

Proposed Exemption of Limited Wraparound Coverage from Health Insurance Market Standards

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On December 19, 2014, various federal agencies issued proposed regulations (“Proposed Regulations”)¹ to amend the definition of “excepted benefits” to include certain limited wraparound health insurance coverage. “Excepted benefits” are those benefits that are generally exempt from certain of the market-wide health insurance requirements that were created under the Affordable Care Act (“ACA”) and codified in the Employee Retirement Income Security Act (“ERISA”), the Internal Revenue Code (“Code”), and the Public Health Service Act (“PHSA”). Comments on the Proposed Regulations are due to the agencies no later than **January 22, 2015**.²

By way of background, there are four categories of excepted benefits:

- 1) benefits that are not generally health coverage, such as auto insurance and workers compensation;
- 2) limited scope benefits, such as limited vision or dental benefits, and benefits for long-term care, nursing home care, and home health care;
- 3) limited coverage for only a specific illness or disease, or fixed indemnity insurance; and
- 4) supplemental health benefits.

Benefits in the second category, health benefits of limited scope, are only excepted if such benefits “wrap around” certain individual health insurance coverage. Under federal regulations proposed in 2013,³ “wraparound” coverage would be available in limited

¹ The Proposed Regulations were later published at 79 Fed. Reg. 76931 (Dec. 23, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-23/pdf/2014-30010.pdf>.

² *Id.* at 76932.

³ 78 Fed. Reg. 77632 (Dec. 24, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-24/pdf/2013-30553.pdf>.

circumstances for employees who could not otherwise afford an employer's group health plan coverage and who instead obtain medical coverage through the individual market. The wraparound coverage would be designed to supplement the coverage that these employees purchased through the individual market and would be considered an excepted benefit not subject to the ACA protections that were codified in ERISA, the Code, and the PHSA. The relevant federal agencies include the U.S. Departments of Health and Human Services, Labor, and the Treasury (collectively, "Departments").

The 2013 proposed regulations enumerated five conditions that wraparound coverage would need to meet in order to constitute an excepted benefit.⁴ In the final regulations that were published on October 1, 2014, the Departments deferred acting on the five proposed conditions, stating their intent to publish another round of proposed regulations to address the extensive comments received on the issue of limited wraparound coverage.⁵ This is the topic addressed by the Proposed Regulations.

Five Requirements Under the Proposed Regulations

In the current version of the Proposed Regulations, the Departments address requirements for limited benefits that would wrap around either individual insurance or coverage under a Multi-State Plan. Specifically, the Department proposes five requirements that such coverage would need to meet to constitute excepted benefits.

First, the limited wraparound coverage could not just be coverage of cost-sharing amounts under an eligible individual health plan but would instead have to provide meaningful benefits. Such benefits could include expanded coverage within a network or coverage of additional benefits not covered under individual insurance. The Departments seek comment on the prospect of standardizing the benefits provided in the limited wraparound coverage, although no such standardization is proposed here.

Second, the limited wraparound coverage must be limited in amount to an annual cost of coverage per employee of \$2,500 (indexed according to section 125(i)(2) of the Code). The Departments have switched to a proposed specific dollar figure limit as opposed to a previously proposed percentage cap for ease of administration. The Departments seek comment on the impact of this limit.

Third, the limited wraparound coverage must meet specific requirements related to nondiscrimination, including a prohibition against imposing any preexisting condition exclusion or discrimination based on any health factor.

Fourth, the individuals eligible for the limited wraparound coverage cannot also be enrolled in excepted benefit coverage that is a health flexible spending arrangement. Additionally, plans would need to comply with two sets of eligibility standards: one for individual health insurance for individuals who are not full-time employees and the other for Multi-State Plan ("MSP") coverage. Of note, because the MSP program is

⁴ *Id.* at 77635, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-24/pdf/2013-30553.pdf>.

⁵ 79 Fed. Reg. 59131 (Oct. 1, 2014), available at <http://www.gpo.gov/fdsys/pkg/FR-2014-10-01/pdf/2014-23323.pdf>.

administered through the Office of Personnel Management (“OPM”) and coverage is issued by insurers through contracts with the OPM, limited wraparound coverage offered as part of such plans would need to be specifically approved by OPM.

Fifth, the Departments would require reporting to the Department of Health and Human Services for both individual health insurance and MSP coverage—and to OPM as well for MSP coverage.

Additional Comments Requested

Notably, the Proposed Regulations would implement limited wraparound coverage as a pilot program with a sunset date. The wraparound coverage could be offered no later than December 31, 2017, and would end on the later of two possible dates. The Departments seek comment on this proposed time frame, including whether the Departments should have the option to terminate such coverage earlier.

In addition to comments on the Proposed Regulations, the Departments also seek comment regarding how small businesses offer health coverage, including whether modifications to health flexible spending arrangements or other existing policies relevant to small businesses would be helpful to small business employers and employees.

Recognizing that some employers, if given the choice, may elect to increase the affordability of their primary coverage rather than offer limited wraparound coverage, the Departments are interested in finding out the degree to which the Proposed Regulations might increase employers’ propensity to provide health insurance.

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The Departments are accepting comments on the Proposed Regulations through **January 22, 2015**.

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*This Client Alert was authored by **Helaine I. Fingold** and **Meghan F. Weinberg**. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

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