August 25, 2010

**VIA FEDERAL eRULEMAKING PORTAL (www.regulations.gov)**

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N–5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210,
Attention: RIN 1210–AB43

Re: Comments on Interim Final Rule on Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections

To Whom It May Concern:

Thank you for the opportunity to comment on the Interim Final Rule ("IFR") that was published in the Federal Register on June 28, 2010 and clarified many issues related to new requirements under the Affordable Care Act ("ACA").

Based in Coldwater, Michigan, Infinisource, Inc. is a benefit and payroll administrator that provides administrative services related to flexible benefits (including Health FSAs, Health Reimbursement Arrangements [HRAs] and Health Savings Accounts [HSAs]), COBRA, HIPAA and payroll. Our client base numbers more than 15,000 employers nationwide.

Specifically, we want to provide comments related to two issues:

- The application of §2711 of the Public Health Service Act (PHSA) to stand-alone HRAs as it relates to lifetime and annual limits
- The application of §2712 of the PHSA to COBRA coverage as it relates to the "No Rescission Rule"

1. **Issue for Comment:** *Should the lifetime and annual limit rules apply to stand-alone HRAs?*
   **Proposed Response:** *No, they should not.*

The preamble to the IFR clarifies that §2711 of the PHSA does not apply to the following types of reimbursement arrangements:

- Health FSAs
- Archer Medical Savings Accounts
- HSAs
- HRAs integrated with medical coverage that is subject to §2711 of the PHSA

- Retiree-only HRAs

At least two good reasons exist to include all other stand-alone HRAs on the above exception list.

First, Congress did not intend the §2711 rules to apply to HRAs. When HRA guidance was first issued in 2002 through Notice 2002-45 and Revenue Ruling 2002-41, the nature of these types of plans was that an employer would provide a specified amount of money each year into an account that could be used to reimburse qualified medical expenses. HRAs can be used to purchase individual insurance that would not necessarily be integrated with the HRA. Other employers offer HRAs alongside medical plans but do not necessarily integrate the two plans, allowing employees to participate in the HRA without having to participate in the medical plan. To prohibit a stand-alone HRA from specifying the annual and lifetime amounts would effectively write stand-alone HRAs out of existence. We don't recall a single member of Congress speaking out against HRAs that would warrant such a result. In administering HRAs for many employers, we are seeing HRAs become an increasingly popular option.

In reviewing the legislative history, we could find no reference to the lifetime and annual limit rules applying to HRAs. Elsewhere in the ACA (for example, §9003), where Congress wanted to make clear that a provision applied to HRAs, the ACA made specific reference.

The IRS and Department of Treasury issued guidance relating to the tax exclusion for adult children under age 27 earlier this year in Notice 2010-38. It was observed that the ACA did not contain a parallel exclusion in §106 to the exclusion referenced in §105(b). The result was to look to Congressional intent and create the appropriate rule:

> *"There is no indication that Congress intended to provide a broader exclusion in § 105(b) than in § 106. Accordingly, IRS and Treasury intend to amend the regulations under § 106, retroactively to March 30, 2010, to provide that coverage for an employee's child under age 27 is excluded from gross income."*

The same approach should be adopted with stand-alone HRAs.

Second, HRAs provide both essential and non-essential health benefits, the latter of which can have reasonable lifetime and annual limits. HRAs can reimburse a wide variety of benefits that constitute medical care. Some of these would not qualify as essential health benefits. It is likely that most participants will use their HRA accounts for a mix of essential and non-essential health benefits. In theory, a participant could use the HRA solely for non-essential health benefits. It is within the discretion of the agencies to determine that because stand-alone HRAs offer non-essential benefits, an employer can place reasonable annual and lifetime limits on those benefits.

2. **Issue for Comment:** *How should the "No Rescission Rule" apply to certain terminations of COBRA coverage?*
   **Proposed Response:** *Certain retroactive coverage terminations should be permissible because they do not meet the definition of a "rescission."*

Current COBRA regulations allow employers two options in providing COBRA coverage when payment has not yet been made by the Qualified Beneficiary (Treas. Reg. §54.4980B-8, Q/A-5(c)):

- Retroactive reinstatement: A plan may cancel coverage if it has not received payment by the due date, but reinstate coverage retroactively if payment is made by the end of the grace period.
- Retroactive cancellation: A plan may provide coverage if it has not received payment by the due date, but cancel coverage retroactively if payment is not made by the end of the grace period.

In the latter approach, the reason for cancellation is *"attributable to the failure to timely pay required premiums or contributions,"* whether it be during the initial 45-day grace period or the subsequent monthly 30-day grace periods. According to the IFR, such cancellations would not constitute a prohibited rescission of coverage.

An additional reason for not applying the No Rescission Rule to the COBRA context is that §(b) specifically acknowledges that *"[o]ther requirements of Federal or State law may apply in connection with a rescission of coverage."* This would seem to recognize that existing rules under federal law (e.g., COBRA) would take precedence over the §2712 rule.

It is recommended that the agencies clarify how this applies to COBRA coverage.

We want to thank all of the agencies and departments involved for the IFR, and we appreciate the opportunity to comment on them. If you have any questions or concerns, please feel free to contact me or Connie Gilchrest, our Research and Compliance Specialist, who assisted with these comments, at 800-300-3838 or via e-mail at rtglass@infinisource.net or cgilchrest@infinisource.net.

Thank you for your consideration.

Respectfully Submitted,

Rich Glass, JD
Chief Compliance Officer