

Notice of Proposed Rulemaking

Exception to the HIPAA Nondiscrimination Requirements for Certain Grandfathered Church Plans

REG-114083-00

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance under section 9802(c) of the Internal Revenue Code relating to the exception for certain grandfathered church plans from the nondiscrimination requirements applicable to group health plans under section 9802(a) and (b). Final, temporary, and proposed regulations (T.D. 8931,

REG-114082-00, and REG-114084-00) relating to the nondiscrimination requirements under section 9802(a) and (b) are being published on pages 542, 631, and 635 in this issue of the Bulletin. The regulations will generally affect sponsors of and participants in certain self-funded church plans that are group health plans, and the regulations provide plan sponsors and plan administrators with guidance necessary to comply with the law.

DATES: Written or electronic comments and requests for a public hearing must be received by April 9, 2001.

ADDRESSES: Send Submissions to: CC:M&SP:RU (REG-114083-00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:M&SP:RU (REG-114083-00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at: http://www.irs.gov/tax_regs/regslst.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Russ Weinheimer at 202-622-6080; concerning submissions of comments or requests for a hearing, Sonya Cruse at 202-622-7190 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Miscellaneous Excise Tax Regulations (26 CFR part 54) relating to the exception for certain grandfathered church plans from the nondiscrimination requirements applicable to group health plans. The nondiscrimination requirements applicable to group health plans were added to the Internal Revenue Code (Code), in section 9802, by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191. HIPAA also added similar nondiscrimination provisions applicable to group health plans and health insurance issuers (such as health insurance companies and health maintenance organizations) under the Employee Retirement

Income Security Act of 1974 (ERISA), administered by the U.S. Department of Labor, and the Public Health Service Act (PHS Act), administered by the U.S. Department of Health and Human Services.

Final and temporary regulations relating to the HIPAA nondiscrimination requirements in paragraphs (a) and (b) of section 9802 of the Code are being published in T.D. 8931 on page 542 of this Bulletin. Those regulations are similar to, and have been developed in coordination with, interim final regulations also being published today by the Departments of Labor and Health and Human Services. Guidance under the HIPAA nondiscrimination requirements is summarized in a joint preamble to the final, interim final, and temporary regulations.

The exception for certain grandfathered church plans was added to section 9802, in a new subsection (c), by section 1532 of the Taxpayer Relief Act of 1997, Public Law 105-34. These proposed regulations would provide guidance for this exception. The guidance is summarized in the explanation below.

Explanation of Provisions

Church plans that are group health plans are generally subject to the Code provisions in Chapter 100 relating to access, portability, and renewability.¹ However, under section 9802(c), church plans satisfying certain requirements continuously since July 15, 1997 are not treated as failing to meet the section 9802 prohibitions against discrimination based on any health factor solely because the plan requires evidence of good health for the coverage of certain individuals.

The grandfather rule in section 9802(c) applies to a church plan for a plan year only if, on July 15, 1997 and at all times after that date before the beginning of the plan year, the church plan had provisions satisfying one of two alternative conditions. The first alternative condition is that the plan contain provisions requiring evidence of good health of two sets of individuals, that is, both (1) any employee of an employer with 10 or fewer employees and (2) any self-employed individual. The proposed regulations specify that this condition is not satisfied if the plan requires evidence of good health of only one of these sets of individuals. The pro-

posed regulations also clarify that the plan provision for the first set of individuals must be exactly 10 or fewer. Thus, a plan provision requiring evidence of good health for employees of an employer of fewer than 10, or of greater than 10, employees does not satisfy this condition. For example, a plan provision requiring evidence of good health of any employee of an employer of five or fewer employees does not satisfy this condition.

The second alternative condition is that the plan contain provisions requiring evidence of good health of any individual who enrolls after the first 90 days of initial eligibility. The proposed regulations clarify that the period for these plan provisions must be exactly 90 days. Thus, a plan provision requiring evidence of good health of any individual who enrolls after the first 120 days of initial eligibility does not satisfy this condition.

The grandfather rule in section 9802(c) of the Code is not by its terms limited in its application to self-funded church plans. Section 2702 of the Public Health Service Act (PHS Act) imposes nondiscrimination requirements on health insurance issuers offering group health insurance coverage, and those nondiscrimination requirements are generally similar to the nondiscrimination requirements imposed on group health plans (including church plans) under paragraphs (a) and (b) of section 9802 of the Code. However, section 2702 of the PHS Act does not include an exception for health insurance issuers offering group health insurance coverage to church plans comparable to the exception for church plans in section 9802(c) of the Code. Thus, if a church plan providing benefits through group health insurance coverage were to require evidence of good health of certain individuals as permitted under section 9802(c) of the Code, the requirement of evidence of good health would cause the health insurance issuer providing the coverage to violate the nondiscrimination requirements of the PHS Act. In such a case, the sanctions under the PHS Act would apply to the issuer, but those under the Code would not apply to the church plan. Thus, assuming that group health insurance coverage complies with the nondiscrimination requirements of the PHS Act, the rule in section 9802(c) of

the Code is, in effect, available only to church plans that are not funded through group health insurance because only such church plans do not include insurance coverage that is subject to Title XXVII of the PHS Act. Accordingly, the examples in the proposed regulations illustrating situations where section 9802(c) is available are limited to group health plans that are not funded through group health insurance in order to avoid misleading insured church plans about the availability of the grandfather rule in section 9802(c).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (a signed original and eight (8) copies) to the IRS. Comments are specifically requested on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Russ Weinheimer, Office of the Operating Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54 — PENSION EXCISE TAXES

Paragraph 1. The authority citation for part 54 is amended in part by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 54.9802–2 also issued under 26 U.S.C. 9802. * * *

Par. 2. Section 54.9802–2 is added to read as follows:

§54.9802–2 *Special rules for certain church plans.*

(a) *Exception for certain church plans*—(1) *Church plans in general.* A church plan described in paragraph (b) of this section is not treated as failing to meet the requirements of section 9802 or §§54.9802–1 and 54.9802–1T solely because the plan requires evidence of good health for coverage of individuals under plan provisions described in paragraph (b)(2) or (3) of this section.

