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ARTICLES

MEDICAL SAVINGS ACCOUNTS: WINDFALLS FOR THE HEALTHY, WEALTHY & WISE

Regina T. Jefferson*

INTRODUCTION

As the average life expectancy lengthens, ensuring that Americans set aside sufficient dollars for their retired years has become an increasingly important aspect of national economic policy and individual saving practices. Contemporary medical and technological advancements allow

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1. In 1990, roughly 31.2 million people in the United States were age sixty-five or older. See JENNIFER CHEESEMAN DAY, U.S. DEP’T OF COMMERCE, P25-1092, POPULATION PROJECTIONS OF THE UNITED STATES, BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1992 TO 2050, at xiv tbl.G (1992) [hereinafter CENSUS: 1992-2050]. The elderly population is expected to increase dramatically in the twenty-first century as the post-World War II baby-boom generation reaches retirement age. See Nina J. Crimm, Tax Plans for the Twenty-First Century: Medical Incentive Vouchers Address the Needs of Academic Health Centers and the Elderly, 71 TUL. L. REV. 653, 662 (1997) (noting that as the post-World War II baby-boomers enter their “golden years” in the second decade of the twenty-first century, elderly Americans will comprise a greater percentage of the overall population than ever before). In fact, the elderly population is projected to double by the middle of the twenty-first century. See id. The average life expectancy of Americans increased from forty-seven years to seventy-four years—a difference of twenty-seven years—since the beginning of the twentieth century. See id. at 657. The Census Bureau anticipates that the average life expectancy for females and males will be 82 years and 74.2, respectively, by the year 2020. See id. at 663 n.46.

2. Cf. Senator J. Robert Kerrey, Welfare Reform: Economic Security for the Next Century, 9 STAN. L. & POL’Y REV. 13, 14 (1998) (arguing that many contemporary income-support programs are outdated and incapable of providing income security in the modern era). Government-sponsored programs, including Medicare and Medicaid, absorb less than 60% of the health care expenditures attributable to the elderly. See Crimm, supra note 1, at 660. For example, Medicare currently does not cover in-home and nursing home health care costs. See id. at 660 n.30. As a result, such expenses must be paid out-of-pocket, imposing a significant financial burden that depletes the retirement savings and security of the growing elderly population. Cf. CONGRESSIONAL BUDGET OFFICE, TRENDS IN HEALTH SPENDING: AN UPDATE 14 (1993) [hereinafter HEALTH SPENDING] (reporting that the elderly allocated in excess of 10% of their income to health care ex-
people today to enjoy not only longer, but healthier, more fulfilling lives. Thus, financial preparation for immediate and future health care expenses also has emerged as a critical element of many individuals' personal savings goals. However, the rapidly rising cost of health care makes it extremely difficult for most individuals to effectively accomplish this goal.

In 1996, Congress responded to growing national concern about the cost and availability of health care by enacting the Health Insurance Portability and Accountability Act (HIPAA or “the Act”). The...
HIPAA, a very popular piece of legislation, garnered bi-partisan support. It also was received well by both business and consumer advocates across the United States.

The HIPAA was intended to improve the availability of affordable health care in America by enhancing portability and continuity of health care coverage, increasing long-term medical care service, and simplifying the administration of the national health care system. In enacting the HIPAA, Congress chose to add to an existing array of tax incentive programs, rather than adopt a new comprehensive governmental health care system. Interestingly, contrary to its intent of making health care more available to the general public, some provisions of the HIPAA actually widened the gap between those who can afford adequate health care and those who cannot. For this reason, some portions of the legislation were seriously opposed.

The creation of the Medical Savings Account (MSA) program was one of the Act's most contested provisions. The MSA is a savings program for financing health care expenses that is designed to supplement traditional indemnity and medical insurance programs. Commonly re-
ferred to as a "medical IRA,"
the MSA is structured to allow participants to pay for current medical expenses and to encourage them to save for future health care costs. The MSA permits funds not used in the current tax year for medical expenses to accumulate tax-free for use in future years.

The ability to carry over unused funds is the most controversial feature of the MSA. The carry-over feature effectively enables account holders to use their MSAs as tax-preferred retirement savings vehicles. Unlike traditional tax-preferred retirement savings programs, however, the use of MSA funds is not limited to retirement savings purposes. Instead, MSA account holders are permitted to use their tax-preferred accumulated savings without penalty for either retirement savings or current medical expenses.

On its face, the MSA program appears to be an efficacious method of tackling the overwhelming problems of long-term health care financing and the increasing need for retirement income security by encouraging individuals to take more responsibility for their health care choices and, at the same time, by providing tax incentives to save for both current

14. Stephens, supra note 9, at 457.
15. See I.R.C. § 220(d)(1) (Defining an MSA as "a trust created or organized in the United States exclusively for the purpose of paying the qualified medical expenses of the account holder").
16. See id. § 220(e)(1).
17. See Todd S. Purdum, Clinton Signs Bill to Give Portability In Insurance, N.Y. TIMES, Aug. 22, 1996, at B12. Two of the most well publicized, but not the most controversial, provisions of the HIPAA addressed portability and pre-existing conditions. See id. Under the HIPAA, workers are permitted to maintain health insurance coverage if they change or lose their jobs, and insurance companies are prohibited from denying coverage to individuals who have preexisting medical conditions. See HIPAA, Pub. L. No. 104-191, §§ 701, 702, 2701, 2702, 2741, 2742, 110 Stat. 1936, 1939-46, 1955-62, 1972-83 (1996) (codified at scattered sections of 29 & 42 U.S.C.); see also Purdum, supra. The Act also includes a provision which allows dying individuals, particularly AIDS patients, to draw on their life insurance benefits while still living. See HIPAA § 331, 110 Stat. at 2067-69; see also Purdum, supra.
18. See I.R.C. § 220(f)(4)(C) (Providing that any distributions made after an account holder reaches age 65 are not subject to the 15% excise penalty that typically applies to distributions used for purposes other than qualified medical expenses); see also Benjamin C. Ayers & Elizabeth Plummer, New MSA and Health Insurance Rules Create Opportunities, 58 TAX'N FOR ACC'T. 260, 263 (1997) (suggesting that Congress authorized, perhaps unintentionally, the use of MSAs as an alternative means of securing retirement savings).
19. See Ayers & Plummer, supra note 18, at 260-61 (explaining that because MSAs allow the taxpayer to accumulate unused funds, they closely resemble IRAs). With IRAs, there is a 10% penalty for distributions taken prior to age sixty-five. See I.R.C. § 72(t)(1) (West Supp. 1998). There is an exception to the penalty, however, if the distribution is used for medical expenses or health insurance premiums, to the extent that they exceed the 7.5% floor of I.R.C. § 213. See I.R.C. § 72(t)(2)(B), (D).
medical expenses and retirement savings purposes. However, the MSA is a questionable response to these concerns because its underlying policy runs counter to existing retirement income and health care goals. Moreover, the MSA program raises serious questions of fairness as it benefits relatively few, failing to provide savings opportunities for a significant portion of the population. As designed, the MSA disproportionately benefits the members of society who arguably least need assistance with their health care expenses or retirement savings objectives. Namely, MSAs benefit individuals with low health care expenses (the healthy), individuals with high incomes (the wealthy), and individuals who are knowledgeable about health service alternatives, their own medical conditions, and the MSA program itself (the wise).

Parts I and II of this Article review the development, general structure, and operation of the MSA program. Part III of this Article compares and contrasts the MSA to other tax-preferred retirement savings plans and explores the applicability of pension law to these arrangements. In Parts IV, V, and VI, respectively, this Article demonstrates that the MSA program disproportionately benefits the wealthiest, healthiest, and most informed members of our society. Part VII of this Article examines the impact of the MSA on the existing health care system. In Parts VIII and IX, this Article identifies various deficiencies in the MSA model that may undermine significantly its marketability as a viable health care savings program. This Article ultimately concludes that the focus and design of the MSA program presents serious doubts concerning its ability to accomplish its goals in the manner contemplated by Congress.

20. See Stephens, supra note 9, at 458 (rationalizing that “[t]he utility of MSAs appears to encourage personal responsibility in the consumer before he spends a healthcare dollar,” by allowing individuals to accumulate unspent funds for future medical expenses or retirement savings goals).

21. See discussion infra Parts IV, VII (arguing that MSAs do not provide savings benefits to those who are not wealthy or have the highest health risks, and actually may discourage physician consultation and preventive health care).

22. The availability of MSAs is limited in several important respects. First, MSAs are available only to “eligible individuals”; that is, individuals who are covered under a high deductible health plan, established and maintained by a small employer. See I.R.C. § 220(c)(1)(A). As defined, a small employer is an employer with an average of fifty or fewer employees during the two preceding years. See id. § 220(c)(4)(A). Second, Congress limited the available number of accounts subject to favorable tax treatment under the pilot program to 750,000 in 1999. See id. § 220(j)(2). Therefore, even an expanded program will benefit only those employees who can afford high deductibles and work for small employers. Third, the tax and saving incentives provided by the MSA program disproportionately benefit the healthiest and wealthiest population. See supra note 7; see also discussion infra Parts IV and V.
I. THE MSA PROGRAM DESIGN

The HIPAA was signed into law by President Clinton on August 21, 1996.23 This legislation amended the Internal Revenue Code of 1986 (I.R.C. or "the Code") by adding § 220 which covers MSAs.24 Under § 220, self-employed individuals and those employed by companies with fifty or fewer employees are allowed to establish MSAs.25

The MSA combines a high-deductible, catastrophic medical insurance plan with a tax-free, health care savings account.26 To qualify as an MSA catastrophic health care plan, a plan's deductible must fall between $1500 and $2250 for individual coverage,27 and between $3000 and $4500 for family coverage.28 To participate in the MSA program, an individual must be enrolled in a qualified, catastrophic health care plan, and also must establish a tax-free savings account.29 Account holders are expected to use their high-deductible plans to cover major medical expenses and their tax-free savings accounts to cover ordinary, routine medical costs.30 The tax-free savings account also may be used to pay a portion of the insurance deductible.31 Once the deductible is met, the catastrophic plan may be fully comprehensive or may contain further co-payments and restrictions.32

Unused funds contributed to an MSA in any given year are carried

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23. See Remarks on Signing the Health Insurance Portability and Accountability Act of 1996, 1996 PUB. PAPERS 1319, 1320 (Aug. 21, 1996). President Clinton signed the bill into law despite his concern that "much work remained to be done" regarding health care in America. See Purdum, supra note 17, at B12. He was concerned about provisions that would have expanded coverage for the unemployed and the mentally ill but were dropped from the final version of the bill. See id.


29. See id. § 220(a), (c)(1)(a).

30. See id. § 220(d)(2)(A). For purposes of the MSA, the definition of "qualified medical expense" generally is consistent with the rules of section 213(d) of the Internal Revenue Code for itemized deductions. See id.

31. See id. § 220(d)(1), (2)(A) (defining "qualified medical expense" as an amount not covered by insurance); see also Mark V. Pauly & John C. Goodman, Using Tax Credits for Health Insurance and Medical Savings Accounts, in THE PROBLEM THAT WON'T GO AWAY: REFORMING U.S. HEALTH CARE FINANCING 274, 278 (Henry J. Aaron ed. 1996) (stating that "[p]eople obviously could and should use the funds in their MSAs for their deductibles").

32. See I.R.C. § 220(c)(2).
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forward to future years and can be used as a cushion against prospective health care expenditures. Alternatively, excess funds may be left in the account and withdrawn without penalty for any purpose once an account holder reaches her social security normal retirement age. All distributions for non-medical purposes are classified as income and taxed accordingly. These distributions also are subject to a 15% penalty. However, distributions made for non-medical reasons after an account holder dies, becomes disabled, or attains the social security retirement age are taxed, but are not subject to the 15% penalty.

