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DEPARTMENT OF THE TREASURY

Internal Revenue Service

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210-AB45

DEPARTMENT OF HEALTH AND HUMAN SERVICES

RIN 0991-AB70

**Availability of Interim Procedures for Federal External Review and Model Notices
Relating to Internal Claims and Appeals and External Review under the Patient
Protection and Affordable Care Act; Notice**

AGENCIES: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Office of Consumer Information and Insurance Oversight, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This document announces the availability of guidance detailing interim procedures for the Federal external review process and model notices both for internal claims and appeals and for external review processes under the Patient Protection and Affordable Care Act.

FOR FURTHER INFORMATION CONTACT: Amy Turner or Beth Baum, Employee Benefits Security Administration, Department of Labor, at (202) 693-8335; Karen Levin, Internal Revenue Service, Department of the Treasury, at (202) 622-6080; Ellen Kuhn, Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, at (301) 492-4100.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1-866-444-EBSA (3272) or visit the Department of Labor's website (<http://www.dol.gov/ebsa>). In addition, information from HHS on private health insurance for consumers can be found on the Centers for Medicare & Medicaid Services (CMS) website

(http://www.cms.hhs.gov/HealthInsReformforConsume/01_Overview.asp) and information on health reform can be found at <http://www.hhs.gov/ociio/> and <http://www.healthcare.gov>.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act (the Affordable Care Act), Public Law 111-148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (the Reconciliation Act), Public Law 111-152, was enacted on March 30, 2010. The Affordable Care Act and the Reconciliation Act reorganize, amend, and add to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement

Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. The Departments of Labor, Health and Human Services, and the Treasury (the Departments) have been issuing regulations in several phases to implement the revised PHS Act sections 2701 through 2719A and related provisions of the Affordable Care Act.

Section 2719 of the PHS Act applies to group health plans and health insurance coverage that are not grandfathered health plans within the meaning of section 1251 of the Affordable Care Act.¹ It sets forth standards for plans and issuers regarding both internal claims and appeals and external review. The Departments published interim final regulations implementing PHS Act section 2719 on July 23, 2010, at 75 FR 43330 (the interim final regulations). In general, the interim final regulations require plans and issuers to comply with the requirements of 29 CFR 2560.503-1 (the DOL claims procedure regulation) and impose specified additional standards for internal claims and appeals.

Section 2719 of the PHS Act provides that plans and issuers in States without an applicable State external review process shall implement an effective external review process that meets minimum standards established by the Secretary through guidance and that is similar to a State external review process described in PHS Act Section 2719(b)(1). The statute and the interim final regulations also provide a basis for determining when plans and issuers must comply with an applicable State external review

¹ The Departments published interim final regulations implementing section 1251 of the Affordable Care Act on June 17, 2010, at 75 FR 34538.

process and when they must comply with the Federal external review process. Generally, if a State has an external review process that meets, at a minimum, the consumer protections set forth in the interim final regulations, an issuer (or a plan) subject to the State process must comply with the State process. The regulations include a transition period for plan years (in the individual market, policy years) beginning before July 1, 2011, during which the Department of Health and Human Services (HHS) will work individually with States on an ongoing basis to assist in making any necessary changes to incorporate additional consumer protections so that the State process will continue to apply after the end of the transition period. For plans and issuers not subject to an existing State external review process (including self-insured plans), a Federal process is to apply for plan years (in the individual market, policy years) beginning on or after September 23, 2010.

The preamble to the interim final regulations provided that the Departments would issue additional guidance on the Federal external review process. In addition, the preamble stated that the Departments would issue model notices that could be used to satisfy the notice requirements under the interim final regulations. This notice announces the availability of and provides links to guidance on the interim Federal external review process, as well as links to the model notices.

