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Under the ACA, most health plans must cover women's preventive services, including contraception, without charging a co-pay or deductible. The interim final rules provided that group health plans established or maintained by religious employers were exempt from these requirements. Guidance issued subsequent to the final rules established a temporary enforcement safe harbor for group health plans established or maintained by certain non-profit organizations that have religious objections to contraceptive coverage. The safe harbor is in effect until the first plan year that begins on or after August 1, 2013.

The Obama administration has issued proposed rules regarding this matter. These proposed rules provide women with coverage for preventive care that includes contraceptive services with no co-pays, while respecting the concerns of some religious organizations. The rules provide that non-profit religious organizations, such as non-profit religious hospitals or institutions of education, that object to contraception on religious grounds can receive an accommodation that provides their enrollees separate contraceptive coverage, and with no co-pays, but at no cost to the religious organization. These proposed rules will be finalized before the end of the temporary enforcement safe harbor.

The proposed rules define an organization eligible for the accommodations as one that:

- opposes providing coverage for some or all of any contraceptive services required to be covered, on account of religious objections;
- is organized and operates as a non-profit entity;
- holds itself out as a religious organization; and
- self-certifies that it meets these criteria and specifies the contraceptive services for which it objects to providing coverage.

The accommodations provide that eligible organizations would not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds. Participants of eligible organizations would receive contraceptive coverage through separate individual health insurance policies, without cost-sharing or additional premiums (neither the religious organization nor the enrollees would be charged). For fully insured plans, an eligible organization will need to provide its self-certification to the insurance carrier, which would automatically provide

separate, individual market contraceptive coverage at no cost for participants. For self-insured plans, the self-certification would be provided to the third-party administrator, which would then automatically work with an insurance carrier to provide separate individual health insurance policies at no cost for participants.

Eligible religious non-profit organizations that are institutions of higher education that arrange for student health insurance may also use an accommodation comparable to that of an eligible organization that is an employer with an insured group health plan.

Definition of “Religious Employer”

The proposed rules also simplify the existing definition of a “religious employer” as it relates to contraceptive coverage. The rule eliminates the criteria that a religious employer (a) have the inculcation of religious values as its purpose; (b) primarily employ persons who share its religious tenets; and (c) primarily serve persons who share its religious tenets. For purposes of the exemption, the simple definition follows a section of the Internal Revenue Code, and would primarily include churches, other houses of worship, and their affiliated organizations.

For-Profit Organizations

The proposed rules do not change the existing rules that will require for-profit organizations to provide contraceptive coverage under this provision, despite religious objections. This contraceptive mandate has been challenged in a number of lawsuits throughout the country and it is likely we will see this issue reach the Supreme Court in the future.