The MSA program is voluntary and tax-preferred. Congress provided substantial tax benefits in connection with the MSA program in the hope that the incentives will prove sufficiently attractive to encourage individuals to save in these arrangements. The MSA program provides

<table>
<thead>
<tr>
<th>Year of Birth of Individual Receiving Benefit</th>
<th>Social Security Normal Retirement Age</th>
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<tbody>
<tr>
<td>1937 and before</td>
<td>65 years</td>
</tr>
<tr>
<td>1938</td>
<td>65 years, 2 months</td>
</tr>
<tr>
<td>1939</td>
<td>65 years, 4 months</td>
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<tr>
<td>1940</td>
<td>65 years, 6 months</td>
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<tr>
<td>1941</td>
<td>65 years, 8 months</td>
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<tr>
<td>1942</td>
<td>65 years, 10 months</td>
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<td>1943-1954</td>
<td>66 years</td>
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<td>1955</td>
<td>66 years, 2 months</td>
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<td>1956</td>
<td>66 years, 4 months</td>
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<td>1957</td>
<td>66 years, 6 months</td>
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<td>1958</td>
<td>66 years, 8 months</td>
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<tr>
<td>1959</td>
<td>66 years, 10 months</td>
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<tr>
<td>1960 and later</td>
<td>67 years</td>
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</tbody>
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33. See Stephens, supra note 9, at 457.
34. See I.R.C. § 220(b)(7) (West Supp. 1998). Social Security retirement ages are as follows:
38. See id. § 220(f)(4)(C); see also supra note 34 (listing the applicable social security retirement ages).
39. See id. § 220(f)(2); see also TAX ANALYSTS, A TAX LAW BAEDERKUR: A GUIDE TO THE 1996 TAX CHANGES 1 (David F. Windish ed., 1996) (explaining that "[d]istributions [of MSA funds] after age 65, death, or disability are not penalized, but are included in income").
40. See Stephens, supra note 9, at 458-59 (discussing the favorable tax treatment of MSAs and observing that the Act includes both employer and employee-based tax incen-
three tax benefits. First, within limits, personal contributions to an MSA are deductible \(^4\) and employer contributions are excludible from taxable income. \(^42\) Second, accumulated earnings in an MSA are not taxed until distribution. \(^43\) Third, distributions for qualified medical expenses are tax-free. \(^44\)

Upon the death of an MSA participant, if the beneficiary of the MSA is the participant’s surviving spouse, the spouse may continue the MSA as her own. \(^45\) If the beneficiary is not the surviving spouse, the beneficiary must report the MSA balance as income in the year of the account holder’s death. \(^46\) If there is no beneficiary, the MSA balance is included on the final income tax return of the account holder. \(^47\)

**II. THE MSA CONTROVERSY**

The MSA concept is a fundamentally different approach to providing
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Unlike traditional health care protection, the MSA program is designed to motivate participating individuals to take more active roles in making decisions about their health care costs. MSA proponents argue that, by giving consumers greater control over their health care funds, in conjunction with an opportunity to save their unspent health care dollars, the MSA model encourages consumers to purchase health care services more prudently. These advocates anticipate that, as a result, the MSA program will curb the rising cost of medical care, making health services more affordable for all Americans in the long-run.

Although evidence suggests that individuals are more conscientious about expenditures involving the use of personal funds, the expected benefits of the MSA program have been grossly exaggerated because many indirect costs either have been overlooked or inadequately considered. For example, proponents of the MSA fail to account fully for the potential harm that the program presents for the conventional health care system. Proponents also have ignored completely the compliance

48. Cf. Ayers & Plummer, supra note 18, at 260 (noting that MSAs were intended to furnish taxpayers with "a method to defray the cost of unreimbursed health care expenses, while increasing competition for health care services"); Stephens, supra note 9, at 457 (explaining that MSAs were designed to control the increasing cost of medical care through the use of tax-based savings). The MSA model is therefore premised on the notion that once consumers have a personal financial stake in purchasing health care services, they will spend the money more prudently. See id. at 458.


50. See id. at 110, reprinted in 1996 U.S.C.C.A.N. at 1911 ("Because MSAs afford people the opportunity to save unspent MSA funds for future health and long-term care needs . . . people will be more prudent in their purchase of health care services."); Stephens, supra note 9, at 461 (acknowledging that supporters of the MSA program subscribe to the theory that "personal responsibility will help to end careless spending of healthcare dollars by putting responsibility for conserving funds back in the hands of the consumer—the patient").

51. See H.R. REP. NO. 104-496, pt. 1, at 69, reprinted in 1996 U.S.C.C.A.N. at 1869 (explaining that MSAs are designed to persuade plan participants to take a more cost-effective approach to health care spending); see also Senator William V. Roth, Jr., Medical Savings Accounts, 11 J. CONTEMP. HEALTH L. & POL'Y 149, 152 (1994) (commenting that MSAs will help restrain rising health care costs by encouraging consumers to make more careful health care decisions).

52. See John Burry, Jr., Monitoring Healthcare Dollars: Medical Savings Accounts: A Quick Fix that Could Destroy the American Healthcare System (visited Sept. 30, 1996) <http://www.citynet.net/hsa.html> (reporting Congressional Budget Office skepticism that MSAs will save money). This cite is no longer accessible, but is on file with The Catholic University Law Review and the author.

53. See Medical Savings Accounts—A Bad Idea, COLLECTIVE BARGAINING REP. (Winter 1996) (visited Sept. 30, 1996) <http://www.afscme.org/afscme/bargtabl/cbr4b.htm> (contending that because MSA participants have no incentive to seek preventive care, medical costs ultimately will escalate as diseases and illnesses will be more advanced and,
problems of having different distribution and contribution rules for traditional retirement savings plans than for MSAs. Additionally, MSA proponents have not considered fully the additional administrative requirements of implementing the program for which the cost ultimately will be passed on to the health care consumers. Thus, when all relevant factors are considered, the MSA program could actually increase the cost of medical care services rather than decrease them. Even if all relevant costs are considered and measured accurately, it is nevertheless questionable whether the expense of the program can be justified if MSAs benefit only the wealthiest, healthiest, and most informed members of society, without providing comparable benefits to those who are less fortunate.

The rationale underlying health care reform in general, and MSAs in particular, is that all citizens should have access to affordable health care. Concerns that the MSA both jeopardizes the existing health care program and disproportionately benefits the affluent were perceived by many commentators as serious weaknesses. As a result, Congress introduced the MSA as an experimental program to be offered on a limited four-year trial basis. After the trial period ends, Congress will determine if MSAs can co-exist with traditional health care plans and control health care costs without benefiting only a few.

The experimental program provides for the establishment of a limited number of MSAs and is scheduled to last until the year 2000. In 2000, Congress will decide whether to abolish or expand the MSA program.

54. See infra text and accompanying notes 71-83, 102-04 (discussing the divergence between MSAs and other employer-sponsored retirement arrangements).
55. See infra Part VII.C.2 (discussing the additional cost of implementation).
56. See infra Part VIII.B (discussing a similar program in Singapore which resulted in an actual increase in medical care costs).
57. See Burry, supra note 52 (criticizing the MSA program as only benefiting healthy and affluent people).
58. See 141 CONG. REC. H4541 (daily ed. May 3, 1995) (statement of Rep. Owens) (noting that FDR's Economic Bill of Rights included the right to adequate medical care); Crimm, supra note 1, at 661 (stating that "[a]ccess to quality health care by and for an aging and elderly population is an important societal expectation").
59. See Havemann, supra note 7, at A1 (reporting that many Democrats feared MSAs would attract only healthy and wealthy participants to the exclusion and detriment of persons who are poor and infirm).
61. See id. § 220(j)(1)-(2) (Supp. II 1996).
62. See id. § 220(i)(2) (Supp. II 1996).
based on the outcome of the experiment. To assess the desirability of expanding the MSA program, Congress authorized two studies. The first study, conducted by the Treasury Department, will evaluate the level of participation in the MSA program and determine the effects of the program on tax revenues. The General Accounting Office (GAO) will undertake the second study. In connection with the second study, the Comptroller General is required to retain the services of “an organization with expertise in health economics, health insurance markets, and actuarial science to conduct a comprehensive study” to determine the impact of the MSA on the health care market.

While the program’s experimental status and reporting requirements reduce its duration and heighten public awareness about its effects, these characteristics do not eliminate the basis for concern about the MSA program. The temporary quality neither justifies the program’s disparate impact among taxpayers nor removes its threat to the existing health care and retirement savings systems. More importantly, however, the results from the studies of the pilot program could be misleading; they may not adequately predict the effects of an expanded MSA program if the composition and behavior of the experimental population is not representative of those who would participate in a permanent program.

Therefore, to the extent that the MSA experiment is used to measure

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63. See Ayers & Plummer, supra note 18, at 263; see also Medical Savings Accounts Might Not Be Cure-all: Small-Business Program Has Supporters, Detractors, FLA. TODAY, Sept. 8, 1997, available in 1997 WL 14133358.
67. See id. The study explicitly is required to determine the effects on the following: (1) selection, including adverse selection, (2) health costs, including any impact on premiums of individuals with comprehensive coverage, (3) use of preventive care, (4) consumer choice, (5) the scope of coverage of high deductible plans purchased in conjunction with such accounts, and (6) other relevant items. A report on the results of the study conducted under this subsection shall be submitted to the Congress no later than January 1, 1999.
Id. The first phase of this study was completed and submitted to the GAO on December 19, 1997. See generally U.S. GEN. ACCOUNTING OFFICE, MEDICAL SAVINGS ACCOUNTS: FINDINGS FROM INSURER SURVEY, GAO/HEHS-98-57 (Dec. 1997) [hereinafter GAO MSA REPORT].
68. See Stephens, supra note 9, at 460-61 (predicting that the effect of preferential tax treatment attendant with the MSA program will reach well beyond the confines of tax law, implicating laws governing ERISA, Medicaid, Medicare and insurance).
69. See discussion infra Parts IV, V, VI, VII, and VIII (discussing disparate impact and effect on health care and retirement savings systems).
the feasibility of a permanent MSA program, the pilot must be evaluated very critically. Not only is it necessary for Congress to assess the actual experience of the pilot program, but also to anticipate effects beyond those occurring during the relatively brief experimental phase.

III. THE MSA COMPARED TO OTHER RETIREMENT ARRANGEMENTS

A. The MSA/IRA Comparison

MSAs were promoted as health care plans. However, to the extent that an account holder is able to accumulate unused medical funds and withdraw them without penalty upon reaching retirement age, death, or disability, the MSA program functions as a traditional tax-preferred, individual retirement arrangement, or IRA. In fact, because of their similarity to IRAs, MSAs are referred to by some as “medical IRA[s].”

However, the label “medical IRA” is misleading. This term suggests that MSAs have a single, or at least a primary, medical savings purpose. This conclusion is incorrect. MSAs can be used as effectively for retirement savings purposes as for medical savings purposes. Thus, it is more accurate to distinguish MSAs from traditional IRAs by emphasizing their greater flexibility than by suggesting that they have relatively limited use.

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70. See H.R. REP. NO. 104-496, pt. 1, at 110 (1996), reprinted in 1996 U.S.C.C.A.N. at 1865, 1911 (characterizing MSAs as alternatives to low-deductible health insurance that are designed to encourage American consumers to be more cost-conscious in purchasing medical services); see also Elizabeth Neus, Medical Savings Account Plan Isn’t Getting Many Buyers, Gannett News Serv., Aug. 30, 1997, available in 1997 WL 8835696 (characterizing the MSA as a “new combination savings account/health plan designed as an option for those who don’t like traditional health insurance plans”).

