



THE SECRETARY OF HEALTH AND HUMAN SERVICES

WASHINGTON, D.C. 20201

September 8, 2010

Kurt L.P. Lawson, Partner
Hogan Lovells US LLP
Columbia Square
555 Thirteenth St, NW
Washington, DC 20004

Dear Mr. Lawson:

Thank you for your letter expressing concern over whether limited scope dental and vision benefits provided under a separate health plan or policy will continue to be exempt from the substantive requirements of the Public Health Service Act (PHSA).

Limited scope dental and vision coverage are considered to be “excepted benefits” provided they are (1) offered as separate benefit policy, certificate, or contract of insurance; or (2) not an integral part of the plan. To be considered not an integral part of the plan, in general, participants must have the right to elect not to receive coverage; and if a participant elects to receive coverage, the participant must pay an additional premium or contribution for that coverage. See section 2722 of the PHSA, section 732 of the Employee Retirement Income Security Act (ERISA), and section 9831 of the Internal Revenue Code (Code) and their implementing regulations at 45 CFR 146.145(c)(3), 29 CFR 2590.732(c)(3), and 26 CFR 54.9831-1(c)(3).

As outlined in the preamble to the interim final regulations relating to status as a grandfathered health plan, the exceptions for excepted benefits in ERISA and the Code remain in effect. Moreover, the Department of Health and Human Services (HHS) also stated in the preamble that it does not intend to use its resources to enforce the PHSA requirements with respect to nonfederal governmental plans that offer dental and vision benefits that meet the definition of excepted benefits. States have the primary enforcement authority for insurance companies that sell coverage meeting the definition of an excepted benefit. HHS encourages states to exercise the same discretion and will not consider the state to be failing to enforce the PHSA with respect to dental and vision plans that meet the definition of excepted benefits. See 75 FR 34538, 34539-34540 (published June 17, 2010).

Again, thank you for your letter and for your continued advocacy and leadership on this important issue.

Sincerely,

Kathleen Sebelius