MY BENEFIT ADVISOR

Final Rules Address the Contraceptives Mandate

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The Affordable Care Act ("ACA") requires non-grandfathered group health plans to cover certain mandated preventive care services, including contraception, at no cost. This requirement does not apply to grandfathered plans.

On July 14, 2015, the Departments of Labor, the Treasury, and Health & Human Services (jointly, "the Departments") issued final regulations. Briefly the guidance:

- Defines a closely held for-profit employer.
- Describes how a closely held for-profit employer may claim an accommodation and avoid providing contraceptive services that violate religious beliefs.
- Describes an alternative notice process for entities that object to completing the EBSA Form 700 to claim an accommodation.
- Outlines the process for third party administrators (TPAs) to provide contraceptives when a health plan claims an accommodation.

These regulations are effective for plan years beginning on or after October 1, 2015.

Background

Beginning in 2012, the requirement to provide certain preventive care services included coverage of all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a health care provider (collectively, contraceptive services). Religious employers are exempt from the contraceptives requirement. Additionally, non-profit religious organizations that oppose providing some or all of the required contraceptive services based on religious beliefs (eligible organizations) could qualify for an accommodation by self-certifying their objections using EBSA Form 700. This removed the burden from the non-profit and imposed the requirement to provide free contraceptives on the carriers and TPAs without cost to the individual or the plan.

Before the Hobby Lobby decision no accommodation was available to a for-profit company. Hobby Lobby, a closely held for-profit entity, challenged the contraceptive services portion of the preventive care mandate, as the organization felt the requirement interfered with religious beliefs. The case made its way to the U.S. Supreme Court and on June 30, 2014, the Court found the contraceptives mandate violated Hobby Lobby's rights under the Religious Freedom Restoration Act of

1993 (RFRA). Over a year after this ruling, the Departments issued final regulations that incorporate for-profit companies into the accommodation process.

Eligible Organizations

The regulations finalize the definition of an eligible organization for purposes of qualifying for an accommodation. An eligible organization is an organization that opposes providing coverage for some or all contraceptive items and services on account of religious objections and is either:

- organized and operated as a non-profit entity and holds itself out as a religious organization; or
- organized and operated as a closely held for-profit entity and the highest governing body (e.g., board of directors, board of trustees, or owners if managed directly by its owners) has adopted a resolution or other similar action establishing that it objects to covering some or all contraceptive services on account of the owner's sincerely held religious beliefs.

