ALSTON&BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax:404-881-7777
www.alston.com

**Mr. Ashley Gillihan** **Direct Dial: 404-881-7390** **E-mail: ashley.gillihan@alston.com**

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*VIA E-MAIL* to E-OHPSCA715.EBSA@dol.gov

Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210
Attention: RIN 1210-AB43

Re: Interim Final Regulations Regarding Rescissions

Dear Sirs/Madam:

Alston & Bird, LLP ("A&B") appreciates this opportunity to submit comments on behalf of its employer/plan sponsor clients regarding the recently issued interim final regulations on rescissions of group health coverage.

A&B is a national law firm with offices in 8 different cities. We represent employers of varying sizes throughout the country that sponsor group health plans for their employees and their dependents. The complexity of the health insurance reforms ("Reforms") added by Sections 1001 and 1201 of the Patient Protection and Affordable Care Act ("PPACA"), the breadth of the changes required by the Reforms, and the relatively short period plan sponsors have to make those changes has created significant administrative challenges for our clients. Consequently, both A&B and our clients are appreciative of the speed at which the Department of Labor ("DOL") and the other agencies have drafted and issued clear, concise and comprehensive guidance on the Reforms, including but not limited to the Interim Final Regulations published in the Federal Register on June 28 regarding rescissions (the "Regulations").

Nevertheless, we wish to express our concerns that the Regulations, as written, are overly broad. More specifically, we have concerns regarding the fact that the Regulations will prohibit retroactive cancellations of coverage in situations where coverage is automatically terminated but it cannot be reasonably terminated administratively until a later date. For example, there are often events that terminate coverage under the plan (e.g., divorce or failure to work the requisite hours) for which a

plan administrator must rely on others to provide notice of the event and coverage is typically provided until such time as that notice is provided or the information is reasonably collected by the plan administrator. In such situations, the plan and plan administrator are not at fault and should not be penalized simply because information regarding the terminating event is not immediately available. We respectfully request specific guidance herein that would alleviate these concerns in a manner that is consistent with the Regulations generally.

Overview of Rule

Section 2712 of the Public Health Service Act (as added by Section 1001 of the Patient Protection and Affordable Care Act; as incorporated into new ERISA Section 715 and IRC Section 9815) prohibits a group health plan from rescinding health coverage except in the case of fraud or intentional misrepresentation of a material fact. The new prohibition on rescissions applies to plans and insurers in the group and individual markets (including grandfathered plans) for plan years beginning on or after September 23, 2010. The Regulations define "rescission" as a cancellation or discontinuance of coverage that has retroactive effect except with respect to cancellations due to failure to make premiums or contributions (see new 29 C.F.R. 2590.715-2712). A cancellation or discontinuance of coverage is not a rescission if it has prospective effect.

The Regulations provide examples to illustrate the application of the rule. The following example provides the primary basis for our concern:

> 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 (See 29 C.F.R. 2590.715-2712).

In this example, B presumably did not commit fraud or intentional mispresprentation nor did he fail to pay his premiums. Therefore, the plan could not retroactively cancel the coverage despite the fact that it was provided in error and B was otherwise not entitled to the coverage.

Overview of the Issues

Nothing in the above example suggests that the employer's error played a role in the conclusion. In fact, the example seems to re-affirm the general principle set forth in the Regulations that a group health plan is prohibited from retroactively canceling an individual's group health coverage in *all* situations other than the covered individual's fraud, intentional misrepresentation, or failure to pay premiums. For example, plan administrators must often rely on notice from employees or other business units (especially where the employer's human resources is decentralized across the nation) that a terminating event has occurred. Without the requisite knowledge, the plan administrator cannot be expected to administratively terminate coverage on the date of the event; therefore, coverage will be provided until such time as the necessary information regarding the event is received. Consider the following examples that illustrate this situation:

> Example #1: ABC enters into a collectively bargained agreement with Union K that requires ABC to provide health plan coverage to employees that are members of Union K during a month if they work a specified number of hours during the month. ABC collects hours of service information from its various human resources offices on the 5th day of each month. The information is processed and notices of termination and the right to elect COBRA are sent on the 20th day of each month. Bob, a member of Union K, works the requisite number of hours in January for ABC but does not work the requisite hours in February. Since ABC did not know until March that Bob failed to work the requisite hours in February, a few of Bob's claims in February are paid by the plan. Bob receives a notice on March 23rd that his coverage ended January 31---the last month in which he worked the requisite hours---and that he must repay the plan for the claims incurred in February.
>
> Example #2: ABC provides coverage to spouses of employees. Coverage ends under the plan on the date a divorce is final. In the event of a divorce, notice must be provided to ABC within 31 days. Employee A and her spouse divorce on March 31, 2011. Employee A provides notice to ABC on April 25, 2011. During period between March 31, 2011 and April 25, 2011, the employer collects premiums from A and pays claims for A's spouse. Upon receiving notice, ABC informs A and A's ex-spouse that coverage ended March 31, 2011 as a result of the divorce

> and that payment of all claims must be repaid incurred during the period following March 31, 2011.

