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New CMS Guidance on Medicare Part D Creditable Coverage Notice Offers Helpful Direction for Prescription Drug Plan Sponsors

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As part of the continuing onslaught of regulatory guidance from the Centers for Medicare and Medicaid Services (“CMS”) in advance of the January 1, 2006 introduction of the new Medicare Part D prescription drug benefit, CMS in late May issued welcome clarification of the creditable coverage notice requirements for plans that currently provide prescription drug coverage to Medicare beneficiaries.¹ The guidance is accompanied by model notices that entities (other than Medigap insurers) may use to satisfy the notice requirements.² Although some businesses may take issue with various aspects of the guidance and the model notices, CMS has nonetheless resolved a number of issues for organizations that sponsor prescription drug plans and are struggling to restructure their programs in light of Medicare Part D.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the “MMA”) added the new Part D to Medicare to offer a basic outpatient prescription drug benefit to Medicare beneficiaries beginning January 1, 2006.³ The MMA provides for an initial enrollment period for Medicare Part D eligible beneficiaries, beginning November 15, 2005 and ending May 15, 2006.⁴ To push Medicare beneficiaries to move into the new Part D, the MMA imposes a late enrollment penalty on any eligible individual who fails to enroll in Part D unless the individual “maintain[s] continuous creditable prescription drug coverage during the period of non-enrollment.”⁵ After the initial enrollment period ends, an eligible individual is subject to the late enrollment penalty if he or she has a period of 63 days or longer without enrollment in either Part D or other creditable coverage, then enrolls in Part D.⁶ The late enrollment penalty is calculated based on the number of months during which an eligible individual was neither enrolled in Part D nor otherwise enrolled in creditable coverage and is at least one percent of the

¹ United States Department of Health and Human Services, Centers for Medicare & Medicaid Services [hereinafter CMS], *Creditable Coverage Guidance*, at <http://www.cms.hhs.gov/medicarerereform/CCGuidance.pdf> (last visited June 29, 2005) [hereinafter *Guidance*].

² CMS, *Model Beneficiary Non-Creditable Coverage Disclosure Language For Use Prior To 11/15/05*, at <http://www.cms.hhs.gov/medicarerereform/Non-CredCov-BeneDsclsreNtc.pdf> (last visited June 29, 2005) and *Model Beneficiary Creditable Coverage Disclosure Language For Use Prior To 11/15/05*, at <http://www.cms.hhs.gov/medicarerereform/CredCov-BeneDsclsreNtc.pdf> (last visited June 29, 2005) [hereinafter *Model Notices*].

³ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2006 (2003).

⁴ S.S.A. § 1860D-1(b)(2)(A), 42 U.S.C. § 1395w-101(b)(2)(A); S.S.A. § 1851(e)(3)(B), 42 U.S.C. § 1395w-21(e)(3)(B).

⁵ S.S.A. § 1860D-1(b)(6)(B), 42 U.S.C. § 1395w-101(b)(6)(B); S.S.A. § 1860D-13, 42 U.S.C. § 1395w-113.

⁶ 42 C.F.R. § 423.46 (2005).

monthly base beneficiary Part D premium.⁷ Not only will the penalty never expire, but CMS notes that the higher premium (due to the late enrollment penalty) will “actually increase each year” because the late enrollment penalty is calculated as a percentage of the base premium, which is expected to increase each year.⁸

Medicare Part D “creditable coverage” includes coverage under a Part D prescription drug plan, a Medicare Advantage (formerly Medicare+Choice) prescription drug plan, an employer group health plan (including a retiree prescription drug plan), certain military and veterans’ prescription drug programs, coverage under Medigap policies, and coverage under state pharmaceutical assistance plans,⁹ provided that the coverage meets an actuarial equivalence requirement specified in the MMA.¹⁰ The MMA considers prescription drug coverage as “creditable coverage” only if the value of the coverage is at least actuarially equal to the value of the standard Part D prescription drug benefit.¹¹

For a Part D eligible individual who otherwise has prescription drug coverage that will continue after Part D becomes effective, understanding how that coverage compares to the Part D standard benefit and the various alternatives available under Part D (including enrollment in a Medicare Advantage plan that includes prescription drug coverage) will be critical to effective decision-making. If the individual’s existing prescription drug coverage qualifies as creditable coverage, the individual should still evaluate whether a Medicare Part D option offers more valuable coverage for that individual (for example, due to a different drug formulary or different co-pay structure). If the individual’s existing prescription drug coverage does not qualify as creditable coverage and the individual fails to switch to Part D coverage during the initial Part D enrollment period, the individual will be permanently injured financially by the Part D late enrollment fee.

