

## ADVISORY | Health Care

March 25, 2014

### CMS PUBLISHES INTERIM FINAL RULE REQUIRING QHP ISSUERS TO ACCEPT CERTAIN THIRD PARTY PREMIUM PAYMENTS

On March 19, 2014, the Centers for Medicare & Medicaid Services (CMS) [published an interim final rule](#) requiring Qualified Health Plans (QHP) and stand-alone dental plans to accept third party premium and cost sharing payments from Ryan White HIV/AIDS programs, tribal organizations, and other state and federal government programs. 79 Fed. Reg. 15,240.

#### BACKGROUND

Ryan White HIV/AIDS programs have long helped low-income individuals living with HIV/AIDS purchase private health insurance. According to CMS, in fiscal year 2013, Ryan White AIDS Drug Assistance Programs made almost \$400 million in premium payments to private health insurers.

Earlier this year, a QHP issuer in Louisiana announced plans to cease accepting third party payments for premiums, including payments from Ryan White HIV/AIDS programs. A class action was subsequently filed against the issuer, asserting that refusal to accept these third party payments violated the Affordable Care Act (ACA) and the Rehabilitation Act. See *East v. Blue Cross Blue Shield of La.*, No. 14-cv-00115.

In announcing its third party payment policy, the QHP issuer cited [CMS guidance](#) in which it “discourag[ed]” QHP issuers from accepting third party premium and cost sharing payments from “hospitals, other healthcare providers, and other commercial entities.” CMS stated that it issued this guidance because the agency believed allowing providers to pay premiums for their patients “could skew the insurance risk pool and create an unlevel field in the Marketplaces.” Although there has been some concern that providers paying premiums could also raise kickback-type issues, the Department of Health & Human Services (HHS) has stated that QHPs are not considered federal programs for purposes of the anti-kickback statute or other federal fraud and abuse laws.

In February, [CMS clarified](#) that the third party payment guidance was not intended to apply to payments from the Ryan White HIV/AIDS programs, other state or federal programs, or tribal organizations. CMS pointed to [Health Resources and Services Administration \(HRSA\) guidance](#) expressly authorizing the use of Ryan White HIV/AIDS funds for QHP premium and cost sharing payments. CMS also explained that it did not intend to discourage payments from private non-profits, provided the non-profit serves individuals “based on financial status and do[es] not consider enrollees’ health status.”

#### INTERIM FINAL RULE

Moved by concern that QHPs refusing to accept Ryan White HIV/AIDS program payments could cause access problems for low-income individuals living with HIV/AIDS, CMS has now finalized a rule requiring QHPs and stand-alone dental plans to accept third party payments from certain entities. Specifically, QHPs and stand-alone dental plans must “accept premium and cost-sharing payments

from the following third-party entities on behalf of plan enrollees: (a) Ryan White HIV/AIDS Program under title XXVI of the Public Health Service Act; (b) Indian tribes, tribal organizations or urban Indian organizations; and (c) State and Federal Government programs.” 45 C.F.R. § 156.1250.

On its face, the rule is limited to “issuers offering individual market QHPs,” which CMS regulations define as plans that have been certified to be offered on an Exchange, see 45 C.F.R. § 155.20; 45 C.F.R. § 156.20. However, in the preamble, CMS appears to assert that the rule also applies to individual market plans sold outside of an Exchange. 79 Fed. Reg. at 15,242 (“This standard applies to all individual market QHPs and [stand-alone dental plans], regardless of whether they are offered through [a federally facilitated Exchange], [a state-based Exchange], or outside of the Exchanges.”).

In addition to prohibiting QHPs from refusing certain third party payments, CMS enhanced its power to enforce that prohibition. Specifically, the final rule amends CMS regulations to authorize civil money penalties for (among other things) refusing to accept the third party payments in a federally facilitated Exchange, 45 C.F.R. § 156.805(a)(1), though CMS notes that such a refusal may also fall under a preexisting provision authorizing a penalty for “practice[s] that would reasonably be expected to have the effect of denying or discouraging enrollment into a QHP offered by the issuer (except as permitted by this part) by qualified individuals whose medical condition or history indicates the potential for a future need for significant medical services or items,” *id.* § 156.805(a)(4). 79 Fed. Reg. at 15,242.

CMS also explains that losing out on coverage in a federally facilitated Exchange because of an issuer’s refusal to accept the required third party payments may constitute “exceptional circumstances” that trigger a special enrollment period for affected individuals under 45 C.F.R. § 155.420(d)(9), and/or may warrant a hardship exemption from the shared responsibility payment under 45 C.F.R. § 155.605(g)(1). CMS also encourages state-based Exchanges to grant a special enrollment period and a hardship exemption under these circumstances. CMS plans to publish further guidance on these issues “in the near future.” 79 Fed. Reg. at 15,243.

The interim final rule does not formalize CMS’s prior guidance “discouraging” acceptance of third party payments from commercial entities. But, in the preamble, CMS reiterates its “concern[]” that third party payments from “hospitals, other healthcare providers, and other commercial entities could skew the insurance risk pool and create an unlevel competitive field in the insurance market,” and the agency encourages QHPs and stand-alone dental plans to reject such third party payments. *Id.* at 15,242.

It is hard to square that reasoning with CMS’s rationale for requiring QHPs to accept payments from public and tribal programs. CMS does not explain why Ryan White, tribal organizations, and government programs fall on the “required” side of the line, while payments from other third parties fall on the “discouraged” side. It is unlikely that accepting third party payments from commercial entities would result in more high-cost enrollees than would accepting third party payments from, for example, Ryan White HIV/AIDS programs, which serve exclusively individuals with HIV/AIDS.

In addition, it is hard to reconcile CMS’s position that refusing payments from public programs may constitute impermissible discrimination based on health status with its discouragement of acceptance of third party payments from commercial entities. If refusing Ryan White HIV/AIDS program payments constitutes impermissible discrimination based on HIV/AIDS status, it would seem similarly discriminatory to refuse third party payments from, for example, a program for low-income individuals with cancer sponsored by a pharmaceutical company or other commercial entity.

In the absence of further clarification from CMS, this new interim regulation and CMS's guidance on third party premium and cost sharing payments may be an area ripe for litigation.

CMS is accepting comments on the interim final rule until May 13, 2014. The publication in the Federal Register states that the rule became effective on March 14, 2014.

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