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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: RIN 1210-AB42
Affordable Care Act Interim Final Rules Regarding Grandfathered Health Plans

Proskauer Rose LLP, on behalf of itself and certain of its clients, appreciates this opportunity to submit comments on the Department's interim final rule implementing Section 1251 of the Patient Protection and Affordable Care Act (the Affordable Care Act), regarding grandfathering rules (the IFR)[1]. Proskauer is an international law firm providing a wide variety of legal services to clients worldwide. In particular, since the Affordable Care Act's enactment, Proskauer's interdisciplinary Health Care Reform Task Force has been assisting numerous clients in recognizing, analyzing and solving the myriad issues raised by the law.

We commend the Department for the swiftness with which the Department, in conjunction with the Department of Health and Human Services and the Department of the Treasury, has promulgated interim final rules and other guidance implementing various provisions of the Affordable Care Act. As plan advisors, the guidance is invaluable as we navigate the post-Affordable Care Act world of providing health benefits to employees. We write, however, to request that the Department clarify the rules governing so-called retiree-only plans articulated in the preamble to the IFR to specify the standard by which the identity of a "current employee" is to be determined. [2]

[1] *See* Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538 (June 17, 2010).

[2] Pursuant to the specified comment procedures, we submit this comment letter only to the Department. *See id.* As such, in this letter we cite only to the relevant ERISA provisions governing the exception for so-called retiree-only plans. Nevertheless, the same comments and concerns apply to the comparable provisions and exception under the Internal Revenue Code (such as Sections 9815 and 9831(a) of the Internal Revenue Code) and under the non-enforcement policy articulated by the Department of Health and Human Services' in the preamble to the IFR.

As an initial matter, we applaud the steps taken by the agencies in the preamble to the IFR to encourage and foster the continued maintenance by employers in the private sector of health care plans for their retirees. First, you acknowledged formally that such plans fall within the ambit of ERISA Section 732(a) with respect to any plan year if on the first day thereof the plan covered fewer than two "current employees." Second, you articulated your view that ERISA Section 732(a) does not conflict with the deletion of the comparable rule previously included in Section 2721(a) of the Public Health Service Act and, consequently, has not been effectively repealed from ERISA by virtue of ERISA Section 715.

There remains at least one open question that we urge you to address in connection with promulgation of future guidance (including any final regulations). That issue involves defining who is a "current employee" for purposes of ERISA Section 732(a).

The Department has observed on several occasions that the term "employee" as defined in ERISA Section 3(37) refers to an individual who is in an "employment relationship" with an employer. Thus, if the word "current" were not used in ERISA Section 732(a) to modify "employee," the provision would apply to plans that covered fewer than two individuals who have an employment relationship with the employer on the first day of the plan year. By referring to "current employees" rather than merely to "employees," Congress must have intended to describe a subset of the larger group of individuals who on the first day of the plan year had an employment relationship with the employer.

We ask that you identify that subset with more specificity. In that regard, we suggest that the easiest and most logical rule to apply is that the term "current employees" consists of employees who were employed on the first day of the plan year in active employment with the employer. Such persons are, in the truest sense of the term, the employer's "current employees" on the statutorily-prescribed measuring date.

The definition we suggest would, among other things, address a situation that we believe requires attention. We understand that many collectively-bargained plans designed to provide retiree coverage also cover individuals who are no longer actively working but nonetheless retain certain collectively-bargained seniority rights and hence may be said to remain in some type of an "employment relationship" with an employer. In many cases, however, these individuals are disabled and unable to work. Moreover, they are not expected ever to return to active service and may do so only in the rare case where they recover sufficiently from their disabling illness or injury to allow them to resume active employment. It is not appropriate to treat these disabled individuals as "current employees" for purposes of ERISA Section 732(a), and we ask that they be excluded under whatever definition the Department elects to apply to the term "current employee."

We hope this comment is constructive and helpful to you. Prompt agency guidance as to the meaning of "current employee" is desperately needed, especially by calendar-year plans that not only cover many retirees, but also more than one person who is no longer actively working

(usually because of disability) but, in light of his/her retention of seniority rights, may not be deemed to have retired.

We would be happy to discuss our concerns and suggestions in more detail. We hope that future guidance, with the changes that we have recommended, will be adopted promptly.

Respectfully submitted,

Paul M. Hamburger