The Affordable Care Act's Early Retiree Reinsurance Program Answers to Frequently Asked Questions

(Updated as of June 29, 2010)

This "Frequently Asked Questions" document is designed to help answer the questions that the Office of Consumer Information and Insurance Oversight has been receiving around the Early Retiree Reinsurance Program established as part of the Affordable Care Act and designed to give some much needed relief to early retirees and their employers. As employers begin to prepare and submit their applications, we will be updating this document frequently so please continue to check the site for updated questions and answers.

Definitions

Question: The definition of "early retiree" at 45 C.F.R. 149.2 states that, among other criteria, the individual "is not an active employee of an employer maintaining, or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such plan." (This criterion does not apply to individuals who might satisfy the definition of early retiree by virtue of being a spouse or dependent). The definition further states that the determination of whether an individual is not an active employee is made by the sponsor in accordance with the rules of its plan, but that an individual is presumed to be an active employee if, under the Medicare Secondary Payer (MSP) rules at 42 C.F.R. 411.104 and related Centers for Medicare & Medicaid Services' guidance, the person is considered to be receiving coverage by reason of current employment status. Under the regulation, this presumption applies whether or not the MSP rules actually apply to the sponsor. How does a sponsor resolve any discrepancy between its plan rules and the MSP rules with regard to whether any individual is an active employee for purposes of the Early Retiree Reinsurance Program?
Answer: *With respect to the Early Retiree Reinsurance Program, the U.S. Department of Health & Human Services (HHS) will generally defer to a plan's rules to determine whether a given individual is an active employee. Such plan rules should be a written plan document, published and in effect as of the day a claim for health benefits for an individual was incurred for which the sponsor seeks credit toward the $15,000 cost threshold or reimbursement, that indicates whether or not the individual in question is an active employee for all plan purposes. Absent such a document, or in situations in which the plan rules regarding the definition of active employee are vague and unclear, the determination of whether an individual is an active employee for purposes of the program, is determined by whether such individual is considered to be receiving coverage by reason of current employment status under the MSP rules at 42 C.F.R. 411.104 and related Centers for Medicare & Medicaid Services' guidance.*

Question: Under the regulatory definition of "early retiree" at 45 C.F.R. 149.2, an early retiree is an individual, who, among other criteria, is not an active employee of an employer maintaining or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such a plan. In instances when the plan sponsor is not an employer, does this mean that the individual cannot be an active employee of the sponsor?
Answer: *No. In instances when the plan sponsor is not an employer, the individual cannot be an active employee of an employer maintaining or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such a plan. This clarification to the regulatory definition of "early retiree" reflects what our intent was when drafting the definition.*

Question: When do different health benefit arrangements constitute different employment-based plans, as opposed to different benefit options within the same plan, for purposes of the Early Retiree Reinsurance Program?
Answer: *Plan sponsors should submit a separate Early Retiree Reinsurance Program (ERRP) application for each employment-based plan for which it intends to seek program reimbursement. Internal Revenue Service regulations at 26 C.F.R. 54.4980B-2 address the question of how the number of group health plans that an employer or employee organization maintains is determined, for purposes of COBRA. We believe that some of the principles articulated in that regulation can be applied to ERRP. Therefore, for purposes of ERRP, a sponsor may consider multiple health benefit arrangements as one employment-based plan, unless (1) it is clear from the instruments governing an arrangement or arrangements to provide health benefits that the benefits are being provided under separate plans, and (2) the arrangement or arrangements are operated pursuant to such instruments as separate plans. However, a multiemployer plan and a non-multiemployer plan are always* separate plans.

