August 7, 2015

The Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., S.W.
Washington, DC 20201

Dear Secretary Burwell:

As Chairmen of the Committees on Ways and Means, Education and the Workforce, and Energy and Commerce, and as the committees of jurisdiction over the President’s health care law, pursuant to House Rule X, we are tasked with examining the administration and effectiveness of the law. Pursuant to this duty, we write to request information on a recent regulatory change that will have significant consequences for employers and the coverage they provide to their employees.

As you know, the President’s health care law established many new requirements for health plans. One such requirement is that all health plans must impose limits on the amount of out-of-pocket costs, such as co-pays, coinsurance, and deductibles. The law initially set these limits equal to those placed on health savings account (HSA) contributions, with the limit for self-only plans twice that of family plans (or other non-self policies). The statute is not ambiguous and clearly states there are two separate and distinct types of coverage, each with respective out-of-pocket limits. The self-only out-of-pocket maximum cannot be read to apply to plans other than self-only coverage. Section 1302(c)(1) states:

The cost-sharing incurred under a health plan with respect to self-only coverage or coverage other than self-only coverage... shall not exceed the dollar amounts in effect under section 223(c)(2)(A)(i) of the Internal Revenue Code of 1986 for self-only coverage and family coverage respectively, for taxable years beginning in 2014.

On November 26, 2014, the Department of Health and Human Services (HHS) issued a new proposed regulation that substantially changed the way this law operated. According to the preamble of the proposed rule:

[The annual limitation on cost sharing for self-only coverage applies to all individuals regardless of whether the individual is covered by a self-only plan or is covered by a plan that is other than self-only .... For example, under the proposed 2016 annual limitation on cost sharing, if an other than self-only plan has an annual limitation on cost sharing of $10,000 and one individual in the family plan incurs $20,000 in expenses from a hospital stay, that particular individual would only

---

1. 42 U.S.C. § 18022(c).
be responsible for paying the cost sharing related to the costs of the hospital stay covered as EHB up to the annual limit on cost sharing for self only coverage that is proposed to be $6,850 for 2016.\footnote{Department of Health and Human Services, Proposed Rule: HHS Notice of Benefit and Payment Parameters for 2016, 79 Fed. Reg. 70674 (Nov. 26, 2014).}

Subsequently, HHS published the final rule on February 27, 2015. The final rule contained similar language to the proposed rule and included the maximum out-of-pocket limitation again in the preamble, not in the text of the regulation. HHS provided no statutory justification for this policy change, which it described as a “clarification.” However, HHS likewise declared that it was “an important consumer protection,” a statement that appears to acknowledge its policy implications.\footnote{Department of Health and Human Services, Final Rule: HHS Notice of Benefit and Payment Parameters for 2016, (Feb. 27, 2015) at 10824-10825.}

In May 2015, after stakeholders questioned the applicability of this new provision, HHS and the Departments of Labor and Treasury issued two sets of Frequently Asked Questions (FAQ) documents to clarify the so-called “clarification,” stating that it also would apply to large employers.\footnote{Centers for Medicare & Medicaid Services” Embedded Self-Only Annual Limitation on Cost Sharing FAQs,” (May 8, 2015) and HHS, Treasury, DOL, “FAQs about Affordable Care Act Implementation (Part XXVI),” (May 26, 2015).} Until this point, many employers and their vendors had no reason to believe that this change applied to them. When the FAQs were published, many plan decisions had already been made for 2016. While agency FAQs are a helpful means of informing taxpayers of their rights and obligations, they are not a substitute for public notice and comment rulemaking.

This change will have a significant impact on employers and working families. The new policy will lead to increased premiums as plans account for the changing requirements. Furthermore, employers are already struggling with administrative and financial difficulties imposed by the President’s health care law. Now, they will be required to make major changes to their plans in order to comply with this new mandate or pay stiff penalties, thus driving up overall health care costs and reducing the availability of employer health care benefits. According to a survey by the ERISA Industry Committee, nearly all of their members would be affected by the rule, with 70 percent reporting a significant adverse impact.\footnote{ERISA Industry Committee, Letter to Departments of Treasury, Health and Human Services, and Labor, re: Maximum out-of-pocket limits in group health plans (June 16, 2015).}

We have become increasingly concerned about agencies’ actions to implement the law that appear to exceed the authority delegated to them by Congress. While HHS has termed this change to be a “clarification,” the relevant statute is clear — these are two distinct and separate limits. The statute sets these limits at the same level as HSA contribution limits, which have one limit for a self-only policy and a different limit for all other policies. The President’s health care law uses similar terms in multiple sections.\footnote{See e.g. 26 U.S.C. § 36B(b)(3)(B) and 26 U.S.C. § 4980I(b)(3)(C).} In each case, these policies were to be treated in accordance to their status as a single policy or any other policy. As noted above, your final rule failed to cite a single statute that would provide HHS with the authority to make this change.

Furthermore, we are concerned that not only does the administration lack the statutory authority to institute this policy change, but this rule may also violate the Administrative Procedure Act (APA). When promulgating a rule, Section 553 of the APA (5 U.S.C. § 553) requires a federal agency to publish
the proposed rule in the Federal Register, refer to the legal authority under which the rule is proposed, give interested persons opportunity to comment, and must publish the rule in final form at least 30 days before its effective date. Currently, HHS has not proposed any changes to the Code of Federal Regulations implementing this change and instead has announced this so-called “clarification” by burying it deep within the preambles of more than one hundred pages of proposed and final rules, and in subregulatory guidance. The preambles do not address whether the change applies to large group health plans, nor provide an effective date or the legal authority with which HHS makes this change. The APA is in effect to ensure that significant regulatory changes are open to public comment — not just hidden in a preamble — and that sufficient time is allowed to provide substantive and informed comments. As a result of the Departments’ actions, many of those affected — including the employers that only recently became aware of this provision in the May FAQ documents — had no opportunity to provide their views through the notice and comment process.

To assist the Committees in understanding this issue, please provide answers to the following questions:

1. What is the source of statutory authority that enables the Administration to make this change?

2. Has the Administration conducted any analysis on the impact of this change on employers and employees? If so, please provide all such analysis.

3. While the policy change only exists in the preamble to the rule and not the regulation itself, HHS appears to be implementing it as though it was part of the regulatory change itself. Please explain the basis for HHS’s justification for implementing in this manner. In addition, please provide all documents and communications related to the decision to propose and finalize this policy change as a part of the preamble.

We ask that you provide your responses to the Committees by August 21, 2015. If you should have any questions, please contact Meinan Goto at the House Committee on Ways and Means at (202) 225-5522, Michelle Nebelt at the House Committee on Education and the Workforce at (202) 225-4527, and Paul Edattel at the House Committee on Energy and Commerce at (202) 225-2927.

Sincerely,

PAUL D. RYAN
Chairman
Committee on Ways and Means

JOHN KLINE
Chairman
Committee on Education and the Workforce

FRED UPTON
Chairman
Committee on Energy and Commerce
Letter to The Honorable Sylvia Mathews Burwell
August 7, 2015
Page 4

cc: The Honorable Jack Lew, Secretary, Department of the Treasury
    The Honorable Thomas E. Perez, Secretary, Department of Labor
    The Honorable Sander Levin, Ranking Member, Committee on Ways and Means
    The Honorable Robert C. Scott, Ranking Member, Committee on Education and the Workforce
    The Honorable Frank Pallone, Ranking Member, Committee Energy and Commerce