



AMERICANS FOR LIMITED GOVERNMENT

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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 Ave, N.W.
Washington, DC 20210

Via email to: E-OHPSCA.EBSA@dol.gov

**RE: Comments of Americans for Limited Government on RIN 1210-AB41
Interim Final Rules for Group Health Plans and Health Insurance
Issuers Relating to Dependent Coverage of Children to Age 26 Under
Patient Protection and Affordable Care Act**

To Whom It May Concern:

These comments are submitted pursuant to the Interim Final Rule that was published by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services (herein after “Secretary” or “Secretaries”) on May 13, 2010 at 75 Fed. Reg. 27122. That Interim Final Rule purports to define “dependents to which coverage shall be made available” as that phrase is found in Section 2714 of Public Law 111-148, the Patient Protection and Affordable Care Act (hereinafter “Act”).

As will be discussed in further detail below, we have significant concerns with the scope of the Interim Final Rule because it goes beyond the statutory language. Additionally, the Interim Final Rule cites no legal authority, other than the Rule itself, which allows for mandating an additional paperwork requirement on the regulated community. Further, the burden analysis found in the Paperwork Reduction Act

section fails to accurately reflect the true cost of legal advice which members of the regulated community will need to engage in order to comply with the Rule.

Relevant Authority

The Interim Final Rule was promulgated pursuant to Section 2714 of the Act. That section states as follows:

"Sec. 2714. EXTENSION OF DEPENDENT COVERAGE.

"(a) In General.--A group health plan and a health insurance issuer offering group or individual health insurance coverage that provides dependent coverage of children shall continue to make such coverage available for an adult child (who is not married) until the child turns 26 years of age. Nothing in this section shall require a health plan or a health insurance issuer described in the preceding sentence to make coverage available for a child of a child receiving dependent coverage.

"(b) Regulations.--The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available under subsection (a).

"(c) Rule of Construction.--Nothing in this section shall be construed to modify the definition of 'dependent' as used in the Internal Revenue Code of 1986 with respect to the tax treatment of the cost of coverage.

This section was amended by Section 2301(b) of the Health Care and Education Reconciliation Act of 2010, 111 P.L. 152 as follows:

(b) Clarification Regarding Dependent Coverage.--Section 2714(a) of the Public Health Service Act, as added by section 1001(5) of the Patient Protection and Affordable Care Act, is amended by striking "(who is not married)".

Under the Act as amended by the Reconciliation Act if the insurance plan offers coverage to dependents then the option of coverage must be extended to dependent children of the participant until those children reach age 26. The Act gives the Secretary the discretion to define "dependents to which coverage shall be made available."

The language used to define dependent in the Interim Final Rule states as follows:

(b) *Restrictions on plan definition of dependent.* With respect to a child who has not attained age 26, a plan or issuer may not define dependent for purposes of eligibility for dependent coverage of children other than in terms of a relationship between a child and the participant. Thus, for example, a plan or

issuer may not deny or restrict coverage for a child who has not attained age 26 based on the presence or absence of the child's financial dependency (upon the participant or any other person), residency with the participant or with any other person, student status, employment, or any combination of those factors. 75 Fed. Reg. 27122, 27136 (May 13, 2010).

Analysis of the Substance of the Rule

Congress passed the Act to enlarge the universe of dependent children to which dependent coverage must be made available. Congress delegated to the Secretary the authority to "define the dependents." The Secretary's Interim Final Rule essentially deletes the word "dependents" from the definition of covered children and replaces it with "children." If Congress had intended for the coverage requirement to apply to all children it would have used the word "children" instead of using terms such as "dependent coverage" and "define the dependents." Even if Congress intended to expand coverage to all "children" the use of the word "dependent" modifies "children" in a way to limit its scope.

The universe of potentially covered "children" is larger than the universe of "dependent children." Instead of defining "dependent" as a subset of "child" the Secretary is using the definition of "child" as the definition of "dependent." The Interim Final Rule's language expressly disallows an insurance provider from taking into consideration whether a child is actually a "dependent" as that term is generally understood in society. Thus, for example, the insurance provider is prohibited from taking into consideration the financial condition of the child when making a determination on coverage eligibility. As such the child could have an income that is many multiples of their parent (participant) but the child would still be eligible for coverage.

Is This "Interpretation" Permissible?

The effective interpretation that has been made by the Secretaries is that "dependent" means "child." Is this interpretation permissible under the laws of the United States?

Based on the definition chosen for use in the Interim Final Rule it is readily apparent that the Secretary ignored the word "dependent" and essentially chose "children" instead. The definition of "dependent" does not allow for any dependency factors to be used. As such rather than defining what factors go into a determination as to whether a child is a dependent what the Interim Final Rule does say is that it is irrelevant

whether the child is a dependent for the purposes of determining whether they are a dependent.

