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CLEARINGHOUSE RULE 97–007

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. The rule-making notice of hearing indicates that a hearing will be held to consider the "repeal, renumbering, renumbering and amendment, amendment, repeal and recreation and creation of the requirements for tax deductible long term care insurance . . . ." However, the rule simply includes the creation of requirements. Future notices of hearings should not indicate that various actions are under consideration unless those actions are included in the rule.

b. The title to s. Ins 3.46 (18) should be written in solid capital letters. [See s. 1.05 (2) (c), Manual.]

c. Because there is no introductory language in s. Ins 3.46 (18), it is not clear that s. Ins 3.46 (18) (b) and (c) apply to tax qualified policies until one reads s. Ins 3.46 (18) (e). It would be helpful if s. Ins 3.46 (18) (intro.) were created to make clear from the outset that s. Ins 3.46 (18) applies to long-term care, nursing home or home health care policies which are intended to be tax qualified under Section 7702B of the Internal Revenue Code of 1986, as amended, and any regulations and administrative pronouncements issued under the Code. If language to this effect were included in s. Ins 3.46 (18) (intro.), then s. Ins 3.46 (18) (e) could be deleted and portions of s. Ins 3.46 (18) (a) (intro.) could be incorporated into s. Ins 3.46 (18) (intro.).

If this approach is used, it also may be appropriate to: (1) include the language from s. Ins 3.46 (18) (f) in s. Ins 3.46 (18) (intro.); and (2) delete the references to Section 7702B of the Internal Revenue Code in s. Ins 3.46 (18) (b).

d. In s. Ins 3.46 (18) (a) (intro.), the reference to P.L. 104-191 should be changed to refer to the appropriate code reference. If a reference to a public law is desired, this should be included in a Note. [See s. 1.07 (3) (a), Manual.]

e. In s. Ins 3.46 (18) (a) 1., the term "contained in subd. (17) (a) 2. and (c) 2. of this rule" should be changed to "in sub. (17) (a) 2. and (e) 2." [See s. 1.07 (2), Manual. Also see comment 4. b., below.] This comment also applies to s. Ins 3.46 (18) (a) 2.

f. SECTIONS 2 and 3 refer to "These changes." It would be preferable to refer to "This rule." [See s. 1.02 (4) (a), Manual.]

3. Conflict With or Duplication of Existing Rules

a. It appears that s. Ins 3.46 (18) (a) 3. is intended to be an exception to the requirements in s. Ins 3.46 (17) (b), but this is never explicitly stated. If this is the case, it should be explicitly stated, for example, either by specifying in s. Ins 3.46 (17) (b) that "except as provided in sub. (18) (a) 3 . . . ," or by specifying in s. Ins 3.46 (18) (a) (intro.) that "notwithstanding sub. (17) . . . ."

b. Section Ins 3.46 (4) (g) provides that coverage under certain policies, including long-term care, nursing home and home health care policies, must be "triggered in conformance with the provisions contained in sub. (17)." However, since s. Ins 3.46 (18) creates different triggering provisions, s. Ins 3.46 (4) (g) should be amended to include a reference to s. Ins 3.46 (18).

4. Adequacy of References to Related Statutes, Rules and Forms

a. Some of the terms defined in s. Ins 3.46 (17) (a) also are used in s. Ins 3.46 (18). However, s. Ins 3.46 (17) (a) (intro.) specifies that its definitions apply only to s. Ins 3.46 (17). It should be made clear that, except as noted in s. Ins 3.46 (18) (a) 1. and 2., the definitions in s. Ins 3.46 (17) also apply in s. Ins 3.46 (18).

b. In s. Ins 3.46 (18) (a) 1., it appears that the reference to accompanying supervision in s. Ins 3.46 (17) (c) 2., should be to accompanying supervision in s. Ins 3.46 (17) (e) 2.

c. In s. Ins 3.46 (18) (a) 3., the term "licensed health care practitioner, as defined in the federal law" should be changed to specify the pertinent law, that is, "licensed health care practitioner as defined in Section 7702B (c) (4) of the Internal Revenue Code of 1986, as amended, and any regulations issued under the Code."

