

## Employee Benefits & Executive Compensation ADVISORY

May 2, 2012

### New Agency Guidance on Required Contraceptive Coverage under Group Health Plans:

- **Permanent Exemption for “Religious Employers”**
- **One-Year Delay for Certain Nonprofit Employers**
- **Proposed Rule Would Require Health Insurers and TPAs to Provide Free Contraceptive Coverage Beginning in 2013 for Certain Religious Organizations**

On August 1, 2011, the Health Resources and Services Administration (HRSA), a part of the Department of Health and Human Services (HHS), issued Guidelines on Women’s Preventive Health (the “HRSA Guidelines”).<sup>1</sup> Under Section 2713 of the Public Health Service Act (PHSA), as added by the Affordable Care Act (ACA) and incorporated by reference into ERISA and the Internal Revenue Code, a non-grandfathered group health plan and a health insurance issuer offering group or individual health insurance coverage must provide benefits for, and may not impose cost-sharing with respect to, preventive care and screening provided for under the HRSA Guidelines.<sup>2</sup> The HRSA Guidelines supplement the previously adopted preventive care guidelines and are subject to the same rules regarding cost-sharing.<sup>3</sup> Non-grandfathered plans and issuers generally are required to provide the preventive coverage specified in the HRSA Guidelines beginning with the first plan year (or, in the individual market, the first policy year) that begins on or after August 1, 2012. Thus, for non-grandfathered plans that have a calendar year plan year, the HRSA Guidelines are effective starting with the plan year beginning January 1, 2013.

Among other things, the HRSA Guidelines require coverage of prescribed contraceptive methods and counseling. This requirement has generated substantial controversy from employers who object to providing such coverage on religious grounds, resulting in further guidance with respect to such situations, including a final regulation that provides that certain “religious employers” are exempt from the requirement to provide contraceptive coverage, a one-year delay for certain nonprofit organizations that do not qualify under the religious exemption, and a proposal that, if finalized, would require third-party administrators (TPAs) and health insurance issuers to provide contraceptive benefits free of charge to nonexempt religious employers (and their plan participants and beneficiaries).

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<sup>1</sup> See <http://www.hrsa.gov/womensguidelines/>.

<sup>2</sup> The preventive care guidelines (including the religious employer exception) apply to student health plans. See 77 Fed Reg. 16453 (March 21, 2012).

<sup>3</sup> For more on the preventive care requirements, see our prior Employee Benefits advisory [here](#).

This advisory discusses the recent guidance relating to the contraceptive coverage requirement as applied to group health plans of religious employers.<sup>4</sup>

## Required Contraceptive Services

The HRSA Guidelines provide that required preventive services include all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a provider. According to agency statements, condoms, vasectomies, and abortifacient drugs are not covered by the HRSA Guidelines. As is the case with other preventive care required under ACA, a group health plan or health insurance issuer may use reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service to the extent not specified in the applicable guideline. HHS, the Department of Labor (DOL), and the Department of Treasury (collectively, the “Departments”) have recently noted that they have received questions regarding the scope of required contraceptive coverage and that they intend to issue future guidance to address these questions.

## Religious Employer Exemption

Final regulations provide that group health plans of “religious employers” (and health insurance coverage provided in connection with such group health plans) are not required to provide contraceptive coverage.<sup>5</sup> For this purpose, a religious employer is an employer that (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization as described in Section 6033 of the Internal Revenue Code.

The religious employer exemption applies only for purposes of the requirements of PHSA Section 2713. Many states have mandates relating to contraceptive coverage. Although the federal religious employer exemption was modeled after existing state law, state law requirements differ. Some states do not provide an exemption for religious employers and some include an exemption that is narrower than the federal law exemption. ACA generally does not preempt state law that is more restrictive than federal law. Thus, if the plan (or health insurance coverage offered under the plan) is subject to state law mandates, these mandates generally will continue to apply unless the plan qualifies for an exemption under the applicable state law.

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<sup>4</sup> For more information on the other preventive services required under the HRSA Guidelines, see our prior Employee Benefits advisory [here](#).

