

July 1, 2010

MEMORANDUM

RE: HHS Issues Final Application for Early Retiree Reinsurance Program

On June 29, 2010, the Department of Health and Human Services ("HHS") posted the Early Retiree Reinsurance Program ("ERRP") Official Application, Instructions for the Official Application, and a document entitled "Application Submission Do's and Don'ts" to the Office of Consumer Information and Insurer Oversight ("OCIIO") website. Along with the publication of this information, HHS announced that they are accepting applications immediately.

HHS previously issued interim final ERRP regulations, 75 Fed. Reg. 24450 (May 5, 2010). A summary of those regulations is available at <http://www.groom.com/resources-494.html>. On June 28, 2010, HHS added several Frequently Asked Questions ("FAQs") to its website that expand and modify this regulatory guidance. Plan sponsors should therefore carefully review the new FAQs before submitting their applications. All HHS documents are available at http://www.hhs.gov/ociio/regulations/index.html#early_retiree. Highlights of the HHS Official Application and Instructions, Do's and Don'ts, and FAQs follow.

Changes From "Draft" Application. A draft of the ERRP application was issued by HHS in early June. The final application mirrors the earlier draft application except for two changes. First, it no longer asks for the date of birth and social security number of the Authorized Representative or the Account Manager. The "Application Submission Do's and Don'ts" clarifies that after an application is approved, HHS will request the social security number and date of birth for Authorized Representative and the Account Manager. Second, the prior draft of the application did not provide an address to submit the application. The new application provides that it should be submitted to:

HHS ERRP Application Center
4700 Corridor Place
Suite D
Beltsville, MD 20705.

After the official application was released, it was changed to add a statement that applications should be sent by U.S. mail. However, it is our understanding that HHS is currently accepting applications through hand delivery, or delivery services other than U.S. mail. Applications may not be submitted electronically, however, and every page (other than additional pages added as attachments) must be an original printout of the website application with an original signature at the end.

Application Timing. HHS emphasizes in several FAQs that it is not important to be the first application submitted in order to ensure that the application is certified before the ERRP \$5 billion funding is exhausted. HHS indicates that, because reimbursement will be based on claims submission rather than application submission, the critical step in ensuring reimbursement is timely submission of claims. An example is given under which a sponsor is the first one to

submit an application, but waits a significant amount of time to request reimbursement. In that case, the FAQ provides that the sponsor may not receive the reimbursement if funds are exhausted.

Application Do's and Don'ts. HHS provided additional requirements on the mechanics of applying, such as:

- Applications must be typed.
- Every required field must be completed.
- Additional pages must be typewritten, in 12 point font or larger, clear and dark enough for scanning, and on 8.5 x 11 inch paper.
- Only completed final applications will be accepted. (Do not submit the draft.)

Claims Submission. Another FAQ provides that HHS is currently developing infrastructure for claims data and reimbursement requests, and that HHS will develop a process for submitting claims. We expect guidance in the near future related to how this system will operate.

Number of Plans. An FAQ provides guidance on how to determine whether there is more than one employment-based plan, which is important because the regulations state that separate plans must have separate applications. The FAQ references COBRA regulations, under which multiple health benefit arrangements are considered one employment based plan, unless (1) it is clear from the instruments governing an arrangement or arrangements to provide health benefits that the benefits are being provided under separate plans, and (2) the arrangement or arrangement are operated pursuant to such instruments as separate plans.

Number of Benefit Options. An FAQ also provides guidance on how to determine whether there is more than one benefit option, which is important because the application instructions indicate that different benefit options must be separately identified. The FAQ states that generally, a single-employment-based plan will not be considered to offer different health benefit options if the options are offered by the same issuer or TPA (even if the options have different benefit structures, such as a low deductible and a high deductible arrangement). If options are offered by different insurers or TPAs, the sponsor should list each benefit option, indicate whether the option is insured or self funded, and identify the insurer/TPA.

Authorized Representative. An FAQ and the instructions state that the individual who signs the application must be someone who has the authority to legally bind the organization. The FAQ provides examples of authorized individuals, including the sponsor's Chief Executive Officer (CEO), Chief Financial Officer (CFO), President, Human Resources (HR) Director, and General Partner. For plan sponsors that are unions, the FAQ states that a member of the union fund's board of trustees typically would have the requisite authority.

Permissible Use of Reimbursements. An FAQ states that reimbursement may not, except in limited circumstances involving insured arrangements, be used to pay administrative costs of administering the plan or participating in the ERRP. With respect to insured arrangements, the reimbursement may be used to pay a portion of the administrative fee if three

conditions are satisfied: (1) A sponsor maintains an insured plan, (2) The premium it pays the insurer for health benefits includes administrative costs, and (3) The insurer does not quantify for the sponsor the portion of the premium that is allocated to such costs.

Maintaining the Level of Effort in Contributing. There are several new FAQs concerning a plan sponsor's obligation to maintain the same level of contributions to the plan after receiving reimbursement (referred to in the regulation as "maintaining the sponsor's level of effort in contributing"). According to one FAQ, the maintenance of effort requirement does not apply if plan sponsors are able to demonstrate that they have used program funds exclusively to reduce or offset increases in plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or a combination of these costs use reimbursements exclusively to reduce plan participant costs (as opposed to the plan sponsor's own cost increases). In addition, an FAQ clarifies that a sponsor must demonstrate that it meets the maintenance of effort requirement in the aggregate, for all plan participants as opposed to a particular participant. Other FAQs introduce the concept of a "baseline" budget or plan year cycle to compare the level of contributions made after the ERRP program begins, and discussed how to calculate the level of effort with respect to a multiemployer plan, or a single employer plan funded through a trust.

Fraud, Waste and Abuse Procedures. FAQs clarify that a plan sponsor can rely on an insurer's or administrator's fraud, waste and abuse procedures as long as those procedures are available upon request, and further provide that the procedures do not need to be specifically designed for the ERRP program or reference that program.

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If you have any questions, please contact your regular Groom attorney or any of the attorneys listed below.

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