Question: How does a plan sponsor determine whether different health benefit arrangements within a single employment-based plan are different benefits options?
Answer: *The regulations at 45 C.F.R. § 149.2 define benefit option as "a particular benefit design, category of benefits, or cost-sharing arrangement offered within an employment-based plan." In its application, a sponsor must define each benefit option for which it might request program reimbursement. We believe it generally to be true that when a single employment-based plan uses different health insurance issuers or different third-party administrators (TPAs) for different health benefit arrangements, each such issuer or TPA is offering a different benefit design, category of benefits, and/or cost-sharing arrangement from each other. Therefore, in the portion of the application where the sponsor is required to identify each benefit option, the sponsor should identify each different health insurance issuer or TPA through which health benefits are provided or administered. We realize that a given health insurance issuer or TPA might offer multiple discrete benefit designs, categories of benefits, and/or cost-sharing arrangements. But for purposes of ERRP, we are not requiring sponsors to provide that level of detail.*

For example, within a single employment-based plan (as that term is defined in 45 C.F.R.

149.2), a sponsor offers a self-funded major medical arrangement administered by Third Party Administrator "A", as well as separate insured major medical coverage arrangements through Insurer "B" and Insurer "C". Insurer "C" offers both a "low" and a "high" option of major medical coverage. The self-funded arrangement and Insurer "B" offer prescription drug benefits through Prescription Benefit Manager "D", while Insurer "C" offers prescription drug benefits through Prescription Benefit Manager "E". The sponsor should assign names, and identifiers, to the arrangements provided by Third Party Administrator "A", Insurer "B", Insurer "C", Prescription Benefit Manager "D", and Prescription Benefit Manager "E." (The sponsor should assign only one name, and only one identifier, to the arrangement provided by insurer "C", notwithstanding the fact that Insurer "C" offers both a low and a high coverage option). The sponsor should list those names, and the identifiers, as the benefit option names and benefit option identifiers, respectively, in the application.

Applications

Question: Are Applications being accepted on a first-come, first-serve basis?
Answer: *For the Early Retiree Reinsurance Program, it's important to make the distinction between the application process and the claims process, which operate separately.*

All qualified applications will be approved. Applications will be processed in the order in which they are received.

Payments are made based on when claims are submitted, not when the employers' applications for the program were submitted. All employers who are accepted into the Early Retiree Reinsurance Program are eligible to receive reimbursement for costs incurred on or after June 1st, regardless of the date on which the employer was accepted into the program. Once an employer is accepted into the program, they can submit claims for their retirees and these claims will be processed in the order in which they are received.

Question: Is there a pre-determined number of applications that HHS is planning to accept?
Answer: *No. there is no predetermined number of applications that HHS will accept. All qualified applications will be approved. Applications will be processed in the order in which they are received.*

HHS does have the authority to stop accepting applications, but only if it appears that the $5 billion in federal funding is insufficient, as program reimbursements are being paid out.

Question: The Early Retiree Reinsurance Program application must be signed by an authorized representative. The regulation at 45 C.F.R. 149.2 defines authorized representative as an individual with legal authority to sign and bind a sponsor to the terms of a contract or agreement. What are some examples of individuals who typically have

such legal authority?
Answer: *Common examples of individuals who typically have the requisite authority to serve as the Early Retiree Reinsurance Program authorized representative for a sponsor include the sponsor's Chief Executive Officer (CEO), Chief Financial Officer (CFO), President, Human Resources (HR) Director, and General Partner. For plan sponsors that are unions, a member of the union fund's board of trustees typically would have the requisite authority. Please note that this list is not exhaustive. The authorized representative and account manager identified in the application must be different individuals.*

Question: How important is it to be the first application to be submitted?
Answer: *It is not important to be the first application submitted. While applications will be processed in the order in which they are received, the application process is separate from the claims process. Payments are made based on when claims are submitted, not when the employers' applications for the program were submitted. The critical step in receiving reimbursement is actually the submission of the request for claims reimbursement. All qualified claims submitted by participating employers will qualify for reinsurance. If the $5 billion in Federal funding available for the program is spent before the program's end in 2014, then the Secretary can stop accepting applications and reinsurance payments for qualified claims will end. If a sponsor is the first one to submit an application to participate, but waits a significant amount of time after its application is approved to request reimbursement, the sponsor may, in fact, not receive the reimbursement if funds are exhausted.*

Question: Where should I send the application for the Early Retiree Reinsurance Program once it is completed?
Answer: *Please mail applications to the following address:*

