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Departments delay enforcement of drug coupon rule

Recent HHS final rules, focused on the ACA's annual limitation requirement on cost sharing and indexed maximums, have called into question the coordination and use of manufacturer drug coupons. Under the guidance, a plan may provide that support offered by drug manufacturers via coupons (discounts) for brand-name drugs are not counted toward the annual limitation on cost sharing when a generic equivalent is available. Stakeholders have questioned the impact of this guidance on the large group market, self-insured group health plans and HSAs. The departments have postponed enforcement and will issue further guidance on this rule.

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Authors

Sharon Cohen, JD

Leslye Laderman, JD, LLM

Background

Issued annually, the Department of Health & Human Service's (HHS) Notice of Benefit and Payment Parameters (NBPP) provides important guidance related to the Affordable Care Act (ACA) marketplaces and various ACA provisions. The NBPP issued for 2020 (see our [June 12, 2019 FYI](#)) addressed a variety of subjects including the maximum annual limitations on cost sharing for the 2020 benefit year that apply to non-grandfathered health plans. The NBPP provides that, to the extent consistent with applicable state law, group health plans and issuers may exclude the value of drug manufacturer coupons for brand-name drugs from counting toward the plan's annual out-of-pocket (OOP) maximum if the drug has an available and medically appropriate generic equivalent. This requirement is effective for plan years beginning in 2020. The guidance was silent about the application of discounts for brand-name drugs when a generic equivalent is *not* available.

Impact on employer group health plans and HSAs?

In addition to how the rule would apply to the large group market and self-insured group health plans, the language in the NBPP left stakeholders (including pharmacy benefit managers) questioning whether the amount the participant would have had to pay for the drug, without a coupon's price reduction, must be credited towards the ACA's OOP maximum if no medically appropriate generic equivalent is available. They also were concerned whether this requirement might conflict with

existing health savings account (HSA) rules and impact an individual's eligibility to make contributions to an HSA. An individual is eligible to make contributions to an HSA if they have qualified high deductible health plan (HDHP) coverage and no other impermissible coverage. (See our *FYI In-Depth* from [January 5, 2015](#).) Guidance in IRS Notice 2004-50 states that "discount cards" (i.e., those that entitle holders to obtain discounts for health care services or products at managed care market rates) will not disqualify an individual from being HSA-eligible as long as only the amounts actually paid by the individual are taken into account for determining whether the minimum deductible for a HDHP has been satisfied. The rule further requires the HDHP to disregard drug discounts and other manufacturers' and providers' discounts.

The Departments of the Treasury, Labor, and Health & Human Services (together, the departments) have addressed this confusion in a new [FAQ](#). They acknowledge the ambiguity created by the 2020 NBPP guidance and provide that (in consultation with Treasury and DOL), HHS will issue clarification in the 2021 NBPP. In the meantime, the departments will not be enforcing the provision. Specifically, they will "not initiate an enforcement action if an issuer of group or individual health insurance coverage or a group health plan excludes the value of drug manufacturers' coupons from the annual limitation on cost sharing, including in circumstances in which there is no medically appropriate generic equivalent available."

Buck comment. As a result of the confusion created by the rule, for the 2020 plan year, plan sponsors may have decided to: (1) drop "true accumulator programs" involving brand-name drug manufacturer coupons, (2) scramble to adjust their programs to comply with the rule or (3) resolve to take on risk by continuing to exclude the value of the coupon even when a generic is not available. Terminating or reducing these accumulator programs is costly for plan sponsors. In light of this new FAQ, plan sponsors should talk with trusted advisors and reconsider any steps previously taken. The application of the NBPP to employer group health plans should be confirmed by the departments in future guidance.

In closing

While the FAQ provides a reprieve for brand-name drug coupon programs for now, it does not hint at the position the departments and future guidance will take for 2021 to clear up the ambiguity created by the current NBPP guidance. In maintaining its mission to support issuers and health plans by advancing policies that lower costs associated with coverage and generate cost savings, the guidance is intended to discourage providers and patients from choosing expensive brand-name drugs when less expensive (generic) equivalents are available.

Will the IRS take a new position that conforms with HHS? Will HHS guidance conform with current HSA guidance? We will have to wait and see.

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