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Final Guidance Released on Research Fees

The Affordable Care Act (ACA) established a private, nonprofit corporation called the Patient-Centered Outcomes Research Institute (Institute). The Institute's task is to help patients, policymakers and health care providers make informed health decisions by advancing evidence-based medicine through comparative clinical effectiveness research.

ACA requires health insurance issuers and sponsors of self-insured health plans to pay fees to help finance the Institute's research. These fees are widely known as Patient-Centered Outcomes Research Institute fees (**PCORI fees**), although they may also be called PCOR fees or comparative effectiveness research (CER) fees.

On Dec. 5, 2012, the Internal Revenue Service (IRS) issued **final regulations** on the PCORI fees. The final regulations adopt the proposed regulations that the IRS issued on the PCORI fees in April 2012, with a few modifications.

On May 28, 2013, the IRS released an **updated Form 720** that includes a section where issuers and plan sponsors will report and pay the PCORI fee. The IRS also released updated instructions along with the revised form.

WHEN ARE THE FEES EFFECTIVE?

The PCORI fees apply for **plan years ending on or after Oct. 1, 2012**. The PCORI fees do *not* apply for plan years ending on or after Oct. 1, 2019. For calendar year plans, the research fees will be effective for the 2012 through 2018 plan years.

HOW MUCH ARE THE FEES?

For plan years ending before Oct. 1, 2013 (that is, 2012 for calendar year plans), the research fee is **$1** multiplied by the average number of lives covered under the plan. For plan years ending on or after Oct. 1, 2013, and before Oct. 1, 2014, the fee is **$2** multiplied by the average number of lives covered under the plan. For plan years ending on or after Oct. 1, 2014, the PCORI fee amount will grow based on increases in the projected per capita amount of National Health Expenditures.

The PCORI fees are based on the average number of covered lives under the plan or policy. This generally includes employees and their enrolled spouses and dependents. Individuals who are receiving **continuation coverage** (such as COBRA coverage) must be included in the number of covered lives under the plan in calculating the PCORI fee. The final regulations outline a number of alternatives for issuers and plan sponsors to determine the average number of covered lives.

WHO PAYS THE FEES?

The PCORI fees generally apply to insurance policies providing accident and health coverage and self-insured group health plans. The final regulations contain some exceptions to this general rule and also clarify how the PCORI fees apply to certain types of health coverage arrangements.

For example, the final regulations explain that the PCORI fees do not apply if substantially all of the coverage under a plan or policy is for excepted benefits, as defined under HIPAA. The regulations also clarify that the PCORI fees may apply to retiree-only plans and policies, even though retiree-only coverage is exempt from many of ACA's other requirements.

SPECIAL RULE FOR HRAS AND HEALTH FSAS

The final regulations do not provide an overall exemption from the PCORI fees for health reimbursement arrangements (HRAs). However, the final regulations do provide two special rules for plan sponsors that provide an HRA or health FSA. Under these special rules, if a plan sponsor maintains only an HRA or health FSA (and no other applicable self-insured health plan), the plan sponsor may treat each participant's account as covering a single life. This means that the plan sponsor is not required to count spouses or other dependents.

In addition, an HRA is not subject to a separate research fee if it is integrated with another self-insured plan providing major medical coverage, as long as the HRA and the plan are established and maintained by the same plan sponsor and have the same plan year. This rule allows the sponsor to pay the PCORI fee only once with respect to each life covered under the HRA and the other plan.

If an HRA is integrated with an insured group health plan, the plan sponsor of the HRA and the issuer of the insured plan will both be subject to the research fees, even though the HRA and insured group health plan are maintained by the same plan sponsor.

The same analysis applies to health flexible spending accounts (FSAs) that do not qualify as excepted benefits.

HOW ARE THE FEES REPORTED AND PAID?

The final regulations direct issuers and plan sponsors to pay the PCORI fees once a year on IRS Form 720 (Quarterly Federal Excise Tax Return). Form 720 and full payment of the research fees will be due by **July 31** of each year. It will generally cover plan years that end during the preceding calendar year. Thus, the first possible deadline for filing Form 720 is July 31, 2013.

On May 28, 2013, the IRS released an **updated Form 720** that includes a section where issuers and plan sponsors will report and pay the PCORI fee. The IRS also released updated instructions along with the revised form.

On Jan. 24, 2013, the Departments of Labor, Health and Human Services (HHS) and the Treasury (Departments) issued **ACA Implementation FAQs** that address payment of PCORI fees from plan assets. In general, because the fee is imposed on the plan sponsor and not on the plan itself, the plan sponsor must pay the fee outside the plan, meaning that **plan assets cannot be used to pay the fee**. However, there are certain circumstances in which PCORI fees may be paid from plan assets.

Multiemployer Plans

In the case of a multiemployer plan, the plan sponsor liable for the PCORI fee would generally be the independent joint board of trustees appointed and directed to establish the employee benefit plan. According to the Departments, a multiemployer plan’s joint board of trustees would be **permitted to pay PCORI fees from assets of the plan**, unless the plan document specifies a source other than plan assets for payment of the fee.

Non-Multiemployer Plans

There may be rare circumstances where sponsors of employee benefit plans that are not multiemployer plans would also be able to use plan assets to pay the PCORI fee. For example, a VEBA that provides retiree-only health benefits may be able to use plan assets to pay a PCORI fee if the sponsor is a trustee or board of trustees that:

- Exists solely for the purpose of sponsoring and administering the plan; and
- Has no source of funding independent of plan assets.

However, this exception would not necessarily apply to other plan sponsors required to pay the PCORI fee. For example, a group or association of employers that act as a plan sponsor, but that also exist for reasons other than solely to sponsor and administer a plan, may not use plan assets to pay the fee even if the plan uses a VEBA trust to pay benefits under the plan. These entities or associations, such as employers that sponsor single employer plans, would have to identify and use some other source of funding to pay the PCORI fee.

ARE THE PCORI FEES DEDUCTIBLE?

On May 31, 2013, the IRS issued a Chief Counsel Memorandum addressing the deductibility of the PCORI Fees. According to the IRS, the required PCORI fee will be an ordinary and necessary business expense paid or incurred in carrying on a trade or business and, therefore, will be deductible under Section 162 of the Internal Revenue Code.

Please contact Gowrie Group for additional information on PCORI fees.