May 7, 2012

U.S. Department of Health and Human Services
Centers for Medicare & Medicaid Services
CMS–9968–ANPRM, P.O. Box 8016,
Baltimore, MD 21244–1850.

Re: CMS–9968–ANPRM

The Self-Insurance Institute of America, Inc. (SIIA) respectfully submits the following comments in response to the above referenced notice of proposed rulemaking focused on contraceptive services coverage requirements for religious-based employers.

More specifically, SIIA addresses ideas set forth in the notice on how Third Party Administrators (TPAs) could pay for (cover) contraceptive services on behalf of their self-insured religious based employer clients.

The use of non-obligated funds, such as rebates, by Third Party Administrators
Such practice would likely be deemed a prohibited transaction in accordance with the Employee Retirement Income Security Act (ERISA) as rebates are disclosed plan assets and can't be used for any purpose not authorized by the Plan Administrator/Plan Sponsor. This approach is therefore not viable as a matter of law.

Marketplace realities also preclude this approach as a growing number of TPAs have moved away from a rebate compensation model and do not provide them at all. Even where rebate compensation exists, the rebate approach would not work anyway because the rebates go right back to the plan sponsor and not the TPA. The only monies that could be used to pay for contraceptive coverage would be administrative fees and other cost-containment management fees (such as medical management) received. Profit margins are thin in the TPA business and are not comparable to margins on fully-insured premiums.

Further, TPA pricing is based on the cost of providing claims administration and other ministerial services. Fees are not based in any way on claims experience or coverage under a particular plan design. Profit margins are built in to ensure that over and above the cost of administration, a TPA can make some return for its stakeholders, the claims experience of any particular sponsor has no bearing on pricing and/or profit and has no connection to renewal pricing in any subsequent year.

As administrators, rather than an insurer, the TPA assumes no responsibility for funding claims and therefore is not receiving any premium to be used to fund claims. The plans we administer have benefits governed by a written plan document that specifically indicates what is covered by the plan. A TPA can't pay claims not in the plan sponsor's document.

TPAs maintain relationships with Pharmacy Benefit Managers but these arrangements do not provide for the TPA to obtain medications on behalf of itself, only on behalf of plan-sponsors. There is no mechanism in current PBM arrangements to obtain contraceptives for a TPA to facilitate direct distribution. Moreover, TPAs do not have actuarial staff in place (like insurers do) to be able to estimate the cost and utilization of this benefit. The notice makes reference to the fact that insurance issuers have the ability to build the estimated cost of each element of coverage into the aggregate premium charges. TPAs simply cannot do this.

Ultimately, if the TPA was forced to pay for these expenses out of its own pocket, the cost of administrative services across all clients will likely have to rise.

Finally, it should also be noted that if the TPA is responsible for payment they cease to be a Third Party Administrator and become an insurance carrier. Insurance carriers are fiduciaries and fiduciaries are regulated by state law. This directly conflicts with the federal regulatory regime under which TPAs currently operate.

The use of received non-profit funds
It is highly unlikely that a TPA of a self-insured plan would solicit funds from a non-profit organization to cover the cost of contraceptive coverage. Additionally, this approach would be unacceptable by the plan-sponsor.

Credit or rebate against fees payment to the reinsurance program
Agency guidance has stated that that TPAs will not be financially liable for such fees, but rather TPAs will be requested to assist in collecting fees paid by self-insured health plans. In other words, TPAs will not be paying any fees from their own funds in accordance with Section 1341 for which a rebate or credit could be applied. As such, this proposal directly conflicts with the preliminary regulatory guidance already provided.

Separate contraceptive coverage arrangements
While it could be possible to establish a separate trust from which to pay for contraceptive coverage, or have the TPA administer claims for a separate insurance entity, the obvious question is where would the funding come from for either arrangement? It cannot come directly from the employer and as explained above, it cannot come from the TPA either.

Moving from a self-insured to a fully-insured plan
Employers, including religious-based institutions choose to self-insure because they are able to better control costs and customize health plans to better meet the needs of their workforce. Plan-sponsors should not be forced to forgo the many cost and coverage advantages of self-insuring.

Thank you for your consideration of our comments.

Sincerely,

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