DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

45 CFR Part 146

RIN 0938–AL64

Request for Information on Benefit-Specific Waiting Periods Under HIPAA Titles I & IV

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Request for information.

SUMMARY: The Departments invite comments about benefit-specific waiting periods. This solicitation is to ensure that the public can provide input into any criteria used to determine whether a benefit-specific waiting period utilized by a group health plan or issuer is a preexisting condition exclusion under HIPAA. The Departments are requesting this information to help decide whether to issue any guidance on this question, and the content of any such guidance.

DATES: The Departments request that comments be submitted on or before March 30, 2005.

ADDRESSES: Written comments should be submitted with a signed original and three copies (except for electronic submissions) to any of the addresses specified below. Any comment that is submitted to any Department will be shared with the other Departments.

Comments to HHS can be submitted to: CMS, Attention: CMS AL64, P.O. Box 8017, Baltimore, MD 21244–8010.

Comments to the Internal Revenue Service can be submitted to: CC:PA:LPD:PR, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20094.

Comments to the Department of Labor can be submitted to: U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room C–5331, Washington, DC 20210.

Alternatively, comments may be submitted electronically to http://www.cms.hhs.gov/regulations/e-comments (attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word).

By mail. You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2150–NC, P.O. Box 8017, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By hand or courier. If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.


(Because access to the interior of the HHHI Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and
retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW., Washington, DC from 9 a.m. to 4 p.m.

All submissions to the Department of Labor will be open to public inspection and copying in the Public Disclosure Room, Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC from 8:30 a.m. to 4:30 p.m.

All submissions timely submitted to HHS will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters for the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7195.

FOR FURTHER INFORMATION CONTACT:

Dave Milawsky, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, at 1–877–267–2323 ext. 61565; Amy Turner, Employee Benefits Security Administration, Department of Labor, at (202) 693–8335; or Russ Weinheimer, Internal Revenue Service, Department of the Treasury, at (202) 622–6080.

SUPPLEMENTARY INFORMATION:

Customer Service Information

To assist consumers and the regulated community, the Departments have issued questions and answers concerning HIPAA. Individuals interested in obtaining copies of Department of Labor publications concerning changes in health care law may call a toll free number, 1–866–444–EBSA (3272), or access the publications on-line at www.dol.gov/ebursa, the Department of Labor’s Web site. These regulations as well as other information on the new health care laws are also available on the Department of Labor’s interactive Web pages, Health Elaws. In addition, CMS’s publication entitled “Protecting Your Health Insurance Coverage” is available by calling 1–800–633–4227 or on the Department of Health and Human Services’ Web site (www.cms.hhs.gov/hipaainfo), which includes the interactive Web pages, HIPAA Online. Copies of the HIPAA regulations, as well as notices and press releases related to HIPAA and other health care laws, are also available at the above-referenced Web sites.

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted on August 21, 1996 (Pub. L. 104–191). HIPAA amended the Internal Revenue Code of 1986 (Code), the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act (PHS Act) to provide for, among other things, improved portability and continuity of health coverage in the group and the individual insurance markets, including group health plan coverage provided in connection with employment. Health coverage is regulated in part by the federal government, through the Code, ERISA, the PHS Act and other federal provisions, and in part by the states.

The portability, access, and renewability provisions of HIPAA are set forth in Subtitle B of the Code, Part 7 of Subtitle B of Title I of ERISA, and Title XXVII of the PHS Act (referred to below as the HIPAA portability provisions). The HIPAA portability provisions are designed to improve the availability and portability of health insurance coverage by limiting exclusions for preexisting conditions and providing credit for prior coverage, guaranteeing availability of health coverage for small employers, prohibiting discrimination against employees and dependents based on health status, and guaranteeing renewability of health insurance coverage for employers and individuals. The HIPAA portability provisions also include rules that guarantee access to individual health coverage for certain people who lose their group coverage. These provisions also set forth other requirements imposed on health insurance issuers.

The Departments issued interim regulations published in the Federal Register on April 8, 1997 to carry out these provisions. Today, elsewhere in this issue of the Federal Register, the Departments are publishing final regulations governing the HIPAA portability requirements. Also being published is a set of proposed regulations addressing additional and discrete issues with an invitation for comments.

Included in today’s final regulations is an example illustrating that a plan providing first-day coverage for other medical/surgical benefits but imposing a waiting period on benefits for pregnancy is imposing a preexisting condition exclusion. Because HIPAA prohibits imposing a preexisting condition exclusion on pregnancy benefits, the final regulations clarify that this plan provision is impermissible. Several comments (including those of several state insurance commissioners’ offices) have asked the Departments to clarify that a preexisting condition exclusion would also include any benefit-specific waiting period or other temporary exclusion of specific benefits.

Essentially, these comments argue that some plans and issuers use benefit-specific waiting periods that are, in effect, preexisting condition exclusions that do not comply with HIPAA’s statutory limits. The rationale for this argument is that these exclusion periods are likely to affect principally individuals who had a condition before the first day of any coverage under the plan or health insurance coverage. In addition, other comments suggest that these exclusions violate HIPAA’s nondiscrimination provisions.

Nonetheless, the comments do not suggest that it would be impermissible to impose a waiting period for all benefits available under the plan or to impose permanent exclusions on specific benefits (that is, these types of exclusions would not be considered a preexisting condition exclusion nor would they be considered discrimination based on health status).

Comments

The Departments welcome further comments on this issue of benefit-specific waiting periods. In particular, the Departments are interested in comments reflecting the experience of group health plans, health insurance issuers, states, individuals, and other interested parties with waiting periods on specific benefits such as tonsillectomies, hernia repairs, and organ transplants. Rules under consideration might also affect plans that cover only emergency services for an initial period; comments on these types of provisions are also welcome. One possible standard for determining whether a benefit-specific waiting period is operating as a preexisting condition exclusion is whether the waiting period is likely to affect principally individuals who had a condition before the first day of any coverage under the plan or health insurance coverage. Several factors affect the application of such a standard to a particular plan’s waiting period, including the relevant population considered to determine whether the impact is likely to affect principally individuals who had a condition before the first day of coverage to which a plan’s waiting period period is applied, and the length of a plan’s
waiting period (because, generally, as
the waiting period becomes longer, a
greater number of individuals affected
will not have had the condition before
enrolling). The Departments welcome
comments on this standard and these
factors, and also invite suggestions for
alternative standards.

In order to quantify the costs and
benefits associated with an
interpretation that certain benefit-
specific waiting periods function as
preexisting condition exclusions, the
Departments are interested also in
comments, studies, surveys, or reports
on the prevalence of such exclusions in
group health coverage and individual
health insurance coverage, what types of
conditions or treatments are subject to
benefit-specific waiting periods, the
duration of such periods, and
alternative cost-control mechanisms that
may be available.

Signed at Washington, DC, this 8th day of

Nancy J. Marks,
Associate Chief Counsel/Division Counsel,
Tax Exempt and Government Entities,
Internal Revenue Service, Department of the
Treasury.

Signed at Washington, DC, this 9th day of

William F. Sweetnam, Jr.,
Benefits Tax Counsel, Department of the
Treasury.

Signed at Washington, DC, this 1st day of

Ann L. Combs,
Assistant Secretary, Employee Benefits
Security Administration, U.S. Department of
Labor.


Mark B. McClellan,
Administrator, Centers for Medicare &
Medicaid Services.


Tommy G. Thompson,
Secretary, Department of Health and Human
Services.

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