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MEMORANDUM

TO: Joseph Miller, General Counsel, America's Health Insurance Plans
FROM: Jonathan Hacker
Sujeet Rao
DATE: August 13, 2010
SUBJECT: **August 10, 2010 Letter Concerning PPACA § 2718**

You have asked us to analyze an August 10, 2010 letter from six members of Congress regarding § 2718 of the Patient Protection and Affordable Care Act ("PPACA") to evaluate whether that letter should affect the interpretation of § 2718. It should not. Well-settled principles of statutory construction and longstanding Supreme Court precedent establish that the post-enactment interpretive opinions of several members of Congress cannot alter the meaning of an otherwise unambiguous statutory provision.

BACKGROUND

Section 2718 of the PPACA describes the calculation a health insurance provider must make to determine the required annual rebate to provide to enrollees. Under the statute, the denominator of the equation is "the total amount of premium revenue (*excluding Federal and State taxes and licensing or regulatory fees* and after accounting for payments or receipts for risk adjustment, risk corridors, and reinsurance under sections 1341, 1342, and 1343 of the Patient Protection and Affordable Care Act) for the plan year." PPACA, Pub. L. 111-148, § 2718(b)(1)(A) (2010) (emphasis added).

In an August 10, 2010 letter written with the expressed intention to "clarify legislative intent," six members of Congress stated that the phrase "Federal taxes and fees" refers "only to Federal taxes and fees that relate specifically to revenue derived from the provision of health coverage that were included in the PPACA." The authors identify three specific categories of taxes and fees they believe are excluded under the provision: "(1) the annual fee imposed by section 9010 based on each health insurer's market share based on net premiums written; (2) the annual fee imposed by section 6301 on each health insurance policy (based on the average number of people covered under the policy); and (3) the tax imposed by section 9001 on high-cost employer-sponsored health coverage." "Federal income taxes or payroll taxes," the authors conclude, "were not intended to be excluded from the denominator."

ANALYSIS

The August 10, 2010 letter does not provide any meaningful interpretive guidance for § 2718. The language of § 2718 is unambiguous. It excludes "Federal and State taxes and

licensing or regulatory fees" from the denominator. PPACA, § 2718(b)(1)(A) (emphasis added). The text contains no qualification or limitation on the taxes and fees identified.

It is a settled principle of statutory construction that if the terms of a statute are "plain and unambiguous," then a court "must apply the statute according to its terms" without further inquiry. *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-64 (2009) (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000); *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). As noted, the taxes and fees subject to the provision are defined in "plain and unambiguous" terms; accordingly, there is no basis for resort to legislative history to clarify the provision. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1332 n.3 (2010) ("reliance on legislative history is unnecessary in light of the statute's unambiguous language"); *id.* at 1342 (Scalia, J., concurring) ("Our cases have said that legislative history is irrelevant when the statutory text is clear.").

The full text of the provision, in fact, affirmatively refutes any suggestion that the excluded taxes and fees are tacitly limited to those enacted by the PPACA. The provision has another exclusion for "payments or receipts for risk adjustment, risk corridors, and reinsurance," and it explicitly limits that exclusion to amounts related to "sections 1341, 1342, and 1343 of the [PPACA]." *Id.* This exclusion, in other words, expressly states the limitation the authors of the August, 10, 2010 letter would *read into* the taxes and fees exclusion. When language is specifically included in one part of a statutory provision but omitted elsewhere in the provision, courts do not consider themselves authorized to add the language judicially. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)).

Finally, it bears emphasis that even if recourse to legislative history were appropriate here, the August 10, 2010 letter is not the kind of "history" courts deem a reliable indicator of congressional intent. The letter is a form of "post-enactment legislative history," a "deprecatory contradiction in terms" that "refers to statements of those who drafted or voted for the law that are made after its enactment." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008). Because post-enactment statements necessarily "could have had no effect on the congressional vote," *id.*, they are "inherently entitled to little weight," *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) (quotation omitted); *see United States v. Texas*, 507 U.S. 529, 535 n.4 (1993); *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650 (1990).

Accordingly, § 2718 should be construed according to its plain and unambiguous terms. This principle controls not only courts, but regulatory agencies as well—when the statute is clear on its face, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). An agency interpretation of the provision that

departs from the plain text to impose the limitations described in the August 10, 2010 letter thus would not be entitled to deference from courts. *Id.*

Courts and agencies, in sum, are bound by statute's clear language, which sets forth the excluded taxes and fees without express or implied limitation. The views of six members of Congress expressed in a letter written months *after* the statute was enacted cannot change what the text of the statute clearly says. Nor can those views "clarify" what is already clear. The August 10, 2010 letter should not be considered a permissible basis for construing the statute to include the limitations the letter suggests, and it should not be given interpretive weight by the NAIC, HHS, or any court.

Please let us know if you have any further questions.