KAY IVEY
GOVERNOR

JIM L. RIDLING
COMMISSIONER

STATE OF ALABAMA
DEPARTMENT OF INSURANCE
201 MONROE STREET, SUITE 502
POST OFFICE BOX 303351
MONTGOMERY, ALABAMA 36130-3351
TELEPHONE: (334) 269-3550
FACSIMILE: (334) 241-4192
INTERNET: www.aldoi.gov

DEPUTY COMMISSIONERS
JERRY WORKMAN
MARK FOWLER
CHIEF EXAMINER
RICHARD L. FORD
STATE FIRE MARSHAL
SCOTT F. PILGREEN
GENERAL COUNSEL
REYN NORMAN

BULLETIN NO. 2019-07

TO: All Health Insurers, Health Maintenance Organizations, and Health Care Services Plans

FROM: Jim L. Ridling
Commissioner of Insurance

DATE: September 11, 2019

RE: FAQs about Affordable Care Act Implementation Part 40

EFFECTIVE: Immediate

On August 26, 2019, the attached Frequently Asked Questions (FAQ) was prepared jointly by the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the Departments). CMS has issued the attached FAQ to answer questions from stakeholders to help people understand the law and promote compliance in regards to how direct support offered by drug manufacturers to enrollees for specific prescription brand drugs (drug manufacturers' coupons) count towards the annual limitation on cost sharing.

The Alabama Department of Insurance (ALDOI) has adopted a similar enforcement position with the aforementioned Departments (Department of Labor, Health and Human Services and the Treasury). ALDOI will not initiate an enforcement action of an insurer of group or individual health insurance coverage or a group health plan that excludes the value of drug manufacturers' coupons from annual limitation or cost sharing, including in circumstances in which there is no medically appropriate generic equivalent available.

JLR/WR/bc

attachment

FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 40

August 26, 2019

Set out below is an additional Frequently Asked Question (FAQ) regarding implementation of the Patient Protection and Affordable Care Act (PPACA). This FAQ has been prepared jointly by the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the Departments). Like previously issued FAQs (available at http://www.dol.gov/ebsa/healthreform/ and http://www.cms.gov/cciio/resources/fact-sheets-and-faqs/index.html), this FAQ answers questions from stakeholders to help people understand the law and promote compliance.

Limitations on Cost Sharing under PPACA

Public Health Service (PHS) Act section 2707(b), as added by PPACA, provides that all non-grandfathered group health plans, including non-grandfathered self-insured and insured small and large group market health plans, shall ensure that any annual cost sharing imposed under the plan does not exceed the limitations provided for under section 1302(c)(1) of PPACA.[1] Under section 1302(c)(1), an enrollee's cost sharing for essential health benefits is limited.[2] For plan or policy years beginning in 2019, the maximum annual limitation on cost sharing is $7,900 for self-only coverage and $15,800 for other than self-only coverage. For plan or policy years beginning in 2020, the maximum annual limitation on cost sharing is $8,150 for self-only coverage and $16,300 for other than self-only coverage.

In the final HHS Notice of Benefit and Payment Parameters for 2020 (2020 NBPP Final Rule),[3] HHS addressed how direct support offered by drug manufacturers to enrollees for specific prescription brand drugs (drug manufacturers' coupons) count toward the annual limitation on cost sharing. Specifically, the 2020 NBPP Final Rule stated that under section 1302(c)(1) of PPACA, for plan years beginning on or after January 1, 2020, plans and issuers are permitted to exclude the value of drug manufacturers' coupons from counting toward the annual limitation on cost sharing when a medically appropriate generic equivalent is available.[4] It has come to the Departments' attention that this provision can be read to imply that, in any other circumstances,

---

[1] See FAQs about Affordable Care Act Implementation Part XXVII, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xxvii.pdf and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQs-Part-XXVII-MOOP-2706-FINAL.pdf.

[2] This annual limitation also applies to non-grandfathered individual market and small group market coverage through the essential health benefits requirements of PHS Act section 2707(a).

[3] 84 FR 17454 (Apr. 25, 2019).

[4] See 84 FR 17454, 17544-17546.

group health plans and issuers are required to count such coupon amounts toward the annual limitation on cost sharing.

The Departments note that such a requirement could create a conflict with certain rules for high deductible health plans (HDHPs) that are intended to allow eligible individuals to establish a health savings account (HSA). Specifically, Q&A-9 of IRS Notice 2004-50 states that the provision of drug discounts will not disqualify an individual from being an eligible individual if the individual is responsible for paying the costs of any drugs (taking into account the discount) until the deductible of the HDHP is satisfied. Thus, Q&A-9 of Notice 2004-50, requires an HDHP to disregard drug discounts and other manufacturers' and providers' discounts in determining if the minimum deductible for an HDHP has been satisfied and only allows amounts actually paid by the individual to be taken into account for that purpose. Such a requirement could put the issuer or sponsor of an HDHP in the position of complying with either the requirement under the 2020 NBPP Final Rule for limits on cost sharing in the case of a drug manufacturer coupon for a brand name drug with no available or medically appropriate generic equivalent or the IRS rules for minimum deductibles for HDHPs, but potentially being unable to comply with both rules simultaneously.

Since the publication of the 2020 NBPP Final Rule, the Departments have received questions regarding the scope and application of the clarification regarding the annual limitation on cost sharing. The Departments are issuing the following FAQ to address these questions from stakeholders.

Q1: The 2020 NBPP Final Rule states that plans and issuers are permitted to exclude the value of drug manufacturers' coupons for specific prescription brand drugs from counting toward the annual limitation on cost sharing when a medically appropriate generic equivalent is available.[5] Are plans and issuers otherwise required to count the value of drug manufacturers' coupons toward the annual limitation on cost sharing?

Since publication of that rule, the Departments have received feedback that indicates there is confusion about whether the 2020 NBPP Final Rule requires plans and issuers to count the value of drug manufacturers' coupons toward the annual limitation on cost sharing, other than in circumstances in which there is a medically appropriate generic equivalent available, particularly with regard to large group market and self-insured group health plans.

Based on this feedback and additional information from stakeholders, the Departments understand that the policy advanced by the 2020 NBPP and prior IRS guidance related to HDHPs[6] may conflict, and therefore the Departments' interpretation of how drug manufacturers' coupons apply with respect to the annual limitation on cost sharing is ambiguous. To address

---

[5] 45 CFR 156.130(h)(1).
[6] IRS Notice 2004-50, Q&A 9.

this conflict, HHS, in consultation with the Departments of Labor and the Treasury, intends to undertake rulemaking in the forthcoming HHS Notice of Benefit and Payment Parameters for 2021.

Until the 2021 NBPP is issued and effective, the Departments 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. States may adopt a similar enforcement policy, and HHS will not consider a state to be failing to substantially enforce the annual limitation on cost sharing in cases where a state does so with respect to health insurance issuers.