

CMS Provides Additional Guidance on Notices of Creditable Coverage

The Centers for Medicare and Medicaid Services ("CMS") recently issued updated guidance on the "notices of creditable coverage" that employer-sponsored health plans and prescription drug plans are required to provide to Medicare-eligible beneficiaries. Such notices are required to be provided to any Medicare-eligible individual, including those receiving COBRA coverage and certain disabled former employees.

The guidance and updated model notices are for use after May 15, 2006, and provide clarification regarding the content of communications to Medicare-eligible individuals, the definition of an "integrated" plan for purposes of the creditable coverage determination, and the ability to arrange for notices to be sent by a third party (e.g., an employer plan's third party administrator).

Perhaps most significantly, the updated guidance does not address the following concerns expressed by some employers and plan sponsors: how to remedy a notice error, and whether any penalty or fee may be assessed by CMS against plan sponsors for failing to comply with the notice requirements. CMS has recently indicated, however, that individuals who were not adequately informed about a plan's creditable status may be able to disenroll from a prescription drug plan.

Revised Model Notices

Although CMS's previous model notice referred to the 2006 initial enrollment period, the revised creditable and non-creditable model notices do not reference this special enrollment period, and therefore may be used each subsequent year to satisfy Medicare Part D's annual notice requirement. In addition, CMS has provided a "personalized"

model notice. The personalized notice omits portions of the background information on Medicare Part D included in the other model notices. CMS recommends, but does not require, that the personalized notice describe the plan sponsor's prescription drug benefits and the times when plan sponsors must provide notices of creditable coverage. In all model notices, CMS continues to recommend a description of an individual's options regarding coordinating employer and Medicare coverage. CMS's policy guidance also details the information that must be contained in notices if employers do not use the models provided, however, the required content is identical to that in the model notices.

CMS reiterated its earlier guidance that the annual notice could be incorporated into other plan information, such as plan enrollment and/or renewal materials. In addition, such notices may be provided electronically if a Medicare-eligible individual consents to this form of notice and the plan informs the individual of the right to receive a paper copy and the right to revoke consent for electronic delivery.

Clarification of Integrated Plan for Purposes of Determining Creditable Coverage

In order to determine whether prescription drug coverage is creditable under Medicare Part D, a plan must either:

- Have an actuary determine that the plan expects to pay as much for prescription drug claims as would be paid under the standard Medicare Part D prescription benefit

- Satisfy the simplified test for creditable coverage; the simplified test varies depending on whether a plan is “integrated” with other coverage

CMS’s policy guidance clarifies when prescription drug coverage is considered to be “integrated” with other coverage. This determination is important because an integrated health plan will not be considered creditable under the simplified test unless it provides for:

- A deductible no greater than \$250 per year
- An annual plan benefit maximum of at least \$25,000
- No less than \$1,000,000 lifetime combined benefit maximum

CMS clarifies that a plan that does not meet *each* of these three requirements will not be an integrated plan for purposes of the simplified test. Accordingly, such a plan would have to either have an actuarial determination, as described above, or meet the simplified test available to non-integrated plans (*i.e.*, demonstrate that the maximum annual *prescription* benefit is at least \$25,000, or that the plan expects to pay at least \$2,000 per year per Medicare beneficiary for prescription coverage).

The simplified test requires both integrated and non-integrated plans to provide:

- Coverage for brand and generic prescriptions
- Reasonable access to retail providers and, optionally, mail order coverage
- Average payments of at least 60% of participants’ prescription drug expenses

Third Party Notice Providers

Although the entity that provides prescription drug coverage (*i.e.*, the plan sponsor) is responsible for providing notices of creditable coverage to Medicare-eligible beneficiaries, CMS’s revised guidance indicates that there is no prohibition on arranging to have a third party distribute the notices to Medicare-eligible individuals. Accordingly, third-party administrators may provide this service to plan sponsors.

We note that CMS’s revised policy guidance does not appear to permit a third-party to fulfill the separate requirement that the plan disclose to CMS whether its coverage is creditable. CMS requires each plan to disclose contact information for the *employee* who completed the CMS notice of creditable coverage submitted to the agency (described below).

Content of Notice to CMS

In January 2006, CMS issued general guidance on the content of creditable coverage notices required to be provided annually to CMS. This information is available on CMS’s website (www.cms.hhs.gov/CreditableCoverage), and requires a plan to disclose the following:

- Name, tax identification number, address, and phone number of the entity offering coverage, as well as contact information for the individual employed by the entity and completing the form
- Type of coverage provided and number of benefit options offered to Medicare-eligible individuals
- Creditable coverage status of options offered by the entity
- Period covered by the disclosure notice
- Estimated number of Part D eligible individuals expected to be covered and, if applicable, the number expected to be covered through an employer or union retiree health benefit plan
- Date that the notice of creditable coverage was provided to Part D eligible individuals, and the date the CMS disclosure is submitted
- Whether any of the prescription options previously available to Medicare-eligible individuals has changed in a manner that affects creditability

Reminder: Timeline to Provide Notices of Creditable Coverage to Medicare-Eligible Beneficiaries

At a minimum, plans must provide notices of creditable coverage to Medicare-eligible individuals:

- Prior to an individual's "initial enrollment period" in Part D; the regulations clarify that this period will be the same as the enrollment period for Medicare Part B¹

¹ This period is the seven months beginning three months before an individual first meets the eligibility requirements for Medicare Part B.

- Prior to the commencement of the "annual coordinated election period" for Part D, beginning November 15 and ending December 31 of each year
- Prior to the effective date of an individual's enrollment in prescription drug coverage, and upon any change that affects whether the coverage is creditable
- Whenever the entity no longer offers prescription drug coverage or changes the coverage such that it affects creditability
- Upon request by the individual

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employeebenefits.

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