In the above examples, coverage ends under the plan on a specific date due to an event that is clearly identified in the plan; however, the employer has no knowledge of the event at the time it occurs and, as a result, coverage is provided until such time as the information regarding that event is received. Once the employer in the above examples has the requisite knowledge to terminate the coverage, it takes steps to terminate the coverage without undue delay. The employer is not in error in either of the above examples, which clearly distinguish them from the above mentioned example from the Regulations. However, since the extra-contractual coverage is not due to the employee's fraud or intentional misrepresentation, the Regulations prohibit the plan from retroactively terminating the coverage as of the date it is otherwise scheduled to end under the clear terms of the plan. If plans are not permitted to retroactively terminate coverage in situations where knowledge of the terminating event can only be gained after the fact, and the plan administrator has not unreasonably delayed or impeded the collection of the requisite information, then covered employees and their dependents will receive coverage beyond that which is reasonably expected or bargained for. The net result is that plans will no longer be permitted to terminate coverage as of the date of an event and instead will only be permitted to terminate coverage "as soon as they receive or collect the necessary information". Unfortunately, this will inadvertently provide legal incentive for individuals to delay providing notice or, worse, to not provide it all and they will be rewarded by Regulations with coverage they are otherwise not entitled to and for which they do not have a reasonable expectation so long as they did not defraud or intentionally mislead the employer. We assert that this was not the intent of Congress.

An analysis of this issue is incomplete without mentioning that many of the events referred to in our letter provide individuals with a COBRA continuation right; a federally mandated right that generally permits retroactive reinstatement of coverage back to the date of the terminating event. For example, even though a plan retroactively terminates an ex-spouse's coverage to the date of the divorce, the ex-spouse will generally have a right to retroactively reinstate that coverage as of the date of the divorce so long as the ex-spouse provides timely notice of the event (generally 60 days after the event) and pays all premiums required to be paid by COBRA. By way of another example, an individual who loses coverage during a month because he/she fails to work the requisite number of hours for that month would be entitled to COBRA continuation coverage, which would allow him/her to retroactively reinstate the coverage back to the first day of the month in which the requirements weren't satisfied.

Overview of Requests

In light of the above, we respectfully request the following clarification and guidance from the agencies:

1. A retroactive termination of coverage is not a "rescission" for purposes of PHSA Section 2712 (as added by Section 1001 of PPACA) to the extent that (i) an event clearly specified by the plan as a terminating event (ii) the plan clearly identifies the date coverage ends under the plan as a result of such event (iii) the coverage is administratively terminated, and confirmation of the termination is provided to the affected individuals, within a reasonable period of time following the date the plan administrators knows or reasonably should know of the event exercising reasonable diligence. The reasonable period requirement set forth above is satisfied if the coverage is administratively terminated and confirmation of the termination is provided by the plan administrator within the time period that notice of a COBRA election right is otherwise required, without regard to whether COBRA applies. Moreover, a retroactive cancellation of coverage is not a rescission for purposes of PHSA Section 2712 if the individual is entitled to COBRA continuation coverage as a result of the event and all of the applicable notice requirements under COBRA are satisfied.

2. Coverage is only deemed provided for purposes of these rules (i.e. coverage is provided such that a rescission would be possible) to the extent that the individual has a reasonable expectation under the facts and circumstances that coverage, even erroneous coverage, is effective.

3. If the covered individuals are required by the plan or by law to provide notice of events that cause termination of coverage under the plan, failure to provide information within the plan's reasonable notice period, or the minimum required by law (where applicable), constitutes a rebuttable presumption of fraud.

Thank you in advance for your consideration of these issues.

Sincerely yours,

Ashley Gillihan, Esq.

Alston & Bird, LLP
1201 W. Peachtree St.
Atlanta, GA 30309
ashley.gillihan@alston.com