Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Room 445-G Hubert H. Humphrey Building
200 Independence Ave., SW
Washington, D.C. 20201

Re: OCIIO–9991–IFC2, Amendment to the Interim Final Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act

These comments are submitted for the record to the Office of Consumer Information and Insurance Oversight (OCIIO) and other associated agencies on behalf of the Small Business Coalition for Affordable Healthcare (the Coalition) on 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 (PPACA) published in the November 17, 2010, edition of the *Federal Register* ("the November 17, 2010 amendments").

Representing the country's largest, oldest and most respected small business associations, the Small Business Coalition for Affordable Healthcare has spent more than a decade working to increase access and affordability of private health insurance. The coalition's membership includes small business organizations in the agricultural, construction, food service, floral, wholesaler, retail, rental, entertainment and houseware communities. As the nation's leading small business coalition, our members actively participated in the healthcare debate and advocated for solutions that would increase choice, enhance competition for private insurance and that would increase the overall affordability of health insurance for America's job creators: small business.

Overview

We acknowledge and appreciate the agencies' willingness to be flexible in its approach to plans that are covered by Section 1251 of the Affordable Care Act ("grandfathered health plans"), which the agencies addressed in 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 (PPACA) published in the June 17, 2010, edition of the *Federal Register* ("the June 17, 2010 Interim Final Rules" or "the original Interim Final Rules").

In our comments on the June 17, 2010 Interim Final Rules, we remain concerned about some of the basic premises on which those rules appear to be based. Specifically, there

are two areas – that the November 17, 2010 amendments create a disparate set of rules for plans due to their renewal date. Second, the Coalition is greatly concerned that the amendments providing employers the ability to "shop" for coverage remain overly restrictive and impair affordability.

Uneven treatment of plans based on plan renewal date

A system that relies on employer-sponsored group health plans to provide health coverage has been eminently successful for many decades. It therefore seems unlikely to us that Congress intended to expose employer-sponsored plans to abrupt, immediate, and permanent loss of their statutorily-conferred grandfathered plan status. It is even more difficult to believe that Congress wanted the agencies to create a rule that would strip a plan of its Section 1251 status merely because an employer entered into a policy with a new carrier instead of a prior carrier while keeping the terms of coverage identical.

Thus, although we may disagree about the statutory basis for the November 17, 2010 amendments, we regard their adoption as a critical first step toward practicality. We encourage the agencies to continue in this direction by making the November 17, 2010 amendments retroactive to the June 14, 2010 effective date of the original Interim Final Rules. In the absence of a retroactive effective date, it would be possible to draw the unreasonable conclusion that (a) an insured plan renewed on its March 23, 2010 terms with a new carrier under a policy effective before the November 14, 2010 effective date of the November 17, 2010 amendments loses its Section 1251 status, whereas (b) an insured plan renewed on its March 23, 2010 terms with a new carrier under a policy effective on or after November 15, 2010, does not lose its Section 1251 status. Indeed, the preamble to the November 17, 2010 amendment seems to endorse such a result.

1. Unless the November 17, 2010 amendment to Paragraph (a)(1) of the interim final rule is applied retroactively to the effective date of the original Interim Final Rule, an employer that renewed its March 23, 2010 coverage with a new carrier, effective before November 15, 2010, would be at a disadvantage as compared with a similarly situated employer that renewed its March 23, 2010 coverage by renewing its existing policy with its existing carrier. Indeed, this would be true even if the first employer found the March 23, 2010 coverage at a more favorable rate from a new carrier and shared the savings with its employees. Placing an employer at a disadvantage for making its March 23, 2010 coverage available to its employees at a lower cost runs contrary to the stated goals of the legislators who promoted the passage of the Act.

Moreover, it is illogical to treat Employer A more favorably than Employer B on the grounds that Employer A renewed its policy with the same carrier rather than a less expensive carrier solely because the employer is too afraid of the effect of a regulation that everyone now agrees was based on an unnecessarily cramped interpretation of Section 1251 (if not on a complete misinterpretation of Section 1251). Similarly, treating Employer B less favorably because Employer B correctly interpreted the PPACA (and/or correctly anticipated that the agencies would abandon a misconstruction of the Act) is also unreasonable and could spawn time-consuming and attention-distracting Due

Process challenges to the interim final rule. We cannot think of any valid policy objective that might justify a decision by the agencies to expose themselves to this litigation risk in defense of an interpretation of the Act that the agencies obviously do not regard as essential.

