

Publications

Benefits Alert: The Uncertain Status of Prescription Drug Copay Accumulator Programs

Related Attorneys

Dawne McKenna Parrish

Jennifer Bibart Dunsizer

Jacquelyn Meng Abbott

Related Services

Employee Benefits and Executive Compensation

Labor and Employment

CLIENT ALERT | 10.24.2019

What is a copay accumulator program?

Drug manufacturers offer copay coupons on certain expensive drugs. A participant can present a copay coupon to a pharmacy and the copay coupon is applied against the participant's cost share. A drug manufacturer's goal in offering a copay coupon is to reduce a participant's cost share on the drug so that the cost to the patient is comparable to less-expensive generic and/or therapeutic alternatives. Even if the drug manufacturer has to fund the majority of the participant's share of the cost, the drug manufacturer can profit from the transaction because the plan would pay its share of the cost of the drug. We note that, while this trend started with drug manufacturer coupons, other medical providers have started issuing discount or copay coupons as well. The analysis in this alert applies equally to coupons for any medical services.

A copay coupon often has an annual dollar limit aimed at covering a significant portion of the participant's cost sharing up to a typical participant's out-of-pocket maximum. The out-of-pocket maximum is the point where the plan pays 100% of the cost of the drug with no further participant cost sharing.

Copay coupon accumulator program timeline

Pre-2018 – copay coupons were undetectable

Prior to 2018, the pharmacy benefit manager (PBM) systems did not distinguish copay coupons from other forms of payment (like cash or a credit card). When a participant filled a prescription at a pharmacy, the coupon was identified as a participant payment. The value of a copay coupon would have been credited against a participant's deductible and out-of-pocket maximum along with any amounts the participant paid by cash or credit card. The electronic data generated from the transaction did not support any other treatment. Then, leading up to 2018, the PBMs began to implement systems to separately track

coupons.

2018 – copay accumulator programs came into existence

Once copay coupons could be tracked, the PBMs rolled out copay accumulator programs that could change the accounting for copay coupons. Under a copay accumulator program, a participant could still use a copay coupon at the point of sale but the value of the copay coupon would not be credited against a participant's deductible or out-of-pocket maximum. In other words, the participant's deductible and out-of-pocket maximums were only credited with amounts that the participant actually paid by cash or credit card. With a copay accumulator program, the deductible would apply after (and only if) the participant exhausted the annual dollar limit of the copay coupon. Of course, if the participant never reached the annual dollar limit on a copay coupon during the course of a year, he or she would never have to pay his or her deductible under the plan.

Some but not all employers adopted the new copay accumulator programs offered by their PBMs starting in 2018.

April 25, 2019 – HHS issued final rule limiting copay accumulator programs

On April 25, 2019, the U.S. Department of Health and Human Services (HHS) published a final rule that expressly permitted copay accumulator programs but only in certain circumstances. The HHS rule allowed a plan to exclude the dollar value of a copay coupon from the expenses counted toward a participant's out-of-pocket maximum only when the drug in question had an available medically appropriate generic equivalent. The clear implication of the HHS rule was that a plan would be required to count the value of a copay coupon toward a participant's out-of-pocket maximum when the drug in question did not have a medically appropriate generic equivalent. The HHS rule would have forced plans to credit copay coupons for many high-cost specialty drugs to participants' out-of-pocket maximums, because the drugs do not have generic equivalents.

The HHS rule was scheduled to go into effect on January 1, 2020.

August 26, 2019 –DOL, IRS and HHS place HHS final rule on hold

Just four months later, the HHS rule was put on hold by an FAQ jointly published by the U.S. Department of Labor (DOL), the U.S. Department of Treasury/Internal Revenue Service (IRS) and HHS on August 26, 2019. The FAQ stated that, until we hear further from the Departments, "the Departments will not initiate an enforcement action if...a group health plan excludes the value of drug manufacturers' coupons from the annual limitation on cost sharing, including circumstances in which there is no medically appropriate generic equivalent available." So, copay accumulator programs are okay for the time being regardless of whether a generic equivalent is available. The FAQ also stated that HHS in consultation with the DOL and IRS intend to address copay accumulators in the HHS Notice of Benefit and Payment Parameters for 2021.

Implications for HSA-compatible high deductible health plans

Not only did the FAQ put the HHS rule on hold (allowing PBMs to continue copay accumulator programs in the current form into 2020), the Departments implied that copay accumulator programs may become mandatory for HSA-compatible high deductible health plans (HDHPs). The FAQ explained that the HHS rule “could create a conflict” with the rules for HSA-compatible HDHPs.

The IRS view may be that, if a HDHP credits the value of a copay coupon to a participant’s deductible, the participant has received impermissible non-high deductible health coverage which negates the participant’s eligibility to make HSA contributions. The IRS cited Q&A-9 of IRS Notice 2004-50 (which significantly predated the development of copay accumulator programs) as support for the principle that an HDHP must disregard the value of copay coupons (and other manufacturers’ and providers’ discounts) in determining whether the minimum deductible for an HDHP has been satisfied. In Q&A-9, the IRS explained that discount cards that entitle holders to obtain a percentage or specific dollar discount for health care services or products will not disqualify a participant from being eligible to make HSA contributions, as long as the discount is not credited to the participant’s deductible. Interestingly, the IRS does not appear to be troubled by the fact that some copay coupons would allow multiple prescription drug refills (with no or minimal participant payment) prior to the application of the deductible, as long as the value of the copay coupons is not credited toward the deductible.

Now that PBMs are able to track copay coupons using copay accumulator programs, additional guidance is needed from the IRS to determine whether plan sponsors are required to implement copay accumulator programs for HSA-compatible HDHPs. We will provide an update when more guidance is available.