



AMERICAN BENEFITS  
COUNCIL

December 8, 2010

Office of Consumer Information and Insurance Oversight  
Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Ave., S.W.  
Washington, DC 20201

*Submitted electronically via the Federal Regulations Web Portal, <http://www.regulations.gov>*

**Re: File Code OCIIO-9986-NC: Affordable Care Act;  
Federal External Review Process; Request for Information**

Dear Sir or Madam:

I am writing to submit comments on behalf of the American Benefits Council (“Council”) regarding the Notice of Request for Information (RFI) soliciting information that will enable the Departments of Health and Human Services (HHS) and Labor (DOL) (“Agencies”) to conduct a market analysis and assist the Departments in planning and developing a Federal external review process as established under section 2719 of the Public Health Service Act, as amended by the Patient Protection and Affordable Care Act (“Affordable Care Act”) and its implementing regulations<sup>1</sup> (75 Fed. Reg. 70160, November 17, 2010).

The RFI requests comments on operational issues associated with the implementation of a Federal external review process for health coverage in States that do not have an applicable external review process that meets minimum Federal standards. According to the Notice, the RFI is being issued in advance of one or more future Requests for Proposals (RFPs) and the Agencies may contract for services required to fulfill the statutory and regulatory requirements of the Federal external review process.

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<sup>1</sup> The Interim Final Regulations apply to plan years beginning on or after September 23, 2010. (75 Fed. Reg. 43330, July 23, 2010)

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The comments below do not directly relate to the specific operational questions regarding Independent Review Organization (IRO) standards as set out in the RFI, but instead are intended to address how such standards might relate to the Federal external review process as that process applies to self-insured plans under the Affordable Care Act, the interim final regulations, sub-regulatory and any future guidance.

## **Background**

The Interim Final Regulations implement a portion of section 1001 of the Patient Protection and Affordable Care Act ("Affordable Care Act"), which added new section 2719 to the Public Health Service Act ("PHSA"). New PHSA section 2719 requires health plans and health insurance issuers to implement an internal claims appeals process that meets specific requirements, based in large part on the current claims regulations for ERISA plans, as well as implement a system that will provide claimants with either a State or Federal external review process.

With respect to external review, the Interim Final Regulations provide rules for determining when a State external review or the Federal external review process applies. For health insurance coverage, if a State external review process meets certain minimum standards<sup>2</sup>, the issuer must comply with the applicable State external review process and not with the Federal external review process. For a plan (including an ERISA self-insured plan) or issuer not subject to an existing State external review process, the Federal external review process applies.

Additional guidance<sup>3</sup> detailing interim procedures for the Federal external review process was issued by the Agencies, including an interim enforcement safe harbor for non-grandfathered self-insured group health plans not subject to State external review process (and therefore subject to the Federal external review process). The enforcement safe harbor is available to self-insured plans who either: (1) voluntarily comply with

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<sup>2</sup> Section 2719(b)(1) of the PHSA and the Agencies' implementing regulations provide that, if a State external review process that applies to and is binding on a health insurance issuer includes at a minimum, the consumer protections set forth in the Uniform External Review Model Act issued by the National Association of Insurance Commissioners (NAIC), then the issuer is not required to comply with the Federal external review process.

<sup>3</sup> 75 Fed. Reg. 52597 (August 26, 2010).

State external review processes; or (2) comply with the procedures for external review set out in Department of Labor Technical Release 2010-01.<sup>4</sup> The procedures for external review identified in the technical release require a self-insured plan to contract with three IROs and specifies a range of specific requirements related to IRO performance that must be included in contracts between plans and IROs.

### **IRO Standards for the Federal External Review Processes Should Apply Equally**

As the Agencies consider operational, quality and other IRO standards for purposes of the Federal external review process established pursuant to this RFI and any future RFPs, we recommend that such standards apply in the same manner to IROs that directly contact with self-insured plans. We believe that performance standards should apply to IROs contacting with the federal government on the same basis as they would to all other IROs.

### **The Federal External Review Process and Self-Insured Plans**

In developing the Federal external review process pursuant to this RFI and any RFPs , we recommend that there be no prohibition or restrictions on any entity that contracts with the federal government to provide services pursuant to the Federal external process from also contracting directly with group health plans or third-party administrators for external review services. The Council believes any such prohibition or restriction would further reduce the availability of IRO services at a time when the Affordable Care Act has produced a significant demand for such services.

### **Agencies Should Seek Additional Comments**

As the Agencies plan and develop the Federal external review process, there may be consideration given as to whether (or how) to allow access to the Federal external review process developed pursuant to this RFI or future RFPs by self-insured plans for purposes of satisfying such plans' external review compliance obligations under the Affordable Care Act.

We believe expanding such access to self-insured plans raises many significant issues that would benefit from an additional RFI or request for comment by the Agencies. An additional RFI, requesting comment on specific questions related to operational,

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<sup>4</sup> According to DoL Technical Release 2010-01 dated August 23, 2010 , the interim enforcement safe harbor applies for plan years beginning on or after September 23, 2010 and until superceded by future guidance on the Federal external review process that is being developed and will apply after this interim period.

administrative and fiduciary issues that would allow the Agencies to ensure that all interested parties have a meaningful opportunity to comment and inform any subsequent guidance or rulemaking.

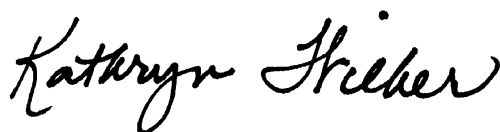
While we reserve comment at this time on allowing self-insured plans access to a Federal external review process established under any federal contracts with IROs, our preliminary recommendation is that any such access be an option (in addition to a plan directly contracting with IROs) and not the required process for Federal external review.

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The Council appreciates the continued efforts of the Agencies to issue important and timely guidance with respect to the Affordable Care Act generally and new PHSA section 2710 specifically.

Thank you for the opportunity to comment and for considering our recommendations. Please contact me at [kwilber@abcstaff.org](mailto:kwilber@abcstaff.org) or 202-289-6700 with any questions or if we can be of further assistance.

Kathryn Wilber

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Senior Counsel, Health Policy