If Congress wished to force coverage to be extended to all “children” it would have used the word “children” and told the Secretary to define that word. Congress did not do this but instead used the word “dependents” which is as discussed above, a subset of the universe of possible “children.”

In so doing the Interim Final Rule fails to give effect to the word “dependents,” violating a basic principle of statutory construction that in the interpretation of a statute we “must give effect to every word of a statute wherever possible.” *Leocal v. Ashcroft*, 542 U.S. 1 (2004). “It is our duty to ‘give effect, if possible, to every clause and word of a statute’.” *United States v. Menasche*, 348 U.S. 528, (1955). “Congress is not to be presumed to have used words for no purpose.” *Platt v. Union P.R. Co.*, 99 U.S. 48, 59 (1878). *See also, Duncan v. Walker*, 533 U.S. 167, 175 (2001): “We believe that our duty to ‘give each word some operative effect’ where possible, *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 209, 136 L. Ed. 2d 644, 117 S. Ct. 660 (1997), requires more in this context.”

In Sec. 2714(b) of the Act Congress gives the Secretary the responsibility to define a subset of children under age 26. Instead of defining a subset of children under age 26 the Secretary defined that subset “dependents” to include the entire universe of children under age 26. This definition is contrary to the Act and should be modified to reflect certain factors that are indicia of dependency.

Factors That Should be Used in Defining Dependents

In other places in the law where the term dependent is defined, such as the Internal Revenue Code, a series of elements or factors are considered to determine whether there is actually a dependency of the child upon the parent. For instance in Section 152 of the Internal Revenue Code (IRC) elements such as residency and whether the parent actually supports a child are used to determine whether that child is a dependent.

The Secretary would be well advised to adopt the IRC Section 152 definition of dependent because the elements used in that section tend to prove dependency. The following are a few of the elements found in IRC § 152(c) to determine whether a child qualifies as a dependent:

(c) Qualifying child. For purposes of this section--

(1) In general. The term "qualifying child" means, with respect to any taxpayer for any taxable year, an individual--

(A) who bears a relationship to the taxpayer described in paragraph (2),

(B) who has the same principal place of abode as the taxpayer for more than one-half of such taxable year,

(C) who meets the age requirements of paragraph (3),

(D) who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins, and

(E) who has not filed a joint return (other than only for a claim of refund) with the individual's spouse under section 6013 [*IRC Sec. 6013*] for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.

(2) Relationship. For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if such individual is --

(A) a child of the taxpayer or a descendant of such a child, or

(B) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative.

The Secretary should use the elements in these categories in "defining the dependents to which coverage shall be made available" because those children falling into these categories are actually dependent to a degree upon the parent. By defining dependent as any child the Secretary has gone beyond the language and intent of the Act. Because of the many issues involved in defining dependents the Secretary should hold public stakeholder meetings and issue a Notice of Proposed Rulemaking and allow for public comment before issuing a Final Rule on this point.

Paperwork Reduction Act Analysis

The Paperwork Reduction Act Analysis found in the Interim Final Rule estimates that the notice required under the rule to be sent to participants will take approximately 30 minutes of time for an attorney to draft. In addition the Paperwork Reduction Act Analysis estimates that this attorney has a labor rate of \$119 per hour. For the reasons

set discussed below both of these estimates severely underestimate the costs associated with this paperwork requirement.

No Legal Authority Cited to Require Additional Paperwork Burden

The Interim Final Rule cites itself as the requirement for issuers to provide notice of the new eligibility requirements to participants. But what is the statutory authority for this paperwork requirement? The Interim Final Rule contains no discussion on any statutory authority that would permit such a requirement to be mandated by regulation. Further, the authority that is given to the Secretary in Section 2714 of the Act extends only to “define the dependents” and not to the creation of additional mandatory paperwork burdens. In the absence of express statutory authority this paperwork requirement should be immediately rescinded.

Estimate of Preparation Time Missing from Estimate of Time Necessary to Draft Notice to Participants

Even if the paperwork requirement can legally be mandated by regulation the burden analysis used in the Interim Final Rule is ludicrous on its face because it severely underestimates the costs associated with this new paperwork requirement.

The Interim Final Rule as published in the Federal Register on May 13, 2010 contains over 20,600 words.

