



LOUISIANA UNIFORM LOCAL SALES TAX BOARD

Policy Advice No. 20-001 June 4, 2020 Sales and Use Tax

Federal Employee Program Purchases

A request for policy advice was submitted to the Louisiana Uniform Local Sales Tax Board (LULSTB) regarding, "...the taxability of purchases made by Federal Employees covered under the Federal Employee Program..." The request included a Wikipedia report about the Federal Employees Health Benefits Act (FEHBA) program. According to the Wikipedia article, the FEHBA program, "...is a system of 'managed competition' through which employee health benefits are provided to civilian government employees and annuitants of the United States government." The article also stated, "[t]he FEHB program allows some insurance companies, employee associations, and labor unions to market health insurance plans to governmental employees." The government contributes a portion of the payment of all plans, not to exceed 75% of the premium for any one plan. The program is administered by the United States Office of Personnel Management (OPM).

The request included materials issued by the Calcasieu Parish School Board Sales/Use Tax Department on June 30, 2008, discussing the taxability of purchases under the TRICARE and TRICARE for Life health insurance programs administered by the U.S. Department of Defense. TRICARE is a healthcare program for active and retired military personnel and their dependents. TRICARE for Life is a medical wraparound program for Medicare qualified retired military personnel and their dependents.

FEDERAL EMPLOYEES HEALTH BENEFITS ACT

The FEHBA is a comprehensive program to provide civilian employees, their families and federal retirees of the United States government with subsidized health care benefits. The United States Government does not act as an insurer, but, through the Office of Personnel Management (OPM), contracts with various insurance carriers to develop health care plans with varying coverages and costs. This arrangement was described in *Travelers v. Cuomo*, 14 F.3d 708 (1993) at 715:

Under FEHBA, the federal government and individual enrollees make "contributions" which are then deposited into the Employees Health Benefits Fund (the "Fund") in the United States Treasury. 5 U.S.C. §§ 8906, 8909 (1988 & Supp. IV 1992). The Fund is administered by OPM. Id.

OPM contracts with various insurance carriers, and through various health benefit plans the carriers provide, pay for, or reimburse the cost of health services for enrollees. 5 U.S.C. §§ 8901(6), 8901(7), and 8902(a) (1988). In turn, OPM creates a letter of credit ("LOC") account for each experience-rated plan,* and the LOC is maintained in the Treasury as part of the Fund. Each carrier draws against its LOC account on a "checks-presented" basis for amounts paid by the carrier as FEHBA claims or expenses. 5 U.S.C. § 8909(a) (Supp. IV 1992); 48 C.F.R. § 1632.170(b)(2) (1992). This requires carriers to pay for covered hospital treatment from their own resources, and then get reimbursed by drawing against their LOC. Cf. 48 C.F.R. § 1632.170(b)(2) ("[D]rawdown on the LOC is delayed until the

checks issued for FEHB Program disbursements are presented to the carrier's bank for payment.”).

TRICARE

TRICARE is the health care program for uniformed service members, retirees, and their families. (See: <https://www.tricare.mil/About/Facts>) This includes health plans, special programs, prescriptions and dental plans. The program is managed by the Defense Health Agency (DHA) and provides coverage to 9.5 million beneficiaries. The TRICARE system consists of 51 military hospitals, 424 medical clinics, 248 dental facilities and 216,000 network providers. The program has two regional contractors that provide health care services and support beyond what's available at military hospitals and clinics (West and East Regions) and an Overseas Region. These regional contractors manage provider networks, customer service, enrollment, referrals, authorization and claims processing and beneficiary and provider education. A list of the Regional Contractors for the TRICARE program can be located at the following link:

<https://www.tricare.mil/About/Partners>

We were unable to confirm that claims for TRICARE patients were made from a “fund” similar to one used under the FEHBA. Our information indicates that payments for prescription drugs are made by the private companies contracted to operate the programs on behalf of the U.S. Department of Defense (DOD), which defines the requirements of the healthcare plans provided to members. Although costs are ultimately borne by the DOD, we could not locate references to TRICARE or TRICARE for Life as “agents” of the DOD or DHA.

