



For your information

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Departments Request Comments on Proposed Alternatives for Provision of Coverage for Contraceptive Services by Plans Sponsored by Religious Organizations

The Departments of Labor, the Treasury, and Health and Human Services recently issued an Advance Notice of Proposed Rulemaking that outlines proposed approaches to covering contraceptive services in plans sponsored by religious organizations that object to such coverage on religious grounds. The notice is also a request for public comments on these proposed “accommodations” as well as on several other specific questions.

Background

Section 2713 of the Public Health Service Act (PHSA), as added by the Patient Protection and Affordable Care Act (PPACA), requires non-grandfathered plans to cover certain in-network preventive care services, including specified preventive care and screenings targeted to the unique needs of women, on a first-dollar basis (i.e., without imposition of copayments, coinsurance, or deductibles).

In July 2010, the Departments of Health and Human Services (HHS), the Treasury, and Labor (the Departments) issued interim final regulations (IFR) relating to PPACA’s preventive services coverage requirements. (See our July 20, 2010 [For Your Information](#).) At that time, guidelines on specific preventive measures for women had not yet been issued.

On July 19, 2011, the Institute of Medicine (IOM), which HHS had charged with providing recommendations with respect to women's preventive health services, issued its report. IOM recommended, among other things, that all Food and Drug Administration-approved contraceptive methods and sterilization procedures should be covered, along with patient education and counseling. In August 2011, the Departments issued an amendment to the IFR to include the IOM coverage recommendations. As a result, non-grandfathered plans must provide first-dollar coverage of these recommended women’s preventive services when furnished by an in-network provider effective with the first plan year beginning on or after August 12, 2012. (See our August 11, 2011 [For Your Information](#).)

The IFR, as amended, exempted religious employers from the requirement to cover contraceptive services. For purposes of the exemption, a “religious employer” is defined as an employer that:

- Has as its purpose the inculcation of religious values
- Primarily employs individuals who share its religious beliefs
- Primarily serves individuals who share its religious beliefs
- Is a non-profit organization under Internal Revenue Code Section 6033(a)(1), which refers to churches, their integrated auxiliaries, and conventions or associations of churches.

Many religious-affiliated organizations do not satisfy this definition and thus would not qualify for the exemption.

Final Regulations and the Temporary Safe Harbor

On February 10, 2012, the Departments issued final regulations that adopted the definition of religious employer set out in the August 2011 IFR. HHS contemporaneously issued a bulletin announcing a temporary enforcement safe harbor with respect to certain plans sponsored by organizations that do not cover otherwise required contraceptive services because of religious beliefs but do not qualify as "religious employers." During the enforcement safe harbor period, which is effective until the first plan year beginning on or after August 1, 2013, the Departments will not take enforcement action against a plan sponsored by a religious organization that satisfies the following conditions:

- The plan is sponsored by an employer that:
 - Is organized and operates as a non-profit entity and,
 - From February 10, 2012 onward did not cover contraceptive services, consistent with applicable state law, because of the religious beliefs of the organization.
- The plan notifies participants that contraceptive coverage will not be provided. This notice must be included with any enrollment/new hire materials for plan years that begin on or after August 1, 2012. A copy of the required notice can be found [here](#).
- The religious organization certifies that it satisfies all the criteria necessary to qualify for the enforcement safe harbor. The certification form must be completed and made available for examination by the first day of the plan year to which the temporary safe harbor applies. A sample of the certification form can be found [here](#).

In the preamble to the final regulations, the Departments announced that prior to the end of the enforcement safe harbor, they would develop alternative ways of providing contraceptive coverage without cost to participants of plans sponsored by organizations with religious objections to providing contraceptive coverage.

Advance Notice of Proposed Rulemaking

On March 16, 2012, the Departments issued an [Advance Notice of Proposed Rulemaking](#) (ANPRM) to begin the process of amending the final regulations to include an “accommodation” for certain religious organizations that object to providing contraceptive coverage due to their religious beliefs. The ANPRM includes the Departments' proposals for such an accommodation and requests comments on, among other things, which religious organizations should qualify for the accommodation, who would be responsible for administering the accommodation, and how the accommodation may be funded.

The Departments expect to have the amendment to the final regulations, which includes the accommodation for religious organizations, finalized by the first plan year that begins on or after August 1, 2013.

Which Religious Organizations Should Qualify for the Accommodation?

The Departments request comments on how to define a “religious organization” for purposes of the accommodation. The ANPRM suggests two possible approaches. The first would be to adopt a definition used in state laws that provide a religious exemption from state mandates to cover contraceptive services. The second would be to adopt a definition used under federal law, such as the definition of “church plan” that is set out in Section 414(e) of the Internal Revenue Code and Section 3(33) of ERISA.

The Departments also seek input on whether for-profit religious employers and/or religious organizations that sponsor plans that offer coverage of some, but not all, FDA-approved contraceptives should be included in the definition of religious organization.

With respect to the proposed accommodation, the Departments contemplate that religious organizations, however defined, will be subject to self-certification requirements similar to those applicable to entities taking advantage of the temporary safe harbor.