(2) *Health insurance issuers.* See sections 2702 and 2721(b)(1)(B) of the Public Health Service Act (42 U.S.C. 300gg–2 and 300gg–21(b)(1)(B)) and 45 CFR 146.121, which require health insurance issuers providing health insurance coverage under a church plan that is a group health plan to comply with nondiscrimination requirements similar to those that church plans are required to comply with under section 9802 and §§54.9802–1 and 54.9802–1T except that those nondiscrimination requirements do not include an exception for health insurance issuers comparable to the exception for church plans under section 9802(c) and this section.

(b) *Church plans to which this section applies*—(1) *Church plans with certain*

coverage provisions in effect on July 15, 1997. This section applies to any church plan (as defined in section 414(e)) for a plan year if, on July 15, 1997 and at all times thereafter before the beginning of the plan year, the plan contains either the provisions described in paragraph (b)(2) of this section or the provisions described in paragraph (b)(3) of this section.

(2) *Plan provisions applicable to individuals employed by employers of 10 or fewer employees and self-employed individuals*—(i) A plan contains the provisions described in this paragraph (b)(2) if it requires evidence of good health of both —

(A) Any employee of an employer of 10 or fewer employees (determined without regard to section 414(e)(3)(C), under which a church or convention or association of churches is treated as the employer); and

(B) Any self-employed individual.

(ii) A plan does not contain the provisions described in this paragraph (b)(2) if the plan contains only one of the provisions described in this paragraph (b)(2). Thus, for example, a plan that requires evidence of good health of any self-employed individual, but not of any employee of an employer with 10 or fewer employees, does not contain the provisions described in this paragraph (b)(2). Moreover, a plan does not contain the provision described in paragraph (b)(2)(i)(A) of this section if the plan requires evidence of good health of any employee of an employer of fewer than 10 (or greater than 10) employees. Thus, for example, a plan does not contain the provision described in paragraph (b)(2)(i)(A) of this section if the plan requires evidence of good health of any employee of an employer with five or fewer employees.

(3) *Plan provisions applicable to individuals who enroll after the first 90 days of initial eligibility*—(i) A plan contains the provisions described in this paragraph (b)(3) if it requires evidence of good health of any individual who enrolls after the first 90 days of initial eligibility under the plan.

(ii) A plan does not contain the provisions described in this paragraph (b)(3) if it provides for a longer (or shorter) period than 90 days. Thus, for example, a plan requiring evidence of good health of any individual who enrolls after the first 120

days of initial eligibility under the plan does not contain the provisions described in this paragraph (b)(3).

(c) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. (i) *Facts.* A church organization maintains two church plans for entities affiliated with the church. One plan is a group health plan that provides health coverage to all employees (including ministers and lay workers) of any affiliated church entity that has more than 10 employees. The other plan is Plan O, which is a group health plan that is not funded through insurance coverage and that provides health coverage to any employee (including ministers and lay workers) of any affiliated church entity that has 10 or fewer employees and any self-employed individual affiliated with the church (including a self-employed minister of the church). Plan O requires evidence of good health in order for any individual of a church entity that has 10 or fewer employees to be covered and in order for any self-employed individual to be covered. On July 15, 1997, and at all times thereafter before the beginning of the plan year, Plan O has contained all the preceding provisions.

(ii) *Conclusion.* In this *Example 1*, because Plan O contains the plan provisions described in paragraph (b)(2) of this section and because those provisions were in the plan on July 15, 1997, and at all times thereafter before the beginning of the plan year, Plan O will not be treated as failing to meet the requirements of section 9802, §54.9802–1, or §54.9802–1T for the plan year solely because the plan requires evidence of good health for coverage of the individuals described in those plan provisions.

Example 2. (i) *Facts.* A church organization maintains Plan P, which is a church plan that is not funded through insurance coverage and that is a group health plan providing health coverage to individuals employed by entities affiliated with the church and self-employed individuals affiliated with the church (such as ministers). On July 15, 1997, and at all times thereafter before the beginning of the plan year, Plan P has required evidence of good health for coverage of any individual who enrolls after the first 90 days of initial eligibility under the plan.

(ii) *Conclusion.* In this *Example 2*, because Plan P contains the plan provisions described in paragraph (b)(3) of this section and because those provisions were in the plan on July 15, 1997, and at all times thereafter before the beginning of the plan year, Plan P will not be treated as failing to meet the requirements of section 9802, §54.9802–1, or §54.9802–1T for the plan year solely because the plan requires evidence of good health for coverage of individuals enrolling after the first 90 days of initial eligibility under the plan.

(d) *Effective date.* [Reserved]

Robert E. Wenzel,
Deputy Commissioner
of Internal Revenue.

(Filed by the Office of the Federal Register on January 5, 2001, 8:45 a.m., and published in the issue of the Federal Register for January 8, 2001, 66 F.R. 1437)