HHS ERRP Application Center
4700 Corridor Place, Suite D
Beltsville, MD 20705

Question: What if a sponsor, which intends to use all or part of its program reimbursement to reduce its own health benefit costs (i.e., to offset increases in such costs), believes that the increases in its costs will probably, but not definitely, be significant enough to consume the program reimbursement. What should the sponsor do?
Answer: *In the application, the sponsor should account for the possibility that it might receive reimbursement that exceeds its cost increases. For example, in its explanation of how the sponsor will use program reimbursement, it could state that any overages will be applied to offset its health benefit cost increases for the following plan year, or that it will use the overage to reduce plan participants' health benefit costs for the current or following plan year. This list of alternatives is not exhaustive.*

Question: Do a plan's programs and procedures for chronic and high-cost conditions have to be in place at the time the sponsor submits the application?

Answer: *Yes. The program's regulations state that as part of the application, the applicant must include a summary of the programs and procedures it has in place that have generated, or have a potential to generate, cost-savings with respect to participants with chronic and high-cost conditions. The regulation defines a chronic and high-cost condition as a condition for which $15,000 or more in health benefit claims are likely to be incurred during a plan year by any one plan participant. It would be helpful in the summary for the applicant to explain how it determined which conditions to address (i.e. how was it determined that the chronic and high-cost condition has generated, or is likely to generate, $15,000 in claims in a plan year), how the program and procedures will generate cost savings with respect to plan participants with these conditions, a description of the programs and procedures, and who benefits from the cost savings (i.e. the plan sponsor and/or plan participants). This list is not exhaustive. While the Secretary only expects a summary, the applicant must describe how it would support its assertions in the event of an audit.*

Question: Does a sponsor need to make the Secretary aware of any changes in information reported on the sponsor's application?
Answer: *Yes. We understand that information on a sponsor's application may need to be updated as the program progresses. We expect that a sponsor will update us as soon as it is aware of any change in the information it provided in the application. The specifics as to how to update us will be clarified in further guidance. It should be noted that changes in information could, if the sponsor no longer meets the requirements of the program or was not truthful in the original application, cause the sponsor's application to be retroactively denied or terminated.*

Question: Can sponsors in the U.S. territories, including territorial governments, participate in the Early Retiree Reinsurance Program?
Answer: *No.*

Claims Submissions and Reimbursement Requests

Question: When can sponsors begin submitting claims data and reimbursement requests to the U.S. Department of Health & Human Services for the Early Retiree Reinsurance Program?
Answer: *The U.S. Department of Health & Human Services (HHS) is currently developing the infrastructure needed to accept claims data and reimbursement requests. HHS will announce instructions detailing the manner and timing for submitting this information in the near future. A sponsor will then be able to submit claims data and reimbursement requests. We encourage interested parties to regularly monitor this webpage for this and other program information.*

Question: The Early Retiree Reinsurance Program regulation at 45 C.F.R. 149.310 states that, for employment-based plans for which a provider in the normal course of business does not produce a claim, such as a staff-model health maintenance organization, the information required in a claim must be produced and provided to the Secretary, as set out in the regulation and applicable guidance. Does this principle also apply in the

context of self-funded plans?
Answer: *Yes. For example, a self-funded plan might pay a capitation rate to all or some providers in its provider network. To the extent the sponsor wishes to receive reimbursement for items and services furnished by such providers, the information required in a claim must be produced and provided to the Secretary, as set out in the regulation and applicable guidance.*

Use of Reimbursement

Question: How can sponsors use the reimbursement?
Answer: *Pursuant to 45 CFR §149.200, a sponsor must use the proceeds under this program (1) To reduce the sponsor's health benefit premiums or health benefit costs, (2) To reduce plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, or any combination of these costs, or (3) To reduce any combination of these costs specified in (1) and (2). Proceeds received pursuant to this program cannot be used as general revenue of the sponsors. In order to ensure that the reimbursement under this program is not de facto used as general revenue, sponsors must maintain their level of financial effort in supporting the applicable plan or plans. In other words, to the extent a sponsor decides to use the reimbursement for its own purposes, it can use the reimbursement only to offset increases in the sponsor's health benefit premiums or health benefit costs. The sponsor must explain in the program application how it will maintain its level of effort for the plan.*

