

## **Additional Preventive Care Benefits Permitted to be Provided by a High Deductible Health Plan Under § 223**

### **NOTICE 2019-45**

#### **PURPOSE**

This notice expands the list of preventive care benefits permitted to be provided by a high deductible health plan (HDHP) under section 223(c)(2) of the Internal Revenue Code (Code) without a deductible, or with a deductible below the applicable minimum deductible (self-only or family) for an HDHP.

#### **BACKGROUND**

Section 223 of the Code permits eligible individuals to establish Health Savings Accounts (HSAs). Among the requirements to qualify as an eligible individual under section 223(c)(1) is that the individual be covered under an HDHP and have no disqualifying health coverage. Only eligible individuals under section 223(c)(1) are allowed to make contributions to an HSA or to receive contributions from an employer to their HSA. An HDHP is a health plan that satisfies certain requirements with respect to minimum deductibles and maximum out-of-pocket expenses.

Generally, under section 223(c)(2)(A), an HDHP may not provide benefits for any year until the minimum deductible for that year is satisfied. However, section 223(c)(2)(C) provides a safe harbor for the absence of a deductible for preventive care. Under section 223(c)(2)(C), “[a] plan shall not fail to be treated as a high deductible health plan by reason of failing to have a deductible for preventive care (within the meaning of section 1861 of the Social Security Act, except as otherwise provided by the Secretary).” Therefore, an HDHP may provide preventive care benefits without a deductible or, subject to any applicable requirements under section 2713 of the Public Health Service Act (PHS Act), with a deductible below the minimum annual deductible otherwise required by section 223(c)(2)(A). To be a preventive care benefit as defined for purposes of section 223, the benefit must either be described as preventive care for purposes of section 1861 of the Social Security Act (SSA) or be determined to be preventive care in guidance issued by the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS).<sup>1</sup>

Notice 2004-23 (2004-1 C.B. 725), and Q&As 26 and 27 of Notice 2004-50 (2004-2 C.B. 196), provide guidance on preventive care benefits allowed to be provided by an HDHP

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<sup>1</sup> The determination of whether an item or service is preventive care for these purposes is unrelated to the determination of whether an amount paid for an item or service is medical care under section 213(d) as an amount paid for the prevention of disease.

without regard to the minimum deductible requirement of section 223(c)(2)(A). Notice 2004-23 clarifies that preventive care generally does not include any service or benefit intended to treat an existing illness, injury, or condition.

Notice 2013-57 (2013-40 I.R.B. 293) provides that any item that is a preventive service under section 2713 of the PHS Act will also be treated as preventive care under section 223(c)(2)(C) of the Code.

Section 1001 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)(PPACA), added section 2713 to the PHS Act, requiring non-grandfathered group health plans and health insurance issuers offering group and individual health insurance coverage to provide benefits for certain preventive health services without imposing cost-sharing requirements.<sup>2</sup> The PPACA also added section 715(a)(1) to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815(a)(1) to the Code to incorporate the provisions of part A of title XXVII of the PHS Act, including section 2713, into ERISA and the Code. Guidance under section 2713 of the PHS Act is published jointly by the Treasury Department and IRS and the Departments of Labor and Health and Human Services (HHS).

Notice 2004-50, Q&A 26, provides that any treatment incidental or ancillary to preventive care services described in Notice 2004-23 is within the preventive care safe harbor if it would be unreasonable or impracticable to perform another procedure to treat the condition. Notice 2004-50, Q&A 27, provides that drugs or medications are preventive care when taken by a person who has developed risk factors for a disease that has not manifested itself or become clinically apparent, or to prevent the reoccurrence of a disease from which a person has recovered.

Notice 2018-12 (2018-12 I.R.B. 441) clarified that benefits for male sterilization or male contraceptives are not preventive care under the SSA, and no applicable guidance issued by the Treasury Department and the IRS provides for including these benefits in the definition of preventive care within the meaning of section 223(c)(2)(C). Accordingly, subject to certain transition relief, the notice provides that a health plan that provides benefits for male sterilization or male contraceptives before satisfying the minimum deductible for an HDHP under section 223(c)(2)(A) does not constitute an HDHP, regardless of whether the coverage of such benefits is required by state law.

## **PREVENTIVE CARE AND CHRONIC CONDITIONS**

The Treasury Department and the IRS have been directed to consider ways to expand the use and flexibility of HSAs and HDHPs consistent with the provisions of section 223

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<sup>2</sup> 42 U.S.C. 300gg-13.

and the appropriate standard for preventive care under section 223(c)(2)(C). Specifically, on June 24, 2019, President Trump issued Executive Order 13877,<sup>3</sup> “Improving Price and Quality Transparency in American Healthcare to Put Patients First,” including, among other things, an order that the Secretary of Treasury, to the extent consistent with law, issue guidance to expand the ability of patients to select HDHPs that can be used alongside an HSA, and that cover low-cost preventive care, before the deductible, that helps maintain health status for individuals with chronic conditions. In response to Executive Order 13877, the Treasury Department and the IRS are issuing this notice. The Treasury Department and the IRS continue to consider appropriate standards for differentiating between services and items that would be considered preventive care for purposes of section 223(c)(2)(C) and those that would not.

