Legal ADVISORY
American Hospital Association™

Wednesday, November 13, 2013

HHS Encourages Insurers to Reject Hospital Subsidies for Patients in Need

AT A GLANCE

The Issue:

The Department of Health and Human Services (HHS) in two recent documents expressed conflicting views that have implications for hospitals and health systems that wish to subsidize premiums for health plans purchased on the health insurance exchanges for individuals in need of assistance. First, in an Oct. 30 letter to Rep. Jim McDermott (D-WA), HHS clarified that the federal Anti-Kickback Statute (AKS) does not apply to qualified health plans (QHPs) because QHPs and other programs related to federal or state health exchanges are not "federal health care programs." As a result, the AKS will not affect the ability of hospitals or health systems to offer these types of subsidies. However, in a question and answer document (Q&A) issued on Nov. 4 regarding third-party payments of premiums for QHPs, HHS said it has "significant concerns" with these types of subsidies and it "discourages this practice and encourages issuers to reject such third party payments."

Our Take:

The Nov. 4 Q&A does not alter HHS's determination that the exchanges and QHPs are not "federal health care programs" and, therefore, the AKS and certain other federal enforcement statutes do not apply. While it undoubtedly was intended to have a chilling effect on the willingness of hospitals to provide insurance subsidies for individuals in need, the Q&A appears to have no legal force or effect on hospitals (or insurers) and to be unenforceable. *If* HHS wanted to try to make this position enforceable, it would have to go through rulemaking. But even then, HHS's authority to adopt the views expressed in the Q&A is highly questionable. By statute, everyone (except incarcerated individuals and undocumented immigrants) is eligible to purchase any QHP offered through an exchange so long as the premium is paid. And the regulations implementing the federal premium tax credit clearly allow for another person or organization to pay the insurance premium for the enrolling individual. In any event, according to the HHS Director of Provider Outreach, the Q&A intentionally does not prevent a hospital from providing insurance subsidies for those in need through charitable organizations, such as a hospital's foundation or other charitable group whose mission is to provide assistance.

The attached advisory provides a legal analysis of the implications of the latest developments from HHS and is an update to our Oct. 10 *Legal Advisory* on subsidies.

What You Can Do:

Share this advisory with your leadership team, legal counsel and those in your organization responsible for your financial assistance program. If you are considering offering subsidies to pay for health insurance coverage, determine how to incorporate this type of assistance into your financial assistance policies.

Further Questions:

Please contact Maureen Mudron, deputy general counsel, at (202) 626-2301 or mmudron@aha.org, or Mindy Hatton, senior vice president and general counsel, at (202) 626-2336 or mhatton@aha.org.

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BACKGROUND

The new Health Insurance Marketplaces (or "exchanges") created by the *Patient Protection and Affordable Care Act* (ACA) are designed to give individuals, especially those who were previously uninsured, an opportunity to purchase health insurance coverage from a number of qualified health plans (QHPs). Recognizing that an individual's share of the cost of a premium may be prohibitive, even with a federal premium subsidy, several hospitals and health systems have inquired whether there are any legal barriers to providing premium assistance if they wish to do so. The federal anti-kickback statute (AKS) and federal tax exemption laws were identified as potential barriers.

This advisory provides a legal analysis of the implications of the latest developments at HHS regarding subsidies and is an update to the *Legal Advisory* on subsidies issued on Oct. 10, 2013.

AS IT STANDS

The Department of Health and Human Services (HHS) in two recent documents expressed conflicting views that have implications for hospitals and health systems that wish to subsidize premiums for health plans purchased on the health insurance exchanges for individuals in need of assistance.

Federal Anti-Kickback Statute

First, in an Oct. 30 letter to Rep. Jim McDermott (D-WA), HHS clarified that the federal AKS does not apply to QHPs because QHPs and other programs related to federal or state health exchanges are not "federal health care programs."

In the letter, HHS stated: "This conclusion was based upon a careful review of the definition of 'federal health care program' and an assessment of the various aspects of the [relevant programs] of the Affordable Care Act and consultation with the Department of Justice." HHS noted the various program integrity and other oversight measures that

were in place for the exchange programs, as well as the potential application of the *False Claims Act* and other statutes depending on the specific conduct in question. This was an important step toward clearing potential barriers to expanding access to health insurance coverage and health care for uninsured individuals. HHS clearly removed the AKS as a potential barrier and, as a result, the AKS will not affect the ability of hospitals or health systems to offer premium subsidies.

HHS "Q&A"

On Nov. 4, however, HHS inexplicably changed course on removing barriers in a single-paragraph question and answer document (Q&A) stating that it has "significant concerns" about these types of subsidies and "discourages this practice and encourages issuers to reject such third party payments."

