

organization of our determination as to the most advantageous local coverage policy. The statute is clear in requiring us "to identify" the most advantageous local coverage policy; we therefore do not believe we could take the passive role of deeming approval through a non-response. Additionally, a positive response from us ensures that there can be no ambiguity as to which of the competing local coverage policies actually applies to all enrollees of the plan.

#### 6. Medicare+Choice Program Compatibility With Employer or Union Group Health Plans

Section 617 of the BIPA amended section 1857 of the Act by adding a new subsection (i), which provides us broad authority to waive or modify requirements that hinder the design of, the offering of, or the enrollment in M+C plans under contracts between M+C organizations and employers, labor organizations, or the trustees of a fund established to furnish benefits to an entity's employees.

Previously, M+C organizations that contracted with an employer group or with a State Medicaid agency to provide benefits had to comply with all requirements of the regulations found in part 422. The authority in section 617 of the BIPA was first available for CY 2001. We informed M+C organizations that, in order to facilitate the offering of M+C plans under contracts with employers, labor organizations, or the trustees of a benefits trust fund, upon receiving a written request from an M+C organization, we have the option to waive or modify those requirements in part 422 of the regulations that would hinder the design of, the offering of, or the enrollment in an M+C plan. As indicated in the proposed rule, after we have approved a request for a waiver, the requesting M+C plan, and any other M+C organization, will be able to use the waiver in developing their ACR proposal. Any M+C plan using the waiver must include that information in the cover letter of its ACR proposal submission to us. The waiver or modification will take effect once the ACR proposal has been approved.

To date, we have approved the following three types of waivers under the authority granted us in section 617 of the BIPA:

- **Employer-Only Plans:** We are allowing M+C organizations to offer employer-only plans (that is, M+C plans not available to the individual market). M+C organizations are not required to market these plans to individuals. In addition, M+C organizations will not be required to submit the marketing

materials for employer-only plans for our pre-review and approval.

- **Actuarial Swaps:** We are allowing M+C organizations to swap benefits not covered by Medicare of approximately equal value when an employer asks for a benefit package that differs from the package offered by the M+C organization to the individual market.

- **Actuarial Equivalence:** We are allowing M+C organizations to raise the co-payments for certain benefits but to provide a higher benefit level or a modification to the premium charged, as long as projected beneficiary liability was actuarially equivalent.

We received two substantive comments on the employer group waiver provisions.

*Comment:* A commenter asked that we confirm whether our waiver authority can be used in areas such as ACR proposals, and enrollment and disenrollment processes (for example, the use of electronic enrollment and disenrollment for employer group members). The commenter also suggested that we revise the regulation to ensure that it is flexible enough to accommodate such waivers, including clarification that requests to use approved waivers that are not related to benefit and rate proposals may be submitted at any time during the year.

*Response:* As noted above, Section 617 of the BIPA provides broad authority for us to waive or modify requirements that hinder the design of, the offering of, or the enrollment in M+C plans under contracts between M+C organizations and employers or unions. Accordingly, under this authority, we have broad discretion to approve employer group waivers in all areas of the M+C program, including both enrollment and disenrollment and benefit and rate proposals. We do not believe that any change to the regulatory language implementing the waiver authority is necessary. The regulatory language implementing this waiver authority is consistent with the statutory language in section 1857(i) of the Act, which provides us wide latitude to approve appropriate waivers. In reviewing proposed waivers, we will balance the objective of promoting M+C enrollment by employer group members with the need to ensure that adequate protections are in place to ensure that employer group members enrolled in M+C plans have access to the Medicare covered benefits consistent with Medicare standards. Waiver requests by M+C organizations may be submitted at any time of the year.

*Comment:* Another commenter asked for clarification of § 422.106(a)(2) which states that employer group benefits that

"complement" an M+C plan and the marketing materials associated with those benefits are not subject to our approval. The commenter was not clear as to what "complement" means in this context. The commenter further notes that paragraph (a)(2) continues, "M+C plan benefits provided to enrollees of the employer \* \* \* and the associated marketing materials, are subject to CMS review and approval." According to the commenter, these two sentences within paragraph (a)(2) are internally inconsistent and confusing, and the commenter suggested that the benefit package of an employer-only M+C plan was subject to our review and approval. The commenter also requested that we clarify that employer group benefits or marketing materials will not be subject to prior review as long as the M+C organization certifies, in its ACR, that an employer-only M+C plan benefit package contains all Medicare-covered items and services. The commenter also suggested that M+C organizations should not be required to send copies of employer group-marketing materials to us after printing.

*Response:* We agree that § 422.106(a)(1) and (a)(2) need to be clarified. The purpose of § 422.106(a)(2) is to highlight the fact that the M+C regulations apply to those benefits that are included under our approved M+C benefit package and that the regulations do *not* apply to what are referred to in the regulation as "complementary" benefits.

Complementary benefits are employer-sponsored benefits, which are outside of the ACR proposal and are independently arranged by an employer on behalf of its employer group members for the purpose of enhancing the M+C benefit package. Therefore, we have modified § 422.106(a)(2) to clarify that we do not regulate or approve employer-sponsored benefits.

Employer group plans are required to provide an ACR proposal that includes all Medicare Part A and Part B services. There are no additional "prior review" requirements for approving the M+C benefit package for employer group members. We have already approved a waiver related to prior review of marketing material of employer-only plans. However, all M+C organizations will continue to be required to send informational copies of the employer-only plan's marketing materials to our Regional Office that is the "lead region." The employer group waivers are posted at our website at the following web address: <http://www.cms.hhs.gov/healthplans/employers/>.