Persons reading text in English do so at an average of 250 to 300 words per minute. However, when reading text with an eye for detail, such as proofreading or reading legal documents, the average rate falls to approximately 200 words per minute.¹

Using this understanding as a baseline the average attorney could be expected to expend between 103 minutes and 68 minutes to read the Interim Final Rule one time. (20,600/200 or 20,600/300.) In order to be able to provide competent and zealous representation to his or her client as required under the ethical standards applicable to attorneys it is likely necessary for each attorney to read the Interim Final Rule at least two or three times, making notes each time as to particular subject matter areas which might require further research. Thus an attorney who reads the Interim Final Rule three

¹ Ziefle, M. (1998), *Effects of display resolution on visual performance*, Human Factors, 40(4), 555-568.

times at 200 words per minute will expend approximately 309 minutes just for this one task. (20,600/200*3.)

| Number of Words | Words Per Minute | Total Minutes | Minutes if Read | |
|-----------------|------------------|---------------|-----------------|--------------------|
| | | | 2x | Minutes if Read 3x |
| 20,600 | 300 | 69 | 137 | 206 |
| 20,600 | 200 | 103 | 206 | 309 |

Assuming that the attorney read only the Interim Final Rule, and no other material, and then immediately began drafting the required notice and that drafting took the 30 minutes that the Secretary estimates this still amounts to 339 minutes of attorney time.

The Secretary estimates that the attorney who drafts the required notice has an hourly labor rate of \$119 per hour. Given the real world costs of obtaining legal advice it is very unlikely that this estimate is even remotely close to the actual cost per hour that will be incurred. First, no insurance provider would use inexperienced counsel for dealing with issues surrounding the Act. An attorney tasked with reviewing the Interim Final Rule and drafting the required notice would likely have a minimum of five years experience and would likely have over ten years experience. Attorneys with this level of experience do not bill at \$119 an hour in metropolitan areas where most insurance providers are headquartered.

The so-called "Laffey Matrix" has been relied upon time and time again by the courts in determining the level of market rates for reasonable attorney's fees when those fees are owed to a prevailing party for litigation in the Washington, DC area. See for instance, *Salazar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000). In *Salazar* the court explained how the plaintiff calculated its fees and how those fees were in line with the market rate for the area:

Plaintiffs have arrived at these hourly rates in the following fashion. They have relied on the so-called Laffey matrix which was first approved in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-375 (D.D.C. 1983), aff'd, 241 U.S. App. D.C. 11, 746 F.2d 4 (D.C. Cir. 1094), overruled in part on other grounds by SOCM, 857 F.2d at 1525. The original *Laffey* matrix presented a grid which established hourly rates for law-yers of differing levels of experience during the period from June 1, 1981, through May 31, 1982. The Court of Appeals accepted the 1981-1982 matrix in SOCM, 857 F.2d at 1525, and the parties to that case

updated it through May 31, 1989, as part of a settlement. *Covington*, 839 F. Supp. 894, 898 (D.D.C. 1993); the updated *Laffey* matrix has often been relied upon to determine appropriate fee awards. See *Trout v. Ball*, 705 F. Supp. 705, 709, n. 10 (D.D.C. 1989); *Sexcius v. District of Columbia*, 839 F. Supp. 919, 924 (D.D.C. 1993); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989).

See *Salazar, supra*, at 17. The court further stated:

Consequently, the Court concludes that the updated *Laffey* matrix more accurately reflects the prevailing rates for legal services in the D.C. community. *Salazar, supra*, at 23.

An updated version of the “Laffey Matrix” gives the following billing rates for attorneys in the Washington, DC area²:

| | Years Out of Law School | | | | |
|-----------------|-------------------------|--------|--------|--------|---------|
| | 1-3 | 4-7 | 8-10 | 11-19 | 20+ |
| Rate Per Hour | \$285 | \$349 | \$505 | \$569 | \$686 |
| Rate Per Minute | \$4.75 | \$5.82 | \$8.42 | \$9.48 | \$11.43 |

Note further that the current billing rate in the matrix for a Paralegal/Law Clerk is \$155 per hour, far in excess of the \$119 per hour of attorney time that the Secretary estimates in the Interim Final Rule. As stated above, the insurance provider would use experienced counsel to review the requirement to provide notice to its participants. Based on the Laffey Matrix the market rate for attorneys in the Washington, DC area with five to ten years of experience ranges from \$349 to \$505 per hour. An average of the ends of these ranges comes to \$427 per hour. This amounts to \$7.12 per minute. Using the figure of \$7.12 per minute amounts to \$2,412.55 in attorney time. This is significantly larger than the \$59.50 cost per notice estimated by the Secretary. (30 minutes of time at \$119 per hour.)

Because the Secretary significantly understated the costs associated with preparing the required notice the notice should not be mandated until a reasonable estimate of the costs is given and approved by the Office of Management and Budget.

² The full, updated Laffey Matrix is available online at: <http://www.laffeymatrix.com/see.html>. (Accessed July 9, 2010.)

Conclusion

Given the many problems found both in the substance and supporting analysis of the Interim Final Rule, the Rule should be rescinded. The Secretaries should hold stakeholder meetings to solicit public comment on the proper definition of “dependents to which coverage shall be made available.” Then the Secretaries should issue a Notice of Proposed Rulemaking which actually defines “dependents” in a way accurately reflecting the meaning of that term. After public comment is received on that Notice of Proposed Rulemaking then and only then should a Final Rule be promulgated on this matter.

Sincerely,



William Wilson
President