

July 12, 2017

Submitted Electronically

Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

Re: CMS-9928-NC (RIN 0938-ZB39)
Requests for Information Regarding Reducing Regulatory Burdens Imposed by
the Patient Protection and Affordable Care Act & Improving Healthcare Choices
To Empower Patients

To Whom It May Concern:

On behalf of the American Council on Education (ACE) and the other higher education associations listed below, I am writing in response to CMS Release No. 9928-NC, in which the Centers for Medicare & Medicaid Services (CMS) of the Department of Health and Human Services (HHS) requested information regarding reducing regulatory burdens imposed by the Patient Protection and Affordable Care Act (ACA) (Pub.L. 111-148). 82 Fed. Reg. 111 (June 12, 2017).

We respectfully request permanent relief from guidance issued in February 2016 by the Departments of Treasury, HHS, and Labor (hereinafter the “Departments”) prohibiting colleges and universities from providing student health insurance plan (SHIP) coverage, defined by HHS as a type of individual health insurance coverage,¹ at little or no cost to graduate students. See IRS Notice 2016-17 (Feb. 5, 2016). This guidance has caused great concern and uncertainty at a number of institutions, causing some schools to end graduate student SHIP subsidies due to the potential fines and the regulatory burden to comply with the guidance.

Specifically, the February 2016 guidance prohibited the use of employer payment plans to offset the cost of SHIP coverage for graduate students providing teaching, research, or other services to a higher education institution or face penalties of \$100 per day, per affected participant. The February notice relied on previous guidance issued by the Departments stating that employer payment plans that pay or reimburse common law employees for all or some of the premium of an individual market plan violate ACA

¹ See 45 CFR 147.145.

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insurance market reform rules. See Notices 2013–51, 2015–17, 2015–87 and 2016-17. Unfortunately, the Departments fail to recognize that graduate students receive subsidized SHIP coverage because of their status as students enrolled in an academic program, and that their teaching, research, and other activities are inherent components of those academic programs.

The February 2016 guidance provided “temporary transition relief” for a period of non-enforcement so that institutions could continue providing subsidized SHIP coverage to graduate students without penalty through the 2016–17 academic year. On October 21, 2016, the Departments issued a Frequently Asked Question (FAQ) regarding implementation of the market reform provisions of the ACA indicating that the Departments were extending the enforcement relief of the February 2016 guidance indefinitely until issuance of further guidance.²

Many colleges and universities have offered some form of student health insurance coverage to their undergraduate and graduate students for years. Indeed, the ACA explicitly protects the right of colleges and universities to continue offering SHIP coverage. Specifically, the ACA provides that “[n]othing in this title shall . . . be construed to prohibit an institution of higher education . . . from offering a student health insurance plan, to the extent that such requirement is otherwise permitted under applicable Federal, State or local law.” See 26 U.S.C. § 1560(a). In addition, the HHS regulations governing SHIP coverage protected the ability of institutions of higher education to offer student health plans. See 45 CFR 147.145.

For a number of years, many research universities have provided thousands of graduate students with SHIP coverage, at little or no cost, as part of their graduate package, spending millions of dollars on these subsidies. Institutions provide this subsidized coverage to graduate students as a form of scholarship aid because of their status as students enrolled in an academic program. We want to continue to provide subsidized SHIP coverage because it helps enhance access to graduate education by reducing its cost and ensures that our students (and frequently their partners/dependents) have access to affordable, quality health insurance coverage.

SHIPs provide an outstanding consumer option for undergraduate and graduate students with broad comprehensive benefits, often including vision and dental coverage. These plans typically cost half that of comparable employee plans. Moreover, SHIPs are better and less costly than other private plans available on the individual market precisely because they have been tailored to the needs and lifestyles of students, including benefits such as enhanced mental health services, global emergency medical and travel assistance, emergency medical evacuation and repatriation benefits, as well as low co-pays and deductibles and, frequently, an accessible medical home.

² See FAQ at <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/ACA-FAQ-Set-33-Final.pdf>.

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In providing subsidized SHIP coverage to graduate students, colleges and universities have relied on the historical framework provided by the Department of Labor's (DOL) Wage and Hour Division and Internal Revenue Service (IRS) FICA regulations which treats students as students whose primary purpose at the institution is to complete a course of academic study. Notice 2017-16 is inconsistent with the long-standing interpretation by DOL's Wage and Hour Division concerning students under the Fair Labor Standards Act (FLSA). Based on a broader definition of employment than the common law, DOL has long viewed a range of students engaged in activities related to their academic programs, including graduate research assistants, as being in an "educational relationship" not an "employment relationship with . . . the school," and therefore not subject to the FLSA's wage and hour requirements. This even includes a graduate Ph.D. candidate receiving a stipend subject to federal income taxes and health insurance from a university. See Department of Labor Wage and Hour Division, "Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act," pp. 8-9 (May 18, 2016).

The guidance is also at odds with the approach taken in IRS regulations implementing the Student FICA and the Federal Unemployment tax exceptions. According to those regulations, students working fewer than 40 hours per week will be exempt from "employment" for FICA and Federal Unemployment taxes if they are engaged in paid services to an institution where the educational aspects of the services are "predominant" and "incident to and for the purposes of pursuing a course of study." See 26 CFR § 31.3121(b)(10)-2. The regulations cite, among numerous examples, a graduate teaching assistant, receiving a stipend and other benefits, who is charged with various instructional related duties (e.g. grading, classroom and laboratory instruction) normally amounting to 20 hours per week and who works occasional periods in excess of 40 hours, as appropriately exempt from employment taxes. *Id.* at Example 8.

Thousands of graduate students (and their partners/dependents) at campuses across the country could potentially be affected, costing students and schools millions of dollars. Moreover, because schools subsidize SHIP coverage for graduate students, they typically constitute the largest pool of insureds, often numbering in the thousands, under a SHIP plan at a university. In turn, by broadening the pool of insureds, this helps spread the risk, and enhances consumer choices by making the cost of comprehensive SHIP coverage less expensive for all students, including undergraduates. As a result, if schools are no longer permitted to provide subsidized coverage for graduate students, the number of insureds will drop, likely driving up the cost of coverage and could result in the loss of student health insurance coverage for all students.

Accordingly, we respectfully request that the Departments pull back Notice 2016-17; issue guidance stating that institutions of higher education do not violate the ACA market rules if they subsidize SHIP coverage; and, that IRS Notices 2013-51, 2015-17, 2015-87 do not apply to SHIP coverage.

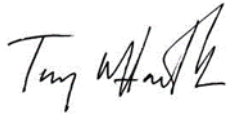
Higher Education letter regarding CMS Request for Information (CMS-9928-NC)

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As you review this issue, we look forward to working with you to answer your questions or concerns. Thank you for your consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry W. Hartle". The signature is written in a cursive, slightly slanted style.

Terry W. Hartle
Senior Vice President

TWH/ldw

On behalf of:

American College Health Association

American Council on Education

Association of American Universities

Association of Public and Land-grant Universities

College and University Professional Association for Human Resources

Council of Graduate Schools

National Association of Independent Colleges and Universities