71. See Albert B. Crenshaw, Without a Lot of Fanfare, A Lot of Tax Legislation, WASH. POST, Aug. 18, 1996, at H1 (describing MSAs as “IRA-like devices that allow workers to save money untaxed to pay medical expenses if they have insurance that covers only catastrophic illnesses”). Traditional individual retirement accounts (IRAs) provide tax incentives for individuals to save for retirement. Eligible taxpayers may deduct up to $2000 a year in contributions to an IRA. See I.R.C. § 219(b)(1) (1994). The earnings on the IRA are tax-free, see id. § 408(e)(1), and amounts invested in an IRA are taxed when distributed. See id. § 408(d)(1). The tax treatment of the traditional IRA is different than the tax treatment of the new Roth IRA which is another type of IRA that receives preferential tax treatment. See infra note 84 (explaining the tax treatment of the new Roth IRA).

72. Stephens, supra note 9, at 457.

73. See Crenshaw, supra note 8, at H1 (advising that if an individual can avoid making large withdrawals from an MSA account, he may accumulate a “healthy nest egg”).

74. See Ayers & Plummer, supra note 18, at 263 (reasoning that “because there are no minimum distribution rules or excess distribution taxes, the MSAs have a distinct advantage over IRAs”).
The underlying purpose for the preferential tax treatment of employer sponsored retirement savings, including IRAs, is to foster economic security in old age.\textsuperscript{75} To ensure that funds saved in IRAs and other tax-preferred retirement savings plans actually are used for retirement purposes, Congress places restrictions on the use of these funds.\textsuperscript{76} Additionally, non-retirement uses of retirement funds generally are discouraged by a 10\% excise tax on the taxable portion of all early distributions, unless the distributions are made on account of death, disability, or the attainment of age fifty-nine and one-half years.\textsuperscript{77}

Therefore, the MSA's distribution rules substantially deviate from traditional pension policy to the extent that they allow unrestricted, penalty-free distributions for health care expenses prior to retirement.\textsuperscript{78} Regardless of whether the use of retirement funds for health care expenses is consistent or inconsistent with retirement income policy, pre-retirement distributions result in fewer dollars available at retirement. Thus, if individuals use MSAs as retirement instruments, their ability to withdraw the funds prior to retirement ultimately could affect their retirement income security.\textsuperscript{79}

The following example illustrates numerically how the MSA can be used as a more flexible retirement savings alternative than traditional retirement savings arrangements. Consider a self-employed taxpayer with $2000 of discretionary income. The taxpayer establishes an MSA catastrophic plan and deposits the $2000 in the associated savings account. If this individual has no medical expenses in the first year, or chooses not to use the savings account for such expenses, she will have $2000 plus the

\textsuperscript{75} See Gustave Simons, \textit{Qualifying a Plan: Tax and Legal Aspects of Pension Planning}, in \textit{HANDBOOK FOR PENSION PLANNING} 47, 49 (BNA ed., 1949) (stating that preferential tax treatment with regard to contributions to retirement savings illustrates a strong congressional policy towards encouraging the establishment of pension reserves).

\textsuperscript{76} The requirements for qualified retirement plans are found in I.R.C. § 401(a). Section 1.401-1(b)(1) of the Treasury Regulations explains that a pension plan qualified under § 401(a) of the code is a plan established and maintained to provide primarily retirement benefits, and profit sharing and stock bonus plans are arrangements that primarily provide deferred compensation; accordingly, benefits such as death benefits and life and health insurance must be incidental only. Treas. Reg. § 1.401-1(b)(1). Pension plans may provide benefits for sickness, accident, hospitalization, and medical expenses subject to the requirements of I.R.C. § 401(h). See \textit{JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW} 151, 164 n.2 (2d ed. 1995).


tax-free buildup available for distribution at retirement.\textsuperscript{80} This result would be the same if she had placed her $2000 in a traditional IRA. Unlike in a traditional IRA, however, the taxpayer has penalty-free access to MSA funds needed for medical expenses prior to retirement, without first having to meet the 7.5% floor of I.R.C. § 213.\textsuperscript{81}

Presumably, the MSA's flexible distribution rules are appealing especially to individuals with limited financial resources who may be reluctant to save in traditional IRAs or employer sponsored retirement plans for fear of losing access to their funds. For this reason, MSA savings may be accomplished at the expense of traditional IRA savings or employer sponsored elective contribution plans, such as 401(k) plans, in which distributions prior to retirement are more restricted.\textsuperscript{82} An argument could be made that increased savings is desirable in any form and, therefore, whether individuals save in MSAs or traditional retirement savings vehicles is irrelevant. However, a shift from traditional retirement savings to MSAs does not represent increased individual savings, but merely a change in savings instruments and objectives.

Moreover, the ability to use retirement savings for non-retirement purposes without restriction may have far reaching consequences.\textsuperscript{83} If medical and retirement savings goals are combined for purposes of the MSA, it would seem that policymakers would be forced to consider combining these goals for all other tax-preferred retirement savings vehicles. A failure to consider such a combination would result in different distribution rules for similar tax-preferred retirement savings vehicles. This inconsistency introduces unnecessary complexity to the private pension system. Taxpayers will find it more difficult to make informed decisions regarding the available options for retirement savings, without the benefit of extensive education and training. An average taxpayer with $2000

\textsuperscript{80} See Margaret O. Kirk, Medical Accounts: Mixed Reviews, N.Y. TIMES, July 5, 1998, § 3, at 6 (explaining how taxpayers can opt to not use MSA funds for medical expenditures).

\textsuperscript{81} See I.R.C. § 220(f)(1) (Supp. II 1996). Traditional IRAs allow distributions for medical expenses that are deductible under § 213 of the Code. See I.R.C. § 72(t)(2)(B). Thus, a taxpayer first must meet a floor of 7.5% of adjusted gross income, see I.R.C. § 213(a) (1994), before such amounts are available without penalty for distribution, see I.R.C. § 72(t)(2)(B) (Supp. II 1996).

\textsuperscript{82} See I.R.C. § 401(k) (West Supp. 1998). A 401(k) plan allows an employee to elect to have a portion of their compensation contributed to a qualified retirement plan. See id. § 401(k)(2)(A); see also Jefferson, supra note 79, at 264 (discussing the adverse effects of more flexible distribution rules on employer sponsored elective contribution plans).

to invest in retirement savings today is faced with such an array of choices that making the best decision can prove quite challenging. She must consider, for example, the varying contribution limits, distribution rules, and tax treatment for traditional IRAs and Roth IRAs. Both of these individual savings arrangements can be equally as effective for retirement savings, but are governed by very different taxation and distribution rules. Therefore, the introduction of the MSA impacts the existing retirement system to the extent that it introduces an additional tax-preferred savings vehicle, with different rules and regulations, in which individuals may choose to save for retirement.

**B. Pension Law and MSAs**

The MSA retirement savings feature is inconsistent not only with existing pension policy, but also with existing pension law. The Employee Retirement Income Security Act of 1974 (ERISA) governs employer-sponsored retirement plans. In order to receive preferential tax treat-

84. The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, established a new type of IRA, referred to as the “Roth IRA,” named after its principal sponsor, Senator William Roth (R-Md.). See id. sec. 302, § 408A, 111 Stat. at 825 (codified at I.R.C. § 408A) (West Supp. 1998). The maximum amount that can be contributed to the Roth IRA is $2000, the same as traditional IRAs. See I.R.C. § 408A(c)(2) (West Supp. 1998). In the traditional IRA, contributions are deductible but withdrawals on retirement are taxable. See I.R.C. §§ 219(a), 408(d) (1994). In the Roth IRA, however, contributions are not deductible, but withdrawals on retirement are tax exempt. See I.R.C. § 408A(c)(1), (d)(1)(A) (West Supp. 1998). A numerical demonstration can show that, when a taxpayer's marginal tax rate remains constant, the traditional and Roth IRA provide identical benefits. See Stephen B. Cohen, Federal Income Taxation: A Conceptual Approach 908 (1989 & 1998 Update at 29).

85. Compare e.g. I.R.C. § 219(a), and id. § 408(d), with id. § 408A(c)-(d).

86. See Linda Stern, Medical Savings Account Offers a Great Tax Deal, SUNSENTINEL (Ft. Lauderdale), Sept. 1, 1997, at 18, available in 1997 WL 11399316 (noting that consumers who “are a little bit crafty about administering [an MSA] plan ... [may enjoy] an additional tax-free pot of money to retire on”).


88. See 29 U.S.C. § 1003(a) (1994) (explaining the coverage of the Act). Section 1001 of the Act articulates the congressional intent under ERISA:

The Congress finds ... that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit plans]; ... it is therefore desirable in the interests of employees and their beneficiaries, ... that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

... It is hereby declared to be the policy of [ERISA] to protect ... the interests of participants in employee benefit plans and their beneficiaries...

Id. § 1001(a)-(b); see also Hansen v. Continental Ins. Co., 940 F.2d 971, 975-76 (5th Cir. 1991) (“Congress enacted ERISA ... to protect working men and women from abuses in
ment, all retirement plans must comply fully with the applicable requirements and standards of ERISA.

Because MSAs may be used effectively as retirement savings vehicles, some portion of the revenue forgone in connection with the MSA program finances retirement savings. Thus, the cost of the program's savings feature, specifically the tax-free buildup of excess contributions, is justifiable only if that portion of the program comports with rules and regulations for the existing retirement income program.9 Accordingly, the retirement savings feature of the MSA program should be evaluated under ERISA to see if that portion of the program complies with applicable pension law.

Interestingly, there has been little discussion about the applicability of ERISA to MSAs. As a result, many important questions about the impact of ERISA on the MSA program have been left unanswered. For example, it is unclear whether, or to what extent, the fiduciary rules of ERISA apply to MSAs.90 Specifically, it is uncertain whether the MSA is an employer-funded arrangement that would satisfy the requirements of an ERISA welfare benefit plan, thereby subjecting the employer to the fiduciary duties provided under ERISA.91

Under ERISA, an employee welfare benefit plan is defined as any plan, fund, or program . . . established or maintained by an employer or by an employee organization, . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death . . .

89. See ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS, 43-61 (1982) (discussing the lost revenue or tax expenditure attributed to private pensions).

90. See Stephens, supra note 9, at 460; see also ERISA, 29 U.S.C. §§ 1001(b), 1021-31, 1101-1114 (requiring reporting and disclosure and laying out fiduciary responsibilities).

91. See Stephens, supra note 9, at 460; see also 29 U.S.C. §§ 1101-14 (fiduciary responsibilities).

92. 29 U.S.C. § 1002(1). An MSA is arguably an employee welfare benefit plan within the meaning of ERISA because the MSA is "(1) a 'plan, fund, or program' (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, [etc.] . . . benefits (5) to [plan] participants or their beneficiaries." Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).
Therefore, the MSA could be considered an employee health benefit plan under ERISA because the catastrophic health care feature can be viewed as a medical program established by the employer for the purpose of providing medical benefits to participants and their families. Alternatively, the retirement component of the MSA to which the health care plan is connected could be considered an employer-sponsored retirement plan. The retirement feature of the MSA is structured similarly to the Simplified Employee Pension (SEP). Under a SEP arrangement, the employer contributes to IRAs on behalf of covered employees in the same manner that an employer contributes to employer-deposit MSAs on behalf of covered employees. Thus, the carry-over feature of the MSA functions as an employer-sponsored retirement benefit plan, indistinguishable from the SEP. Therefore, the fiduciary rules of Title I of ERISA should apply to MSAs under the theory that the program is either a welfare benefit plan, an employer-sponsored retirement plan, or a combination of the two.