HHS stated: "It has been suggested that hospitals, other health care providers, and other commercial entities may be considering supporting premium payments and cost-sharing obligations with respect to qualified health plans purchased by patients in the Marketplaces. …HHS intends to monitor this practice and to take appropriate action, if necessary."

While HHS may have broad authority to issue regulations to set standards for the offering of QHPs through the exchanges and "such other requirements as the Secretary [of HHS] determines appropriate," its attempt to discourage hospitals from offering premium subsidies finds no support in the ACA statute or regulations. The Q&A appears to have no legal force or effect on hospitals (or insurers) and to be unenforceable.

Even if HHS has the authority to establish a policy either preventing hospitals from providing premium assistance to uninsured individuals, or permitting insurers to reject enrollees who received such assistance, it could do so only through regulation. That means that HHS first would have to go through the rulemaking process – publish a notice about the policy explaining the agency's rationale and providing data or other evidence to support its policy decision, and provide hospitals and other stakeholders a meaningful opportunity to comment on both the policy and any supporting evidence.

Even if HHS went through the rulemaking process, it is far from clear that HHS could justify either of the policies described above. The single paragraph Q&A offers no explanation, facts or other evidence to support HHS's purported concerns. Instead, HHS simply asserts that premium assistance to uninsured individuals "could skew the insurance risk pool and create an unlevel field in the Marketplaces." In other words, the Q&A is not even a persuasive argument supporting the agency's non-binding views.

In addition, such a policy would undermine one of the core objectives of the ACA – making more affordable insurance coverage available to the uninsured – and worse, would do so for those poor and sick individuals most in need of health insurance. The entire "Marketplace" approach is based on the notion that any individual (with limited exceptions for incarcerated individuals and undocumented immigrants) can choose to

purchase any QHP offered through an exchange. As long as the premium for that plan is paid, the insurer has to accept that individual and enroll him or her in the chosen plan (again, with limited exceptions). As in any other commercial market, it should not matter who actually pays the insurance premium – the enrollee, the enrollee's relative, or another person or organization.

In fact, the regulations implementing the federal premium tax subsidy clearly contemplate that, in many cases, another person or organization might pay the premium for an individual to enroll in a QHP. **For purposes of determining whether an individual is eligible for a federal premium tax credit for a given month, the regulations provide that premiums paid by "another person," such as by another individual or by an Indian tribe, are treated as "paid by the [enrollee]."** In other words, an individual enrolled in a QHP can be eligible for a federal subsidy if another person pays for that individual's insurance premium. Thus, it is contrary to the regulations to encourage insurers to reject premium payments made by certain third parties on behalf individuals enrolling in that insurer's QHP. (The hospital would still need to ensure that its involvement in the process of assisting a patient to enroll in a QHP is consistent with federal and state law including health privacy and conflict of interest rules.)

Finally, it is important to recognize that the Q&A does not express concerns about other charitable organizations providing premium subsidies to the uninsured. The views expressed in the Q&A apply to third-party payments offered by only "hospitals, other healthcare providers, and other commercial entities." **As result, the Q&A would not apply to hospital-affiliated charitable foundations and unrelated charitable organizations that wish to offer this type of premium assistance as part of their mission.** This is especially important for individuals residing in states that have chosen not to expand their Medicaid programs and could help fill the gap in making affordable coverage available to meet the needs in those communities.

Tax Exemption Considerations

The AHA continues its efforts to obtain confirmation from the Internal Revenue Service (IRS) that tax exempt hospitals may provide premium subsidies for individuals in need of financial assistance without jeopardizing their tax-exempt status. We believe that existing IRS precedent strongly supports a determination that providing this type of subsidy advances the charitable purpose of hospitals and that any benefit to insurers is incidental to achieving the larger public good of making health care available to those with financial need.

The ACA requires tax-exempt hospitals to have a written financial assistance policy that describes the criteria that will be applied and the financial assistance that will be provided to help patients afford health care. Premium subsidies could be one form of financial assistance. To the extent that premium subsidies provide a benefit to a private health insurance company, that benefit would be incidental in the same way that any benefit to drug and medical device suppliers is incidental when the hospital purchases their products as part of providing free care to a needy patient. IRS rulings recognize

that when private benefit is only incidental to achieving a charitable purpose, it does not jeopardize exemption (e.g., a hospital subsidizing liability insurance for a physician recruited to serve unmet needs in the community).

FURTHER QUESTIONS

Please contact Maureen Mudron, deputy general counsel, at (202) 626-2301 or mmudron@aha.org, or Mindy Hatton, senior vice-president and general counsel, at (202) 626-2336 or mhatton@aha.org.