II. Interim Federal External Review Process for Self-insured Group Health Plans

This notice announces the availability of EBSA Technical Release No. 2010-01, which provides an interim enforcement safe harbor for non-grandfathered self-insured group health plans not subject to a State external review process, and therefore subject to the Federal external review process. (In the case of health insurance coverage offered in

connection with a group health plan, the issuer has primary responsibility to comply with the interim final regulations.) This interim enforcement safe harbor applies for plan years beginning on or after September 23, 2010 and until superseded by future guidance on the Federal external review process that is being developed and that will apply after this interim period. During the period that this interim enforcement safe harbor is in effect, the Department of Labor and the Internal Revenue Service will not take any enforcement action against a self-insured group health plan that complies with either of the following interim compliance methods (and if a plan complies with one of the interim compliance methods of this notice, no excise tax liability should be reported on IRS Form 8928 with respect to PHS Act section 2719(b)):

- Compliance with the procedures outlined in Technical Release 2010-01.
The Department of Labor and the Internal Revenue Service will not take enforcement action against any plan that complies with the procedures set forth in Technical Release No. 2010-01. These procedures are based on the Uniform Health Carrier External Review Model Act promulgated by the National Association of Insurance Commissioners (NAIC Model Act) in place on July 23, 2010.² The Technical Release is available today on the Department of Labor's website at: <http://www.dol.gov/ebsa>.
- Voluntary compliance with State external review processes. Alternatively, States may choose to expand access to their State external review process

² Even though these procedures are based on the NAIC Model Act, they do not include all the consumer protections of the NAIC Model Act. For example, the procedures set forth in this notice do not include the special provisions for claims relating to experimental or investigational treatment and do not include a government agency certifying and assigning independent review organizations. The NAIC Model Act is available at <http://www.dol.gov/ebsa> and <http://www.hhs.gov/ociio/>. Future guidance will address the minimum consumer protections required under the Federal external review process after the interim enforcement safe harbor period.

to plans that are not subject to the applicable State laws, such as self-insured plans, and such plans may choose to voluntarily comply with the provisions of that State external review process. In such circumstances, while the interim enforcement safe harbor is in effect, the Department of Labor and the Internal Revenue Service also will not take enforcement action against a plan that voluntarily complies with the provisions of a State external review process that would not otherwise be applicable or available.

The Departments will issue guidance regarding what process will apply under 26 CFR §54.9815-2719T(d), 29 CFR §2590.715-2719(d), and 45 CFR §147.136(d) no later than July 1, 2011 to replace the interim process.

III. Interim Federal External Review Process for Issuers

For issuers in the individual market and the small group and large group health insurance markets (including fully-insured group health plans), there will be an interim enforcement safe harbor which will apply only for plan years (in the individual market, policy years) beginning on or after September 23, 2010 and until superseded by future guidance on the Federal external review process that is being developed and that will apply after this interim period. During this limited interim enforcement safe harbor period, HHS will not take any enforcement action against an issuer that complies with the interim compliance method that will be detailed by HHS on the Office of Consumer Information and Insurance Oversight website (<http://www.hhs.gov/ociio/>). This method will either involve use of a State external appeals process or a temporary process established by HHS.

Prior to July 1, 2011, HHS will issue further guidance as to which State external review laws have been determined to satisfy the minimum standards of the NAIC Model Act as identified in 45 CFR §147.136(c). The Departments will issue guidance regarding what process will apply under 26 CFR §54.9815-2719T(d), 29 CFR §2590.715-2719(d), and 45 CFR §147.136(d) no later than July 1, 2011 to replace the interim process.

IV. Model Notices

Model notices that can be used to satisfy the disclosure requirements of the interim final regulations³ are being posted on the Department of Labor's website at <http://www.dol.gov/ebsa> and the Department of HHS/Office of Consumer Information and Insurance Oversight website at <http://www.hhs.gov/ociio/>. These models include:

- (1) A notice of adverse benefit determination;
- (2) A notice of final internal adverse benefit determination; and
- (3) A notice of final external review decision.

Model language for the description of the internal claims and appeals and external review procedures in the summary plan description provided to participants and beneficiaries will be posted on these websites in the future.

Please note that the Departments accounted for the actual costs of the external appeal process taking into account the model notices when the interim final regulations were issued.

³ For rules regarding the form and manner of notice, see 26 CFR §54.9815-2719T(e), 29 CFR §2590.715-2719(e), and 45 CFR §147.136(e).

Signed August 19, 2010.

Sarah Hall Ingram
Acting Deputy Commissioner for Services and
Enforcement,
Internal Revenue Service.

Signed August 20, 2010.

Michael L. Davis
Deputy Assistant Secretary
Employee Benefits Security Administration
Department of Labor

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Dated: August 20, 2010

Jay Angoff,

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Oversight

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