To aid individuals in understanding their options, the MMA mandates disclosure by entities offering prescription drug coverage (other than Medicare Part D coverage) of whether or not their coverage qualifies as creditable coverage, as well as information about the consequences of failing to enroll in Part D for an individual with coverage that does not qualify as creditable coverage.¹² CMS’ May guidance focuses on this disclosure and provides far more detail than is available in either the MMA or the related regulations.

In general, the May guidance clarifies that the determination of creditable coverage for purposes of the required disclosure does not require an attestation by a qualified actuary (unless the prescription drug plan is an employer or union plan attempting to qualify for the MMA’s employer plan subsidy).¹³ The guidance also provides a safe harbor plan design that qualifies as creditable coverage.¹⁴ Finally, the guidance provides details of

⁷ S.S.A. § 1860D-13(b)(3)(A), 42 U.S.C. § 1395w-113(b)(3)(A).

⁸ CMS, *Guidance*, *supra* note 1.

⁹ S.S.A. § 1860D-13(b)(4), 42 U.S.C. § 1395w-113(b)(4).

¹⁰ S.S.A. § 1860D-13(b)(5), 42 U.S.C. § 1395w-113(b)(5).

¹¹ *Id.*

¹² S.S.A. § 1860D-13(b)(6)(B), 42 U.S.C. § 1395w-113(b)(6)(B).

¹³ CMS, *Guidance*, *supra* note 1.

¹⁴ *Id.*

what the disclosure to eligible beneficiaries should contain, both for individuals in plans that offer creditable coverage and for individuals in plans with coverage that fails to qualify as creditable, and clarifies acceptable methods of distributing the notices to eligible individuals.¹⁵ As part of the latter piece of guidance, CMS has posted model notices on its website.¹⁶

Industry commentators have already noted various drawbacks to the guidance. For example, some employers may feel the model notices “raise more questions than they answer”¹⁷ or are “too confusing or misleading to give to their plan participants.”¹⁸ Because the CMS requirements for electronic delivery of the disclosure notices (model or otherwise) differ from – and appear to be more demanding than – the requirements applicable to other types of employee communications (particularly the Department of Labor’s requirements for notices under the Employee Retirement Income Security Act), employers may find it difficult to comply and be forced to mail notices.¹⁹ For employers who have already planned their benefit communications strategies for the year, the guidance may be perceived as coming late and disrupting communications plans.²⁰ Employers who had already begun drafting disclosure notices based on the regulations and previous guidance may find that they must revise those drafts to reflect the details required by CMS, even if they choose not to adopt the model notices.

On the other hand, for organizations – particularly employers who sponsor retiree prescription drug plans – that have been waiting to design their communications to plan participants, the CMS guidance cannot help but be useful. At the very least, it settles any questions as to what will satisfy CMS and lays to rest concerns that an expensive actuarial attestation is required even if a plan sponsor does not plan to pursue the MMA’s employer subsidy. As the months wane until Medicare Part D goes into effect, every bit of assistance from CMS that clarifies previously unresolved issues should be perceived as fundamentally useful.

¹⁵ *Id.*

¹⁶ CMS, *Model Notices*, *supra* note 2.

¹⁷ McDermott Will & Emery, *Group Health Plan Sponsors Required to Send New Medicare Notice* (June 17, 2005), at http://mwe.com/fuseaction/publications.nldetail_print [hereinafter *Comments*].

¹⁸ Aon Consulting, *Alert: Medicare Part D “Creditable Coverage” Model Notices Released* (May 31, 2005), at http://www.aon.com/about/publications/pdf/alert/alert_05_31_05.pdf.

¹⁹ McDermott, *Comments*, *supra* note 17. See also Hewitt Associates, *Medicare Part D Creditable Coverage Guidance Issued by CMS* (June 2005), at http://was4.hewitt.com/hewitt/resource/legislative_updates/united_states/pdfs/creditable_coverage_guidance.pdf.

²⁰ McDermott, *Comments*, *supra* note 17.