TRICARE for Life

TRICARE for Life is operated by regional contractors much like the TRICARE program. The April 2019 TRICARE for Life handbook states, “TRICARE for Life is Medicare-wraparound coverage for TRICARE beneficiaries who have Medicare Part A and Medicare Part B, regardless of age or where you live.” The following narrative comes from the booklet:

How TRICARE for Life works with Medicare

Medicare and TFL work together to minimize your out-of-pocket expenses. However, there are instances when some health care costs may not be covered by Medicare and/or TFL.

Health Care Services Covered by Medicare and TRICARE

When you see a Medicare participating or Medicare non-participating provider, you have no out-of-pocket costs for services covered by both Medicare and TFL. Most health care services fall into this category. After Medicare pays its portion of the claim, TFL pays the remaining amount and you pay nothing.

As the primary payer, Medicare approves health care services for payment. If Medicare does not pay because it determines that the care is not medically necessary, TFL also does not pay. You may appeal Medicare's decision and, if Medicare reconsiders and provides coverage, TFL also reconsiders coverage.

If a health care service is covered by both Medicare and TFL, but Medicare does not pay because you have used up your Medicare benefit, TFL becomes the primary payer. In this case, you are responsible for your TFL deductible and cost-shares.

MEDICARE

Link to the Official U.S. Government Site for Medicare:

<https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare>

What's Medicare?

Medicare is the federal health insurance program for:

- People who are 65 or older
- Certain younger people with disabilities
- People with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant, sometimes called ESRD)

Medicare Part A (Hospital Insurance)

Part A covers inpatient hospital stays, care in a skilled nursing facility, hospice care, and some home health care.

Medicare Part B (Medical Insurance)

Part B covers certain doctors' services, outpatient care, medical supplies, and preventive services.

Medicare Part D (prescription drug coverage)

Part D adds prescription drug coverage to:

- Original Medicare
- Some Medicare Cost Plans
- Some Medicare Private-Fee-for-Service Plans
- Medicare Medical Savings Account Plans

These plans are offered by insurance companies and other private companies approved by Medicare. Medicare Advantage Plans may also offer prescription drug coverage that follows the same rules as Medicare Prescription Drug Plans.

Medicare Advantage

Medicare Advantage (also known as Part C) is an "all in one" alternative to Original Medicare. These "bundled" plans include Part A, Part B, and usually Part D.

QUESTIONS PRESENTED

Prescription drug purchases are normally subject to local sales and use tax in Louisiana. With regard to this request, two questions were found relevant for discussion:

1. Does Louisiana's statutes provide an exclusion or exemption from local sales and use tax on prescription drug purchases made under the FEHBA, TRICARE, TRICARE for Life and Medicare programs?
2. Does the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, § 2 prohibit the imposition of local sales and use tax on prescription drug purchases made under the FEHBA, TRICARE, TRICARE for Life and Medicare programs?

DISCUSSION

1st Issue – Louisiana’s laws relevant to the exemption, exclusion or refund for purchases of prescription drugs under the FEHBA, TRICARE, TRICARE for Life and Medicare health insurance programs:

Generally, the sale of prescription drugs are exempt only from Louisiana state sales tax (See: La. Const. Art. VII, § 2.2; La. R.S. 47:305(D)(1)(j)). The sales tax exemption on prescription drugs is optional for local taxing authorities (See: La. R.S. 47:337.10). However, La. R.S. 47:301(7)(i), 301(10)(u), 315.3, and 337.9 provide relief from both state and local sales and use tax on purchases made “under the provisions of Medicare.” These laws provide that pharmaceutical and other medical purchases paid for by Medicare are not subject to state or local sales tax. On the question of whether the relief provided by these provisions extend to other federally administered health plans like FEHBA, TRICARE and TRICARE for Life, the case of *Crowe v. Bio-Medical Application of Louisiana LLC*, 208 So.3d 473 (1st Cir. 2016) may be instructive. In *Crowe*, the First Circuit Court of Appeal ruled that Bio-Medical, which operated a dialysis facility in Washington Parish, was not entitled to an exemption for drugs administered to its dialysis patients under Medicare. Drugs administered to Medicare patients by Bio-Medical were not purchased or stored separately from the drugs administered to non-Medicare patients. Instead, Bio-Medical bulk ordered all drugs it needed for its entire patient population at the clinic, and then dispensed the drugs to Medicare and non-Medicare patients as needed.

