FamiliesUSA
The Voice for Health Care Consumers

December 16, 2010

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-AB42

Office of Consumer Information and Insurance
Oversight, Department of Health and Human Services
Attention: OCIIO-9991-IFC2
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, DC 20201.

Attention: OCIIO-9991-IFC2

Submitted online at www.regulations.gov

Families USA provides the following comments on the amendment to the grandfathering interim final rule. Families USA is a national nonprofit, nonpartisan organization for health care consumers. Our mission is to ensure that all Americans have access to affordable, high-quality health care. This amendment will allow employers to offer the same plan through a different carrier and still retain grandfathered status. We understand the need to provide employers with negotiating power as they renew plan contracts, and thus support the general concept of this amendment. However, some important consumer protections that do not apply to grandfathered plans have very small cost implications. We urge you to maintain these protections for as many plans as possible. It is helpful that this regulation will only be provided prospectively, and not for the period between March 23 and November 17, 2010, since consumers, employers, and health plans were operating under the assumption that the Affordable Care Act protections applied to them at that time.

The amendment should be improved in the following ways as it moves to final:

1) **Significant changes in plan structure (such as a change from a PPO to an HMO plan), or in provider networks, drug formularies, and benefit design should also trigger loss of grandfathered status.**

We and other consumer organizations commented on these issues in an August 16 letter. If an employer not only changes carriers or TPAs, but also changes the provider network or other plan features, consumers will not regard it as the same plan. Affordable Care Act protections may be especially important to enrollees when there are changes of this nature. For example, if the new plan's utilization review team decides not to approve an ongoing course of treatment or continued use of a prescribed drug, consumers will want strong appeal rights. In another example, if consumers enjoyed direct access to OBGYNs or used a pediatrician as their child's primary care provider in

1201 New York Avenue, NW ■ Washington, DC 20005 ■ 202-628-3030 ■ Fax 202-347-2417
E-Mail: info@familiesusa.org ■ Web site: www.familiesusa.org

their former plan, they will want this feature to continue when their employer changes carriers. (Even though neither is required to provide this by federal law, a grandfathered PPO is likely to provide such direct access, but absent a protection, if an employer switches to a different plan structure, such as an HMO, and that plan is still considered grandfathered, the consumer may lose direct access.)

2) **Responsibility for declaring that a plan is or is not grandfathered when there is a change in carriers or third party administrators should rest with the plan sponsor.**

Without a clear delineation of this responsibility, there may be disagreements between the insurer and the sponsor as to the plan's status, which will leave consumers unsure of their rights.

3) **Provide clear information to consumers about the plan's status.**

When an employer changes carriers or TPAs, the sponsor should provide notice to enrollees that it believes the plan to be grandfathered because it has not altered the benefits, cost-sharing, and employer contributions to the plan. EBSA and HHS contact information should be included as a source of information. Further, if an employer provides its employees with several plan options, some grandfathered and others not, it should provide clear information in advance of enrollment decisions about which plans are subject to which Affordable Care Act protections.

4) **Allow grandfathered plans to use the new federal appeals process on a voluntary basis, even if they are not subject to the new appeals rules.**

Some grandfathered plans may be willing to provide an external appeals system if they are not responsible for contracting with independent review organizations themselves. If the Department of Labor sets up an independent review system directly or by contract, it should thus allow consumers and employer-based plans to use that system even if the plans are grandfathered, as long as the plan agrees to be bound by the decision.

Thank you for considering these comments.

Sincerely,

Cheryl Fish-Parcham
Deputy Director of Health Policy
Families USA