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

RE: Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act

To Whom It May Concern:

The U.S. Chamber of Commerce (the "Chamber") is submitting these comments in response to the Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act ("Amendment"), which were published in the Federal Register on November 17, 2010.[1] The Amendment modifies paragraph (a)(1) of the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act ("Grandfathered Plan IFRs" or "IFRs"), which were published in the Federal Register on June 17, 2010.[2] As with other guidance under these Acts, the Amendment to the IFRs was published jointly by the Department of the Treasury, the Department of Labor and the Department of Health and Human Services (the "Departments").[3]

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[1] Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538–70 (June 17, 2010) (to be codified at 26 C.F.R. pts. 54 & 602; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) [hereinafter Amendment to the Grandfathered Plan IFRs].

[2] Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538–70 (June 17, 2010) (to be codified at 26 C.F.R. pts. 54 & 602; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) [hereinafter Grandfathered Plan IFRs].

[3] Pursuant to the request in the IFRs, the Chamber is submitting these comments to one of the Departments - The Department of Health and Human Services, with the understanding that these comments will be shared with the Department of Labor and the Department of Treasury, as well.

This Amendment provides guidance pursuant to the statutory language of the Patient Protection and Affordable Care Act (the "Affordable Care Act") and the Health Care and Education Reconciliation Act (the "Reconciliation Act").

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. These comments have been developed with the input of member companies with an interest in improving the health care system.

The Chamber recognizes the very difficult undertaking by the Departments in connection with the original Grandfathered Plan IFRs and in remedying the unintended consequences associated with it. We applaud the Departments' efforts to reconsider the IFRs and take corrective measures to address critical impediments highlighted by public comments. In fact, the Chamber specifically highlighted this issue in our comments, stressing that linking a change of issuers or carriers with a loss of grandfathered plan status "*creates a situation in which fully insured plans must choose between paying increased premiums without shopping for alternative coverage, or losing grandfathered plan status. It eliminates the downward pressure on costs that results from the ability of businesses to consider switching insurers*."[4]

While we appreciate this critical revision[5] and applaud the Departments for issuing this Amendment, we have several practical concerns. Although the change in policy is appropriate, we reiterate a critical concern with the Grandfathered Plan IFRs: even as amended, the IFRs far exceed the statutory language that authorizes their very promulgation. Secondly, the Amendment's prospective effective date of this change will make it meaningless for many plans. Finally, the Amendment contains a documentation requirement[6] that is not fully explained, raising numerous operational questions.

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[4] U.S. Chamber of Commerce Comments to Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538-70 (June 17, 2010) (to be codified at 26, C.F.R. pts. 54 & 602; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) on page 8 "All plans should be permitted to change policies and issuers. This change is necessary to ensure that plan fiduciaries can continue to discharge their duties under ERISA; the primary focus must continue to be on the benefits provided to participants. Locking employers and consumers into staying with policy issuers in order to maintain grandfathered status is inconsistent with the clear support of Congress and the Administration for grandfathered plan status. Instead, *this creates a situation in which plans must choose between paying increased premiums without shopping for alternative coverage, or losing grandfathered plan status. It eliminates the downward pressure on costs that results from the ability of businesses to consider switching insurers*. Insured plans should not be treated any differently than self-insured plans; the identity of the policy issuer (insurance company) is no more important to most participants than the identity of the third party administrator (TPA) in a self-insured plan. Similarly, the financial structure of a plan should not affect grandfathered status. Coverage, as experienced by the enrollee and participant, may be identical regardless of whether the plan is insured or self-insured. The direct impact on the consumer is negligible and, in fact, in many instances, these types of changes are necessary to preserve the ability of individuals to keep the plan they have, if they want to."