Bio-Medical asserted that its bulk orders of drugs should not be subject to local sales tax. Bio-Medical argued the exclusion from state and local sales and use tax on sales of personal tangible property made “under the provisions of Medicare” should include *all* sales of personal property “subject to the guidance, instruction, or authority of the rules and statutes of Medicare.” The *Crowe* court conducted a historical review of the statutes and found the exclusion did not apply to the purchases made by Bio-Medical. The court determined, “...even construing the statute liberally in favor of the taxpayer, we conclude that reading this provision to apply to the third-party sales of prescription medication at issue herein would require a strained interpretation that is unsupported by the record before us. As detailed above, Medicare is not a party to these transactions, which are structured such that these sales are not paid by Medicare...” *Crowe* at 489. The court did not go into detail about which purchases *would* qualify “under the provisions of Medicare” or offer a definition for this phrase. However, the *Crowe* court did conclude that Medicare must be a party to the transaction for the exemptions and exclusions to local sales tax to apply, and that purchases by third parties in order to provide medical services to patients under a contract with Medicare would not escape the application of local sales tax.

Although the issues in *Crowe v. BioMedical* involve different facts, the ruling demonstrates that the sales tax provisions relating to Medicare would not likely be interpreted so broadly as to apply to other programs. As discussed above, the provisions of La. R.S. 47:301(10)(u), 315.3 and 337.9 specifically identify Medicare for exemption, exclusion and refund and therefore only apply when Medicare directly purchases or compensates policy holders for the prescription drugs. And although TRICARE for Life has benefits related to Medicare, it is not Medicare. It is solely a Medicare-wraparound policy that provides additional coverage in excess of the amount of Medicare’s authorized payments.

2nd Issue – Potential Applicability of the Supremacy Clause:

Under the Supremacy Clause, U.S. Const. Art. VI, §2, the United States Government is immune from taxation by any state or local government. This interpretation was upheld as early as 1819 in *McCulloch v. Maryland*, 17 U.S. 316 (1819) where the state of Maryland sought to impose a state tax on the Bank of the United States, which was incorporated by Congress and had a branch located in Maryland. The U.S. Supreme Court held, “The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.” Thus, the U.S. Government is relieved from payment of any sales or use taxes imposed by the state of Louisiana or any of its political subdivisions.

However, does this immunity extend to contractors that conduct business with the U.S. Government? In *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373 (1982) the Supreme Court opined:

What the Court’s cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned. This view, we believe, comports with the principal purpose of the immunity doctrine, that of forestalling “clashing sovereignty,” *McCulloch v. Maryland*, 4 Wheat., at 430, by preventing the States from laying demands directly on the Federal Government. See *City of Detroit v. Murray Corp.*, 355 U. S., at 504-505 (opinion of Frankfurter, J.)

Therefore, an indirect financial burden on the U.S. Government resulting from taxes imposed upon and paid by its contractors is not an unconstitutional levy. Under TRICARE, three companies serve as regional contractors to provide health care services and support for U.S. military and their families. Several more provide health care services under the FEHBA and TRICARE for Life programs. The ruling in *United States v. New Mexico* provides a foundation for the opinion that local sales tax could be potentially be imposed on purchases made under these programs without running afoul of the U.S. Constitution.

