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BY EMAIL (E-OHPSCA715.EBSA@dol.gov)

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: RIN 1210-AB43
Affordable Care Act Interim Final Rules Regarding Rescissions

Ladies and Gentlemen:

Proskauer Rose LLP, on behalf of itself and certain of its clients, appreciates this opportunity to submit comments on the Department's interim final rule implementing section 2712 of the Public Health Service Act, as enacted by the Patient Protection and Affordable Care Act (the Affordable Care Act), regarding rescissions. Proskauer is an international law firm providing a wide variety of legal services to clients worldwide. In particular, since the Affordable Care Act's enactment, Proskauer's interdisciplinary Health Care Reform Task Force has been assisting numerous clients in recognizing, analyzing and solving the myriad issues raised by the law.

We commend the Department for the swiftness with which the Department, in conjunction with the Department of Health and Human Services and the Department of the Treasury, has promulgated interim final rules and other guidance implementing various provisions of the Affordable Care Act. As plan advisors, the guidance is invaluable as we navigate the post-Affordable Care Act world of providing health benefits to employees. We write, however, to request that the Department[1] revise the interim final rule regarding rescissions (the IFR or no-rescission rule)[2] to clarify that it does not override the final regulations promulgated under the

[1] Pursuant to the specified comment procedures, we submit this comment letter only to the Department. *See* Requirements for Group Health Plans and Health Insurance Issuers Under the Patient Protection and Affordable Care Act Relating to Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. 37,188 (June 28, 2010). As such, in this letter we cite only to the Department's regulations although the same comments and concerns apply to the Department of Health and Human Services' and the Department of the Treasury's regulations.

[2] *See* DOL Reg. § 2590.715-2712.

continuation coverage provisions of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA).[3]

Of specific concern to us and to our clients is the ability of plan administrators to retroactively terminate a COBRA qualified beneficiary's coverage if the qualified beneficiary does not pay for that coverage in full and on time.[4] This rule, which has been in place for over 20 years, effectively addresses the administrative delays that are inherent in, and actually dictated by, COBRA and its regulations. As neither Congress, nor presumably the Department, intended to override this rule and the rule is necessary to properly and efficiently administer COBRA, we urge the Department to revise the IFR to clearly state that this COBRA principle applies in tandem with the no-rescission rule.

The No-Rescission Rule. The IFR generally states that effective for plan years beginning on or after September 23, 2010, a group health plan may not rescind a participant's coverage except in the case of fraud or the individual's intentional representation of a material fact, as prohibited by the terms of the plan. However, the IFR also states that a group health plan may cancel coverage, even retroactively, if the termination of coverage is due to a failure to timely pay required premiums or contributions towards the cost of coverage. It then goes on to provide that "Other requirements of Federal or State law may apply in connection with a rescission of coverage," and gives the following example of how the no-rescission rule works:

> **Facts.** An employer sponsors a group health plan that provides coverage for employees who work at least 30 hours per week. Individual B has coverage under the plan as a full-time employee. The employer reassigns B to a part-time position. Under the terms of the plan, B is no longer eligible for coverage. The plan mistakenly continues to provide health coverage, collecting premiums from B and paying claims submitted by B. After a routine audit, the plan discovers that B no longer works at least 30 hours per week. The plan rescinds B's coverage effective as of the date that B changed from a full-time employee to a part-time employee.
>
> **Conclusion**. In this example, the plan cannot rescind B's coverage because there was no fraud or an intentional misrepresentation of material fact. The plan may cancel coverage for B prospectively, subject to other applicable Federal and State laws.

By failing to mention COBRA, these provisions in the IFR leave plan administrators uncertain as to the continued viability of COBRA's retroactive termination rule. In this regard, we note that Congress enacted the no-rescission rule to prevent insurance companies (and group health plans) from canceling a person's coverage when that person begins to suffer from an expensive medical

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[3] *See* ERISA §§ 601 *et. seq.*

[4] *See* Treas. Reg. §4980B-6, Q/A-3(b).

condition.[5] Nothing in the legislative history or Congressional Record indicates any intent to use the no-rescission rule as a means of overriding COBRA's rule allowing retroactive termination of coverage for qualified beneficiaries who fail to elect and pay for that coverage.

The COBRA Rule. The right to COBRA coverage is generally measured from the date of the qualifying event and continues for the relevant 18, 29, or 36-month period.[6] For example, if an employee's hours are reduced from full-time to part-time and that reduction in hours causes a loss of coverage under the terms of the plan, the affected employee's COBRA right is to elect up to 18 months of continued coverage measured from the date of the switch from full-time to part-time.[7] To receive COBRA, the employee must elect in a timely manner and pay the full COBRA premium for that coverage (generally up to 102% of the full cost, including the employer and employee portion of the premium).[8]