2. Obviously, the lack of a retroactive effective date cannot be attributed to insistence on "obedience" to a rule of law. The issue of "obedience" does not even arise with respect to the interim final rules, since neither Section 1251 of the Affordable Care Act nor the original Interim Final Rule established any absolute duties on the part of any employer. The original Interim Final Rules simply represented the agencies' then-current beliefs about how to reconcile the language of Section 1251 with some broader policy goals. There were no changes in the language of the Affordable Care Act between the issuance of the original Interim Final Rules in June, 2010, and the issuance of the November 17, 2010 amendments. All that changed was the agencies' thinking. It is perfectly understandable and even predictable that agencies which felt compelled to issue interim final rules so quickly might arrive later at a new understanding of the law. Amending an interim final regulation to reflect a more considered interpretation of a statute under those circumstances is admirable. Punishing an employer for arriving at the more considered interpretation of the statute a few steps ahead of the agencies might strike some as ill-tempered.

In any event, where a restrictive interpretation of a statute such as Section 1251 of the Act has been abandoned shortly after it was adopted, no statutory or administrative goal is served by treating an employer adversely under Section 1251 because the employer acted in accordance with the newer and more carefully thought out regulatory standard, regardless of when the employer did so before or after the November 17, 2010 amendments were made public. In the preamble to the November 17, 2010 amendments on Section 1251 status, the agencies distinguish between the circumstances of two employers, each of which entered into a policy with a new carrier before November 15, 2010. In the case of one such employer, the policy also became effective before November 17, 2010. In the case of the other employer, the policy became effective on January 1, 2011. The preamble concludes that the first employer's plan loses its Section 1251 status but the second employer's does not. This approach compounds the irrationality noted in Section 1 above by arbitrarily subdividing all the employers who correctly interpreted Section 1251 before November 15, 2010, into an advantaged group and a disadvantaged group *based solely on when the new policy entered into under the correct interpretation of the statute went into effect*.

3. It has occurred to us that the agencies' decision regarding a retroactive effective date could be based on a misconception evident from the preamble about the nature of the regulatory process as distinguished from contract-based mechanisms. The preamble to the November 17, 2010 amendments describes the scenario in Section (a)(1)(ii) of the original Interim Final Rule in the following terms:

> [P]aragraph (a)(1)(ii) of the interim final regulations . . . provides that a group health plan will relinquish grandfather status if it changes issuers or policies.

75 Fed. Reg. 70114, 70116 (Nov. 17, 2010).

This description of section (a)(1)(ii) cannot be reconciled with the actual text of Treas. Reg. § 54.9815-1251T(a)(1)(ii) (June 17, 2010). The text of section (a)(1)(ii) in the original Interim Final Rules does not say anything about anyone "relinquishing" anything. It certainly does not say that "a group health plan" can or does relinquish any "status." Instead, it states that

> [I]f an employer or employee organization enters into a new policy, certificate, or contract of insurance after March 23, 2010 (because, for example, any previous policy, certificate, or contract of insurance is not being renewed), then that policy, certificate, or contract of insurance is not a grandfathered health plan with respect to the individuals in the group health plan.

75 Fed. Reg. 34538, 34558 (June 17, 2010); *cf*. 75 Fed. Reg. 70114, 70116 (Nov. 17, 2010).

The mismatch between section (a)(1)(ii) as actually promulgated and as it is described in the preamble to the amended Interim Final Rules is strikingly peculiar. The reference in the November 17, 2010 preamble seems to suggest that the original Interim Final Rules should be treated as a "one time only" offer by the agencies to enter into a unilateral contract to recognize some contingent right or privilege on the part of the employer or a group health plan in exchange for adherence to the terms of the interim final rule as originally issued. Given that characterization, we can understand how the agencies might have believed that, under simple contract principles, a private employer's entering into a policy with a new carrier constituted a "rejection" by the employer of the agencies' "offer" to recognize the employer's plan as a Section 1251 plan.

It should go without saying that an executive branch agency cannot enforce a law through a series of unilateral bargains with individual members of the regulated community. Even if it could, we do not think this view of the regulatory process is sound or workable as a practical matter. For one thing, it would imply that some members of the regulated community who "accepted" the first version of a regulation would acquire a vested immunity from amendments to the regulation that reflect evolving interpretations of unchanged statutory language.

Even under contract law, it would not be logical to conclude that a group health plan or an employer knowingly and/or voluntarily "relinquished" or abandoned recognition of its status under Section 1251 simply because it entered into a policy with a new carrier rather than renewing its old policy. In many instances, there was nothing voluntary about

entering into a policy with a new carrier because some carriers simply refused to renew some of their existing policies. An administrative body could not conclude as a matter of fact in an adjudicative proceeding that when a carrier would not renew a policy, the employer affirmatively elected not to renew, and did so because of an actual intention to "relinquish grandfathered status." The conclusion is even less justifiable as the product of rulemaking.

Thus, there simply is no merit to the only "justification" for the lack of a retroactive effective date that is even hinted at in the preamble to the amended interim final rule.