The interplay between federal law and local tax laws becomes more complicated upon review of Federal provisions (see the attached sheet) prohibiting the imposition of state and local taxes on FEHBA, TRICARE, and TRICARE for Life programs. At first reading these provisions, particularly 32 CFR § 199.17 and 42 CFR § 422.404, appear to only provide for the preemption of any state or local laws imposing “premium” taxes on these programs. However, some federal courts have expanded the preemption outside of just “premium” taxes. See *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, at 715 (Finding surcharges imposed by New York at various percentages on the hospital rates for certain categories of payors, and not others, were preempted by federal law); *Health Maintenance Organization v. Whitman*, 72 F3d 1123 (1995), (Concluding the Federal Employee Health Benefits Act, 5 U.S.C. §§ 8901 et seq. preempted provisions of the New Jersey Health Insurance Reform Act, N.J.S.A. §§ 17B:27A-2 to -16.4 imposing premium assessments even though it was an “assessment” rather than a “tax.”); But see *Mobility Med., Inc. v. Miss. Dept.*

of Rev., 119 So. 3d 1002 - Miss: Supreme Court 2013 (No conflict between the FEHBA and the Mississippi gross receipt taxes paid on proceeds from medical equipment sales to customers since the tax was not charged to customers or their insurance carriers nor was it required to be reimbursed from the fund established for the payment of claims by FEHBA contractors.); *US v. West VA*, 339 F 3d 212, the U.S. (West Virginia's gross receipts tax was not in conflict with the provisions of 5 U.S.C. § 8909(f). because the tax's legal incident fell solely on health care providers).

We found no decisions directly on point with regard to these federal provisions and Louisiana's sales and use tax. Regardless, the issue could potentially provide grounds for a legal challenge in federal court by a contractor that provides health care services to federal employees and military personnel under the aforementioned plans.

Prospective Issue

Although not part of your request, local collectors should be aware that effective July 1, 2020, Act 124 of the 2019 Regular Legislative Session goes into effect. This bill is intended to regulate pharmacy benefits managers (PBM) defined in La. R.S. 22:1863(7) as entities that administer or manage pharmacy benefits plans or programs. While the bill is aimed at regulating prescription drug programs, it contains a feature relevant to local sales and use taxes. Specifically, pursuant to La. R.S. 40:2870(A)(13), if the PBM refuses to pay or does not pay sales tax charged by a pharmacy for any other reason, the PBM becomes responsible for payment of the tax and not the pharmacy. Also, if the PBM purchases prescription drugs from out-of-state pharmacies, the PBM is responsible for payment of the use tax. This would mean that if any of these programs utilize private PBM's to manage pharmacy benefit programs, those PBM's could be liable for payment of the local sales and use tax on the prescription drug purchases.

CONCLUSION OF THE BOARD

After analyzing the programs, state and federal laws and court cases regarding application of the laws, the Board has determined that, in regard to state law, there is an exemption only for purchases made under the provisions of Medicare. No Louisiana statute provides an exemption, exclusion or refund for the other programs – TRICARE, TRICARE for Life or the FEHBA. However, an unresolved issue exists as to whether federal laws could potentially prevent local collectors from moving forward with collecting sales and use tax from insurers under these programs. A collector wishing to pursue local sales and use tax on the purchase of prescription drugs by health insurance contractors under the FEHBA, TRICARE and TRICARE for Life programs should consider this factor in the risks of potential litigation. Finally, effective July 1, 2020, any private PBM's managing pharmacy benefits programs for FEHBA, TRICARE and/or TRICARE for Life could potentially be liable under the provisions of La. R.S. 40:2870(A)(13).

A Board Tax Advisory is issued under the authority of R.S. 47:337.102(C)(1) and (5) to provide guidance to the public and local sales and use tax collectors on matters concerning the imposition, collection, and administration of local sales and use taxes authorized under the constitution and laws of this state. It applies principles of law to a specific set of facts and is an expression of the position of the Louisiana Uniform Local Sales Tax Board regarding particular issues. A Board Tax Advisory does not have the force and effect of law, is not binding on the public or local collectors and is not subject to appeal to the Louisiana Board of Tax Appeals.