[5] Amendment to the Grandfathered Plan IFRs, 75 Fed. Reg. at 70,121(to be codified at §147.140 (a)(1)(i)) "Subject to the limitation set forth in paragraph (a)(1)(ii) of this section, a group health plan (and any health insurance coverage offered in connection with the group health plan) does not cease to be a grandfathered health plan merely because the plan (or its sponsor) enters into a new policy, certificate, or contract of insurance after March 23, 2010 (for example, a plan enters into a new issuer or a new policy is issued with an existing issuer)."

[6] Amendment to the Grandfathered Plan IFRs, 75 Fed. Reg. at 70,122 (to be codified at §147.140(a)(3)(ii)) "To maintain status as a grandfathered health plan, a group health plan that enters into a new policy, certificate or

Prospective Effective Date Renders Amendment Meaningless

For many employers the policy change contained in the Amended IFR comes too late and provides little solace. Due to the interim final rule issued by the Departments in June 2010, many employers were forced to weigh the cost of losing Grandfathered Plan status vs. the additional cost of staying with the same issuer. Many of our members, due to the initial IFR, were essentially forced to forego the opportunity to contract with another carrier (something that would have permitted them to minimize premium increases) in order to retain Grandfathered Plan Status. Additionally, many employers (unable to afford the increase in premiums demanded by their current carrier) had to switch insurers, thereby causing their plans to lose Grandfathered Plan status.

We appreciate the Departments' recognition that this dilemma should not have been forced on plan sponsors. Further, we applaud the Departments for understanding how this restriction undercut the ability of employers to comparison shop in an effort to find the best deal for employees. However, we respectfully request that this laudable and critical policy correction the Departments are making be retroactive. While we appreciate the operational difficulties in applying this rule retroactively, we believe that the Departments should create a grace period to permit employers to break newly entered plan agreements, if they so choose. Employers should have the option, given this Amendment and its significant affect, to retain (or renegotiate) an arrangement with their previous insurance carrier and to retain grandfathered plan status. Alternatively, those employers who would like to contract with a new carrier (and under the Amendment would now be permitted to retain grandfathered plan status if they did so) should also have the opportunity to renegotiate coverage with a new carrier and retain grandfathered plan status. Even though we disagree and respectfully dispute the statutory basis for the other requirements contained in the original Grandfathered Plan IFRs[7], in this scenario to advance the amendment's policy improvement until others are made, employers retaining grandfathered plan status would still be required to offer coverage that complies with the original Grandfathered Plan IFRs requirements listed in (g)(1).[8]

Amended IFR Continues to Far Exceeds Statutory Language

The Affordable Care Act contains a very simple grandfathered plan rule essentially legislating the Administration's promise: "[n]othing in the Act shall be construed to require that an individual terminate coverage…in which such individual was enrolled on the date of enactment."[9] The provision specifies that the majority of the health insurance market reforms shall not apply to grandfathered plans and allows new family members and new employees to enroll in grandfathered plans.

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contract of insurance must provide to the new health insurance issuer (and the new health insurance issuer must require) documentation of plan terms…under the prior health coverage sufficient to determine whether a change causing a cessation of grandfathered health plan status…has occurred."

[7] Grandfathered Plan IFRs,75 Fed. Reg. at 34,568 (to be codified at §147.140(g)(1).

[8] Grandfathered Plan IFRs,75 Fed. Reg. at 34,568 (to be codified at §147.140(g)(1).

[9] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1251(a), 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2301(a), 124 Stat. 1029 (2010).

Neither Section 1251, nor any other provision of the Affordable Care Act, discusses the loss of grandfathered plan status. In fact, the Amendment to the Grandfathered Plan IFR tacitly concedes that only the IFR (not the statute) specifies what would cause a plan to lose grandfathered plan status.[10]

In previous legislative reforms, when Congress intended grandfathered status to be terminable, that intention was clearly stated in the law. Significantly, before the Affordable Care Act and the Reconciliation Act were passed, ***other health reform legislation considered by Congress included far more prescriptive grandfathering provisions*** and limited the duration of grandfathered plan status to a definitive period of time. ***This approach was specifically rejected by Congress***.[11] We continue to assert that the Grandfathered Plan IFRs, even as amended, exceed the statutory language and are inconsistent with Congressional intent.