Question: To the extent a sponsor wishes to use some or all of the proceeds it receives under this program to reduce plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, must it do so for all plan participants, and not just for early retirees?
Answer: *Yes. If a sponsor chooses to use some or all of the proceeds it receives under this program to reduce plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, it must do so for all plan participants, and not just for early retirees. As we discussed in the regulation, the statute uses the term "plan participant" (as opposed to "early retiree") when setting out the requirements for how a sponsor is to use the reimbursement. §1102(c)(4). The term "plan participant" is defined in the regulations as "anyone enrolled in an applicable plan including an early retiree, as defined in this regulation, a retiree, a retiree's spouse and dependent, an active employee and an active employee's spouse and dependent." 45 C.F.R. §149.2. Also, we note that nothing in the program waives the non-discrimination rules promulgated under the health insurance portability provisions of the Health Insurance Portability and Accountability Act at 45 CFR 146.121(b)(2) and (c). Those rules continue to apply regardless of participation in the program.*

Question: Can sponsors use the reimbursement to pay increased administrative costs generally related to the administration of the plan?
Answer: *Generally, no. We interpret the statutory and regulatory prohibition on using program funds as general revenue to mean that a sponsor, to the extent it is using program funds for its own purposes, must use them only to offset increases in* ***health***

benefit *costs or increases in* ***health benefit*** *premiums. The term "health benefits" is defined in Section 149.2. Based on this interpretation, a sponsor should not use program funds to offset increases in its administrative costs relating to maintenance of its plan(s) generally, as such costs are not health benefit costs nor are they health benefit premiums. One exception, however, arises when all three of the following circumstances apply: (1) A sponsor maintains an insured plan, (2) The premium it pays the insurer for health benefits includes administrative costs, and (3) The insurer does not quantify for the sponsor the portion of the premium that is allocated to such costs. When all three of these circumstances exist, the sponsor can use program funds to offset increases in its health benefit premium costs or to reduce, or offset increases in, plan participants' health benefit premiums, even though the premium includes administrative costs.*

Question: Can sponsors use reimbursement funds from the Early Retiree Reinsurance Program to pay for expenses that are created by participation in the program?
Answer: *No. The regulations state that the reimbursement may only be used to reduce the sponsor's health benefit premiums or health benefit costs (keeping in mind that the sponsor must show maintenance of effort), to reduce the health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs for plan participants, or any combination of these costs. Administrative costs created in order to participate in the Early Retiree Reinsurance Program are not health benefit premiums nor are they health benefit costs, nor do they reduce costs for plan participants. The term "health benefits" is defined in Section 149.2.*

Question: Some self-funded plans establish an ongoing reserve to fund the health benefits of their plan participants. Can reimbursement under this program be placed into the ongoing reserve to be used to fund health benefits for plan participants?
Answer: *Upon audit, the sponsor will need to be able to show that it used the reimbursement funds as is required under the program (and as it said it would use the reimbursement in its application to participate in the program). We are unsure if a sponsor could make such a showing if the program reimbursement is placed into an ongoing pool of funds. If sponsors could make such a showing, for instance by placing the funds into a separate account so that, when audited, it could show how and when the reimbursement was used, this arrangement could be consistent with program requirements.*

Reporting Data Inaccuracies

Question: When and how must sponsors disclose the amount of post-point of sale negotiated price concessions that were received but not accounted for in their submitted claims data and reimbursement requests (as required by 45 C.F.R. 149.110), and report other data inaccuracies (as required by 45 C.F.R. 149.600)?
Answer: *The U.S. Department of Health & Human Services will announce the manner and timing of making such disclosures on this webpage. We encourage interested parties to regularly monitor this webpage for this and other program information.*

Fraud, Waste and Abuse

Question: Do the policies and procedures that a sponsor must have in place to detect and reduce fraud, waste, and abuse, have to be in place at the time the sponsor submits its application?
Answer: *Yes.*

