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Health Care Reform Management Alert Series

Substantial Fees to Hit Group Health Plans

Issue 47

This is the forty-seventh issue in our series of alerts for employers on selected topics in health care reform. (Click here to access our general summary of health care reform and other issues in this series.) This series of Health Care Reform Management Alerts is designed to provide an in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

Regulations were issued in December of 2012 providing guidance on two different fees that group health plan sponsors will have to pay, one beginning in 2013 and one beginning in 2014; namely, the Patient-Centered Outcomes Research Institute (PCORI) fee and the Transitional Reinsurance Program (TRP) fee. Note that although the fees are payable by health insurance issuers and sponsors of self-funded group health plans, this alert focuses on self-funded plans.

PCORI Fee -

This is the lesser of the two fees. The Affordable Care Act (ACA) established the Patient-Centered Outcomes Research Institute to assist patients and policymakers in making informed health decisions through the dissemination of clinical research findings. The ACA intended that the research be financed, in part, by fees paid by health insurance issuers and sponsors of self-funded health plans. Final regulations were recently issued by the Department of Treasury providing guidance as to how the PCORI fees should be calculated and paid.

Who Pays. Issuers of specified health insurance policies and plan sponsors of "applicable self-insured health plans" are liable for PCORI fees. A plan is an applicable self-insured health plan if it is fully or partially self-funded. Certain plans are excluded under the final regulations, including plans providing HIPAA-excepted benefits (including most health flexible spending accounts (FSAs)), employee assistance, wellness and/or disease management programs *that do not provide significant medical benefits* (which is not defined); and plans designed to cover primarily employees working and residing outside of the U.S.

In addition, the regulations provide that two or more self-funded arrangements providing health coverage, maintained by the same plan sponsor with the same plan year, may be treated as one plan for purposes of calculating the fee (e.g. separate arrangements providing medical and prescription drug coverage, or providing medical coverage and an health reimbursement arrangement (HRA)). Notably, the fee applies to former employees who are COBRA qualifying beneficiaries or who have retiree coverage under an active or retiree-only plan.

Fee Amount. The PCORI fee is determined by multiplying the average number of covered lives for the plan year times the applicable dollar amount. The applicable dollar amount is $1 for the first year and $2 for the second year. For the remaining years, the applicable dollar amount will be adjusted based on increases in the projected per capita amount of National Health Expenditures.

In general, the average number of covered lives may be determined using one of the following three methods set forth in the regulations, provided that the method is used consistently throughout the plan year:

1. ***Actual count method.*** Add the total number of lives covered for each day of the plan year, and divide by the number of days in the plan year (usually 365).

2. ***Snapshot method.*** Add the total lives covered (using the snapshot factor or snapshot count method described below) on one or more dates during the first, second or third month of each quarter of the plan year, and divide that total by the number of dates on which a count was made (usually 4). (Each date used in the second, third and fourth quarters must be within three days of the date(s) used for the first quarter.)

- Snapshot factor method - the sum of the number of participants with self-only coverage on that date, plus the number of participants with coverage other than self-only coverage on that date times 2.35.
- Snapshot count method - the actual number of lives covered on the designated date.

3. ***Form 5500 method.*** Use the numbers reported on Form 5500 filed no later than the due date for the payment of the PCORI fee (i.e. the 2012 Form 5500 if filed by July 31, 2013). For plans with self-only coverage, add the total participants covered at the beginning and end of the plan year and divide by two; or for plans with more than self-only coverage, simply add the total participants covered at the beginning and end of the plan year.

Under a special counting rule, if an employer sponsors a health FSA or HRA (and no other health coverage), the sponsor is not required to count spouses, dependents or other beneficiaries as covered lives. If the employer sponsors another health plan that has the same plan year, as mentioned above, the arrangements may be treated as a single plan. In this case, only participants who do not participate in the other plan are subject to the special counting rule.

Payable July 31 of Next Year. Fees must be paid for plan years that end on or after October 1, 2012 and before October 1, 2019. The fee must be paid by July 31 of the year following the last day of the plan year using IRS Form 720. For plans with calendar years, this means a fee is payable beginning July 31, 2013 through July 31, 2019.

TRP Fee

This fee, although only payable for three years, will be substantial. Beginning in 2014, individuals will be able to purchase health insurance through a competitive marketplace called an "Exchange." To help stabilize premiums in the marketplace and to reinsure the Exchanges against bad insurance risks during initial years of operation, the ACA requires that a transitional reinsurance program be established in each State. According to the new proposed regulations, HHS will collect the fees from all insurance issuers and self-funded plans in all States (including States that elect to operate their reinsurance programs) and distribute them to issuers based on the need for reinsurance.

Who pays. Health insurance issuers and plan sponsors of applicable self-funded plans are "contributing entities" and must pay the TRP fee. (The proposed regulations anticipate that a plan may utilize a third party administrator to transmit the TRP fee, which is not the case for the PCORI fee.) Certain plans are excluded, including plans providing HIPAA-excepted benefits, HRAs integrated with a self-funded plan providing major medical benefits; health savings accounts (HSAs); all health FSAs; and employee assistance, wellness and/or disease management programs *that do not provide major medical coverage.* The TRP fee applies to covered retirees, unless the coverage is secondary to Medicare. (Thus, post-65 retiree coverage will typically not be subject to the TRP fee because Medicare will be primary.) Although not addressed in the regulations, the TRP fee will likely apply to COBRA qualifying beneficiaries.

If a plan sponsor maintains two or more self-funded plans that collectively provide major medical coverage for the same covered lives, then the plans shall be treated as a single self-funded plan. The names of the multiple plans treated as a single plan must be reported to HHS along with the average number of covered lives and the counting method used.

Fee Amount. The TRP fee is calculated by multiplying the average number of covered lives, including employees, spouses, dependents and any other individuals (e.g. domestic partners) receiving coverage during the applicable benefit year for all plans times the contribution rate. The contribution rate means the per capita amount each contributing entity must pay for a reinsurance program. HHS has proposed a contribution rate of $63 per covered life for 2014, but is seeking comments on this calculation.

The number of covered lives must be determined by using one of three methods set forth in the regulations (which are similar but different than the methods permitted for the PCORI fee):

1. ***Actual Count Method.*** Add the total number of lives covered each day of the first nine (9) months of the year and divide by the number of days during that 9 month period.

2. ***Snapshot method.*** Add the total lives covered (using the snapshot factor or snapshot count method) on any date during the same corresponding month in each of the first three quarters of the year and divide that total by the number of dates on which a count was made.

3. ***Form 5500 Method.*** Use the most recently filed Form 5500 (e.g. the 2013 Form 5500 even though filed in October, 2014). For plans with self-only coverage, add the total participants covered at the beginning and end of the plan year and divide by two; or for plans with more than self-only coverage, simply add the total participants covered at the beginning and end of the plan year.

Payable December 31 of Same Year. The TRP fee must be paid annually for 3 years, from 2014 through 2016. No later than November 15th of each of these years (i.e. beginning November 15, 2014 for calendar year plans), the contributing entity must submit an annual enrollment count of covered lives to HHS. Within 15 days of the report (or December 15th if later), HHS will notify the contributing entity of the contribution amount to be paid. Within 30 days of HHS notification, the contributing entity must pay the fee to HHS.

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Joy Sellstrom is senior counsel in Seyfarth's Chicago office. If you need assistance determining which of your plans are subject to each of these fees or whether you can aggregate plans, please do not hestitate to contact the Seyfarth Shaw LLP attorney with whom you usually work or Joy Sellstrom at *jsellstrom@seyfarth.com*.