

**CENTERS FOR MEDICARE & MEDICAID SERVICES
RETIREE DRUG SUBSIDY (RDS) PROGRAM GUIDANCE**

**TRANSITIONING RDS RETIREES TO A GROUP HEALTH PLAN
THAT USES A VEBA AS A FUNDING MECHANISM**

Introduction

This document provides guidance for plan sponsors (sponsors) that are establishing group health plans that will be funded through a Voluntary Employee Beneficiary Association (VEBA) trust, and that wish to receive the retiree drug subsidy (RDS). Specifically, this document addresses scenarios where such a group health plan is absorbing some or all of the retirees of a sponsor that is already participating in RDS.

This document interprets the regulatory provisions in 42 CFR §423.892 dealing with change of ownership. In so doing, this document establishes that when the identity of a sponsor changes in a way that does not satisfy the change of ownership criteria specified in that section, a change of ownership has not occurred for purposes of the RDS program. Therefore, the sponsor of the group health plan that is funded by the VEBA, if it wishes to participate in RDS, must submit a new application under its own name and Employer Tax Identification number (EIN). If the transition of retirees from the previous RDS plan sponsor occurs during that previous sponsor's plan year, costs incurred by that sponsor cannot be carried over toward satisfying the cost threshold and cost limit that applies to the new sponsor.

The Transitioning of Retirees to a Group Health Plan Funded
Through a VEBA

A Voluntary Employee Beneficiary Association (VEBA) is a type of trust specified in the Tax Code.¹ For a variety of reasons (bankruptcy, litigation, agreements with labor unions, etc.) there is a trend underway whereby an employer that is directly providing coverage of health benefits to its retirees ceases to provide such direct coverage, and in lieu of doing so makes a contribution to a VEBA trust that will pay out health care benefits to retirees. The trustees or a committee (instead of the employer) will become the sponsor of the group health plan funded by the VEBA. In some cases, this takes effect at the conclusion of the employer's RDS plan year. In other cases, it takes effect in the middle of its RDS plan year. In the latter instance, we have been asked whether the new sponsor can assume the previous sponsor's RDS plan sponsor agreement for the

¹ 26 USC 501(c)(9)

remainder of the plan year specified in the application that correlates to that plan sponsor agreement. We have also been asked whether the new sponsor can get credit for costs incurred by the previous sponsor while participating in RDS for the earlier part of the year, toward meeting the RDS cost threshold and cost limit.

The Relevant RDS Regulations

Regulations at 42 C.F.R. §423.892 state the following:

- (a) Change of Ownership. Any of the following constitutes a change of ownership:
 - (1) Partnership. The removal, addition, or substitution of a partner, unless the partners expressly agree otherwise as permitted by applicable State law.
 - (2) Asset sale. Transfer of all or substantially all of the assets of the sponsor to another party.
 - (3) Corporation. The merger of the sponsor's corporation into another corporation or the consolidation of the sponsor's organization with one or more other corporations, resulting in a new corporate body.

The regulations also state that when there is a change of ownership as specified above, and this results in a transfer of the liability for prescription drug costs, the existing plan sponsor agreement is automatically assigned to the new owner, who is subject to the terms and conditions of the sponsor agreement (See 42 CFR. §423.892(d) and (e)). Therefore, in such a change of ownership scenario that occurs during the "old" plan sponsor's plan year, the regulations envision that the "new" sponsor gets credit for the costs accumulated by the "old" sponsor, toward satisfying the cost threshold and cost limit that apply to the 12-month (or shorter) period specified in the "old" sponsor's RDS application.

Analysis and Conclusion

In the typical scenario described above where retirees are transferred into a group health plan funded by a VEBA, the identity of the plan sponsor has not changed as a result of a change of ownership, as defined by the regulations. Rather, the identity of the plan sponsor has changed for other reasons. Therefore, in such instances, it is CMS' conclusion that the VEBA-funded group health plan, for purposes of RDS, is in fact a different group health plan than that which was sponsored by the previous plan sponsor. This is true even if the retirees, benefits, and/or cost-sharing are identical. Therefore, the sponsor of the group health plan that is funded by the VEBA, if it wishes to participate in RDS, must submit a new application under its own name and Employer Tax Identification number (EIN). If the transfer of retirees from the previous RDS plan

sponsor occurs in the middle of the previous plan sponsor's plan year, costs incurred by the previous plan sponsor cannot be carried over toward satisfying the cost threshold and cost limit that applies to the new plan sponsor's RDS application..

This guidance in no way prohibits or limits a sponsor of a group health plan funded by a VEBA, from participating in RDS. Nor does it prohibit the two sponsors from negotiating an arrangement under which the sponsor of the VEBA-funded group health plan absorbs the retirees from the old RDS plan sponsor after the old sponsor's RDS plan year has ended.