AIMEDALLIANCE

IRS's 2004 Notice Should Not Prevent Copay Accumulator Reform

What Are Copay Accumulator Programs?

Many privately insured patients who cannot afford their copayments or coinsurance are often able to benefit from copay assistance programs – copay coupons offered by drug manufacturers. Historically, copay assistance has counted towards an individual's deductible and annual out-of-pocket maximum. These programs are particularly important to individuals in high deductible health plans (HDHPs) who are responsible for significant out-of-pocket costs before the health plan starts to cover treatments and services. In recent years, some health plans have begun adopting copay accumulator programs, which accept drug manufacturer assistance to cover the individual's copay or coinsurance, but do not credit the amount towards the individual's deductible or annual out-of-pocket maximum.

IRS's Interpretation of Notice 2004-50

On August 16, 2004, the Internal Revenue Services (IRS) issued Notice 2004-50 (IRS Notice), a bulletin that contained a set of questions and answers on health savings accounts (HSAs). In that document, question 9 or "Q-9" asked "may an individual who is covered by an HDHP and also has a discount card that enables the user to obtain discounts for health care services or products, contribute to an HAS?" The IRS provided the following answer:

> A-9. Yes. Discount cards that entitle holders to obtain discounts for health care services or products at managed care market rates will not disqualify an individual from being an eligible individual for HSA purposes if the individual is required to pay the costs of the health care (taking into account the discount) until the deductible of the HDHP is satisfied.

The IRS has recently interpreted this language to mean that individuals who are enrolled in an HSA alongside an HDHP may only use copay assistance if that assistance does not count toward the annual deductible (i.e., a copay accumulator program).

Why Is the IRS's Interpretation Important?

The U.S. Department of Health and Human Services (HHS) and Department of Treasury have relied on the IRS interpretation. In 2019, all three agencies revoked protections that would have prevented exchange plans and employer-sponsored plans from using copay accumulator programs if a patient was prescribed a brand medication and no generic equivalent was available. States are also beginning to adopt this interpretation as they begin to pass legislation limiting the use of copay accumulator programs.

However, the IRS interpretation is flawed and should not be adopted.

The IRS Notice Is Not Legally Binding

The IRS Notice is a guidance document that does not carry full force of the law. According to the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, guidance documents are not legally binding. Thus, federal agencies and state governments are not bound by the IRS Notice.

The IRS Interpretation of the Notice Is Wrong

The IRS's interpretation of the 2004 Notice is wrong. The Notice only precludes "discount cards" from contributing to the individual's annual out-of-pocket maximum. Discount cards and manufacturer copay assistance are not the same thing. Discount cards typically refer to third-party programs that are often used as an alternative to health insurance. Thus, patients without health insurance can use these discount cards to receive their prescription drugs at a lower cost. Discount cards have no annual cap. Copay assistance is distinguishable because copay assistance has a finite annual cap.

Additionally, copay assistance programs were not a common practice in 2004. Therefore, it is unlikely that the drafters of the 2004 guidance intended to include copay assistance programs under the definition of discount cards. Moreover, unlike discount cards, which have not historically counted towards annual out-of-pocket maximums, copay assistance has counted towards an individual's annual out-of-pocket maximum. It is only recently that health plans have begun enacting copay accumulator programs and that these contributions have stopped counting towards the patient's cost-sharing requirements.

The IRS Notice Is Inconsistent with the HSA Statute

HSAs were created under 26 U.S. Code § 223. To qualify for an HSA, holders must: (1) have an HDHP; (2) be solely covered by their plan and not on another plan; (3) be under the age of 65; and (4) not be claimed as a dependent on someone else's federal tax form. Thus, the statute essentially provides an enumerated list as to what disqualifies an individual from having an HSA account. No other disqualifications are listed. While the 2004 Notice references the statute, it is entirely unclear how the IRS came up with its interpretation that an individual's use of copay assistance would disqualify them from contributing to their HSA account.

To The Extent that It Is Persuasive, the IRS Notice Should Be Narrowly Interpreted

Even if federal agencies and state governments elect to adopt the IRS Notice on this issue, the Notice can be interpreted narrowly. Currently, some have stated that, in light of the IRS Notice, bans on copay accumulator programs cannot apply to any HDHP with an HSA. However, this interpretation is too broad. The IRS interpretation would only apply to individuals who are (1) enrolled in an HDHP; (2) actually use their HSAs; and (3) apply for copay assistance. It should not be applied broadly across all enrollees of a particular HDHP. This interpretation is consistent with other IRS guidance, which provides that only the specific HSA beneficiary is responsible for managing HSA distributions, ensuring the money is used exclusively for qualified medical expenses, and returning any money that is overspent from the HSA.

Further, IRS guidance provides that if an HSA owner fails to return an excess distribution, the HSA owner will be required to count that amount as taxable income subject to a 20 percent penalty tax. In contrast, the entire plan is not subject to a penalty due to one individual's decision. Thus, it would be consistent with IRS guidance to only penalize a singular HSA account when the individual uses copay assistance, and not the entire plan

The IRS Interpretation Is Bad for Patients

Prohibiting individuals from contributing to their HSA account after receiving copay assistance only hurts patients. A 2020 study found that 55 percent of individuals enrolled in HDHP with HSAs did not contribute to their HSA account, with 32 percent of these individuals reporting they did not contribute because they could not afford to. This leaves many patients in the position to choose whether to receive copay assistance or forfeit their HSA, and for some, copay assistance may even be a better option. Therefore, it is important that patients have access to both HSAs and copay assistance in order to have access to medically necessary treatments.

References

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