However, much of the uncertainty surrounding ERISA's potential applicability to MSAs stems from the lack of judicial consensus as to the precise definition of an ERISA employee welfare benefit plan in the context of employer-sponsored insurance plans. Compare Kidder v. H & B Marine, Inc., 932 F.2d 347, 353 (5th Cir. 1991) (concluding that an employer's purchase of a policy, or of multiple policies, that insure a class of employees offers "substantial evidence," standing alone, that an employee welfare benefit plan is established), and Donovan, 688 F.2d at 1375 (holding an employer's purchase of a group health insurance policy to provide its employees with health coverage is evidence of, but not itself, a plan), with Kornman, 662 So. 2d at 502 (reasoning that relying solely upon whether an employer contributes insurance premiums in determining whether ERISA applies to group health insurance policies disregards other critical factors with respect to the degree of control an employer maintains over a plan), and Robertson v. Gem Ins. Co., 828 P.2d 496, 502-03 (Utah Ct. App. 1992) (holding that an employer's "bare contribution" of insurance premiums in providing employee insurance coverage is insufficient to establish the existence of an ERISA plan).

93. See Stephens, supra note 9, at 460 (warning that determining whether an employer-established MSA plan would constitute an employee benefit plan within the meaning of ERISA is an important threshold consideration); see also Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987) (explaining that although no single act, by itself, brings a plan under the ambit of ERISA, an employer nonetheless can establish such a plan "rather easily").

94. ERISA defines a retirement plan as one that is "established or maintained by an employer or by an employee organization" and that "(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A).


96. See LANGBEIN & WOLK, supra note 76, at 151. Essentially, the SEP is an IRA which is funded by the employer. Special limitations similar to those for qualified plans are imposed on SEPs. See id. The SEP has an advantage over the traditional IRA because it allows larger contributions. See id. Although IRAs and SEPs are afforded similar preferential tax treatment to qualified plans, they are not qualified plans. See id. As such, SEPs are governed by statutory provisions that are separate and distinct from those applicable to qualified plans. See id.
tirement plan, or both.

Title I applicability would render employers who sponsor the MSA, and perhaps even insurance companies that sell the catastrophe insurance policies, ERISA fiduciaries. As such, they would be subject to a duty to oversee the investment of the MSA funds. In the event of a breach, ERISA fiduciaries are personally liable to the plan for any resulting losses. Failure to apply the fiduciary rules of Title I to MSAs would seemingly frustrate ERISA's goal of providing greater protection to participants in employer-sponsored employee benefit plans.

The non-discrimination standard of ERISA raises similar issues of inconsistency regarding the retirement savings component of MSAs. In order to maintain their tax-preferred status, qualified employer-sponsored retirement savings plans must comply with ERISA's complex non-discrimination rules. These rules prohibit plans from favoring highly compensated employees over non-highly compensated employees.

Although MSA legislation requires an employer establishing an employer-deposit MSA to make comparable contributions on behalf of all participating employees, because the MSA is not labeled a "qualified" retirement plan, ERISA's anti-discrimination standards do not apply.

98. See id. § 1104(a).
99. See id. § 1109(a).
100. See I.R.C. § 410(b) (1994). The non-discrimination rules ensure that employers do not, beyond levels of permitted disparity, provide greater benefits to highly compensated employees than to non-highly compensated employees. See id.
101. See generally id. § 410.
102. I.R.C. § 410(b)(1) provides that as a condition of qualification, a plan must satisfy one of the minimum coverage tests set forth in I.R.C. § 410(b) and the regulations thereunder. For elective contributions plans in which participants choose whether to have the employer make contributions to the plan directly or in cash to the employee, referred to as 401(k) plans, there are additional non-discrimination requirements to ensure non-discriminatory levels of participation by non-highly compensated employees. See I.R.C. § 401(k)(3)(A) (1994 & Supp. II 1996). However, the non-discrimination requirements for MSAs are different. In order for an MSA to be considered non-discriminatory, comparable contributions must be made available to all employees. See I.R.C. § 4980E(a)-(d) (West Supp. 1998). A failure to meet the requirements of § 4980E(a) results in the imposition of a tax equal to 35% of the aggregate amount contributed to the MSAs in a given tax year. See id. § 4980E(b). The employer must make available comparable contributions to the MSAs of all participating employees for each year of coverage. See id. § 4980E(d)(1). The contributions may be the same dollar value or "the same percentage of the annual deductible limit under the high deductible health plan covering the employees." Id. § 4980E(d)(2)(a). For example, assume an employer maintains two different high deductible plans. Under one plan, the deductible for single coverage is $1500 and $3000 for family coverage. Under the second plan, the deductibles are $2,000 and $4,000 respectively. Further assume that the employer's contribution to the MSAs of participating employees of the first plan is $500 for singles and $750 for families. The amount contributed to the
Accordingly, if an employer makes the MSA available on a non-discriminatory basis, but only the highly compensated employees choose to participate, the plan would not be considered discriminatory. This result is inconsistent with ERISA's treatment of other elective retirement arrangements in which plans must be non-discriminatory in both design and operation.

Finally, as discussed above, the distribution rules for MSAs are inconsistent with the distribution rules that govern other employer-sponsored retirement arrangements. Although individuals are discouraged by the 10% excise tax from taking early distributions from other retirement arrangements (e.g., IRAs and 401(k) plans), they are actually encouraged to do so from MSAs with the tax-free treatment of distributions for medical expenditures.

Different fiduciary standards, coverage requirements, and distribution rules for MSAs result in disparate treatment among available retirement arrangements. Not only do these inconsistencies introduce an unnecessary level of complexity to the pension system as discussed above, but they also produce peculiar results. On the one hand, the burdensome rules and regulations of ERISA are imposed on employers who choose to offer qualified retirement arrangements to their employees in order to ensure that plan participants receive sufficient protection. On the other hand, because MSAs are excepted from ERISA's rules and regulations, employers are encouraged to offer them and individuals are induced to participate in them, resulting in less protection to plan participants. Even if one concludes that the MSA's goal of encouraging

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103. Some plans may allow employees to choose between employer contributions to an MSA or to another health plan. See CANAN & MITCHELL, supra note 36, § 10.2A, at 323. Thus, if the non-highly compensated employees disproportionately elect not to receive contributions to MSAs, a plan potentially could have only highly compensated individuals participating. See id.

104. See, e.g., I.R.C. § 410(b)(1); see also id. § 401(k)(3)(A). Section 401(k) plans are nondiscriminatory if an insufficient number of non-highly compensated employees elect to participate, regardless of the availability of the benefit to non-highly compensated employees. See I.R.C. § 401(k)(3)(A) (West Supp. 1998). It should be noted that there are safe harbor rules for satisfying the nondiscrimination test for elective contribution plans. See id. § 401(k)(12).

105. See supra notes 73-81 and accompanying text (discussing the disparate distribution rules for MSAs versus other tax preferred retirement arrangements).

106. See supra note 77 and accompanying text (identifying the 10% excise tax on pre-retirement distributions under I.R.C. § 72(t)).

individuals to become more involved in their health care choices overrides the need for consistency between the MSA and other retirement savings programs, it is nevertheless important to acknowledge and explain the differences and similarities in these arrangements. This discussion must take place in order to maintain support for the existing retirement programs, and to avoid unnecessary confusion about the rules governing the different individual retirement savings vehicles.

C. A Comparison of MSAs and Flexible Spending Accounts (FSAs)

Some commentators have maintained that MSAs are not a new concept, but are simply a variation of existing § 125 plans, commonly known as Flexible Spending Accounts (FSAs). Under current law, employees may contribute pre-tax money to FSAs to pay for medical expenses not covered by their health insurance. FSA funds not used for medical expenses during a given year are forfeited by the employee at the end of the plan year. Thus, because FSA funds may not be carried over, account holders have incentives to spend as much of their FSA funds as possible before the end of the year. By contrast, excess MSA contributions may accumulate tax-free and may be withdrawn without penalty after death, disability, or when an account holder reaches retirement age. Thus, FSAs and MSAs are very different concepts. They are similar only to the extent that both can be used for current medical expenses. Unlike MSAs, however, FSAs have no carry-over feature and, therefore, cannot be used effectively as long-term savings arrangements.

IV. MSAs DISPROPORTIONATELY BENEFIT THE WEALTHY

The MSA program was established as a means of furnishing savings opportunities to all Americans. However, the program's savings feature, in connection with the self-employed MSA, benefits high-income taxpayers disproportionately and provides little or no benefit to low-income taxpayers. Consequently, as designed, the program is incapable

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111. See supra notes 33-39 and accompanying text (discussing the tax treatment of unused MSA funds).
112. See supra note 9 and accompanying text (discussing improving the availability of affordable healthcare under the HIPAA).
of delivering the intended benefits to many of its anticipated beneficiaries.

A. The Impact of Greater Discretionary Income

One reason the MSA program disproportionately benefits highly compensated individuals is because it effectively expands the IRA contribution limit. Under current law, annual IRA contributions are limited to $2000. By saving $2000 in an MSA as well as $2000 in a traditional IRA, however, a self-employed taxpayer can double the IRA limit.

Low and moderate-income taxpayers will derive significantly less benefit from an increased contribution limitation than high-income taxpayers, because households that contribute to IRAs tend to be wealthier than households that do not. Studies conducted by the Center on Budget and Policy Priorities indicate that, prior to 1986, when taxpayers at all income levels could contribute up to $2000 to an IRA and deduct the contribution from their taxable income, 82% of all IRA deductions were taken by individuals in the top one-third income bracket. Only 8% of households earning between $10,000 and $20,000 made IRA contributions during the same period. Presumably, the lower IRA participation rate among low-income individuals was attributed to low earnings. Thus, it appears that low-income Americans earn insufficient wages to take advantage of the MSA program's expansion of the IRA limit.

The only beneficiaries of the increased IRA contribution limit are individuals who already contribute the maximum amount to their

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113. See supra note 71 (describing IRA contribution limits).
114. See I.R.C. § 219(b)(1) (1994). It should be noted that when contributions are made to both a traditional IRA and a Roth IRA, there is a collective limit of $2000. See I.R.C. § 408A(c)(2) (West Supp. 1998).
118. See Jefferson, supra note 79, at 267.
119. Cf. id. (discussing a similar effect on low-income Americans in relation to “The American Dream Savings Account”). This discussion pertains to MSAs established by self-employed individuals. Although the disproportionate benefit to taxpayers with higher marginal tax rates occurs with respect to all deductions and exclusions, the fact that the MSA increases existing regressivity in the tax system is particularly troubling because it is a program touted to be responsive to the health needs of all Americans. See supra note 9 and accompanying text (citing preamble to the HIPAA).
IRAs. Consequently, the MSA program increases the disparity between the tax subsidy received by individuals who currently can afford to save and those who cannot.

B. The Effects of Higher Marginal Tax Rates

Another reason the MSA disproportionately benefits the wealthiest members of society is because of the progressive tax rate structure; the applicable tax rate increases as an individual earns more income. Thus, the benefit of an exclusion depends on the marginal tax rate of the taxpayer.\textsuperscript{120} To illustrate, assume an employer makes a contribution of $500 on behalf of two workers, A and B, in 40\% and 20\% tax brackets, respectively. If A and B were taxed on the $500 contribution, A would pay a tax of $200, and B a tax of $100. However, because the contribution is excluded from each taxpayer's gross income, neither pays any tax on the $500 contribution. Accordingly, the exclusion for MSA contributions is more valuable to A than it is to B.\textsuperscript{121} Similarly, the tax-free buildup of excess amounts in MSAs is more valuable to high-income taxpayers.

