

September 15, 2010

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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210
Attention: RIN 1210-AB45

RE: RIN 1210-AB45

Comments Regarding the Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act

To Whom It May Concern:

These Comments are submitted in response to the Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43330 (July 23, 2010) (the "Interim Final Rules"), promulgated by the Department of Labor, Department of the Treasury, and Department of Health and Human Services (collectively the "Agencies").

These Comments direct the Agencies (1) to clarify if and to the extent to which nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans) must comply with the Interim Final Rules; (2) to identify and explain the statutory authority, if any, under which the Agencies may require nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans) to comply with the Interim Final Rules; and (3) to identify and explain the statutory authority, if any, under which the Agencies may enforce the Interim Final Rules against nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans).

The Interim Final Rules implement requirements regarding internal claims and appeals and external review processes for group health plans and health insurance coverage in the group and individual markets under the Patient Protection and Affordable Care Act (the "PPACA"), as amended by the Health Care and Education Reconciliation Act (the "HCERA"). The PPACA, as amended by HCERA, reorganized, amended, and added to the provisions of part A of title XXVII of the Public Health Service Act (the "PHSA") relating to group health plans and health insurance issuers in the group and individual markets. Section 2719 of the PHSA (as amended by the PPACA) requires group health plans to implement an effective appeals process for appeals of coverage determinations and claims that meet certain specified standards. Section

2719 further requires group health plans to implement an effective external review process that meets minimum standards if, *inter alia*, the plan is a self-insured plan that is not subject to state insurance regulation. The Interim Final Rules add § 54.9815-2719T to part 54 of 26 C.F.R., § 2590.715-2719 to part 2590, subpart C, of 29 C.F.R., and §147.136 to part 147 of 45 C.F.R. The Preamble to the Interim Final Rules suggests self-funded or self-insured group health plans sponsored or maintained by nonfederal governments are subject to PHSA § 2719 and the Interim Final Rules. However, the Agencies cite to no statutory or regulatory authority to support the position that nonfederal governmental plans are subject to PHSA § 2719 or the Interim Final Rules. A close examination of the codification of PHSA § 2719 demonstrates self-funded or self-insured group health plans sponsored or maintained by nonfederal governments are not subject to PHSA § 2719 or the Interim Final Rules.

Because of how PHSA § 2719 is codified, nonfederal governmental plans should be exempt from the mandates of PHSA § 2719 and the Interim Final Rules. Section 2719 of the PHSA is codified at 42 U.S.C. § 300gg-19. Section 300gg-19 is located in Title 42, Chapter 6A, Subchapter XXV, Part A, Subpart 3 of the United States Code. Under 42 U.S.C. § 300gg-21(a)(1), the requirements of subparts 1 and 2 apply with respect to group health plans (including nonfederal governmental plans). However, § 300gg-21(a)(1) does not make the requirements of subpart 3 apply with respect to group health plans (including nonfederal governmental plans). PHSA § 2719 (42 U.S.C. § 300gg-19) is codified in subpart 3 and § 300gg-21(a)(1) does not make the requirements of subpart 3 – including those of § 300gg-19 – applicable to nonfederal governmental plans. Therefore, no statutory authority exists to require nonfederal governmental self-funded or self-insured group health plans to comply with PHSA § 2719 or the Interim Final Rules.

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), further exempts nonfederal governmental self-funded or self-insured group health plans from complying with PHSA § 2719 and the Interim Final Rules. The PPACA added § 715(a)(1) to ERISA. ERISA § 715(a)(1) incorporates by reference the requirements of PHSA § 2719. ERISA § 715(a)(1) is codified at 29 U.S.C. § 1185d, which is located in Title 29, Chapter 18, Subchapter I, Subtitle B, Part 7, Subpart B of the United States Code. ERISA § 4(b)(1), codified at 29 U.S.C. § 1003(b)(1), provides that the provisions of Title I of ERISA shall not apply to any employee benefit plan if such plan is a governmental plan. ERISA defines a governmental plan as a "plan established or maintained for its employees by ... the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA § 3(32) (codified at 29 U.S.C. § 1002(32)). ERISA § 4(b)(1) (29 U.S.C. § 1003(b)(1)) is located in Title 29, Chapter 18, Subchapter I, Subtitle A, of the United States Code. Because ERISA § 715(a)(1) (29 U.S.C. § 1185d) is located in Title I of ERISA and governmental plans are exempt from the provisions of Title I of ERISA pursuant to ERISA § 4(b)(1) (29 U.S.C. § 1003(b)(1)), no statutory authority exists to mandate nonfederal governmental self-funded or self-insured group health plans to comply with PHSA § 2719. Furthermore, because nongovernmental plans are exempt from Title I of ERISA, such plans should also be exempt from the Interim Final Rules.

The Internal Revenue Code of 1986, as amended (the "Code"), also exempts nonfederal governmental self-funded or self-insured group health plans from complying with PHSA § 2719 and the Interim Final Rules. The PPACA added § 9815(a)(1) to the Code. Code § 9815(a)(1) incorporates by reference the requirements of PHSA § 2719. Code § 9815(a)(1) is located in Title 26, Subtitle K, Chapter 100, Subchapter B of the United States Code. Code § 9831(a)(1) exempts "any governmental plan" from the requirements of Chapter 100. Code § 9831(a)(1) is located in Title 26, Subtitle K, Chapter 100, Subchapter C of the United States Code. Code § 9832(d)(2) defines a "governmental plan" as having "the meaning given such term by [Code] section 414(d)." Code § 414(d) defines "governmental plan" as "a plan established and maintained for its employees ... by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Because Code § 9815(a)(1), which incorporates PHSA § 2719, is codified in Title 26, Subtitle K, Chapter 100, Subchapter B of the United States Code and Code § 9832(d)(2) exempts nonfederal governmental plans from the provisions of Chapter 100, no statutory authority exists for the Agencies to mandate nonfederal governmental self-funded or self-insured group health plans to comply with PHSA § 2719. Furthermore, because nonfederal governmental plans are exempt from the provisions of Code § 9815(a)(1) (and therefore PHSA § 2719), such plans should also be exempt from the Interim Final Rules.

Based on the foregoing, the Agencies must: (1) clarify if and the extent to which nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans) must comply with PHSA § 2719 and the Interim Final Rules; (2) identify and explain the statutory authority, if any, under which the Agencies may require nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans) to comply with PHSA § 2719 and the Interim Final Rules; and (3) identify and explain the statutory authority, if any, under which the Agencies may enforce PHSA § 2719 and the Interim Final Rules against nonfederal governments that sponsor self-funded or self-insured group health plans (nonfederal governmental plans).