Question: The regulations require that the sponsor attest that it has fraud, waste and abuse policies and procedures in place, in order for an application to be approved. Is this requirement satisfied if an entity that is contracted with a sponsor that pays the sponsor's claims, and/or submits Early Retiree Reinsurance Program reimbursement requests to the Secretary of the U.S. Department of Health & Human Services, has fraud, waste and abuse procedures in place?
Answer: *Provided the contracted entity's fraud, waste, and abuse policies and procedures have the ability to effectively detect and reduce fraud, waste and abuse related to the Early Retiree Reinsurance Program, and the sponsor can ensure that the policies and procedures are produced upon the request of the Secretary of the U.S. Health & Human Services, the contracted entity's fraud, waste, and abuse policies and procedures would satisfy this requirement. We would expect that any entity contracting with a sponsor that is vulnerable to fraud, waste and abuse would have policies and procedures in place.*

Question: Do the policies and procedures that a sponsor must have in place to detect and reduce fraud, waste, and abuse have to specifically reference, or be specifically designed for, the Early Retiree Reinsurance Program?
Answer: *No. However, the policies and procedures must have the ability to effectively detect and reduce fraud, waste, and abuse related to the Early Retiree Reinsurance Program. Sponsors will be required to attest, in their program applications, that they have such policies and procedures.*

Maintenance of Effort

Question: Does the maintenance of effort expectation apply to plan sponsors that use Early Retiree Reinsurance Program funds exclusively to reduce or offset increases in plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or a combination of these costs?
Answer: *No. But the sponsor must be able to demonstrate that it used program funds exclusively to reduce or offset increases in plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or a combination of these costs.*

Question: Some sponsors, such as certain states, negotiate their health benefit contracts on a biennial basis. Can the sponsor show maintenance of effort based on a biennial cycle?
Answer: *A sponsor can show maintenance of effort on a biennial basis, provided the contract for health benefits is traditionally negotiated on a biennial basis. We do not expect sponsors to change their health benefit contracting cycle for purposes of showing maintenance of effort.*

Question: Some states legislatures have cut their budgets for funding health benefits. Therefore a state (or political subdivision that is an Early Retiree Reinsurance Program plan sponsor) may not be able to show that it is maintaining its level of effort. How should a state or political subdivision address this in its application?
Answer: *We expect sponsors to maintain their level of effort to ensure that the reimbursement under this program is not used as general revenue. If a State's health benefits budget or the health benefits budget of a political subdivision are cut, it would be problematic for the State or political subdivision to use the reimbursement for its own purposes because it would not be maintaining its level of effort, as required by the regulation. Furthermore, private companies may also be in the same budgetary situation as a State or political subdivision, therefore to carve out an exception for a State or political subdivision would create an unlevel playing field between States, political subdivisions and private entities. We want to encourage States, political subdivisions and private entities to maintain their level of effort to their plan participants' health benefits. In instances when a sponsor, whether a State, political subdivision or a private entity, has finalized a budget before the start of the Early Retiree Reinsurance Program, the baseline for showing level of effort will be the finalized budget provided it was finalized before June 1, 2010. The sponsor must be able to show upon audit that the budget was finalized prior to June 1, 2010.*

Question: Except as specified in the immediately preceding Q & A, in order to show maintenance of effort, what year is the baseline year for determining the level of effort that must be maintained?
Answer: *The baseline year is the plan year cycle that ended immediately preceding the application submission.*

Question: If a sponsor reimburses plan participants, with the sponsor's own funds, for health benefit premiums, copayments, deductibles, coinsurance, or other out-of-pocket costs for health benefits, can those amounts count toward the amount the sponsor pays toward its own share of health benefit or heath benefit premiums, in order to satisfy the maintenance of effort test?
Answer: *Yes, but the sponsor must be able to demonstrate that those amounts were not comprised of program reimbursement funds.*