As explained above, in prior guidance the Treasury Department and the IRS have stated that preventive care generally does not include any service or benefit intended to treat an existing illness, injury, or condition. However, the Treasury Department and the IRS are aware that the cost barriers for care have resulted in some individuals who are diagnosed with certain chronic conditions failing to seek or utilize effective and necessary care that would prevent exacerbation of the chronic condition. Failure to address these chronic conditions has been demonstrated to lead to consequences, such as amputation, blindness, heart attacks, and strokes that require considerably more extensive medical intervention.

The Treasury Department and the IRS, in consultation with HHS, have determined that certain medical care services received and items purchased, including prescription drugs, for certain chronic conditions should be classified as preventive care for someone with that chronic condition. These medical services and items are limited to the specific medical care services or items listed in the attached Appendix for the chronic conditions specified in the Appendix. In making this determination, the Treasury Department and IRS are exercising the Secretary’s authority under section 223(c)(2)(C).

In determining that these particular medical services and items are classifiable as preventive care with respect to an individual with the relevant chronic condition, consistent with the structure and purposes of section 223, the Treasury Department and the IRS noted that each medical service or item, when prescribed for an individual with the related chronic condition, evidences the following characteristics:

- The service or item is low-cost;

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<sup>3</sup> 84 FR 30849 (Jun. 27, 2019).

- There is medical evidence supporting high cost efficiency (a large expected impact) of preventing exacerbation of the chronic condition or the development of a secondary condition; and
- There is a strong likelihood, documented by clinical evidence, that with respect to the class of individuals prescribed the item or service, the specific service or use of the item will prevent the exacerbation of the chronic condition or the development of a secondary condition that requires significantly higher cost treatments.

These criteria were used in determining the particular services and items listed in the Appendix, but this notice does not expand the scope of preventive care beyond the list. Therefore, services or items that meet (or may meet) the criteria but are not on the list are not treated as preventive care as a result of this notice or on any other basis (but see the Effect On Other Documents section of this notice regarding the continued applicability of previous guidance).

The Treasury Department and the IRS, in consultation with HHS, will periodically review the list of preventive care services and items listed in the Appendix and similar services and items to determine whether additional services or items should be added or any should be removed from the list. The periodic review is expected to occur approximately every five to ten years to promote stability and to avoid confusion by participants in, or sponsors or providers of, HDHP arrangements.

#### **LIST OF ADDITIONAL PREVENTIVE CARE SERVICES AND ITEMS FOR CHRONIC CONDITIONS THAT MAY BE TREATED AS PREVENTIVE CARE FOR PURPOSES OF SECTION 223(c)(2)(C)**

The Treasury Department and the IRS consider benefits for services and items set forth in the Appendix to this notice as preventive care for purposes of section 223(c)(2)(C). These specified services and items are treated as preventive care only when prescribed to treat an individual diagnosed with the associated chronic condition specified in the Appendix, and only when prescribed for the purpose of preventing the exacerbation of the chronic condition or the development of a secondary condition. If an individual is diagnosed with more than one chronic condition, all listed services and items applicable to the two or more conditions are preventive care. However, services and items not listed in the Appendix that are for secondary conditions or complications that occur notwithstanding the preventive care are not treated as preventive care for purposes of section 223(c)(2)(C).

#### **EFFECT ON OTHER DOCUMENTS**

Any services and items that constitute preventive care under the guidance in Notice 2004-23, Notice 2004-50, and Notice 2013-57 continue to be treated as preventive care for purposes of section 223. Although this notice clarifies that benefits for the specified services and items for individuals with the specified chronic conditions listed in the Appendix are preventive care for purposes of section 223(c)(2)(C), it does not treat these services and items as preventive care required to be provided without cost sharing for purposes of section 2713 of the PHS Act. Accordingly, this notice does not affect the definition of preventive care provided in § 54.9815-2713.

#### **EFFECTIVE DATE**

This notice is effective as of July 17, 2019.

#### **DRAFTING INFORMATION**

The principal author of this notice is William Fischer of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes), though other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice, contact Mr. Fischer at (202) 317-5500 (not a toll-free number).

#### **ATTACHMENT**

**APPENDIX**

<b>Preventive Care for Specified Conditions</b>	<b>For Individuals Diagnosed with</b>
Angiotensin Converting Enzyme (ACE) inhibitors	Congestive heart failure, diabetes, and/or coronary artery disease
Anti-resorptive therapy	Osteoporosis and/or osteopenia
Beta-blockers	Congestive heart failure and/or coronary artery disease
Blood pressure monitor	Hypertension
Inhaled corticosteroids	Asthma
Insulin and other glucose lowering agents	Diabetes
Retinopathy screening	Diabetes
Peak flow meter	Asthma
Glucometer	Diabetes
Hemoglobin A1c testing	Diabetes
International Normalized Ratio (INR) testing	Liver disease and/or bleeding disorders
Low-density Lipoprotein (LDL) testing	Heart disease
Selective Serotonin Reuptake Inhibitors (SSRIs)	Depression
Statins	Heart disease and/or diabetes