Limited Duration Insurance plans to be listed on the state ACA exchanges which could now receive ACA premium tax credits (subsidies).
- **HRA Proposed Rule:** This proposed rule would permit employers to offer HRAs to either fund the premiums for short-term, limited duration & COBRA plans, or go off of the traditional employer plan to go on the ACA exchange and then utilize the HRA for those premiums (which with the waiver guidance would include STLDI plans).

Opportunities: For states that have a history of protecting vulnerable populations like our patient group, the new guidance and proposed rule when combined could:

1. Permit states to receive a more flexible and expedited innovation waiver and provide further coverage in addition to what is included on the ACA (if approved).
2. Allow employers to offer HRAs for individual ACA exchange plans that would provide comprehensive essential health benefits that may not otherwise be as comprehensive under the traditional employer plans.

Threats: Overall there is a two-phased risk for REDC's patient population with both the guidance and proposed rule:

1. Immediate Risk for 2019: With the removal of the individual mandate (but not the employer mandate), small businesses (not subject to the employer mandate) may opt in 2019 to offer HRAs as a benefit to their employee to purchase a short-term limited duration insurance premium (with traditional ACA plans being excluded).
2. 2020 and Later Risk: A risk that we may see down the road- likely with more conservative states like Texas, South Carolina, Alabama, etc.- would be that the state would pass a waiver to decrease the baseline requirements under the ACA (negatively affecting our sicker patient population's coverage), and then an employer in that state could offer an HRA for a plan on the ACA that also could include an STLDI **and** receive a premium tax credit to pay for it. Additionally, overall, shifting ACA exchange groups to STLDI or AHPs will increase the cost to others on the ACA exchanges.

II. ACA State Innovation Waiver Section 1332 New Guidance- Summary of Guidance

On October 22, 2018, the Secretary of Health and Human Services and the Secretary of the Treasury (collectively, the Secretaries) released federal guidance to provide supplementary requirements that must be met for the approval of an ACA State Innovation Waiver (Section 1332). The Obama Administration released 2015 guidance that allowed states to modify how they implement key elements of the ACA and to adopt alternative ideas that depart from some of its standards and requirements.[1] **The guidance went into effect on October 22, 2018, however, there is an open comment period until 5:00PM EST on December 21, 2018.** The new guidance released by the Secretaries increases flexibility for states around these guardrails including:

Essential Health Benefits

- The 2015 guidance stated that 1332 waivers could be used to change essential health benefit (EHB) requirements or change which plan is used as a benchmark for determining the advance premium tax credit for subsidized enrollees. However, it did stipulate that the waiver must demonstrate coverage is *as least as comprehensive as ACA marketplace coverage* (a state's benchmark plan). The current guidance posits that states no longer have to ensure in their waiver applications that the new proposed coverage is comprehensive, but coverage as defined under *45 C.F.R. 144.103*, which includes group health insurance, individual health insurance (ACA marketplace plans), short-term, limited-duration insurance (STLDI) and association health plans (AHPs).[2] These plans would be sold on the exchanges and subsidized enrollees can use their tax credits to purchase these plans, which was prohibited under the ACA as STLDI and AHP plans are not considered to be ACA-compliant.

Number of Insured

- The 2015 guidance was very strict in that waivers would be considered based on the effect it may have on vulnerable populations (i.e. elderly, sick); however, the new guidance removes this requirement and focuses on the aggregate effects of those covered in a state. A waiver application only must demonstrate that a comparable number of state residents eligible for coverage would have coverage (including STLDI plans) absent the waiver, regardless of effects on vulnerable populations.[3]

Affordability

- The 2015 guidance underscored that any waiver application must provide coverage that is at least as affordable under current law "on average" across the population subject to the waiver.[4] Waivers that would leave health care spending burdens on specific populations would be rejected. The proposed guidance will engage in more of a balancing test—if a waiver makes coverage more affordable for some people and only slightly costlier for a larger number of people, it may still be approved.[5]

Budget Neutrality

- The proposed guidance largely keeps intact the 2015 guidance stating that no waiver can be approved if doing so would increase the federal deficit. Importantly, the proposed guidance does remove a sentence from 2015, which states that a waiver that would increase the deficit in any given year over a ten-year period would be rejected. This means that a state that submits a waiver increasing the federal deficit over any of the years the waiver is in effect, it may be approved.

