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Transparency in Coverage Rules: When Accurate Estimates for Low?Utilization Items and Services Are Not Available

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Last week, the Departments of Labor, Treasury and Health and Human Services ("the Departments") issued an FAQ about the final Transparency in Coverage rules ("TiC Rules"). This FAQ addresses compliance with cost-sharing disclosure requirements where a plan is providing cost estimates based on claims data but there is extremely low utilization of the item or service at issue.

TiC Overview

The TiC Rules require non-grandfathered health plans (and health insurance issuers) to make certain cost-sharing and pricing information available to participants and beneficiaries. The requirements first applied to 500 specified items and services in 2023, and expanded to all covered items and services for plan years starting on or after January 1, 2024.

- **Upon request**: For a covered item or service, individuals can request in-network cost-sharing information or information about out-of-network allowed amounts (the plan may limit responses to no fewer than 20 providers per request). The requesting participant or beneficiary may specify the information necessary for the plan to provide meaningful information about their cost-sharing liability (e.g., prescription dosage).
- **Internet-based self-service tool**: Plans must make available to participants and beneficiaries an internet-based self-service tool that provides accurate estimates (as of the time of request) regarding cost-sharing with respect to an item or service. While these estimates are generally based on contracted rates, plans may also use advanced analytics such as past claims data to arrive at more accurate estimates. If prospective dollar rates are not negotiated, estimates may be based entirely on past claims data, which can present a challenge if utilization of the item or service is very low.

The TiC Rules also require publicly posting machine-readable files detailing (i) in-network provider rates, (ii) out-of-network allowed amounts and billed charges, and (iii) negotiated rates and historical net prices for covered prescription drugs. While this requirement was technically in effect earlier, plans saw some relief as a result of two different non-enforcement policies. Those non-enforcement policies were revoked on September 27, 2023. More information is available in our blog post discussing this revocation.

FAQ on Low-Utilization Items and Services

The Departments recognize that estimates may not be accurate for items and services with extremely low utilization rates. Accordingly, in this FAQ they announced that they are likely to exercise discretion to not bring an enforcement action where a plan fails to provide certain information with respect to these items and services. This exercise of discretion is limited to cost-sharing information otherwise required to be provided to the participant or beneficiary (through the self-service tool or in hard copy or by phone) where:

1. The cost estimate would need to be based on past claims data AND
2. There have been fewer than 20 claims in the past three years.

In these cases, the self-service tool should indicate that the item or service is covered, but that a cost estimate is not available pursuant to the TiC Rules due to insufficient data, and should encourage the individual to contact the plan for more information on applicable cost-sharing requirements. Where the participant or beneficiary reaches out to the plan directly (rather than using the self-service tool), the plan should provide all available relevant information (e.g., information available on the Summary of Benefits and Coverage, or the portion of costs that the individual will be responsible for).

Proskauer Perspective

After a number of delays, the Departments are now looking to enforce the TiC Rules, but appear to recognize that there are certain costs and services where accurate estimates are difficult to produce and an estimate based on the data available might not be useful to participants and beneficiaries. Plan sponsors should be focused on compliance with the TiC Rules given their applicability beyond the 500 listed items and services from last year, and look to guidance by the Departments as questions like this arise.

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