Once a qualifying event occurs and a qualified beneficiary has been provided with a proper COBRA notice, the qualified beneficiary has a 60-day period within which to decide whether to elect COBRA coverage.[9] According to the final IRS COBRA regulations, a plan has two choices of how to deal with coverage during the COBRA election period: (1) the plan can automatically provide the coverage during the election period subject to retroactive termination; or (2) if the plan allows retroactive reinstatement, the plan can terminate the qualified beneficiary's coverage and reinstate her or him when the election and payment for the coverage is made.[10] This election period is defined as the period beginning not later than the date the qualified beneficiary would lose coverage because of the qualifying event and ending 60 days after the qualified beneficiary receives the COBRA election notice.[11] Claims incurred by a qualified beneficiary during the election period do not have to be paid before the election and payment for the coverage is made.[12]

Even though the regulations allow plans to choose between retroactive termination of coverage for failure to pay for COBRA coverage or retroactive reinstatement of COBRA coverage during the election period upon a proper election, the nature of many qualifying events necessitates that

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[5] *See* 156 Cong. Rec. H1457 (daily ed. Mar. 16, 2010) (statement of Rep. Schakowsky); 156 Cong. Rec. H1580 (daily ed. Mar. 17, 2010) (statement of Rep. Schakowsky); 156 Cong. Rec. H1581 (daily ed. Mar. 17, 2010) (statement of Rep. Holt); 156 Cong. Rec. H2259 (daily ed. Mar. 23, 2010) (statement of Rep. Garamendi); 156 Cong. Rec. H2941 (daily ed. Apr. 28, 2010) (statement of Rep. Stupak).

[6] *See* section 4980B(f)(2)(B) of the Internal Revenue Code of 1986, as amended (Code).

[7] *See* Code § 4980B(f)(2)(B)(i)(I).

[8] *See* Code §§ 4980B(f)(1), (f)(2)(C).

[9] *See* Code § 4980B(f)(5)(A).

[10] *See* Treas. Reg. §54.4980B-6, Q/A-3(b).

[11] *See* Treas. Reg. §54.4980B-6, Q/A-1(a).

[12] *See* Treas. Reg. §54.4980B-6, Q/A-3(b).

plans continue to cover qualified beneficiaries during the election period subject to retroactive termination of coverage. Consider a divorce. COBRA provides that an individual has 60 days after the divorce is finalized to notify the plan administrator of the divorce.[13] During this 60-day notice period, the plan administrator often does not know that the former spouse is not eligible for coverage under the plan or even that a COBRA qualifying event has occurred. Therefore, the plan would continue to cover that former spouse.

Before the no-rescission rule, if the former spouse did not timely elect and fully pay for COBRA continuation coverage during the election period, then the plan could exercise its right under COBRA to terminate the former spouse's coverage back to the date of the loss of coverage due to the divorce. With the publication of the IFR and the example referred to above, this practice is called into question.

Similar issues arise with respect to other COBRA qualifying events. In addition, the issues are magnified for multiemployer group health plans, which face unique administrative difficulties related to the fact that such plans depend upon many contributing employers to provide the plans with information related to COBRA qualifying events.

Reconciling the IFR and COBRA. To resolve the uncertainty, we urge the Department to revise DOL Reg. §2590.715-2712(a)(2)(ii) to clarify that the failure to pay COBRA premiums otherwise owed is included within the exception to the prohibition against rescissions for failure to pay premiums.[14] Further, we urge the Department to revise example 2 in DOL Reg. § 2590.715-2712(a)(3) to use an example that does not result in a qualifying event for COBRA purposes (*e.g.*, an employee being transferred from one affiliate to another and losing coverage without a reduction in hours of employment). That way, the example will not cause confusion insofar as COBRA rules are concerned. That is, the IFR could provide the following example:

> **Facts.** An employer sponsors a group health plan that provides coverage for employees who work at Division X but not Division Y. Individual B has coverage under the plan as an employee working at Division X. The employer reassigns B to Division Y. Under the terms of the plan, B is no longer eligible for coverage. The plan mistakenly continues to provide health coverage, collecting premiums from B and paying claims submitted by B. After a routine audit, the plan discovers that B no longer works at Division X. The plan rescinds B's coverage effective as of the date that B was reassigned to Division Y.
>
> **Conclusion**. In this example, the plan cannot rescind B's coverage because there was no fraud or an intentional misrepresentation of material fact. The plan may cancel coverage for B prospectively, subject to other applicable Federal and State laws.

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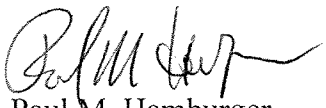
[13] *See* Treas. Reg. §54.4980B-6, Q/A-2(a).

[14] The exception should also cover any failure to pay the premium for continuation coverage mandated by any State mini-COBRA laws.

Finally, we urge the Department to revise DOL Reg. §2590.715-2712(b) to clarify that the statement referring to other legal requirements continuing to apply specifically includes Federal COBRA and State mini-COBRA laws and that the no rescission rule does not in any way affect the application of such laws, which we believe to be the Department's original intent.

We would be happy to discuss our concerns and suggestions in more detail. We hope that a final rule, with the changes that we have recommended, will be adopted promptly.

Respectfully submitted,



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