Question: Can a sponsor show it is maintaining its level of effort by showing that it is paying the same percentage of total plan and participant health benefit costs and/or premium costs that it paid during the baseline year, or must it show that it is paying the same specific dollar amount as it did during the baseline year?
Answer: *We interpret our regulations to require that the sponsor show that it is contributing the same specific dollar amount. The regulations explain that the purpose of the maintenance of effort requirement is to prohibit sponsors from using program funds as general revenue. If a sponsor could show maintenance of effort by showing it paid the same percentage of total costs, such an approach would incentivize the deterioration of health benefits because sponsors could pay less to sponsor a plan by sponsoring a less robust plan but receive the same amount of reimbursement under the program, which is contrary to the purpose of the statute and our regulations.*

Question: With respect to sponsors maintaining their level of effort to a plan, must a sponsor in the Early Retiree Reinsurance Program maintain the same level of historical contribution per plan participant, or can a sponsor maintain its same level of historical contribution in the aggregate, for all plan participants?
Answer: *The Early Retiree Reinsurance Program regulation requires a sponsor to maintain its level of effort toward the plan as a way of ensuring that the sponsor does not violate the statutory prohibition on using program reimbursement funds as general revenue. We interpret this requirement as applying with respect to the plan, and not necessarily with respect to each plan participant. A sponsor must demonstrate that it meets the maintenance of effort requirement in the aggregate, for all plan participants.*

Question: For a multiemployer plan, how is it determined whether the sponsor met the maintenance of effort test?
Answer: *A multiemployer plan satisfies the maintenance of effort test if the amount the sponsor spent from the trust on health benefits and/or health benefit premiums, in the applicable year, is at least as much as what it spent on health benefits and/or health benefit premiums in the baseline year.*

Question: A single-employer plan sponsor puts money into a discrete fund or a trust to pay for health benefits and/or health benefit premiums. How is it determined whether the sponsor met the maintenance of effort test?
Answer: *If an arrangement a sponsor has with the discrete fund or trust is such that the sponsor relinquishes its ability to get those amounts back from the fund or trust, and the fund or trust is prohibited from using the money for purposes other than health benefits (as defined in 45 C.F.R. 149.2) or health benefit premiums, the maintenance of effort test will be conducted by comparing the amount the sponsor paid into the fund or trust in the baseline year vs. the applicable year. If the arrangement is such that the sponsor does <u>not</u> relinquish its ability to get those amounts back from the fund or trust, and /or the fund or trust is <u>not</u> prohibited from using the money for purposes other than health benefits (as defined in 45 C.F.R. 149.2) or health benefit premiums, the maintenance of effort test will be conducted by comparing the amount the fund or trust paid out in health benefit claims and/or health benefit premiums in the baseline year vs. the applicable year. The answer to this question varies from the answer in the previous question because in the scenario to which the previous question applies, the sponsor is the multiemployer plan or its governing board or committee. Therefore, for purposes of the maintenance of effort test, it is irrelevant what the employers, who are not the sponsors, contribute. In contrast, in <u>this</u> question, the employer is the sponsor. So what the employer pays toward maintaining the plan is relevant. To the extent the employer-sponsor's payments into the fund are irrevocable and can be used only for health benefits as defined in 45 C.F.R. 149.2, we view that as similar to the sponsor paying premiums to an insurer. Thus, what the sponsor pays into the fund, rather than what the fund pays in claims, is the relevant amount for purposes of the maintenance of effort test.*

Miscellaneous

Question: If a sponsor has an approved application for the Early Retiree Reinsurance Program, and subsequently decides not to request reimbursement, or stops requesting reimbursement at some point while possessing an approved application, must it notify the U.S. Department of Health & Human Services that it will not, or will no longer, be requesting reimbursement?

Answer: *No. However, the fact that a sponsor will not be requesting reimbursement does not relieve it of any obligations it has under the program, such as maintaining and furnishing records pursuant to 45 C.F.R. 149.350, or reporting data inaccuracies pursuant to 45 C.F.R 149.600. Because funding for the program is limited, we encourage sponsors to tell us that they will not be requesting reimbursement so that we will not rely upon the sponsor's reimbursement projections that it submitted with its application.*