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. Ins 3.46 (18) (a) 1., in order to create parallel structure and avoid ambiguity, it would be helpful if the phrase "the term" were inserted following the phrase "in lieu of." In addition, the term "cognitive impairment" should be enclosed in quotation marks. This remark also applies to s. Ins 3.46 (18) (a) 2. In addition, in s. Ins 3.46 (18) (a) 2., the phrase "hands on assistance" should be hyphenated as it is in s. Ins 3.46 (17) (a) 7.

b. Section Ins 3.46 (18) (a) 1. would be clearer if it were restructured by moving the phrase "as a benefit trigger" and inserting it following the phrase "may be used."

c. Section Ins 3.46 (18) (a) 3. provides that, in order to be a tax-qualified policy, a policy may provide that, in order to trigger benefits, the claimant must obtain certification from a licensed health care practitioner that an inability to perform activities of daily living is expected to last at least 90 days. Also, s. Ins 3.46 (18) requires that the outline of coverage also specify this. Can benefits be triggered if the licensed health care practitioner indicates that the claimant's life expectancy is less than 90 days?

d. As currently worded, s. Ins 3.46 (18) (b) suggests that the Internal Revenue Code requires a policy to be tax qualified. To avoid this, it is suggested that the sentence be reordered by moving the phrase "as required by . . . thereunder" to the beginning of the sentence. (Also see item 2. c., above (suggesting that references to the Internal Revenue Code be consolidated in s. Ins 3.46 (18) (intro.)).)

e. In s. Ins 3.46 (18) (e), the phrase "The provisions contained in" should be deleted as they are unnecessary, and the word "apply" should then be changed to "applies." (But see item 2. c., above (suggesting that s. Ins 3.46 (18) (e) be deleted).)

f. In s. Ins 3.46 (18) (f), the word "contained" should be eliminated. Also, in the phrase "this section and s. Ins 3.455," the word "and" should be changed to "or."

g. SECTION 2 indicates that the changes first apply to any "long term policy" after a certain date. The term "long term policy" is not defined. Unless it is defined, ambiguity should be avoided by referring to the types of policies discussed in the rule, that is, long-term care, nursing home only or home health care only policies.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

a. Section Ins 3.46 (18) (a) 3. provides that, in order to be a tax-qualified policy, a policy may provide that, in order to trigger benefits based on other than cognitive impairment, the claimant must obtain certification from a licensed health care practitioner that an inability to perform activities of daily living is expected to last at least 90 days. It appears that under Section 7702B (c) (2) (A) (i) of the Internal Revenue Code, it must be specified that the policy must require that the claimant obtain certification that an inability to perform ***at least two*** activities of daily living is expected to last at least 90 days due to a loss of functional capacity.

Because s. Ins 3.46 (17) (b) would permit a policy to provide for a triggering of benefits if there were an inability to perform only one activity of daily living, s. Ins 3.46 (18) (a) 3. should specify that there be an inability to perform at least two activities of daily living if the policy is to be tax qualified.

b. SECTION 2 provides that the rule first applies to policies "solicited in Wisconsin on or after the effective date," that is, the first day of the first month after publication. However, Section 7702B (f) (1) (A) of the Internal Revenue Code indicates that the treatment of qualified long-term care insurance applies to contracts issued after December 31, 1996. Moreover,

Section 7702B (f) (2) of the Internal Revenue Code provides that if a person was covered on December 31, 1996, then contracts issued before January 1, 1997 which met the long-term care insurance requirements of the state in which the contract was situsued at the time the contract was issued are treated as qualified long-term care contracts. In light of these provisions, was the selection of the initial applicability date intentional? Has the agency considered applying the rule to situations occurring after December 31, 1996 and prior to the effective date of the rule?

It would be helpful if the analysis included a reference to the pertinent provision in the Internal Revenue Code regarding existing policies.