elected under § 146.180 of this part to exempt the plan from the requirements of this section for the plan year beginning October 1, 2005, and renewed the exemption election for the plan year beginning October 1, 2006. Under the terms of the plan while the exemption was in effect, employees and their dependents were allowed to enroll when the employee was first hired without regard to any health factor. If an individual declines to enroll when first eligible, the individual could enroll effective October 1 of any plan year if the individual could pass a physical examination. The evidence-of-good-health requirement for late enrollees, absent an exemption election under § 146.180 of this part, would have been in violation of this section. *D* chose not to enroll for coverage when first hired. In February of 2006, *D* was treated for skin cancer but did not apply for coverage under the plan for the plan year beginning October 1, 2006, because *D* assumed *D* could not meet the evidence-of-good-health requirement. With the plan year beginning October 1, 2007 the plan sponsor chose not to renew its exemption election and brought the plan into compliance with this section. The plan notifies individual *D* (and all other employees) that it will be coming into compliance with the requirements of this section. The notice specifies that the effective date of compliance will be October 1, 2007, explains the applicable enrollment restrictions that will apply under the plan, states that individuals will have at least 30 days to enroll, and explains that coverage for those who choose to enroll will be effective as of October 1, 2007. Individual *D* timely requests enrollment in the plan, and coverage commences under the plan on October 1, 2007.

(ii) *Conclusion.* In this *Example 1*, the plan complies with this paragraph (i)(2).

Example 2. (i) *Facts.* Individual *E* was hired by a nonfederal governmental employer in February 1999. The employer maintains a self-funded group health plan with a plan year beginning on September 1. The plan sponsor elected under § 146.180 of this part to exempt the plan from the requirements of this section and ''§ 146.111 (limitations on preexisting condition exclusion periods) for the plan year beginning September 1, 2002, and renews the exemption election for the plan years beginning September 1, 2003, September 1, 2004, September 1, 2005, and September 1, 2006. Under the terms of the plan while the exemption was in effect, employees and their dependents were allowed to enroll when the employee was first hired without regard to any health factor. If an individual declined to enroll when first eligible, the individual could enroll effective September 1 of any plan year if the individual could pass a physical examination. Also under the terms of the plan, all enrollees were subject to a 12-month preexisting condition exclusion period, regardless of whether they had creditable coverage. *E* chose not to enroll for coverage when first hired. In June of 2006, *E* is diagnosed as having multiple sclerosis (MS). With the plan year beginning September 1, 2007, the plan sponsor chooses to bring the plan into compliance with this section, but renews its exemption election with regard to limitations on preexisting condition exclusion periods. The plan notifies *E* of her opportunity to enroll, without a physical examination, effective September 1, 2007. The plan gives *E* 30 days to enroll. *E* is subject to a 12-month preexisting condition exclusion period with respect to any treatment *E* receives that is related to *E*'s MS, without regard to any prior creditable coverage *E* may have. Beginning September 1, 2008, the plan will cover treatment of *E*'s MS.

(ii) *Conclusion.* In this *Example 2*, the plan complies with the requirements of this section. (The plan is not required to comply with the requirements of § 146.111 because the plan continues to be exempted from those requirements in accordance with the plan sponsor's election under § 146.180.)

Editorial Note: This document was received at the Office of the Federal Register on December 1, 2006.

Dated: July 16, 2004.

Mark B. McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Dated: November 28, 2005.

Michael O. Leavitt,

Secretary, Department of Health and Human Services.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[TD 9299]

RIN 1545–AY33

Exception to the HIPAA Nondiscrimination Requirements for Certain Grandfathered Church Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final 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 regulations relating to the nondiscrimination requirements under section 9802(a) and (b) are being published elsewhere in this issue of the **Federal Register**. 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: *Effective Date:* These regulations are effective February 12, 2007.

Applicability Date: These regulations apply for plan years beginning on or after July 1, 2007.

FOR FURTHER INFORMATION CONTACT: Russ Weinheimer at 202–622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains 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 (110 Stat. 1936). 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 regulations relating to the HIPAA nondiscrimination requirements in paragraphs (a) and (b) of section 9802 of the Code are being published elsewhere in this issue of the **Federal Register**. Those regulations are similar to, and have been developed in coordination with, final regulations also being published today by the Departments of Labor and of Health and Human Services. Guidance under the HIPAA nondiscrimination requirements is summarized in a joint preamble to the final regulations.

The exception for certain grandfathered church plans was added to section 9802, in subsection (c), by section 1532 of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788). A notice of proposed rulemaking on the exception for certain grandfathered church plans and a request for comments (REG–114083–00) was published in the **Federal Register** of January 8, 2001. Two written comments were received. After consideration of the comments, the proposed regulations are adopted as amended by this Treasury decision.

Explanation and Summary of Comments

One comment was pleased with the guidance in the proposed rules and asked that they be published as final rules as soon as possible. The other comment explained why the statute needed this exception and suggested that the proposed regulations did nothing more than paraphrase the statute. Neither comment asked for any change in the proposed regulations.

These final regulations make no significant substantive change to the proposed regulations. An effective date has been supplied and references to the supplanted temporary regulations have been deleted, but otherwise no change has been made in the final regulations.

Special Analyses

It has been determined that this Treasury decision 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 is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these 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.

List of Subjects in 26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 54 is amended as follows:

PART 54—PENSION EXCISE TAXES

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

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

Section 54.9802–2 also issued under 26 U.S.C. 9833. * * *

■ **Par. 2.** In § 54.9801–1, paragraph (a) is revised to read as follows:

§ 54.9801–1 Basis and scope.

(a) *Statutory basis.* Sections 54.9801–1 through 54.9801–6, 54.9802–1, 54.9802–2, 54.9811–1T, 54.9812–1T, 54.9831–1, and 54.9833–1 (portability sections) implement Chapter 100 of Subtitle K of the Internal Revenue Code of 1986.

* * * * *

■ **Par. 3.** In § 54.9801–2, the introductory text is revised to read as follows:

§ 54.9801–2 Definitions.

Unless otherwise provided, the definitions in this section govern in applying the provisions of §§ 54.9801–1 through 54.9801–6, 54.9802–1, 54.9802–2, 54.9811–1T, 54.9812–1T, 54.9831–1, and 54.9833–1.

* * * * *

■ **Par. 4.** 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 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 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 or § 54.9802–1 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 or § 54.9802–1 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) *Applicability date.* This section is applicable to plan years beginning on or after July 1, 2007.

■ **Par. 5**. Section 54.9831–1 is amended by revising paragraphs (b) and (c)(1) to read as follows:

§ 54.9831–1 Special rules relating to group health plans.

* * * * *

(b) *General exception for certain small group health plans.* The requirements of §§ 54.9801–1 through 54.9801–6, 54.9802–1, 54.9802–2, 54.9811–1T, 54.9812–1T, and 54.9833–1 do not apply to any group health plan for any plan year if, on the first day of the plan year, the plan has fewer than two participants who are current employees.

(c) *Excepted benefits*—(1) *In general.* The requirements of §§ 54.9801–1 through 54.9801–6, 54.9802–1, 54.9802–2, 54.9811–1T, 54.9812–1T, and 54.9833–1 do not apply to any group health plan in relation to its provision of the benefits described in paragraph (c)(2), (3), (4), or (5) of this section (or any combination of these benefits).

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Approved: June 22, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury (Tax Policy).

Editorial Note: This document was received at the Office of the Federal Register on December 1, 2006.

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