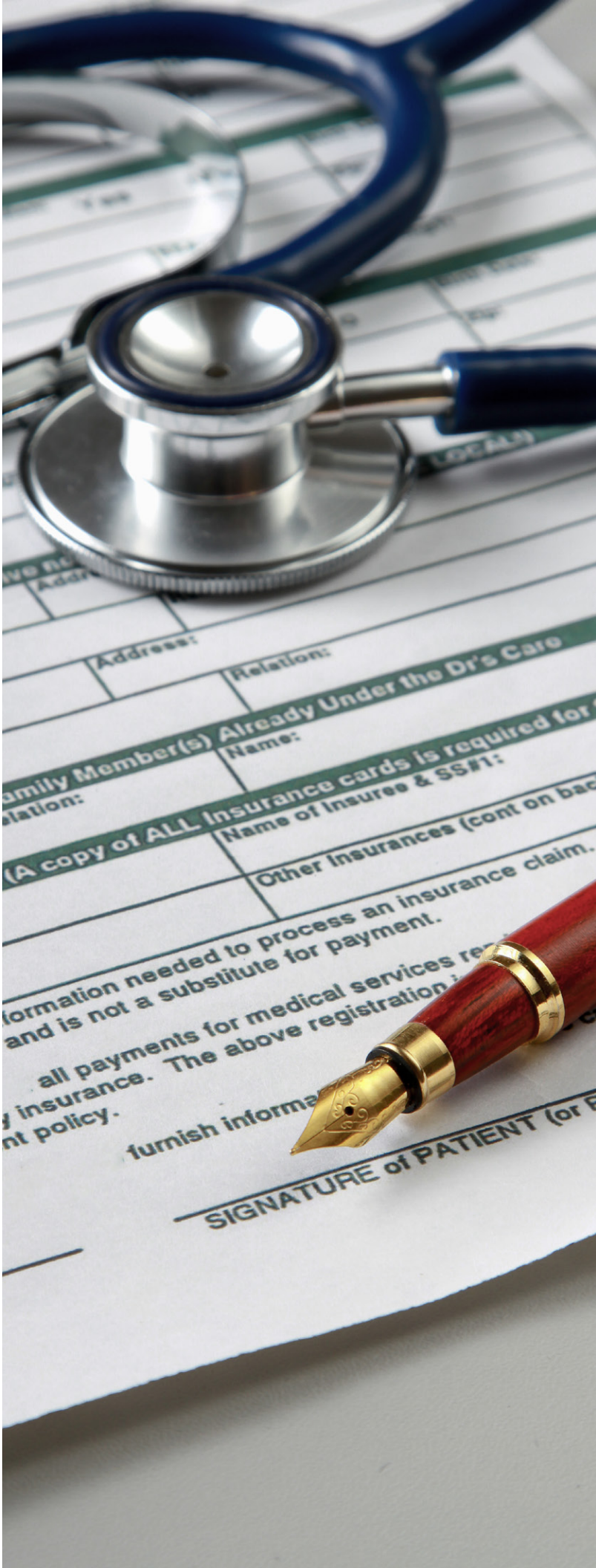
Closely Held For-Profit Entity

A closely held for-profit entity, not previously defined, is defined as an entity that:

- is not a non-profit entity;
- has no publically traded ownership interests; and
- has more than 50% of the value of its ownership interest owned directly or indirectly by five or fewer individuals4 (or an ownership structure that is substantially similar to these requirements) as of the date of the entity's self-certification or notice.

For purposes of the 50% threshold (or substantially similar ownership interest), the Departments lay out specific ownership interest considerations that are consistent with other areas of tax law.

Additionally, a for-profit entity may seek clarification from HHS as to whether it qualifies as a closely held entity. The for-profit entity may send a letter describing the ownership structure to HHS. If no response is received by HHS within 60 calendar days, the requirement is deemed to be satisfied so long as the entity maintains that structure.



Process for Eligible Organizations

To qualify for the accommodation, the organization (non-profit or closely held for-profit) must self-certify status consistent with HHS rules.

1. **EBSA Form 700.** A person authorized to make a certification on behalf of an employer must execute the Form 700 and provide it to the TPA or carriers. The certification must be made available for examination upon request by the first day of the first plan year to which the accommodation applies. It should be maintained consistent with the record retention requirements under ERISA (generally 8 years from the start of the plan year for which the certification relates).

For a copy for EBSA Form 700, visit: http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc

2. **Other Notice.** Alternatively, the authorized person may provide notice to HHS that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services. The notice must contain specific information requested by HHS, including names and contact information for any carriers or TPAs. This is outlined in greater detail in the Model Notice at: http://www.dol.gov/ebsa/modelnoticetosecretaryofhhs.doc

Under this option, HHS will send a separate notification to each of the plan's TPAs informing them of receipt of this notice and their obligations with respect to providing contraceptives coverage at no cost to the employee or the plan. In the case of a self-insured group health plan, the DOL will coordinate with HHS to notify the TPAs.

Process for Carriers and TPAs

Insured Health Plans

When the certification is provided by the eligible organization to the carrier or notice is provided by HHS to the carrier, the carrier has the sole responsibility for providing the contraceptive coverage. This must be provided without cost-sharing or a premium, fee or other charge to the eligible organization, the health plan, or participants or beneficiaries.

Self-Insured Health Plans

When the certification is provided by the eligible organization to the TPA or notice is provided by the DOL to the TPA and the TPA agrees to enter into or remain in a contractual relationship with the eligible organization, the TPA will provide or arrange payments for contraceptive services under one of the following methods:

1. Provide payment for contraceptive services for plan participants and beneficiaries; or

2. Arrange for a carrier to provide payments for the contraceptive services for plan participants and beneficiaries to the TPA.

In either case, the TPA may not impose any cost-sharing or a premium, fee, or other charge on the eligible organization, the health plan, or participants or beneficiaries. Both the TPA and carrier may be reimbursed for the cost of arranging such payments though an adjustment to the federally-facilitated Exchange user fee for a participating issuer.

What's Next?

The preventive care requirements remain an area of litigation as ongoing challenges reflect objection to the completion of the Form 700 based on religious beliefs. It may revisit the Court in an upcoming session. Keep in mind that just because a non-profit or closely held for-profit may be excused from the contraceptive requirement under these regulations, there may be other laws that are not as forgiving. For example, following the Hobby Lobby decision, the EEOC came out with guidance stating the Pregnancy Discrimination Act ("PDA") requires an employer providing prescription drugs, devices, or services for the prevention of medical conditions other than pregnancy must cover prescription contraceptives on the same basis. At this point, it is unclear if an entity can successfully apply the same logic of RFRA to the PDA. If employers intend to rely on this accommodation, they should consult with counsel. Interested employers should determine eligibility for an accommodation under the standards described above and review potential qualification for relief. Advice of counsel is recommended.