LEGAL PROCEEDING DIVISION
PUBLICATION & REGULATIONS
BRANCH

REG-118412-10

JUL 1 2 2010

PUBLIC SUBMISSION

As of: July 12, 2010
Received: July 09, 2010
Status: Posted
Posted: July 12, 2010
Tracking No. 80b1655c
Comments Due: September 15, 2010
Submission Type: Web

Docket: IRS-2010-0010
Group Health Plans and Health Insurance Coverage Rules Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Afforable Care Act

Comment On: IRS-2010-0010-0002
Group Health Plans and Health Insurance Coverage: Status as Grandfathered Health Plan under the Patient Protection and Affordable Care Act; Cross-Reference

Document: IRS-2010-0010-0006
Comment on FR Doc # 2010-14487

Submitter Information

Name: Unknown

General Comment

See attached file(s)

Attachments

IRS-2010-0010-0006.1: Comment on FR Doc # 2010-14487

I have had occasion to study the Interim Final Rules for Group Health plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act (the "Rules"). I am writing to seek clarification regarding the application of section 2718 of the Public Health Service Act (the "PHS Act") to grandfathered plans that are self-insured. Set out below is a background explanation, the issue, and a suggested response.

1. Background

By its terms, section 2718 of the PHS Act applies to grandfathered health plans and health insurance issuers. Section 1251(e) of the Patient Protection and Affordable Care Act ("PPACA") provides that a group health plan is a grandfathered health plan with respect to individuals enrolled on March 23, 2010. Section 1301(b)(3) of PPACA defines group health plan by reference to section 2791(a) of the PHS Act. Section 2791(a)'s definition of group health plan includes self-insured plans. Thus, self-insured group health plans are grandfathered health plans to the extent that an individual was enrolled on March 23, 2010. Consequently, it appears that section 2718 of the PHS Act applies to grandfathered health plans that are self-insured.

Although section 2718, by its terms, appears applicable to grandfathered health plans that are self-insured, a contrary provision of PPACA exempts all self-insured group health plans from compliance with section 2718. Section 1563(e) of PPACA adds section 715 to the Employee Retirement Income Security Act ("ERISA") and section 9815 to the Internal Revenue Code (the "Code"). Section 715 of ERISA exempts self-insured group health plans from compliance with section 2718 of the PHS Act. Section 9815 of the Code also exempts self-insured group health plans from compliance with section 2718 of the PHS Act. Together, these two sections appear to exempt all self-insured group health plans from section 2718, including self-insured group health plans that are grandfathered health plans, even though section 2718 expressly applies to all grandfathered health plans.

PPACA takes a contradictory position regarding the application of section 2718, and it appears that the Rules do as well. The Rules' preamble provides that section 2718 of the PHS Act applies to insured grandfathered health plans. The Rules do not provide a definition of the term insured grandfathered health plans. Sections 54.9815-1251T(d) and 2590.715-1251(d) of the Rules provide that section 2718 of the PHS Act applies to grandfathered health plans for plan years beginning on or after September 23, 2010. No exception is provided for self-insured grandfathered health plans. The Rules appear to take conflicting stances on section 2718; the preamble applies section 2718 to insured grandfathered health plans only, but sections 54.9815-1251T(d) and 2590.715-1251(d) apply section 2718 to all grandfathered health plans.

2. Question

Whether section 2718 of the PHS Act applies to grandfathered health plans that are self-insured.

3. Suggested Response

Based on section 715 of ERISA and section 9815 of the Code, section 2718 should not apply to any grandfathered health plan that is self-insured. This position should be made clear by amending sections 54.9815-1251T(d) and 2590.715-1251(d) of the Rules in the following manner.

(d) *Provisions applicable to all grandfathered health plans.* The provisions of PHS Act section 2711 insofar as it relates to lifetime limits, and the provisions of PHS Act sections 2712, 2714, 2715, and 2718, apply to grandfathered health plans for plan years beginning on or after September 23, 2010, **except that the provisions of PHS Act section 2718 shall not apply to any grandfathered group health plan that is self-insured**. The provisions of PHS Act section 2708 apply to grandfathered health plans for plan years beginning on or after January 1, 2014.