Employer-provided payments for health insurance premiums in connection with traditional health care programs also generally are excluded from an employee's gross-income.\textsuperscript{122} This exclusion, like the MSA exclusion, disproportionately benefits wealthy taxpayers not only because the value of the exclusion increases as income rises, but also because upper-income taxpayers typically work for organizations that provide the most generous employer health care contributions.\textsuperscript{123} Therefore, the MSA does not create the inequities that exist in the current health care system with respect to disparate treatment among taxpayers in different tax brackets for employer-provided health benefits, but the MSA exacerbates the situation by allowing a tax-free buildup of unused funds in addition to an exclusion for employer-provided health benefits. This result is troubling, especially because the MSA program is marketed as a medical savings program designed to make the health care system operate more fairly and increase the availability of affordable health care to all Americans.

\begin{itemize}
\item \textsuperscript{120} See I.R.C. § 1 (West Supp. 1998) (listing the applicable tax rates).
\item \textsuperscript{121} That is, 40\% of $500 equals $200 and 20\% of $500 equals $100.
\item \textsuperscript{122} See I.R.C. § 106(a) (Supp. II 1996). These expenses also are deductible by the employer under I.R.C. § 162(a) (West Supp. 1998) as business expenses.
\item \textsuperscript{123} See COHEN, supra note 84, at 145-47; see also Pauly & Goodman, supra note 31, at 275.
\end{itemize}
V. MSAS DISPROPORTIONATELY BENEFIT THE HEALTHY

Proponents of the MSA program maintain that catastrophic policies are relatively inexpensive and cost considerably less than traditional low-deductible plans. Accordingly, they argue, an employer-deposit MSA theoretically could be funded by the difference in the cost of a high-deductible plan and a low-deductible plan without increasing an employer's overall cost.125

Skeptics argue, however, that the cost of high-deductible plans vary and, in many instances, are more expensive than proponents suggest. When premiums for high-deductible policies are not significantly less than those for conventional plans, employers who maintain their contribution levels have only small amounts available to fund employees' tax-free savings accounts.127 As a result, in these situations neither the savings account nor the high-deductible policy will cover many of the medical expenses incurred by account holders.128 Thus, although the primary goal of the MSA program ultimately is to make health care more affordable, in some instances participation in the MSA program may actually increase the out-of-pocket medical expenses for certain individuals, making it more difficult for them to obtain necessary medical services.129

Individuals who spend less than the amounts contributed by employers to their MSAs will experience gains. Therefore, for the vast majority of

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125. See Brad Carlson, MSAs: Participants See Benefits to Alternative Coverage, IDAHO BUS. REV., Mar. 17, 1997, at 1A, available in LEXIS, News Library, BusDTL File (“Theoretically a high-deductible policy would leave the owner with more money to put into the MSA . . . .”).

126. See Len M. Nichols, Who Will Jump Into the MSA Pond?, BUS. & HEALTH, Oct. 1996, at 47, 51 (arguing that the decrease in premiums charged to employers as a result of their changing to catastrophic plans would pay for less than one-half of the increase in deductibles).

127. See News Hour: Sick Days (PBS television broadcast, June 6, 1996), available at Online NewsHour: Medical Savings Accounts (visited Oct. 27, 1998) <http://www.pbs.org/search> (use search term “sick days”) [hereinafter Sick Days] (statement of Gail Shearer, Consumers Union); see also Bennett Roth, Medical Program Looks Sickly: Congress Debating Savings Accounts, HOUSTON CHRONICLE, Aug. 16, 1998, at 1D (stating that "many people are afraid they won't have enough money in their accounts to cover regular medical expenses").

128. See Sick Days, supra note 127 (statement of Gail Shearer, Consumers Union).

129. See Kirk, supra note 80, § 3, at 6.
Americans, who spend approximately $960 annually on health care, a yearly MSA contribution greater than $960 would produce a surplus.\textsuperscript{3} For this reason, employees with histories of little or no health care costs are more likely to prefer employer-deposit MSAs, because they stand to benefit from the carryover of unused contributions.\textsuperscript{3}

Although healthy individuals stand to gain in the short-run from the ability to select medical benefits according to their own interests and risk tolerance, this flexibility could lead to a massive self-selection process, which eventually would segregate the health insurance market.\textsuperscript{3} The healthiest individuals will remove themselves from the larger insurance pool for traditional insurance arrangements, leaving only older and sicker individuals to be covered by these insurance arrangements. Ultimately, this situation will result in prohibitively high insurance premiums for the most vulnerable members of society, making it difficult for them to obtain adequate insurance protection.\textsuperscript{3}

VI. MSAS DISPROPORTIONATELY BENEFIT THE MOST INFORMED

A. Shopping for the Best Price

MSA proponents argue that because MSA funds eventually may be used for non-medical expenditures, the program provides incentives for individuals to be more selective about the services they purchase than they would be under conventional health care plans.\textsuperscript{3} Accordingly, they contend, over time MSAs will reduce appreciably the cost of medical care.\textsuperscript{4}

\begin{itemize}
\item \textsuperscript{130} See Burry, Jr., supra note 52.
\item \textsuperscript{131} See id.
\item \textsuperscript{132} See Michele Conklin, Insurance Innovation: Experiment Provides For Medical Savings Accounts for Small Firms, Self-Employed, ROCKY MTN. NEWS, Jan. 5, 1997, at B5 (arguing that healthy people who use MSAs as a savings vehicle will “split the insurance pool and drive up costs for the sick”).
\item \textsuperscript{133} See id.; see also Charles Ornstein, Few Choose Pilot Health Program: Critics Say Medical Savings Accounts Favor the Wealthy, DALLAS MORNING NEWS, July 23, 1998, at 1D (citing the results of a 1996 Urban Institute study that premiums of traditional health plans will rise by 335% if the healthy population removes itself).
\item \textsuperscript{134} See Gallagher, supra note 124, §E, at 1 (contending that by spending their own money, and not that of the insurance company, individuals will “price-shop more” and forego unnecessary medical care). Opponents, however, argue that this price-shopping will result in a neglect of preventive care, such as annual checkups. See id.; see also Dan-shera Cords, Comment, The Medical Savings Account Provision of the HIPAA: Is It Sound Health and Tax Policy?, 21 SEATTLE UNIV. L. REV. 1217, 1228 (1998) (arguing that this neglect of preventive care could result in “a reduction in the general level of health of account holders”).
\item \textsuperscript{135} See Gallagher, supra note 124, §E, at 1.
\end{itemize}
The underlying assumptions of this "more selective" theory are that individuals are able to compare the prices of different medical treatments, are fully informed about their medical conditions, and are fully aware of all of the available treatment options. It is unlikely, however, that the average consumer satisfies all of these conditions.136 Most individuals are not qualified to perform cost-benefit analyses of appropriate health care procedures. Moreover, the circumstances surrounding many medical emergencies would not lend themselves to an economically driven decision-making process for individuals who are not expert in the field of medicine.137 For example, it is unrealistic to expect the average parent of a sick child to investigate the cost of a penicillin injection in order to determine whether the benefits of such treatment justify the expense.138

The relatively few individuals who possess significant medical knowledge may indeed benefit from an opportunity to shop for competitive prices and treatment. It is important, however, to question the wisdom of encouraging those individuals who lack medical expertise to make decisions that would withhold recommended medical treatment from themselves or others in order to save for future medical emergencies, or retirement savings goals. If the MSA program causes such individuals to make unwise health decisions, the program could be counter-productive, increasing future medical costs.139 Although consumer education would remedy this problem, an initiative to educate the entire population of health care consumers would require considerable time, effort, and ex-

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136. See David A. Hyman, Consumer Protection in a Managed Care World: Should Consumers Call 911?, 43 VILL. L. REV. 409, 451 (1998) (arguing for more aggressive consumer protection regulation in the United States health care market because consumers are "weak, ignorant, poor and disorganized" and have a "limited ability to 'shop around'"). Furthermore, by forcing individual consumers to shop for the best prices, MSAs actually may delay the receipt of timely care to those individuals. See Russell, supra note 8, at 560.

137. See COST IMPLICATIONS AND DESIGN ISSUES, supra note 110, at 3 ("Clearly, in medical emergencies, shopping around for a lower-cost provider is rarely in the cards . . ."). See also Cords, supra note 134, at 1227 (noting the unlikely situation of an individual who is on route to a hospital in an ambulance deciding which hospital she should go to based on cost). Additionally, once at the hospital or the doctor's office, it is virtually certain that an individual consumer will not possess the bargaining power to receive a better price. See id.; see also Medical Savings Accounts-A Bad Idea, supra note 53 (arguing that under an MSA plan, "group-negotiated rates would not be possible").

138. See Burry, Jr., supra note 52.

139. See John V. Jacobi, The Ends of Health Insurance, 30 U.C. DAVIS L. REV. 311, 381 (1997) (arguing also that "MSAs would not improve health expenditure efficiency because personal control of health expenditures is inconsistent with the structure of cost containment through managed care, where systemic utilization review channels spending choices").
B. Gaming the System

The MSA not only rewards those who have expertise in the health care area, but also those who have advance notice about their medical conditions and, therefore, are able to predict more accurately their medical expenditures. Because MSA legislation limits the ability of insurance providers to impose pre-existing condition clauses, employer-deposit MSAs allow certain individuals to "game" the system. In years in which individuals anticipate higher medical expenses, such as those associated with starting a family or undergoing elective surgery, it is advantageous for them to elect conventional plan coverage. In other years, when such expenses are not expected, it is advantageous for them to choose the catastrophic insurance protection under the MSA program. By using this strategy, individuals able to predict or plan their medical expenses can receive substantial windfalls.

Under the current health care system, an individual could utilize a similar strategy. By opting-out of conventional coverage and making contributions to an FSA in years in which the individual anticipates

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140. See HIPAA, Pub. L. No. 104-191, 110 Stat. 1936, 1939-40 § 101(a) (codified at 29 U.S.C. § 1181 (Supp. II 1996)) (limiting the amount of time of any such exclusion to twelve months for individual participants who enroll in the plan in a timely manner). The HIPAA amended § 701 of ERISA in an effort to eliminate "job lock." See Cords, supra note 134, at 1248. Job lock occurs when an individual with preexisting conditions is unable to obtain new health insurance, and therefore is restricted from changing jobs. See id. at 1248 n.197.

141. See Medical Savings Accounts-A Bad Idea, supra note 53.

142. See id.; see also Elliot K. Wicks & Jack A. Meyer, The Role of Medical Savings Accounts in Health System Reform (May 1998) <http://www.nchc.org/finance/medicare2-0698.html> (arguing that "[o]ver time, switchers in the aggregate may pay substantially less than their full share of the care they receive . . ."). This "bunching" of medical expenses in a given year to reap tax benefits already occurs with respect to deducting medical expenses under § 213 of the I.R.C. See Liz Pulliam, Be Stingy With Uncle Sam: A Few Adjustments Now to Your Tax Status or Retirement Plans Can Lop Hundreds, If Not Thousands, of Dollars Off Your '98 Bill, L.A. TIMES, Oct. 4, 1998, at D1 (advocating "scheduling medical exams and elective procedures before Dec[ember] 31 if your medical expenses for the year are already close to the deductible threshold, which is 7.5% of your adjusted gross income"). By planning to undergo certain procedures all in a given year, rather than across several years, an individual could deduct amounts from their taxes that they may not otherwise have been able to deduct. See id. For wealthier individuals, however, this serves as a "generous subsid[y]" for elective procedures such as plastic surgery. See Cohen, supra note 84, at 145 (quoting a 1980 Congressional Budget Office Study on medical care).

