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Interim Final Regulations Issued for Health Plans Relating to Status as a Grandfathered Health Plan

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June 15, 2010

On June 14, 2010, the three primary agencies charged with regulating and enforcing the federal government's health care reform effort (the U.S. Department of Treasury, the U.S. Department of Health and Human Services, and the U.S. Department of Labor) released interim final regulations that address the applicable exemptions for grandfathered health plans and the changes that may and may not be made to health plans seeking to retain their grandfathered status. *See* T.D. 9489.

Although the agencies last week inadvertently released a draft version of the regulations, the final version contains a few changes to the earlier release. In this *On Benefits*, we review the interim final regulations and explore what sponsors of these plans can next expect.

Interim Final Regulations.

Following the Patient Protection and Affordable Care Act and the subsequent Reconciliation Act (collectively, "PPACA"), grandfathered health plans were granted an exemption from many of the health care reform requirements. For these purposes, a grandfathered health plan is an employment-based group health plan (insured or self-funded) or individual insurance coverage existing as of March 23, 2010. PPACA further provided that the three primary agencies were to create the regulations pertaining

to grandfathered health plan status.

Although they are not completely dispositive, the interim final regulations answer many of the questions about the applicability of health care reform to grandfathered health plans, such as:

- Retiree-only health plans generally are exempt from the health care reform plan design and operational changes (*e.g.*, extension of coverage to adult children up to age 26, coverage of preventive care without cost-sharing, etc.).
- "Excepted benefits," such as dental-only, vision-only, and health flexible spending account plans, are exempt from the health care reform plan design and operational changes.
- There is no broad exemption for collectively bargained insured plans that are subject to bargaining agreements in effect on March 23, 2010; such plans are simply deemed to be grandfathered health plans until the termination of the last collective bargaining agreement in effect on March 23, 2010, and are subject to all of the health care reform changes that otherwise apply to grandfathered health plans (*e.g.*, the adult child coverage rules apply, but the new appeal procedures will not ap-

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- The delayed effective date for collectively bargained insured plans does not extend to self-funded health plans. Self-funded collectively bargained plans will be subject to the same requirements as other self-funded employment-based health plans.
- Adding existing employees as new enrollees in an employment-based group health plan after March 23, 2010, will not affect the plan's status as a grandfathered health plan.
- A plan that has multiple benefit packages may have both grandfathered and non-grandfathered benefit packages (*i.e.*, the rules apply separately to each benefit package).
- In general, plan changes adopted before March 23, 2010, with an effective date after that date will not cause a loss of grandfathered status. If an employer/plan sponsor made changes to a group health plan since March 23, 2010, that would cause a plan to lose its grandfathered status under the new guidance, the employer/plan sponsor may reverse those changes before the first plan year beginning on or after September 23, 2010 (generally, the 2011 plan year) and preserve grandfathered health plan status.

The interim final regulations thoroughly describe when and whether changes to a health plan will adversely affect its grandfathered health plan status. Any health plan changes that are not specifically prohibited (*e.g.*, benefit improvements) will not cause a health plan to lose its grandfathered status.

In order to maintain status as a grand-

fathered health plan, the plan document must include a statement that the plan is a grandfathered health plan and the plan sponsor must provide contact information for questions and complaints. The interim final regulations include model language that plan sponsors may use to comply with the requirements.

The following changes will cause a health plan to lose its status as a grandfathered health plan:

- Elimination of all or substantially all benefits to diagnose or treat a particular condition, even if that condition affects only a few covered individuals.
- Any increase in an individual's percentage coinsurance requirement (*e.g.*, increasing from 20 percent to 30 percent coinsurance).
- Any increase in fixed-dollar cost-sharing (such as deductibles and out-of-pocket expense limits, but not co-payments) in excess of the rate of medical inflation (as defined in the regulations) since March 23, 2010, plus 15 percentage points.
- Any increase in co-payments in excess of the greater of (1) the rate of medical inflation, plus 15 percentage points, or (2) \$5.00, as adjusted for medical inflation.
- Any decrease in the employer contribution towards the cost of any tier of coverage by more than 5 percent of its contribution rate in effect on March 23, 2010. The total cost of coverage is to be determined in the same manner as the COBRA continuation premium.
- Certain changes to lifetime and annual benefit limits that would be adverse to plan participants.

What to Next Expect.

The interim final regulations invite comments on whether changes to plan structure (*e.g.*, self-funded to insured status), provider networks, prescription drug formularies, and other plan design changes should be permitted without loss of grandfathered health plan status. We anticipate that several trade organizations will take advantage of the comment period to clarify these issues.

Additionally, we expect that the three primary agencies will issue additional guidance on grandfathered health plans over the coming months. Employers and other plan sponsors will need to decide whether the limited grandfathered health plan exemption from the health care reform plan design and operational changes is worth the cost of limited flexibility in making desired plan design changes. Brucker & Morra, APC can assist employers and other plan sponsors in conducting this analysis.

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