How Should the Accommodation for Religious Organizations Be Administered?

Under the Departments' approach, the only way to provide contraceptive coverage to plan participants and dependents while simultaneously respecting the interests of religious organizations is to have an independent entity provide and administer coverage for contraceptive services. In the ANPRM, the Departments suggest possible candidates to assume the role of the independent entity with respect to both fully insured and self-insured plans that are sponsored by a religious organization.

Fully Insured Plans

The Departments propose that in the case of a fully insured plan, the health insurance issuer would serve as the independent entity that provides contraceptive coverage for a religious organization's plan participants. Once the religious organization provides the issuer with written notice that it qualifies for the accommodation and will not assume any responsibility for the provision of contraceptive coverage,

the issuer must offer the religious organization coverage that does not include coverage of contraceptives (and does not reflect contraceptive coverage in the premium cost). The issuer would be responsible for providing plan participants separate contraceptive coverage without cost sharing and at no additional cost. It would have to be given access to information necessary for it to notify participants of the availability of the benefit and to serve as a claims and plan administrator with respect to contraceptive coverage.

Noting that some actuaries and others have estimated that covering contraceptives is cost-neutral, the Departments suggest that issuers would pay for contraceptive coverage from the estimated savings resulting from the elimination of the need to pay for services that would otherwise be used if contraceptives were not covered.

Self-Insured Plans

The Departments propose that in the case of a self-insured plan, the religious organization's third-party administrator (TPA) could assume responsibility for providing contraceptive coverage, although they note that the TPA is not obligated to enter into such an agreement. Similar to the requirements imposed on a fully insured plan, a self-insured plan must provide all TPAs with written notice that the plan is sponsored by a religious organization and that the organization will not assume any responsibility for the provision or administration of contraceptive coverage. The TPA must also have authority and control over the funds available to pay for contraceptive coverage, the authority to act as claims and plan administrator with respect to this coverage, and access to information necessary to communicate with the plan's participants and dependents.

The DOL is contemplating a new ERISA regulation that would make the TPA the plan administrator for the separate contraceptive-only benefit on receipt of the religious organization's notice of its refusal to provide contraceptive coverage.

Proposals for Funding Contraceptive Coverage

TPAs of self-insured plans sponsored by a religious organization that assume the role of plan administrator with respect to contraceptive coverage will be faced with the question of how to fund this coverage. The ANPRM suggests ways in which a TPA could pay for the benefit without using monies from the religious organization.

- Revenue Not Already Obligated to Plan Sponsors. The TPA could use funds generated from drug rebates, including rebates for contraceptive drugs, service fees, disease management program fees, and other similar sources.

INSIGHT

Many pharmacy benefit management services agreements obligate the TPA to refund rebates directly to the plan sponsor. The majority of rebates that could be used to fund these services would be those received in connection with

contraceptive drugs and would likely be insufficient to cover the costs of the required services. In addition, service fees, including disease management fees, are paid by the plan sponsor and thus would not be a permitted source of funds to pay for these services.

- Private Funding. The TPA may receive funds from a private, non-profit organization.
- Credit Against Payments Made to the PPACA Reinsurance Program. The TPA could subtract the cost of providing contraceptive coverage from the total assessment due under the PPACA Reinsurance Program.
- Separate Arrangement for Coverage. The TPA could separately arrange for contraceptive coverage. The ANPRM notes that PPACA will require the Office of Personnel Management (OPM) to contract with at least two insurers to offer multi-state options in each Exchange, and suggests that OPM could reward these insurers or require them to provide contraceptive coverage with no cost sharing to the religious organization's plan participants and dependents. The TPA would be responsible for sending OPM information on plan participants and dependents while the contraceptive coverage would be provided by the multi-state insurer. The cost of such coverage could be credited against any user fees the insurer might have to pay to be part of the Exchange.

INSIGHT

Because the PPACA Reinsurance Program and the Exchanges will not be available until January 1, 2014, the latter two funding options would not be available with respect to a plan with a plan year that begins on or after August 1, 2013 but before January 1, 2014. The Departments indicated that they intend to propose a way to address this gap.

Two other sources of funding that have been considered are public funding and/or the use of a tax-preferred employee account that the employee can use for a range of services, including contraceptives. The Departments note that the TPA could use these sources individually or in combination.

Additional Issues

The Departments also request comments on the following questions:

- Should an accommodation or exemption from the requirement to provide contraceptive coverage without cost sharing be made for religious health insurance issuers or TPAs?

- How should the accommodation be coordinated when there are multiple TPAs and/or multi-year contracts?
- What is the prevalence of self-insured plans that do not contract with a TPA?

Conclusion

The Advance Notice of Proposed Rulemaking is the first step in creating an accommodation for religious organizations that object to covering contraceptive services because of their religious beliefs while also providing plan participants and dependents access to contraceptive services, free of cost sharing. The deadline for comments is June 19, 2012.

Buck Can Help

- Prepare comments on the proposed accommodation for submission to the Departments
- Determine how the proposed accommodation might affect your group health plans

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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