143. See Wicks & Meyer, supra note 142.
lower medical expenses, lower medical expenses, a taxpayer could both save annual premium costs and reduce their out-of-pocket costs for expected medical expenses by paying with pre-tax dollars. However, there is less incentive to use this strategy with FSAs because, as discussed above, there is no possibility of carry-overs or potential retirement savings in the event of a year-end surplus.

C. Awareness

Finally, because the number of MSAs is limited and the program is temporary, individuals who know to act prior to the effective dates of the interim limits, or the program cut-off date, to establish their accounts could benefit at the expense of individuals who are unaware of the program, or fail to fully comprehend the complexity of the MSA pilot. MSA legislation allows no more than 750,000 accounts to be established during the experimental phase. These accounts are awarded on a first-come, first-served basis. Additionally, there are interim limits that establish various “cut-off-dates” by which employees or self-employed individuals must set up their MSAs in order to qualify for the program. Once an interim limit is met, no new accounts will be granted tax-exempt status, although contributions may continue to be made to existing accounts.

144. See Pulliam, supra note 142, at D1 (explaining that with flexible spending accounts, “you can save hundreds of dollars if you plan right”). It should be noted, however, that in certain circumstances, benefits under an FSA are considered “excepted benefits” and therefore not subject to the requirements of section 701 of ERISA. See Application of HIPAA Group Market Portability Rules to Health Flexible Spending Arrangements, 62 Fed. Reg. 67,688, 67,688 (1997).

145. See supra note 110 and accompanying text (explaining that FSA account holders are subject to a “use it or lose it” requirement that bars carrying-over unspent dollars to the next fiscal year); cf. Carrie J. Gavora & Robert E. Moffit, Health Care: Improving Consumer Choice and Access, in ISSUES ’98: THE CANDIDATE’S BRIEFING BOOK ch.10 (1998), available at <http://www.heritage.org/issues/chapl0.html> (FSA and MSA section) (arguing that the “use it or lose it” feature encourages families to spend for medical services that may be “only marginally desirable or beneficial” just so they spend all that is in their FSA account).

146. See I.R.C. § 220(j) (Supp. II 1996). Uninsured individuals who establish an MSA will not be counted in this number. See id. § 220(j)(3).

147. See id. § 220(i)(3)(C); see also BETH C. FUCHS ET AL., THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) OF 1996: GUIDANCE ON FREQUENTLY ASKED QUESTIONS CRS-24 n.36 (Cong. Res. Serv. No. 96-805 EPW, 1998) (describing and explaining the provision’s schedule of “cut off dates”).

148. See FUCHS ET AL., supra note 147, at CRS-24. Because of uncertainty about the effects of the interim limits in particular, and the design of the MSA pilot program in general, Congress recently attempted to amend the HIPAA legislation. See infra note 197 (discussing the “Patient Protection” legislation passed by the House that would have expanded significantly the MSA program).
Thus, the MSA’s structure and complexity potentially pit the unaware against the more aware. If interim limits are reached, self-employed individuals such as lawyers, doctors, and investment bankers, who have access to financial advisors and planners, could prohibit the employees of smaller, non-professional businesses from ever establishing MSAs. Although the low levels of participation in the MSA program do not suggest that it is likely the interim limits actually will prevent individuals who desire to participate in the program from doing so, the mere possibility of rewarding the most informed population at the expense of the least informed is nevertheless a problem of perception.

VII. MSAs and the Existing Health Care System

A. Health Care Policy

The MSA is designed to encourage cost-effective consumer behavior by increasing individual control over health care spending. Under the traditional health care model, patients rely heavily on their physicians’ advice and recommendations regarding their health care treatment. As designed, however, the MSA program places the onus on patients to make these decisions more independently. Thus, the MSA program represents a paradigm shift away from existing health care policy. This

149. MSAs presently are relatively popular among the self-employed. See Crenshaw, supra note 8, at H1 (noting that MSAs have been “big sellers” with law firms because of the tax benefits). For the self-employed, medical expenses under traditional health plans only could be deducted to the extent that they exceeded 7.5% of the individual’s adjusted gross income. See id. With MSAs, however, all qualified medical expenses not covered by insurance are fully deductible to the extent that contributions to MSAs are fully deductible. See id.

150. See supra notes 147-48 and accompanying text (explaining the participation cut-off dates).

151. See supra notes 49-50 and accompanying text (explaining that MSAs were designed to increase individual control over medical spending, which in turn would encourage more prudent spending).

152. See ERIN DOMINIQUE WILLIAMS & LEO VAN DER REIS, HEALTH CARE AT THE ABYSS: MANAGED CARE VS. THE GOALS OF MEDICINE 169-70 (1997) (describing the traditional relationship between a physician and a patient as a “type of contract” in which both parties freely share information”); cf. John G. Day, Managed Care and the Medical Profession: Old Issues and Old Tensions, The Building Blocks of Tomorrow’s Health Care Delivery and Financing System, 3 CONN. INS. L.J. 1, 6-7 (1996) (explaining that “[u]nder the traditional system . . . [t]he decision of which doctor to go to, how much care one receives and the amount charged for each service is between the patient and the doctor”).

153. See Ferraro, supra note 83; see also Peter M. Clarke, M.D., Correspondence, Medical Savings Accounts, 331 NEW ENG. J. MED. 1158 (1994) (noting that placing the burden on patients to make their own decisions regarding health care will have “obvious consequences” of separating wealthy and poor patients).
shift not only alters the doctor-patient relationship, but also may have serious consequences on the delivery of medical treatment.

MSAs may cause some individuals to shun routine medical check-ups and other early-detection procedures to save money. Financially strapped consumers will forgo the aspects of their medical care that they perceive as not urgently necessary; they will seek treatment only when their medical conditions become symptomatic or severe. However, illnesses that go undetected before they reach more advanced stages are both more difficult and expensive to treat. Therefore, the MSA program may undermine recent achievements in health care policy that emphasize the importance of prevention, health maintenance, and early detection. Those who defer early detection and preventive procedures in order to save money are likely to be less wealthy. As a consequence, poorer individuals will suffer from certain diseases disproportionately, while wealthier individuals will continue to enjoy a full range of state-of-the-art medical services. This result ultimately may increase the cost of medical treatment of some illnesses and cause the health care system to be even more multi-tiered than it is today.

B. MSAs and the Rising Cost of Health Insurance Premiums

Most individuals who are covered under group and conventional health plans pay premiums in excess of the medical expenses that they incur. This enables these plans to cover the cost of the relatively few

154. See supra note 136 (stating that the price-shopping caused by MSAs will cause individuals to neglect preventive care).

155. See Committee on Child Health Fin., American Acad. Of Pediatrics, Principles of Child Health Care Financing, 102 PEDIATRICS 994, 995 (1998) (arguing that MSAs “include economic disincentives for preventive care and favor higher income groups financially”).

156. See Clarke, supra note 153, at 1158.

157. See Medical Savings Accounts—A Bad Idea, supra note 53 (noting that “[w]ithout preventive care, medical costs will eventually increase, since diseases and illnesses will be more advanced and, therefore, more costly to treat once detected”).

158. See Clarke, supra note 153, at 1158 (arguing that high-income patients will receive outstanding care while low-income patients’ health will suffer because they neglect diseases to save money).

159. See Medical Savings Accounts—A Bad Idea, supra note 53; see also Bryan Ford, Essay, The Uncertain Case for Market Pricing of Health Insurance, 74 B.U. L. REV. 109, 121 (1994) (noting that health insurers using the “community rating” system typically charge all of their customers a premium equal to what they anticipate will be the average health expenses of the group). It is estimated that “85% of Americans spend less than $3,000 a year on medical care, and 73% have less than $500 a year in claims.” Consumer-First Health Care, WALL ST. J., July 21, 1994, at A14.
individuals who experience costly illnesses or injuries.\textsuperscript{160} Thus, the excess premiums paid by healthy participants are necessary to offset the cost of covering those who are sick. Studies show that even a modest self-selection process causes premiums for traditional and managed care plans to rise significantly; if as little as one-fourth of all insured individuals in traditional policy groups chose MSAs, premiums would rise by nearly two-thirds.\textsuperscript{161} Therefore, the removal of healthy individuals from the insurance pool eventually would drive up medical care costs for those who are unable to profit from their own health, and ultimately jeopardize the existence of conventional health insurance.\textsuperscript{162}

Although the self-selection process can benefit healthier individuals, even these individuals may be winners only in the short-run. As healthy individuals grow older and experience deteriorating health, they too will want to rely on conventional insurance for financial protection against increasing medical costs.\textsuperscript{163} By that time, however, the cost of traditional, comprehensive health plans may be unaffordable. Consequently, the initial savings that a healthy individual enjoys by choosing an MSA today could be depleted by the cost of a single medical emergency later in life, when that individual's income is likely to be fixed. Therefore, both the healthy and unhealthy should be concerned that the MSA program threatens the viability of conventional health insurance.\textsuperscript{164}

\textbf{C. MSAs and the Risk of Rising Health Care Costs}

The MSA's failure to deliver affordable health care to all Americans, and its potential threat to the health care system does not necessarily render the MSA program void of value or its cost unjustifiable if the program is successful in curbing the rising costs of health care. However, this result is unlikely. Although supporters of MSAs believe that the

\begin{itemize}
\item \textsuperscript{160} See Linda J. Blumberg & Len M. Nichols, \textit{Health Insurance Market Reforms: What They Can and Cannot Do} (visited Jan. 18, 1999) <http://www.urban.org/pubs/hinsure/insure.htm> (stating that "[t]he principle behind insurance is to spread individual risks across a group").
\item \textsuperscript{162} See Blumberg & Nichols, supra note 160 (arguing that "insurance dropping" by low-risk individuals could lead to high prices, for which high-risk individuals do not have the ability to pay).
\item \textsuperscript{163} See Medical Savings Accounts—A Bad Idea, supra note 53 (explaining that healthy individuals will need comprehensive health insurance as they age).
\item \textsuperscript{164} See Ornstein, supra note 133, at 1D (quoting Gail Shearer, Director of Health Policy Analysis for Consumers Union: "Widespread MSAs will lead to premium spirals that could drive traditional policies out of the market.").
\end{itemize}
ability to accumulate unused account funds ultimately will reduce the cost of medical care,\textsuperscript{165} studies have shown the MSA program will not have a significant impact on the costs of medical services.\textsuperscript{166} Moreover, for the reasons set forth below, it is very likely that the cost of medical care will increase rather than decrease as a result of the MSA program.

1. Medical Health Dollars Spent on a Few

First, the MSA program targets the wrong population and the wrong medical expenditures to effectively reduce the cost of health care. The distribution of health care costs in this country is highly skewed.\textsuperscript{167} Approximately 70\% of Americans account for only 15\% of national medical expenditures.\textsuperscript{168} Nearly seventy-five cents of every dollar spent on health care in the United States is attributed to only 10\% of the population,\textsuperscript{169} and at least 80\% of all health care expenditures are accounted for by individuals who spend more than $2000 annually.\textsuperscript{170} Consequently, a more effective way of decreasing medical care costs is to encourage the 10\% of the population that spends the most to cut back on unnecessary or wasteful services.\textsuperscript{171} Additionally, medical expenses that typically exceed $2000 should be the focus of any initiative for reduced medical care spending.\textsuperscript{172}

\textsuperscript{165} See Roth, Jr., supra note 51, at 152 (arguing that the patient choice aspect of MSAs will help to control health care costs); John C. Goodman & Gerald L. Musgrave, Patient Power: The Free-Enterprise Alternative to Clinton's Health Plan 93 (1994) (contending that by allowing individuals to substitute less expensive self-insurance for more expensive third-party insurance for small medical bills, the result will be a lowering in general of the cost of health insurance). Additionally, proponents argue that the cost of health care coverage would be lowered because expensive third party insurance would be used only for catastrophic events. See id.

