



Date: March 14, 2014

Subject: Frequently Asked Question on Coverage of Same-Sex Spouses

On February 27, 2013, the Centers for Medicare & Medicaid Services (CMS) published final regulations implementing section 2702 of the Public Health Service Act (PHS Act).¹ Section 2702 of the PHS Act requires health insurance issuers offering non-grandfathered health insurance coverage in the group or individual markets (including qualified health plans offered through Affordable Insurance Exchanges or “Exchanges”²) to guarantee the availability of coverage unless one or more exceptions applies. The preamble to the final regulations (78 FR at 13417) indicates that discriminatory marketing practices or benefit designs represent a failure by health insurance issuers to comply with the guaranteed availability requirements, and the final regulations at 45 CFR 147.104(e) establish certain marketing and nondiscrimination standards in the regulation text. The following serves to clarify the meaning of the terms used in 45 CFR 147.104(e) for the purposes of describing the requirements health insurance issuers must meet to ensure guaranteed availability of coverage.

Q: If a health insurance issuer in the group or individual market offers coverage of an opposite-sex spouse, may the issuer refuse to offer coverage of a same-sex spouse?

No. Federal regulations at 45 CFR 147.104(e) provide that a health insurance issuer offering non-grandfathered group or individual health insurance coverage cannot employ marketing practices or benefit designs that discriminate on the basis of certain specified factors. One such factor is an individual’s sexual orientation. As CMS has used the terms in this regulation, an issuer is considered to employ marketing practices or benefit designs that discriminate on the basis of sexual orientation if:

- (1) The issuer offers coverage of an opposite-sex spouse; and
- (2) The issuer chooses not to offer, on the same terms and conditions as those offered to an opposite-sex spouse, coverage of a same-sex spouse based on a marriage that was

¹ Patient Protection and Affordable Care Act; Health Insurance Market Rules; Rate Review, 78 FR 13406 (February 27, 2013).

² Exchanges are also known as Health Insurance Marketplaces or “Marketplaces.”

validly entered into in a jurisdiction³ where the laws authorize the marriage of two individuals of the same sex, regardless of the jurisdiction in which the insurance policy is offered, sold, issued, renewed, in effect, or operated, or where the policyholder resides.

This section does not require a group health plan (or group health insurance coverage provided in connection with such plan) to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a plan sponsor to define a dependent spouse for purposes of eligibility for coverage under the plan. Instead, this section prohibits an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the option to cover same-sex spouses under the coverage on the same terms and conditions as opposite sex-spouses.

CMS is issuing this guidance to clarify the current regulations' prohibition against discrimination based on sexual orientation. This guidance operates to clarify these terms as CMS has used them in 45 CFR 147.104(e). This clarification is consistent with the policy of ensuring that all individuals have access to health coverage. At the same time, we recognize that some issuers may not have understood the prohibition as described in this guidance when designing their policies for the 2014 coverage year. Accordingly, while issuers are encouraged to implement this clarification for the 2014 coverage year, we expect issuers to come into full compliance with the regulations as clarified in this guidance no later than for plan or policy years beginning on or after January 1, 2015. We also expect States⁴ to begin enforcing the regulations in accordance with this clarification no later than for plan or policy years beginning on or after January 1, 2015. CMS will not consider a State to be failing to substantially enforce PHS Act section 2702 in connection with this clarification for earlier policy years.

³ For purposes of this guidance, the term "jurisdiction" means any domestic or foreign jurisdiction having the legal authority to sanction marriages.

⁴ For purposes of this guidance, the term "State" means each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.