



October 22, 2010

By e-mail: j.mark.iwry@do.treas.gov

Mr. J. Mark Iwry
Senior Advisor to the Secretary
Deputy Assistant Secretary for
Retirement and Health Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Room 3064D
Washington, DC 20220

RE: Additional guidance and transition relief needed for Adult Child coverage requirement under the Patient Protection and Affordable Care Act

Dear Mr. Iwry:

Thank you for speaking with us on October 4 by telephone regarding certain provisions of the Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act” or “PPACA”), including the requirement that plans providing dependent coverage to adult children through age 25 without regard to any eligibility tests, such as age, dependency, or residency (“Adult Child Coverage Requirement”). I am writing to follow up that discussion with specific comments and recommendations for additional agency guidance.

We appreciate the agencies’ issuance of sub-regulatory guidance on September 20, 2010 (“Sub-Regulatory Guidance”), which addressed, in part, the Adult Child Coverage Requirement. The guidance helped clarify an important issue for our membership; specifically, whether a plan may impose eligibility tests on dependent coverage for children not encompassed by the definition of “child” set forth in Internal Revenue Code (“Code”) section 152(f)(1). The guidance, however, also gave rise to several additional questions and concerns for our members that would benefit from written clarification. These issues are discussed in greater detail below.

In addition, the late issuance of the Sub-Regulatory Guidance relative to the provision’s effective date also created significant uncertainty for many of our members. Prior to the issuance of the Sub-Regulatory Guidance, many plan sponsors had already adopted a good faith definition of “child” for purposes of complying with the Adult Child Coverage

Requirement. This was due in large part to an absence of written guidance defining “child” and sponsors’ needs to make final and timely preparations for their upcoming plan years. Since these decisions were typically made prior to the issuance of the Sub-Regulatory Guidance, it is our understanding that certain plan definitions may differ from the approach set forth in the guidance. To ensure that these plans do not face liability and/ or unnecessary uncertainty by reason of having adopted a good faith definition of “child” that differs from that set forth in the guidance, we request that transition relief be provided for the plan year beginning on or after September 23, 2010, as discussed below .

Background

The interim final rules issued by the agencies on May 13, 2010 do not include a definition of “child” for purposes of complying with the new coverage requirement set forth in PHSA section 2714. Accordingly, the Council and other entities urged the agencies to issue additional guidance clarifying who is a “child” for this purpose. We requested this guidance so that employers could plan accordingly with respect to the upcoming plan year (or for sponsors and issuers of plan/ policy years that commenced on or after September 23, 2010 , plan or policy years that have already begun). No definition was provided then nor has one been provided to date.

On September 7th and 8th, the agencies held a joint webinar during which the issue of adult child coverage was addressed. Statements were made by certain agency representatives indicating that a “child” for purposes of the Adult Child Coverage Requirement could reasonably be interpreted by a plan sponsor to mean only the legal or adopted child of the employee, leaving open the possibility that such sponsors, might, therefore, be able to apply age, dependency or other eligibility tests to step and foster children, along with other individuals such as grandchildren or nieces and nephews. Given the absence of written guidance defining who is a child for purposes of the coverage requirements and many employers’ urgent need to make final decisions regarding plan eligibility criteria in time to prepare for fall annual open enrollments, employers were compelled to rely on good faith, reasonable interpretations regarding who constitutes a “child” for purposes of the adult child coverage requirement.

Sub-Regulatory Guidance

On September 20th, following the tri-agency webinar, the agencies issued Sub-Regulatory Guidance in question and answer format that addressed a range of issues regarding PPACA implementation . One of the issues addressed pertained to the Adult Child Coverage Requirement. Specifically, Q/ A no. 14 asked:

Will a group health plan or issuer fail to satisfy section 2714 of the Public Health Service Act (PHS Act) and its implementing interim final regulations merely because it conditions health coverage on support, residency, or other dependency factors for individuals under age 26 who are not described in section 152(f)(1) of the Internal Revenue Code (Code)?

Q/ A no. 14 included the following answer:

No. A plan or issuer does not fail to satisfy the requirements of PHS Act section 2714 or its implementing regulations because the plan limits health coverage for children until the child turns 26 to only those children who are described in section 152(f)(1) of the Code. For an individual not described in Code section 152(f)(1), such as a grandchild or niece, a plan may impose additional conditions on eligibility for health coverage, such as a condition that the individual be a dependent for income tax purposes.