\textsuperscript{166} See Emmett B. Keeler et al., Can Medical Savings Accounts for the Nonelderly Reduce Health Care Costs?, 275 JAMA 1666, 1671 (1996) (concluding in an economic policy evaluation based on the RAND Health Expenditures Simulation Model that “[o]ur simulations show that the MSA approach is not likely to produce the reduction in health care use that its advocates foresee”).

\textsuperscript{167} See Blumberg & Nichols, supra note 160 (stating in the discussion of the current health insurance market that “[t]he most expensive 1 percent of our population accounts for 30 percent of all health spending”); see also Marilyn Moon et al., Medical Savings Accounts: A Policy Analysis, pt. III (visited Jan. 18, 1999) <http://www.urban.org/pubs/hinsure/msa.htm> (cautioning that the skewed distribution of health care spending must be considered in determining the potential for MSAs to reduce health costs).

\textsuperscript{168} See Burry, Jr., supra note 52 (“No Going ’Back to the Future’” section).

\textsuperscript{169} See id.

\textsuperscript{170} See Moon et al., supra note 167, at pt. III (arguing that, because typical catastrophic policies under an MSA have a $2000 deductible, “a majority of spending would be protected by insurance and hence not directly subject to the incentives established by the MSA/catastrophic [program]”).

\textsuperscript{171} See Burry, Jr., supra note 52 (“No Going ’Back to the Future’” section).

\textsuperscript{172} See Wicks & Meyer, supra note 142 (arguing in the “Concerns of the Critics” sec-
The MSA model adopts neither of these approaches. Instead, the program targets the healthiest, wealthiest, and most informed members of society, rather than the most wasteful consumers and the most costly medical procedures.\textsuperscript{173} Aside from the out-of-pocket deductibles, which arguably will not affect a large percentage of spending, the MSA fails to provide any other incentives to reduce medical care spending.\textsuperscript{174}

Furthermore, technological advances are the major reason that health care costs continue to escalate.\textsuperscript{175} Many of these procedures are used in connection with inpatient settings, where costs typically exceed the MSA deductibles.\textsuperscript{176} Accordingly, for these services, there would be no out-of-pocket cost once an account holder met the plan deductible.\textsuperscript{177}

It is even more unlikely that the MSA will affect the demand for high-priced medical procedures by seriously ill individuals once their plan deductibles are met.\textsuperscript{178} Facing dire circumstances, seriously ill individuals who are insulated from the full cost of medical care are particularly unlikely to make decisions about medical treatment that a rational person incurring the full cost of medical care might make.\textsuperscript{179} For example, an individual suffering from a life threatening disease may choose an extremely expensive procedure, notwithstanding a very small probability...
for success. Consequently, the widespread use of MSAs will have little impact on the most expensive types of medical treatment. They will also have little impact on the behavior of the relatively few individuals who disproportionately incur medical costs that exceed the MSA deductible. Thus, the MSA program is unlikely to succeed in reducing health care costs.

2. MSAs and Increased Administrative Costs

Second, the MSA debate rarely includes any discussion about additional collection and administrative costs. There will be, however, additional costs associated with the processing of small service invoices for individual patients. If the MSA program is expanded, hospital outpatient departments, clinics, and other health care providers will find it necessary to restructure their billing procedures to bill patients individually, rather than collectively through insurance companies, as many of the automated systems currently are equipped to do. Without the benefit of electronic billing, service providers will incur increased costs for hiring more processors to handle the additional workload. Furthermore, under an expanded MSA program, service providers would incur higher default and collection costs associated with individualized billing processes. Amounts expended for these indirect costs ultimately will be reflected in the cost of medical care, and may well offset any reduction in expenditures that the MSA otherwise may generate.

180. See id.
181. See Wicks & Meyer, supra note 142 (arguing, in the “Concerns of the Critics” section, that the large majority of medical expenses are above the MSA plan deductible and, therefore, do not provide any incentive for cost-containment).
182. See Jeanne Schulte Scott, MSAs: Defining Terms and Setting Boundaries, HEALTHCARE FIN. MGMT., Sept. 1996, at 26, 28 (arguing that billing to individuals will raise administrative costs). Proponents, however, argue that MSAs will reduce administrative expenses associated with traditional health insurance plans. See AMERICAN ACADEMY OF ACTUARIES, ISSUE BRIEF: MEDICAL SAVINGS ACCOUNTS 3 (May 1995) (arguing that administrative savings would result from MSAs because there would be fewer claims to process); American College of Physicians, Position Paper, Medical Savings Accounts, 125 ANNALS OF INTERNAL MED. 333, 337 (1996) (same).
183. See Scott, supra note 182, at 28. Additional administrative expenses also may be experienced by the IRS in monitoring MSA withdrawals. See Medical Savings Accounts Come Out of the Wilderness, HEALTH LEGIS. & REG., Jan. 25, 1995, at para. 21, available in 1995 WL 8354903 (arguing also that individual account holders would be burdened with record keeping). Furthermore, providers still would have to provide verification of medical expenses to insurers for the purpose of being reimbursed for amounts that exceed the deductible. See American College of Physicians, supra note 182, at 339.
184. See Scott, supra note 182, at 28.
185. See Cords, supra note 134, at 1245 (arguing that the costs of the record keeping and reporting requirements placed on account trustees and employees may exceed other
3. A Questionable Underlying Theory

The basic theory underlying the MSA program is that American health care consumers will consume as much health care as available, unless financial disincentives are created.\textsuperscript{186} This theory may be true for most goods and services; however, health care is fundamentally different from other consumption items. Generally, there is no inherent personal benefit to the consumer who purchases excessively expensive drugs, or who undergoes unnecessary medical procedures.\textsuperscript{187} By contrast, if an individual spends more on food, for example, than average amounts, it can be assumed that the increased expense results from personal choice. Presumably, the correlation exists between high medical costs and medical necessity, rather than between high medical costs and personal choice.\textsuperscript{188}

Furthermore, because individuals typically do not know what medical treatment they need, consumers shopping for health care face considerable and inherent difficulties that do not exist in other markets.\textsuperscript{189} Thus, even if individuals were likely to make health care decisions in the same manner as they make other spending choices, they would need some level of medical expertise to make informed decisions. To overcome a lack of medical education, each individual would need to invest substantial resources in receiving medical training in order to develop the skills necessary to make informed medical decisions. For many consumers this solution is inefficient and, accordingly, they will prefer to continue to rely on their physician’s medical advice.
VIII. THE MSAs CHANCES OF SUCCESS

A. Design Complexities

Even if the underlying policy of the MSA is sound, the complexity of the program could have a negative impact on its success. Both buyers and sellers may be deterred by the uncertain effects of the interim limits and the lack of permanence of the experimental program.\(^{190}\) The overall number of accounts in the MSA program is limited to 750,000.\(^{191}\) The program also provides for interim caps on the number of accounts that may be established by specific dates within the four-year demonstration period.\(^{192}\) The first of several interim caps was effective April 30, 1997, and was set at 375,000 accounts.\(^{193}\) The remaining two interim caps were set at 525,000 by June 30, 1997, and 600,000 by April 15, 1998.\(^{194}\)

If any of the interim limits had been reached at any time, enrollment would have ceased and no new accounts would have been allowed.\(^{195}\) Individuals who previously had established their MSAs, however, would have been permitted to continue making contributions to, and receiving distributions from, their existing accounts.\(^{196}\) Thus, the initial uncertainty surrounding the interim limits may have deterred some insurance companies from gearing up their promotional efforts, out of concern that they could not be guaranteed continuation of the MSA’s tax deductibility feature beyond the interim dates.\(^{197}\) Furthermore, because many indi-

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190. See NATIONAL CENTER FOR POLICY ANALYSIS, MEDICAL SAVINGS ACCOUNTS: OBSTACLES TO THEIR GROWTH AND WAYS TO IMPROVE THEM (NCPA Policy Report No. 216, July 1998), available at <http://www.ncpa.org/studies/s216/s216b.html> [hereinafter NCPA POLICY REPORT No. 216] (noting, in the section on problems with the MSA, that the 750,000 limit on the number of MSAs has “kept the biggest players such as Chase Manhattan Bank and Prudential Insurance out of the market”).


192. See id. § 220(j); see also FUCHS ET AL., supra note 147, at CRS-24 n.36 (describing the series of cut-off dates established by the program).


194. See id. § 220(j)(1)(B), (j)(2)(A); see also Ayers & Plummer, supra note 18, at 262 (stating that if the number of reported MSAs exceeded 375,000 on April 30, 1997, the IRS would announce a cut off date of September 1, 1997).

195. See I.R.C. § 220(i)(1); see also FUCHS ET AL., supra note 147, at CRS-24 (noting that once an interim limit had been reached, the MSAs would be limited to those individuals who already had established accounts). In determining whether a limit had been reached, the law precludes the IRS from including in the number previously uninsured individuals. See I.R.C. § 220(j)(3).


197. See NCPA POLICY REPORT NO. 216, supra note 190 (noting that the largest insurance companies have not offered MSAs due to the limited market); Linda Koco, Tax-Qualified MSA Products are on the Rise, NAT’L UNDERWRITER, Apr. 21, 1997, at 13
Individuals who sell health insurance have never dealt with financial products like MSAs, a lack of familiarity with the product may contribute to their reluctance to aggressively promote the product. An additional factor that may discourage brokers from marketing MSAs, is that the commission for high-deductible products is often lower than that for traditional products.

Another concern that insurers have expressed about the design of MSAs pertains to the annual cap placed on the amount that account holders actually pay for medical expenses, referred to as the “out-of-pocket maximum.” The MSA legislation requires that the catastrophic insurance plan pay for all covered services in excess of the out-of-pocket maximum. Network plans, such as Preferred Provider Organizations (PPOs), typically give financial incentives to participants who use in-network providers as a cost control method. However, under the MSA program, once the maximum out-of-pocket amount is reached by a participant, insurers are required to cover all approved medical services regardless of whether the services are provided in or out of the network.

(“The 750,000 limit, combined with the short time line between the law’s enactment and its 1/1/97 implementation and uncertainty over certain MSA reporting requirements, initially caused many insurers to hold back on market entry.”). Because of the uncertainty associated with the interim limits, as well as the many eligibility restrictions placed on MSAs, Congress recently attempted to expand the program. See generally, BOB LYKE, MEDICAL SAVINGS ACCOUNTS: LEGISLATION IN THE 105TH CONGRESS (Cong. Res. Serv. No. 97-643 EPW, 1998) (discussing potential expansion of MSA availability). The House proposed and passed the Patient Protection Act of 1998, H.R. 4250, which eliminated limits on the number of taxpayers allowed to participate, deleted the ceilings on the deductible percentages, and expanded the program to include all employers. See id. at CRS-3; see also 144 CONG. REC. H6416-17 (daily ed. July 24, 1998) (recording the vote in which the House passed the Patient Protection Act, 216 for, 210 against). The Senate, however, tabled the motion to bring the bill to the floor, effectively “killing” the legislation for the remainder of the 105th Congress. See Amy Goldstein & Helen Dewar, Senate Kills ‘Patients’ Rights’ Bill: Managed-Care Measure a Victim of Partisanship, Clinton Scandal, Lobbying, WASH. POST, Oct. 10, 1998, at A1 (noting that it failed to pass because, in part, philosophical differences existed, and “well-funded lobbyists” opposed the legislation).

198. See GAO MSA REPORT, supra note 67, at 7 (stating that unfamiliarity with the MSA product as well as the “need to explain the interaction of the qualified plan and the MSA” negatively affected initial MSA sales).

