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MEMORANDUM

To: Jeff Bernhard/CEO and Revive- Healthcare Board of Directors

From: D. Douglas Aldeen, Esq.

Date: January 4, 2022

Re: Legal Opinion/Whether an Employer May Offer Limited Access First Dollar Coverage with a Health Savings Account by Implementing an EAP Like Program

Background and Executive Summary:

Briefly and by way of background, The CARES Act created a temporary safe harbor that allows (but did not require) a HDHP health plan with a health savings account (HSA) to cover telehealth and remote care services prior to the member reaching their plan's deductible. The CARES Act provision extended the safe harbor for plan years beginning on or before December 31, 2021. *Members enrolled in plans with plan years beginning on January 1, 2022,* cannot use the safe harbor under the current law. The safe harbor overrides the IRS regulation that prevents employees from making or receiving contributions to HSAs if they hold a high deductible health plan that waives the deductible for telehealth services.

More importantly, there have been a couple of bipartisan bills introduced in Congress recently that aim to expand or permanently waive the first dollar HSA requirement for telehealth. *The Telehealth Expansion Act of 2021* would permanently allow first dollar coverage of virtual care under high deductible health plans (HDHP), which would allow participants to access telehealth without first meeting a deductible. *The Telehealth Health Savings Account (HSA) Act* would allow employers to offer high deductible health plans that include telehealth services without limiting employees' ability to use health savings accounts. Unfortunately, no action has been taken by Congress to date with respect to either of these bills. Moving forward, Revive-Healthcare has developed an "EAP like" program that solves this dilemma.

With that said, Revive-Healthcare believes that by lowering the financial barriers to accessing care is critical to ensuring appropriate care and utilization which further assists to drive equitable distribution of health care services. Given the legislative circumstances outlined above and by implementing an "EAP like" benefit structure that

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limits the number of visits to twelve virtual primary care, twelve urgent care and twelve mental health visits and (thirty-six total annually, per member), the Revive-Healthcare program is appropriately considered an "excepted benefit" since it is not offering significant benefits in the nature of medical care and does not violate ERISA or the Affordable Care Act minimum essential coverage requirements which is discussed in greater detail below. In addition, it does not disqualify pre-tax contributions made by employees to their HSA accounts.

Analysis of Revive-Healthcare Program and Applicability of Affordable Care Act (ACA) and MHPAEA:

EAPs are exempt from ACA requirements if they qualify as "excepted benefits." 79 Fed. Reg. 59130, 59132-34 (Oct. 1, 2014). Excepted benefits are generally exempt from health reform requirements added by the Health Insurance Portability and Accountability Act (HIPAA) as well as the ACA.

There are four categories of excepted benefits. For purposes of this memorandum, this discussion will focus on the fourth category that illustrates how an employer may offer limited access first dollar coverage with a health savings account by implementing an EAP like program without violating the Affordable Care Act, HIPAA or ERISA. Simply put, to qualify as excepted benefits and therefore be exempt from complying with ACA insurance market reforms and MHPAEA requirements, the EAP-like program must meet four criteria:

1. The EAP type of program must not provide significant benefits in the nature of medical care, taking into account the amount, scope, and duration of covered services. For example, an EAP like plan that provides limited access and only 12 mental health visits per year per member does not provide significant benefits in the nature of medical care. On the contrary, EAPs that provide unlimited mental health services, including inpatient treatment, do provide significant benefits in the nature of medical care and therefore would fail to qualify as excepted benefits. However, EAP-like sponsored prescription discount cards, or free Rx coverage, could be appropriately implemented under this model. In fact, several EAP's have adopted such a program. More specifically, the Revive Rx plan provides as a benefit of membership, free access to a limited number of generic drugs in addition to a discount card over the course of the plan year. The IRS has specifically endorsed and permitted this approach in IRS Publication 969 which allows a plan participant to qualify as an eligible individual on a first dollar coverage basis.

2. The EAP-like offering must not be coordinated with group health plan benefits. Specifically, participants in the group health plan must not be required to use and exhaust benefits under the EAP (making the EAP a gatekeeper) before an individual is eligible for group health plan benefits. Also, EAP participation must

not depend upon group health plan participation. However, the EAP may be financed by the group health plan.

3. To qualify as excepted benefits, the EAP-like program may not require employee premiums or contributions as a condition of participation in the EAP.
4. The EAP-like program may not impose any cost-sharing requirements.

EAP-like programs that meet these four criteria are exempt from meeting requirements such as annual dollar limits, the ACA penalty on employers for failing to offer minimum essential coverage, as well as mental health parity requirements. Also, to the extent that the EAP like program is an employer's only health-related benefit, these EAP-like programs that qualify as excepted benefits will not preclude an employee from qualifying for premium tax credits through the ACA insurance exchanges.

Conclusion:

In short, given the current climate for substantive change in health care in Congress in addition to several bills which remain pending to extend the telehealth "safe harbor" exemption, the market opportunity to help individuals to find and obtain affordable assistance is paramount. By lowering the financial barriers to allow plan participants to access care is critical to ensuring appropriate care and utilization which further assists to drive equitable distribution of health care services. This can be achieved by employers implementing an EAP like program and make available first dollar coverage at no cost to the employee that limits the number of visits to primary care, urgent care and mental health professionals which does not violate ERISA, the Affordable Care Act minimum essential coverage requirements, or IRS regulations for employees to contribute to HSA qualified accounts.