III. Pros & Cons of Guidance

Pros:

- **Loosen State Requirement:** The guidelines loosen the state requirement a state law be passed in order to apply for a waiver; allowing needed flexibility to state waiver applications—in particular has been a target conversation in a number of Senate HELP hearings on stabilization. This may help states who want to provide

[1] Lueck, Sarah & Schubel, Jessica. (September 5, 2017). "Understanding the Affordable Care Act's State Innovation ('1332') Waivers." Center on Budget and Policy Priorities. Retrieved from: https://www.cbpp.org/research/health/understanding-the-affordable-care-acts-state-innovation-1332-waivers
[2] Keith, Katie. (October 23, 2018). "Feds Dramatically Relax Section 1332 Waiver Guardrails." Health Affairs Blog. DOI: 10.1377/HBLOG20181023.512033
[3] Center for Medicare & Medicaid Services (October 22. 2018) "State Relief and Empowerment Waivers." p. 15 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23182.pdf
[4] Lueck, Sarah & Schubel, Jessica. (September 5, 2017). "Understanding the Affordable Care Act's State Innovation ('1332') Waivers." Center on Budget and Policy Priorities. Retrieved from: https://www.cbpp.org/research/health/understanding-the-affordable-care-acts-state-innovation-1332-waivers
[5] [5] Center for Medicare & Medicaid Services (October 22. 2018) "State Relief and Empowerment Waivers." p. 14 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23182.pdf

even more comprehensive coverage for their populations to have an expedited waiver application process. However, it also offers states wanting to provide limited coverage more flexibility to apply.

Cons

- **Weakening Pre-existing Condition Protections & EHB Protections**—expanding the definition of comprehensive coverage to include AHPs and STLDI plans that do not have to provide EHBs and pre-existing conditions protections would allow states to develop state plans that allow for the spread of plans that do not cover mental health and substance use disorder coverage, which is critical for the REDC patient population.
- **Adverse Selection**—allowing states to develop plans that don't take into account specific populations (i.e. individuals with chronic health conditions) when determining "affordable" coverage can adversely affect the pool of individuals that need more comprehensive coverage. Allowing STLDI and AHP plans available on the exchanges could result in ACA-compliant plans to significantly increase in price for individuals that have multiple health needs.

I. HRA and Other Account-Based Group Health Plan Proposed Rule: Summary of Guidance

On October 23, 2018, the Department of Health and Human Services, Department of Labor and the Department of the Treasury (collectively, the Departments) released a proposed rule to loosen restrictions on Health Reimbursement Arrangements (HRAs). **There is an open comment period until 5:00PM EST on December 22, 2018.** HRAs are employer-funded, tax-free accounts that employees can use to cover health costs. The proposed rule would loosen restrictions that would allow employers to offer employees: 1) an HRA for the purchase of individual health coverage (e.g. plans available on the state exchanges, which can include short-term, limited duration insurance plans under the recently released guidance beginning in 2020) in lieu of a traditional group plan; and separately, 2) an HRA to be used for excepted benefits coverage such as covering short-term, limited duration plan premiums.[6]

- *HRA for Purchase of Individual Health Coverage*

Under the proposed rule, an employer can offer a class of employees an HRA integrated with individual health coverage—which is currently prohibited under the ACA, while maintaining compliance with the employer mandate. However, the employer is prohibited from offering both the option of a traditional group health plan and an HRA for the purchase of individual health coverage to the same class of employees. The eight classes of employees that can be offered an HRA integrated with individual health coverage or a traditional group health plan include:

  - Full-time employees
  - Part-time employees
  - Seasonal employees
  - Collective bargaining agreement unit
  - Employees currently in a waiting period
  - Employees under the age of 25
  - Non-resident aliens with no U.S.-based income (foreign employees who work abroad)
  - Employees whose primary site of employment is in the same rating area