199. See David Flaum, Medical Savings Accounts’ Pros, Cons; Ability to Choose Among Pluses, HOUSTON CHRONICLE, Nov. 16, 1998, at 5 (discussing the difference in commissions between high-deductible insurance policies and traditional health insurance policies).

200. See I.R.C. § 220(c)(2)(A)(iii) (specifying that, under a high deductible health plan, an individual’s out-of-pocket expenses (other than those paid for premiums) may not exceed $3000 for self-only coverage and $5500 for family coverage).

201. See id.

202. See GAO MSA REPORT, supra note 67, at 8.
Because the deductible comprises a large portion of the out-of-pocket maximum, insurers are concerned that there is insufficient financial penalty to discourage participants from going outside of the network plan.

The MSA program's design has proven to be problematic not only for prospective sellers, but also for prospective buyers. Several insurers have reported that they have had numerous requests for information about MSAs, but relatively few sales of the product. Insurance sales persons have explained that the low sales numbers are due to a lack of understanding about the product. For example, some consumers incorrectly assume the "use it or lose it" feature of the FSA applies to MSAs. Others are confused about the use of MSA funds. One insurer recounted that a small employer established MSAs for its employees, believing that instead of paying premiums for the catastrophic plan, the premiums could be deposited in the employees' MSAs.

B. A Comparative View of MSAs

Like the United States, Singapore experienced health care cost inflation in the 1970s. In 1984, Singapore responded to the problem of rising medical costs by adopting an insurance scheme that resembles the United States' MSA program. Interestingly, Singapore's ten-year experience with a similar medical program has neither reduced nor controlled health care costs; in fact, its experience shows that after introducing an MSA-like program, the costs for medical care actually increased.
The Singapore program, known as “Medisave,” guarantees each citizen access to quality medical care. The program provides financing for health services, and at the same time responds to the “moral hazard” problem of insurance protection by providing incentives to use health care services responsibly. Under the Medisave program, every worker must deposit part of his or her earnings into an individual Medisave account; from this account, hospital expenses and certain outpatient services can be paid. The Medisave program also has a lifetime savings feature which allows individuals to save for retirement. At death, an account holder’s estate receives any remaining balance.

The Medisave program in Singapore is currently well established. To the extent that the Medisave program compels individuals to save and pay for health care services with their own money, it is similar to the MSA concept. Therefore, important lessons can be learned from Singapore’s experience. Accordingly, it is very useful to analyze how the Medisave project has affected both the demand for, and cost of, medical services in Singapore.

Positive Experience With Medical Savings Accounts In Singapore, 14 HEALTH AFF. 267, 269 (1995) (stating that the Medisave program has been successful in controlling the inflationary rate of medical costs).

210. See Hsiao, supra note 207, at 261; WILLIAMS & VAN DER REIS, supra note 152, at 124 (noting that the Medisave program’s “combination of individual responsibility and government subsidies helps to keep health care affordable while giving participants an incentive to use services appropriately”). “Moral hazard” refers to a problem of insurance protection which causes those who are insured against certain risks to have incentives to use less than optimal care to avoid the insured risk. See supra note 186 (explaining the moral hazard problem). For purposes of defining moral hazard problems it is necessary to distinguish between two types of risks: reactive and fixed. A reactive risk is one over which the insured has some control, for example an automobile wreck due to a controllable cause, such as speeding. See Daniel Keating, Pension Insurance, Bankruptcy and Moral Hazard, 1991 Wisc. L. REV. 65, 68 (1991). A fixed risk is “one over which the insured has no control,” such as damage from floods and acts of God. See id.

211. See Hsiao, supra note 207, at 261.

212. See MUKUL G. ASHER, COMPULSORY SAVINGS IN SINGAPORE: AN ALTERNATIVE TO THE WELFARE STATE (NCPA Policy Report No. 198, Sept. 1995), available at <http://www.ncpa.org/studies/s198/s198.html> (stating in the section on components of the Medisave accounts that a minimum balance of $11,000 must be left in an individual’s account upon reaching age 55 to be used for medical bills during his retirement).

213. See Hsiao, supra note 207, at 261.

214. See id. at 262. “By 1992, 95[%] of the total working population [in Singapore] above age fifteen had Medisave accounts” and by 1993 “[m]ore than 80[%] of patients admitted to hospitals used their Medisave accounts to pay their hospital bills. . . . The remaining 20[%] paid their bills out of pocket, or their employers paid them.” Id. In 1993, Singapore established “Medifund,” to assist impoverished people with their hospital bills. See id.

215. When comparing Singapore’s Medisave program to our MSA program, however,
After the Medisave program was introduced, the per capita cost of health care rose faster than it had in previous years in Singapore. On average, the rate of increase for health expenditures per capita increased 2% per year, from 11% per capita to 13%. Additionally, Singapore found that after the Medisave program was introduced, health care facilities reallocated the services they provided. Specifically, hospitals began purchasing more expensive equipment and offering the latest technologically advanced procedures, although these services ultimately increased the inflationary rate for medical services. Hospitals adopted these practices because they recognized that high-cost services were in greater demand by physicians. Moreover, because the availability of technologically advanced procedures was viewed by the public as an indicator of the quality of care provided by the hospital, hospitals were responding to consumer demands as well. Today, ten years after the Medisave program was established, Singapore has widespread duplication of costly medical equipment and advanced technological services; for example, as many as seven hospitals in Singapore have in vitro fertilization programs.

Like the proponents of MSAs in the United States, Singapore initially believed that the rising cost of medical treatment was in large part attributable to a lack of sensitivity regarding medical cost on the parts of both patients and health care providers. However, Singapore has since discovered that the results do not support this theory. After implementing the Medisave program, Singapore is experiencing a higher rate of inflation.

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216. See Hsiao, supra note 207, at 264. Singapore did not collect data on their Medisave project that would have provided easy answers to questions about the impact of the program on health care costs. See id. Nor is there comprehensive data available from hospitals and clinics that could provide helpful information regarding these questions. See id. Despite the lack of detailed data, however, there are indicators that can assist in determining whether the Medisave program helped control the escalating costs of medical care in Singapore.

217. See id. But see Mark V. Pauly & John C. Goodman, Medical Savings Accounts: The Authors Respond, 14 HEALTH AFF. 277, 278 (1995) (arguing that the Medisave program was designed not to keep health expenses from rising, but rather “to ensure that when Singaporeans enter the medical marketplace, they are able to pay the costs of their own care without relying on the charity of others or subsidies from the state”).

218. See Hsiao, supra note 207, at 264.

219. See id.

220. See id. at 264-65.
tion in health care than ever before.\textsuperscript{221} Accordingly, Singapore's government has appointed a ministerial committee to investigate the causes of the problem and propose new solutions.\textsuperscript{222}

It is just as unlikely that MSAs will be successful in curbing rising health care costs in the United States. The Medisave experiment proved to be a costly project in Singapore. Although differences in market conditions, program design, and patient preferences make it impossible to draw direct parallels between the MSA and Singapore's experience with its Medisave program,\textsuperscript{223} valuable lessons nevertheless can be learned. Perhaps the most important lesson is caution. Policymakers should proceed with great caution before instituting an expanded or permanent MSA program here in the United States.

\section*{IX. Current Status of MSA Program}

When the HIPAA was passed, both proponents and opponents believed that MSAs would be a popular product; however, participation in the MSA program has fallen far short of the initial expectations.\textsuperscript{224} The IRS reported that only 9720 MSAs were established by the first interim cap date of April 30, 1997; MSA legislation had allowed for as many as 375,000 accounts to be established by this date.\textsuperscript{225} Between January and June of 1997, only 22,051 MSAs had been opened, a number significantly below the interim cap of 525,000 accounts set for June 30, 1997.\textsuperscript{226} The IRS's next official count was on August 1, 1998, and was based on the number of accounts created through June 30, 1998; the total number of accounts established was 50,172.\textsuperscript{227} This figure, too, is significantly below the applicable interim cap of 600,000.

\textsuperscript{221} See id. at 265 & ex. 2. In addition, Singapore's restrictions on the use of Medisave funds encourage individuals to "over-use hospital care and under-use less expensive alternatives." Goodman & Musgrave, supra note 208, App. B (noting also that the timing of medical expenses during an individual's life may not coincide with the accrual of money in the Medisave account).

\textsuperscript{222} See Hsiao, supra note 207, at 265.

\textsuperscript{223} See Williams & Van Der Reis, supra note 152, at 125; see also supra note 217 (noting that a comparison of Medisave accounts to MSAs requires one to note the cultural and demographic differences between Singapore and the United States).

\textsuperscript{224} See GAO MSA Report, supra note 67, at 7 (noting that "sales of qualified plans have not met the initial expectations of the insurance industry" (emphasis removed)).

\textsuperscript{225} See Lyke, supra note 197, at CRS-2.

\textsuperscript{226} See GAO MSA Report, supra note 67, at 7. Of this amount, approximately 17% previously were uninsured. See David E. Rosenbaum, There's Been No Rush for Medical Savings Accounts, But Idea Is Gaining Favor, N.Y. Times, Dec. 24, 1997, at A11.

The low enrollment for MSAs indicates that the MSA concept has not yet been fully embraced by American taxpayers. Proponents of the MSA are hopeful, however, that as individuals become more familiar with the program, participation will increase. Accordingly, they are encouraged by the fact that MSA sales increased more than 100% from the first cut-off date to the second.

Whether the low enrollment is attributable to the complexity of the program's design, a lack of interest, or a temporary lag in interest cannot be determined at this point. However, low enrollment in the MSA program already has delayed the availability of information about the MSA pilot. Because less than half of the total number of accounts allowed have been established, the GAO advised Congress to postpone the demographics survey. The GAO believed that the extremely low enrollment numbers would make it infeasible to conduct the required survey. Demographics surveys such as the one required by MSA legislation use random-digit dialing to examine the characteristics of people with and without MSAs. GAO representatives explained that, because of the low number of MSA account holders, it would require unreasonable amounts of labor and funds to randomly reach an equivalent number of MSA account holders as non-MSA enrollees. Therefore, it will be some time before economists can begin to fully assess the impact of the MSA pilot project, and determine if an expanded and permanent MSA program is warranted.

CONCLUSION

As designed, the MSA program presents serious perception, equity, and social policy concerns. The program was marketed as a health care program, but in reality its purpose is two-fold—medical and retirement savings. As a savings program, the MSA disproportionately benefits individuals who can afford to save. As a health care program, the MSA disproportionately benefits individuals who are healthy and informed. Thus, rather than delivering a single health care benefit to a cross-section of the population, the MSA delivers two separate and distinct benefits to

228. See supra note 197 (discussing Congress's attempts to expand the MSA program, and citing as one of the reasons for its attempts the uncertainty surrounding the permanence of the pilot program).


230. See id. at G-3.

231. See id.

232. See id.
relatively few individuals. Notwithstanding its limited number of beneficiaries and dual savings focus, the cost of the MSA program nevertheless could be justified if MSA were able to curb the rising cost of health care. The focus and design of the MSA program, however, raise serious doubts that this goal can be accomplished.

If one is not persuaded to withhold support for an expanded MSA program because of these arguments, it is at least important to recognize that the anticipated benefits of the MSA program cannot occur without substantial costs, complexity, and repercussions to existing markets and social programs. Therefore, while it still is too early to determine whether the MSA program will prove to be an innovative way to reduce health care costs and provide the social good of more and better health care for greater numbers of Americans, it is not too early to recognize that the MSA program provides large windfalls for individuals in American society who are the most fortunate: those who are the healthiest, wealthiest, and most informed.