We, along with many others, have read the Sub-Regulatory Guidance to set forth a safe harbor under which plans will be deemed to be in compliance with the Adult Child Coverage Requirements to the extent that they provide coverage to all of the following classes of children without regard to any eligibility tests: (i) children by birth or adoption; (ii) step children; and (iii) eligible foster children.

The Council and its members appreciate the issuance of the Sub-Regulatory Guidance. As noted above, the guidance helped clarify an issue that had been causing great confusion for our members; specifically, whether a plan can impose eligibility tests on classes of children other than those set forth in Code section 152(f)(1), such as, for example, an employee's grandchildren or nieces and nephews. The Sub-Regulatory Guidance raised several new questions, however, which warrant the issuance of additional guidance. These new questions include:

- Whether a plan that provides coverage to any class of children set forth in the Code section 152(f)(1) definition of "child" (*i.e.*, (i) children by birth or adoption, (ii) step children, and (iii) eligible foster children) adoption must then provide coverage to all of the classes; or, alternatively, whether a plan may extend coverage to only one or more of the classes of children set forth in Code section 152(f)(1) (for example, where a plan only makes coverage available to birth and adopted children of the employee).
- To the extent a plan provides coverage to step children or foster children, whether a plan may impose eligibility conditions, including, for example, age, dependency, residency or student status.
- To the extent a plan provides coverage to step children or foster children, whether a plan may cease making coverage available on the date upon which the individual's status changes such that they no longer qualify as a step or foster child, even where this occurs prior to their attainment of age 26.

Recommendations for Transition Period and Additional Guidance

As discussed during our call, many plan sponsors have had to make good faith, reasonable interpretations regarding who constitutes a "child" in the absence of guidance setting forth a definition of "child" for purposes of the Adult Child Coverage Requirement and as open enrollment fast approached for plan years commencing on or after September 23, 2010. Many

plan sponsors did so based, in part, on statements made by agency representatives during the September 7th and 8th tri-agency webinar and did so prior to the issuance of the Sub-Regulatory Guidance. The issuance of the Sub-Regulatory Guidance on September 20th, just three days before September 23, 2010 raises significant concerns for plan sponsors that may have adopted good faith interpretations that differ from the safe harbor approach set forth in the Sub-Regulatory Guidance.

As a result, we request that the agencies issue transition relief providing that for the plan year beginning on or after September 23, 2010, plans be deemed in compliance with new PHSA section 2714 and the Interim Final Rules to the extent they make coverage available, without regard to any eligibility tests, to all children who are by birth or adoption the legal child of the employee.

Such a transition rule will help ensure that plans do not face liability and/ or unnecessary uncertainty under new PHSA section 2714 by reason of plan definitions of “child” that were previously adopted by plans as necessary and in good faith based on the limited guidance that existed at the time such decisions were made (including for example, based on the statements made by agency representatives on the September 7th and 8th webinars).

We further recommend that additional guidance be issued addressing existing ambiguities regarding the application of new PHSA section 2714 to the classes of children set forth in Code section 152(f)(1). Such guidance should clarify that:

- a plan will not fail to satisfy PHSA Section 2714 and its implementing regulations if it limits coverage to only birth and adopted children;
- plans that choose to extend coverage to step and foster children may impose eligibility conditions, including age, residency, student status, dependency, and/ or custodial relationship; and
- coverage extended to step and foster children may be terminated upon a change in an individual’s status as a step or foster child.

The clarifications above would reduce current uncertainty and confusion regarding “adult child” coverage among employers and employees. They are consistent with our understanding that the PHSA 2714 coverage requirements are intended to apply to birth and adopted children, and that to the extent plans continue to voluntarily offer dependent coverage to other individuals, that eligibility conditions may be imposed. It has become clear to us based on continued discussion with our members that the recommended clarifications are necessary to provide important flexibility with respect to coverage for step and foster children. This will allow employers to continue to offer such coverage affordably and with minimal disruption. We believe these clarifications would ultimately serve to preserve employer-sponsored coverage for step and foster children as opposed to an interpretation that subjects such coverage to the requirements of PHSA Section 2714.

Thank you for the opportunity to discuss and follow up on these important issues. Please do not hesitate to contact me by email (kwilber@abcstaff.org) or by telephone at 202-289-6700 with any questions or if we can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Steiker". The signature is written in a cursive, flowing style.

Senior Counsel, Health Policy

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