Employees can opt-out of an HRA if the employee is eligible for an ACA premium tax credit.[7] ACA premium tax credits, also known as subsidies offered for silver plans which is approximately 87% of ACA enrollees, are given to individuals and families who meet certain income threshold of $49,960 as an individual/$94,200 for a family of four and other requirements to offset the cost of insurance premium costs. Additionally, the employer is required to provide written notice to eligible participants that enrolling in an HRA integrated individual coverage plan would make enrollees ineligible for ACA premium tax credits.[8]

[6] Council for Affordable Health Coverage. (October 23, 2018). "Summary of Proposed Rule Health Reimbursement Arrangements and Other Account-Based Group Health Plans." Retrieved from: https://www.cahc.net/newsroom/2018/10/23/cahc-praises-proposed-rule-expanding-hras
[7] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 50 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf
[8] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 33 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf

- *HRA For Excepted Benefits*

The second part of the proposed rule permits an employer to offer employees an HRA for excepted benefits—which is currently not permitted under the ACA. This means that there may be a scenario where an employer wants to offer an HRA as an employee benefit (i.e. dental insurance premium assistance) even if its employees have other health insurance coverage or its employees have coverage that satisfies market requirements (i.e. Essential Health Benefits).[9] However, the rule prohibits an employer from offering an employee an HRA for the purchase of individual coverage *and* an HRA for excepted benefits, which could be used for services not provided by an employee's current plan. There are four requirements for an HRA to qualify as an excepted benefit HRA[10]:

(1) HRA must not be an integral part of the plan;
(2) HRA must provide benefits that are limited to $1,800 annually (carryover is permitted);
(3) HRA cannot provide reimbursement for premiums for traditional health insurance coverage, but can be used for short-term, limited duration insurance and COBRA;
(4) HRA must be made available under the same terms to all similarly situated individuals

II. Pros and Cons of Proposed Rule

Pros

- Anti-Discrimination Protections/Protection Against Adverse Selection—the proposed rule provides safeguards to prevent employers from offering coverage options to their employees based on health status, in turn protecting against adverse selection by:
  - Creating eight classes of employees (referenced above) and prohibiting the employer from offering both a traditional group health plan and an HRA integrated individual health plan.
  - Additionally, defining eligible employees into distinct groups will not be easily manipulated by employers in the attempt to transfer risk (and perceived higher costs) from one group of workers to another.[11]
- Transparency—the proposed rule requires that all employers provide a notice to employees that enrolling in an HRA will make the employee ineligible to receive a premium tax credit. It also allows for employees to opt-out of an HRA and waive future reimbursements to maintain their premium tax credit.[12]
- Potential Expansion of Coverage for Small Employers—The Administration estimates that the rule would provide health insurance for 1 million currently uninsured Americans, which would be primarily from businesses with under 50 employees who would otherwise be required to enroll under the ACA.

Cons

- Although the proposed rule integrates anti-discrimination provisions on the basis of health status, there is still concern the provision isn't strong enough and that some employers may still decide to move their workers over to the ACA individual market and incentivizing the new enrollment in short-term, limited duration insurance plans (instead of the comprehensive ACA plans) versus maintaining their traditional large group employer plan. Depending on the employees' plan selection (whether they choose the new STLDI or the original ACA comprehensive coverage which will be more expensive), this could again increase premiums for individuals remaining on the ACA and for the employees that need more comprehensive coverage with mental health and substance use disorder benefits that a non-comprehensive plan like an STLDI wouldn't cover.
- Allowing employers to contribute to tax-free accounts that workers can use for the purchase of individual health insurance is a shift from a defined benefit, to a defined contribution. This shift increases the risk of increased health care costs falling on the employees over time instead of the employers.

[9] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 59 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf
[10] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 60 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf
[11] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 41 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf
[12] The Departments. (October 23, 2018). Health Reimbursement Arrangements and Other Account-Based Group Health Plans. p. 33 Retrieved from: https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23183.pdf