Determining the Continuation of Grandfathered Status

The Amendment to the Grandfathered Plan IFRs includes vague and incomplete language under a documentation requirement.[12] The Amendment to the IFRs simply states that documentation "sufficient to make a determination as to whether a change causing cessation of grandfathered plan status under paragraph (g)(1) has occurred"[13] must be provided. However, there is no further discussion of several critical questions:

- What entity will be responsible for making that determination?
- What criteria will be used as a basis for the decision?
- Will there be an opportunity to review or challenge this determination?

[10] Amendment to Grandfathered Plan IFRs, 75 Fed. Reg. at 70,115 "[The statute] provides that certain plans or coverage existing as of March 23, 2010 (the date of enactment of the Affordable Care Act) are subject to only certain provisions of the Affordable Care Act. The statute and the interim final regulations refer to these plans or health insurance coverage as grandfathered health plans. The statute and the interim final regulations provide that a group health plan or group or individual health insurance coverage is a grandfathered health plan with respect to individuals enrolled on March 23, 2010 regardless of whether an individual later renews the coverage. The *interim final regulations* specify certain changes to a plan or coverage that would cause it to no longer be a grandfathered health plan. In addition, the statute and the interim final regulations provide that a group health plan that provided coverage on March 23, 2010 generally is also a grandfathered health plan with respect to new employees (whether newly hired or newly enrolled) and their families that enroll in the grandfathered health plan after March 23, 2010.

[11] See Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010, H.R. 3962, 111th Cong. §202(a)(1)–(3) (2010). As passed by the House of Representatives, H.R. 3962 designated that grandfathered plan status would be lost for insured arrangements if: new enrollees (other than dependents of existing enrollees) entered the plan; or if plan provisions "including benefits and cost-sharing" changed. Employment based plans could only be grandfathered for a five year "grace period." After five years, grandfathered plans would then be required to "meet the same requirements as apply to a qualified health benefits plan under section 201, including the essential benefit package requirement under Section 221."

[12] Amendment to Grandfathered Plan IFRs, 75 Fed. Reg. at 70,117 and 70,122. (to be codified at §147.140(a)(3)(ii)).

[13] Ibid.

- Will there be a cure opportunity to make changes after an adverse determination? (i.e. If a new policy is not sufficient will a sponsor have the opportunity to revise the new policy in order to retain grandfathered plan status?)[14]

- What will occur if the determination is made in error?

Details regarding the burden of proof in assessing whether a plan under a new carrier, policy or issuer is sufficiently the same for the retention of grandfathered plan status must be more clearly delineated. If an enrollee, or one of the Departments, maintains that a plan is no longer grandfathered, the burden of proof should be on the party arguing against grandfathered status and there should be a rebuttable presumption of grandfathered status.

CONCLUSION

We appreciate the opportunity to comment on the Amendment to the Grandfathered Plan IFRs and applaud the Departments for considering our previous comments and for revising the original IFR to reflect important policy priorities. We are happy to discuss any of our comments informally, or by way of testimony in hearings conducted by the Departments. We support the general principles of improving health care coverage and access and applaud the Administration's promise to the American people that nothing will require an existing plan to terminate coverage. However, we remain troubled by some critical elements of the original Interim Final Rules implementing the Grandfathered Status provisions. We look forward to working with you to protect the fundamental goals of health reform that we jointly support.

Sincerely,

Randel K. Johnson
Senior Vice President,
Labor, Immigration, & Employee Benefits
U.S. Chamber of Commerce

Katie Mahoney
Director,
Health Care Regulations
U.S. Chamber of Commerce

[14] There must also be a remediation opportunity for plan sponsors to: reverse a change that caused the loss of grandfathered plan status. The determination process is unclear and plan sponsors must be afforded an opportunity to correct changes which may have significant and long lasting ramifications.