<sup>5</sup> The final regulations are published in 77 Fed Reg. 8725 (February 15, 2012), which may be found at <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=25828>. The final regulations authorize HRSA to determine required women’s preventive care. The text of the religious employer exemption does not appear in the final regulations, but in the HRSA guidelines, which are found at <http://www.hrsa.gov/womensguidelines/>.

## One-Year Delay for Certain Nonprofit Employers

Contemporaneous with the issuance of the final regulations adopting the religious employer exemption, the Departments issued a bulletin announcing a one-year enforcement safe harbor for certain plans that do not qualify for the religious employer exemption (the "Bulletin").<sup>6</sup> The enforcement safe harbor applies until the first plan year beginning on or after August 1, 2013, and protects employers, group health plans, and health insurance issuers from enforcement action by the Departments for failure to provide contraceptive coverage with respect to a group health plan.

In order for the enforcement safe harbor to apply to a plan maintained by an organization, all of the following requirements must be satisfied:

1. The organization must be organized and operated as a nonprofit entity.<sup>7</sup>
2. From February 10, 2012 (the date of issuance of the Bulletin), onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable state law, because of the religious beliefs of the organization.
3. The group health plan (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides a notice to participants stating that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012. The Bulletin includes the text of the required notice to participants.
4. The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed in the Bulletin. The Bulletin contains a form to be used for the self-certification.

Note that, as with the case of the religious employer exemption, the enforcement safe harbor applies only for purposes of federal law. Further, because one of the requirements to qualify for the enforcement safe harbor is that the plan is not required to provide contraceptive coverage under state law, a plan that is subject to a state law mandate to provide contraceptive coverage generally will not qualify for the safe harbor.

## Proposed Rule Will Require Health Insurance Issuers and TPAs to Provide Free Contraceptive Coverage Beginning in 2013 for Certain Religious Organizations

In order to address the continuing concerns of organizations with religious objections to providing contraceptive coverage, but that do not qualify for the religious employer exemption, the Departments have requested comments on a proposal to provide a "religious accommodation" to required contraceptive coverage.<sup>8</sup>

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<sup>6</sup> The Bulletin, titled "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code," may be found at <http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf>.

<sup>7</sup> The one-year delay would generally apply to student health plans sponsored by such institutions as well. See 77 Fed Reg. 16453, 16456-16457 (March 21, 2012).

<sup>8</sup> The proposal was described in an advance notice of proposed rulemaking published on March 21, 2012, and may be found at <http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-6689.pdf>. The proposal similarly applies to student health plans sponsored by entities that qualify for the religious accommodation.

The proposal is designed to relieve objecting religious employers of the obligation to provide and pay for contraceptive coverage, while making the coverage available to participants and beneficiaries without charge.

In the case of self-funded plans, the proposal would make the third-party administrator (TPA) of the plan (or possibly some other independent party) responsible for providing contraceptive benefits. The TPA would be considered the designated plan administrator under ERISA, and, therefore, a fiduciary, with respect to such coverage. The TPA would not be permitted to charge the plan (or its participants and beneficiaries) for such coverage. In the case of a fully-insured plan, the insurer would be required to provide contraceptive coverage directly to plan participants and beneficiaries free of charge.

The proposal raises a number of significant questions, including how TPAs are expected to fund such coverage and whether the provision of such coverage by a TPA (which presumably would be considered insurance for state law purposes) is permitted under applicable state law. Comments on the proposal are due by June 19, 2012. The goal of the Departments is to finalize a rule before the expiration of the temporary enforcement safe harbor.

Further details of the proposal are discussed below.

### ***What organizations are eligible for a religious accommodation?***

The proposal does not contain a specific definition of religious organizations that would qualify for the accommodation, but suggest some possible definitions that might be used, such as pre-existing definitions under federal or state law. Comments are also requested as to whether the accommodation should be limited to nonprofit organizations (as is the religious employer exemption and the temporary enforcement safe harbor) or should also be available to certain for-profit organizations.

In order to be eligible for an accommodation, a qualifying organization would have to make a self-certification and provide notice to participants in a manner similar to the provisions of the temporary enforcement safe harbor.

