



CMS Issues Guidance Regarding Required Medicare Part D “Creditable Coverage” Notices

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The Centers for Medicare and Medicaid Services (CMS) recently issued guidance regarding “creditable coverage” under the new Medicare prescription drug program (Medicare Part D). The guidance focuses on the requirement that Medicare-eligible individuals be notified of whether their current prescription drug coverage is creditable, which means that it is equivalent to or as good as Medicare Part D’s prescription drug coverage. This notice must be issued *prior to the November 15, 2005* start date for the initial enrollment period under Medicare Part D, and it must be provided if the health plan covers any Medicare-eligible individuals, even if it does not cover any retirees. As a practical matter, we expect that virtually all health plan sponsors will provide the notice because Medicare-eligible individuals include, for example, an active employee’s spouse who is Medicare-eligible because he/she is 65 or older, is disabled or has end-stage renal disease.

In general, all entities covered by the final regulation (including employers, unions, churches, government employers, and other plan sponsors) must provide, or arrange for a vendor or third party to provide, a notice of creditable or non-creditable coverage to Medicare-eligible individuals who are covered by, or who apply for, prescription drug coverage under the entity’s plan. This notice must be provided to both retirees and their beneficiaries and active employees and their beneficiaries who are covered by their employer’s health plan and who are Medicare-eligible. This notice is required regardless of whether the employer’s coverage is primary or secondary to the Medicare Part D coverage. However, entities that contract directly with Medicare as a Part D plan or that contract with a Part D plan for qualified prescription drug coverage are excepted from this notice requirement. In addition, covered entities are generally required to provide annual notice of creditable or non-creditable coverage to CMS (additional guidance regarding this notice requirement will be forthcoming).

The reason for providing the notice of creditable coverage to Medicare-eligible individuals is to assist them in determining whether and when they should enroll in a Medicare Part D plan. If, after the end of the initial enrollment period, an eligible individual has no creditable coverage for a continuous period of sixty-three (63) days or longer, he/she will be subject to a late enrollment penalty if he/she subsequently enrolls in a Medicare Part D plan. That penalty will be a higher premium, which equals the amount of the applicable premium increased by at least 1% for each month that the individual did not have creditable coverage. However, individuals who maintain

creditable coverage, for example, by continuing their enrollment in an employer-sponsored retiree health plan that meets the Medicare creditable coverage standard, will not be subject to a late enrollment penalty if they decide to enroll in a Medicare Part D plan after their initial enrollment period ends.

Prescription drug coverage generally is considered to be “creditable” if the value of the prescription drug coverage for an individual is at least actuarially equivalent to the standard prescription drug coverage under Medicare Part D. The CMS guidance, however, provides an alternative test by which entities may determine whether their coverage is creditable without having to perform actuarial equivalence calculations. This alternative test provides relief for entities that do not intend to apply for the retiree drug subsidy available under Medicare Part D in that those entities do not need to have actuarial equivalence calculations performed. But entities that intend to apply for the subsidy will likely use the “at least actuarially equivalent” test to determine whether their coverage is creditable because that test, as well as other requirements, will need to be satisfied for them to apply for the retiree drug subsidy.

Specifically, under the alternative test, a prescription drug plan’s coverage is “creditable” if it:

- (1) provides coverage for brand name and generic prescriptions;
- (2) provides reasonable access to retail providers and, optionally, for mail-order coverage;
- (3) is designed to pay on average at least 60% of participants’ prescription drug expenses; and
- (4) has no annual maximum benefit or has an annual maximum benefit payable by the plan of at least \$25,000 (or has an actuarial expectation that it will pay at least \$2,000 per eligible individual in 2006). However, plans with integrated health plan coverage must have deductibles no greater than \$250 per year, a maximum annual benefit of at least \$25,000 (or no maximum annual benefit), and a lifetime combined maximum benefit of no less than \$1,000,000.

The CMS guidance provides model notices that entities may use to notify individuals as to whether their coverage is creditable or non-creditable. However, entities can opt to prepare their own notices rather than use the models, in which case CMS has provided the required and recommended language for such customized notices. In addition, the guidance provides that the notice may accompany other documents, such as a summary plan description or enrollment/renewal materials, but the entity is required to delineate clearly the notice so that Medicare-eligible individuals or those who will become Medicare-eligible will be aware of the importance of the notice. If certain additional requirements are met, the notice may be delivered electronically. The guidance issued by CMS does not specify whether any penalties or sanctions will apply if an employer or plan sponsor fails to provide the notice.

The notice must be provided at the following times:

- (1) as noted above, prior to November 15, 2005;
- (2) prior to the Part D annual coordinated election period (November 15–December 31) for each year (but the first initial enrollment period is extended to run from November 15, 2005 through May 15, 2006);

- (3) prior to an eligible individual's initial Medicare Part D enrollment period;
- (4) prior to the effective date of coverage for any Medicare-eligible individual who joins the plan;
- (5) whenever prescription drug coverage ends or changes so that it is no longer creditable or becomes creditable; or
- (6) upon request of a beneficiary.

Notably, the sample language and model notices provided by CMS only apply to the initial enrollment period of November 15, 2005–May 15, 2006. CMS intends to issue further guidance, including additional sample notice language, related to individuals who have initial enrollment periods for Part D benefits after May 15, 2006, and for use in future plan years.

If you would like further information regarding the issues raised in this Morgan Lewis LawFlash, please contact any of the following Morgan Lewis attorneys:

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