National Business Group on Health®

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Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

Specific Comments Related to the 2020 NBPP

- The current preamble and regulations create a gray area of compliance for group health plans related to copay accumulator programs. Many employers have copay accumulator programs in place and perceived restrictions on their utility could trigger a severe disruption, to the extent those within the health care industry are unclear on how to interpret the rules. The August 26, 2019 FAQ was helpful in clarifying and we recommend that CMS amend the regulatory language accordingly, to be consistent with the FAQ.[i]
- Employers view cost-sharing designs—including those involving prescription drug direct support programs—as integral to overall plan design strategy. Prohibiting use of copay accumulators, for example, would require a substantial change to many group health plan designs.
- Because large employers often finalize plan designs 6-9 months before the beginning of a given plan year, eliminating features such as copay accumulators generally would require at least 1 year of advance notice for any rule change.
- Our members remain concerned that the widespread use of prescription drug coupons and other direct support programs artificially inflates prices for employer-sponsored group health plans – for both plan sponsors and participants.
- Our members are concerned that many direct support programs are designed such that patients who use them may violate rules under Internal Revenue Code section 223 for HSA/HDHP arrangements – particularly when these programs are designed to circumvent deductibles. Having uniform rules for HSA/HDHP arrangements and other group health plans is critical to efficient plan design.
- Finally, our most recent Plan Design Survey shows that employers are increasing their efforts to control prescription drugs costs through copay accumulators and other plan designs.

Background: The Availability of Copay Coupons is Growing and is Increasing Costs

A study published last year estimated that drug copay coupons increased retail drug spending by up to 4.6-percent, with each 1-percent increase corresponding to about $1.5 billion in higher drug spending annually.[ii] The researchers estimated that copay coupons increased retail spending of branded drugs by up to $2.74 billion. The study also found that copay coupons meaningfully reduce the use of generic drugs and increase the utilization of branded drugs by up to 60 percent. A separate analysis found that, for 200 of the highest-expenditure drugs in 2014 with available coupons, only 12% had no therapeutic or generic substitute.[iii]

Proliferation of copay cards[iv]

- There were 75 drugs that had copay cards in 2009; by 2015, there were 700.
- An estimate 80% of specialty drug products currently have copay card programs.
- Copay cards were used in 10% of all prescriptions in 2015, and this figure continues to increase.
- One recent study suggested that copay cards will generate up to $32B in additional health care costs over the next decade.

Copay Accumulator Programs

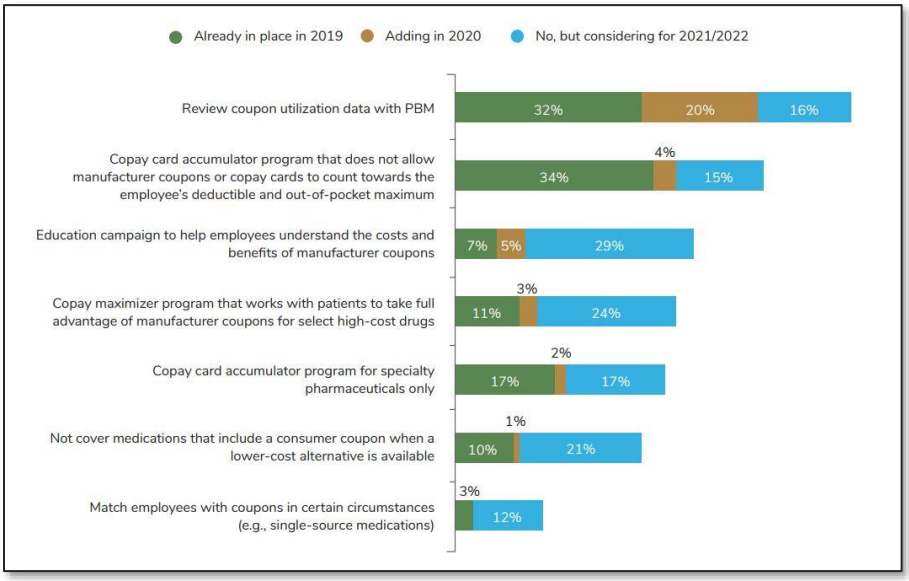
To protect the enforceability of plan terms and conditions, and control prescription drug expenditures, many employers have implemented policies to ensure that copay card payments will not count towards meeting required deductibles and out-of-pocket maximums. Two programs to address third-party copay assistance programs are on the rise. Copay accumulator programs will grow 31% from 2019 to 2020. A smaller percent of employers (14%) will leverage copay maximizer programs next year.

Additional Considerations

> "Pharmaceutical companies undercut a key safeguard against rising drug costs when they create assistance funds to serve as conduits for the companies to subsidize the copays of their own drugs."
>
> ***Assistant Attorney General Jody Hunt of the Department of Justice's Civil Division***

- Restrictions on accumulator programs may lead to higher premiums for participants.
- Employers have a fiduciary duty toward the plan as a whole and are required to consider overall plan costs, not just deductibles and out-of-pocket costs for individual participants.
- The Anti-Kickback Statute prohibits a pharmaceutical company from offering or paying, directly or indirectly, any remuneration — which includes money or any other thing of value — to induce Medicare or ChampVA patients to purchase the company's drugs. This prohibition extends to the payment of patients' copay obligations.[v]
- If permissible in the commercial market for prescription drugs, what is to stop the proliferation of these types of kickback schemes for other health care services, further undermining plan design and threatening the financial integrity of the health care system?

Large Employer Tactics to Address Consumer Coupon Cards, 2019-2022



[i] "FAQS ABOUT AFFORDABLE CARE ACT IMPLEMENTATION PART 40," n.d., 3.
[ii] "Assessing the Legal and Practical Implications of Copay Accumulator and Maximizer Programs," Managed Care magazine, February 13, 2019, https://www.managedcaremag.com/archives/2019/2/assessing-legal-and-practical-implications-copay-accumulator-and-maximizer-programs.
[iii] "Copay Coupons: There's More to the Story," Pharmaceutical Commerce, February 16, 2018, https://pharmaceuticalcommerce.com/brand-marketing-communications/copay-coupons-theres-story/.
[iv] "Prescription Drug Copayment Coupon Landscape," *USC Schaeffer* (blog), February 7, 2018, https://healthpolicy.usc.edu/research/prescription-drug-copayment-coupon-landscape/.
[v] "Three Pharmaceutical Companies Agree to Pay a Total of Over $122 Million to Resolve Allegations That They Paid Kickbacks Through Co-Pay Assistance Foundations," April 4, 2019, https://www.justice.gov/opa/pr/three-pharmaceutical-companies-agree-pay-total-over-122-million-resolve-allegations-they-paid.