AIMED ALLIANCE

May 23, 2019

Jeanne Klinefelter Wilson
U.S. Department of Labor
Employee Benefits Security Administration (EBSA)
200 Constitution Ave. NW, Ste S-2524
Washington, DC 20210

Re: Copay Accumulator Programs

Dear Ms. Wilson:

Aimed Alliance is a non-profit health policy organization that seeks to protect and enhance the rights of health care consumers and providers. On December 17, 2018, we sent you a copy of our report on copay accumulator programs titled *Employers Beware: Understanding the Costs and Liability Risks of Health Insurance Copay Accumulator Programs*. We would like to follow-up on that correspondence in light of recent developments and request that the Department of Labor take additional steps to regulate the use of copay accumulators in employer-sponsored health plans.

As you may know, copay accumulator programs are an emerging type of health plan policy that restricts access to treatment for patients. These programs prohibit cost-sharing assistance received from third parties, such as drug manufacturers, from counting toward a plan beneficiary's deductible or out-of-pocket limit.[1] In some instances, these policies are applied in a misleading manner that may violate provisions of the Employee Retirement Income Security Act (ERISA).[2]

Recently, the Centers for Medicare & Medicaid Services (CMS) finalized the Notice of Benefit and Payment Parameters for the 2020 plan year.[3] This final rule permits commercial health plans to adopt copay accumulator programs, but limits their use to circumstances where the brand medication is not medically necessary.[4] This change will become effective on January 1, 2020.[5] In addition, Arizona, Virginia, and West Virginia have passed laws that prohibit copay accumulator programs in health plans.[6] We anticipate that more states will follow suit; however, these state laws do not regulate employer-sponsored plans.[7]

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[1] Aimed Alliance, EMPLOYERS BEWARE: UNDERSTANDING THE COSTS AND LIABILITY RISKS OF HEALTH INSURANCE COPAY ACCUMULATOR PROGRAMS 3 (2018).
[2] *Id.* at 16-18.
[3] CTRS. FOR MEDICAID & MEDICARE SRVS., CMS ISSUES FINAL RULE FOR THE 2020 ANNUAL NOTICE OF BENEFIT AND PAYMENT PARAMETERS (Apr. 8, 2019) https://www.cms.gov/newsroom/press-releases/cms-issues-final-rule-2020-annual-notice-benefit-and-payment-parameters.
[4] *Id.*
[5] *Id.*
[6] Lauren Clason, *New state laws highlight an escalating battle in the war over drug pricing*, ROLL CALL (Apr. 26, 2019), https://www.rollcall.com/news/congress/new-state-laws-highlight-escalating-battle-war-drug-pricing.
[7] John S. Linehan, *State legislatures spring ahead with restrictions on drug copay accumulators*, MANAGED CARE (Apr. 16, 2019), https://www.managedcaremag.com/voices/state-legislatures-spring-ahead-restrictions-drug-copay-accumulators; *see also* H.B. 2166, 54th Leg., 1st Reg. Sess. (Ariz. 2019); H.B. 2515, Reg. Sess. (Va. 2019) ; H.B. 2770, Reg. Sess. (W. Va. 2019).

While these recent legislative and regulatory actions make progress towards protecting patients from the pitfalls of copay accumulator programs, more must be done to ensure that plan enrollees are fully aware of the impact of a copay accumulator program in their health benefit, if one exists. Under ERISA, plan administrators are required to provide beneficiaries with affirmative disclosures regarding cost-sharing provisions and limits on benefits under the plan.[8] Plan administrators also have a duty not to mislead enrollees about the plan's benefits.[9]

A plan administrator may breach its duty to disclose if he or she does not properly inform plan participants about the benefits offered by the plan, including cost-sharing requirements associated with those benefits and any limitations on those benefits. Copay accumulator programs qualify as cost-sharing provisions because they impact the amount that plan enrollees must spend to meet their annual deductible. They also act as limits on benefits by limiting the types of payments that count toward annual deductibles and maximum out-of-pocket limits. For these reasons, we believe that plan administrators should have a duty to include information about copay accumulator programs in summary plan descriptions.

A plan administrator may breach its duty not to mislead enrollees if he or she makes a statement that would likely mislead a reasonable person making a decision about pursuing benefits that they are owed by the plan.[10] These statements may be intentional or unintentional.[11] Some copay accumulator policies are so poorly written that it would be difficult to argue that the fiduciary was unaware of the program's misleading description. For example, in 2017 an employer implemented a copay accumulator policy that was described as a "Specialty Medication Copay Card Benefit," which is inherently misleading because it implies that the program confers a benefit when in actuality the policy imposes limits on the enrollee's benefits.[12] Research by the AIDS Institute into Florida health plans confirmed how difficult it can be to determine whether an insurer has implemented a copay accumulator program because of the vague and deceptive language used to describe the policies.[13] According to their findings, some plans do not disclose the existence of copay accumulator programs at all.[14] Other examples of misleading descriptions include "out-of-pocket protection," and "deductible surcharge," which seem to intentionally obscure the nature and purpose of these policies.[15] A fiduciary that uses such language could potentially breach its duty not to mislead.

We request that the Department of Labor issue guidance clarifying that failing to clearly and adequately disclose the existence of a copay accumulator program in a health plan governed by ERISA violates the plan administrator's duty of disclosure. Additionally, we request that the Department of Labor issue guidance clarifying that employers can breach their duty not to mislead plan enrollees if the copay accumulator program description includes material misrepresentations.

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[8] 29 U.S.C. §§ 1021, 1024 (proscribing certain disclosure duties to beneficiaries); 29 C.F.R. § 2520.104b-1 (detailing fiduciary disclosure responsibilities).

[9] *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 506 (1996).

[10] Howe, 516 U.S. at 506.

[11] Aimed Alliance, *supra* note 1, at 17-18.

[12] *Id.*

[13] Carl Schmid, *Hidden Policies: The Search for Copay Accumulator Policies in Florida Qualified Health Plans*, DRUG CHANNELS (June 7, 2018), https://www.drugchannels.net/2018/06/hidden-policies-search-for-copay.html.

[14] *Id.*

[15] Aimed Alliance, *supra* note 1, at 25.

We would be happy to schedule a call or meeting with you to address any questions or comments you may have about this report or about copay accumulator programs in general.

Sincerely,

John Wylam
Staff Attorney