### ***How is the religious accommodation to be administered by a TPA in the case of a self-funded plan?***

A self-funded group health plan of a religious organization that self-certifies itself as being eligible for the religious accommodation is not required to provide contraceptive coverage if the organization (1) contracts with one or more third parties for the processing of benefit claims; (2) before entering into each such contract, the employer provides notice to the TPA, as required in the proposal, that the employer will not be responsible for providing contraceptive coverage; and (3) with respect to contraceptive coverage, the TPA has the authority and control over the funds available to pay the benefit, authority to act as claims administrator and plan administrator, and access to information necessary to communicate with the plan's participants and beneficiaries. The proposal further provides that the required notice will be an instrument under which the plan is operated and shall have the effect of designating the TPA as the plan administrator under Section 3(16) of ERISA for those contraceptive benefits for which the TPA processes claims in its normal course of business.

A TPA that becomes a plan administrator in accordance with this process will be responsible for providing those categories of contraceptive services for which the TPA processes claims in its normal course of business. Thus, for example, if the TPA is responsible for processing surgical claims in its normal course of business, it would be responsible for providing required contraceptive coverage consisting of surgical services. Presumably, the requirement would apply to TPAs of health reimbursement arrangement (HRA) coverage where such coverage is sponsored by an employer that qualifies for the religious accommodation.

The proposal suggests a number of possible funding sources that a TPA could draw upon to provide contraceptive benefits, including revenue received by the TPA that is not already obligated to the plan sponsor, such as drug rebates and service fees. The proposal indicates the Departments' belief that some of these sources of revenue may be larger if contraceptive benefits are provided (e.g., drug rebates). Another suggested option would be to provide a TPA with a credit or rebate against the amount it pays under the temporary reinsurance program established under Section 1341 of ACA. Under recently issued final regulations under the reinsurance program, TPAs are responsible for making contributions to HHS "on behalf of" self-funded plans.<sup>9</sup> The Departments also suggest that TPAs could receive funding to pay for required contraceptive services from nonprofit organizations.

The Departments are also considering having the TPA separately arrange for contraceptive coverage, such as through an insurer. One possibility is to use insurers in the multistate option established by ACA and administered by the Office of Personnel Management. In such cases, the insurer would become responsible for providing the coverage.

The Departments note that religious organizations have commented that tax-favored individual employee accounts could be used to pay for contraceptive benefits. Some religious organizations have also commented that using public funds to pay for contraceptive coverage is not objectionable to the organizations.

***How is the religious accommodation to be administered by a health insurer in the case of a fully-insured plan?***

A fully-insured group health plan of a religious organization that self-certifies itself as being eligible for the religious accommodation is not required to provide contraceptive coverage if the organization (1) provides written notice to the insurer, as provided in the proposal, that the organization will not be responsible for providing contraceptive coverage; and (2) the insurer has access to information necessary to communicate with the plan's participants and beneficiaries and to act as a claims administrator or plan administrator with respect to contraceptive benefits.

A health insurer that receives such a notice must offer health insurance to the organization that does not include contraceptive benefits and must separately provide to the plan's participants and beneficiaries health insurance coverage consisting only of required contraceptive benefits. This coverage must be provided free of charge—i.e., without any charge to the participant/beneficiary, the organization, or the plan. The insurer will also be required to provide notice to participants and beneficiaries of the availability of the coverage. The Departments are considering classifying this separate contraceptive coverage as a new type of "excepted benefit" in the individual market that would be subject to some, but not all, of the ACA health reforms (e.g., the new claims and appeals requirements might apply, but the separate contraceptive coverage would not be required to provide all essential health benefits).

The proposal states that the Departments expect savings generated from the provision of the contraceptive coverage will pay for the coverage.

*This advisory was written by [Carolyn Smith](#), [John Hickman](#), and [Ashley Gillihan](#).*

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<sup>9</sup> Further discussion of the contribution requirements imposed on TPAs under the temporary reinsurance program may be found in our prior Employee Benefits advisory [here](#).

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