Employers need meaningful flexibility to "shop" for coverage

The ability for small employers to shop for coverage as a response to premium increases is critical to maintaining the voluntary offer of employer-sponsored coverage in the small business community. Small businesses are active and engaged consumers for two reasons. First, they cannot survive unless they are smart shoppers who systematically seek out the best ratio of value to cost with respect to virtually every good or service they pay for, from cleaning supplies to health coverage. It is completely illogical to believe that a small business owner would spend countless hours after the regular business day is over comparison shopping for miniscule differences in the cost of office supplies, only to select its health plan on a random or heedless basis. This is particularly unlikely to be true when one considers that the vast majority of entrepreneurs are owner-employees. They want to make the best coverage choice possible under prevailing circumstances, not only for the sake of their employees, but for their own sake and the sake of their families as well.

Second, small business tends to attract employees who are very good at making the best decisions possible in response to rapidly-changing circumstances. The same tendency means that the employees of small businesses are more likely to "vote with their feet" if they find that their employer's compensation and benefits package is no longer suited to their individual needs. Thus, over time, employees of small businesses are more likely to align themselves with employers whose plan design decisions, however they are made, reflect employees' perceptions of their overall best interests.

The necessity for employers in the small business community to have greater flexibility is acknowledged by the Administration in the November 17, 2010 amendments. However, as constructed, the proposed remedy allowing small employers to shop for various plans without losing status is little more than a difference without a distinction. On its face the ability to shop is most certainly helpful. Instead, the requirement that small employers are prohibited from making changes that, based in the interim final rule, would revoke its grandfathered status is untenable.

Small employers, like others who offer employer-based coverage, often/frequently shop around for new coverage options and opportunities. According to the Kaiser Family Foundation, 63 percent of small firms (3–199 workers) have shopped for coverage in the past year. Among firms that shopped, 31 percent of small firms have changed the type of

health plan. Further, they shop in response to cost pressures. A national survey of small employers found that 45 percent of small employers who shopped for health insurance in the last three years did so in an effort to lower premium costs.

Allowing employers to shop, but then restrict their ability to make necessary changes to the plan so they can both maintain an offer of coverage and adapt to premium increases plan for their workforce is a sincere, but unworkable solution. While the most preferred solution would be to suspend in its entirety these severely restrictive practices, at the very least, the final rules and regulations ought to allow small employer plans to be changed or modified by employers and employees between now and 2014 when the healthcare law and its consumer options are fully implemented. If employers and employees make the determination to make adjustments to their plan so that "if you like your plan, you can keep it," then they ought to have that freedom. Both employers and employees have rights under section 1251 (a). For that reason it seems inappropriate to pressure employers in an administrative effort to limit the choices of their employees. This is particularly true given that until 2014, employers and employees will not have Exchange-based coverage to fall back on if the restrictions on plan modification necessitate that they suspend the offering of coverage. Forcing the small business community to walk yet another regulatory tightrope is bad enough; forcing them to walk that tightrope before there is a safety net for employees is unjustifiable. Therefore, the Coalition suggests that, at a minimum, small employers retain the opportunity to shop for and switch plans freely until 2014 when the PPACA is fully implemented.

Conclusion

For more than a decade the Small Business Coalition for Affordable Healthcare has been a constructive participant in seeking to develop solutions that bring about lower costs, more choices and greater competition for private insurance. While challenges presented in the interim final rule have been acknowledged, as drafted, the rules outlined in the November 17, amendment remain restrictive and create the likelihood that small businesses faced with unsustainable premium increases may choose to drop their plans prior to 2014. We look forward to continuing to work with the agencies to develop guidelines that enhance, rather than restrict the ability of employers to voluntarily offer and maintain the coverage that best reflects the needs of their workforce.

Thank you for your time and consideration.

Aeronautical Repair Station Association
Agricultural Retailers Association
American Bakers Association
American Farm Bureau Federation
American Hotel & Lodging Association
American Institute of Architects
American Rental Association
American Veterinary Medical Association
Associated Builders and Contractors

Associated Equipment Distributors
Associated Food and Petroleum Dealers
Associated General Contractors
Association of Ship Brokers & Agents
Automotive Recyclers Association
Bowling Proprietors Association of America
Commercial Photographers International
Electronic Security Association (ESA)
Gasoline and Automotive Service Dealers Association
Independent Electrical Contractors, Inc
Independent Office Products & Furniture Dealers Association
International Franchise Association
International Housewares Association
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS
National Association of Theatre Owners
National Association of Wholesaler-Distributors
National Club Association
National Federation of Independent Business
National Newspaper Association
National Retail Federation
National Roofing Contractors Association
National Tooling and Machining Association
National Utility Contractors Association
Petroleum Retailers and Auto Repair Association (PRARA)
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Professional Golfer's Association of America
Professional Photographers of America
Repair-Shop & Gasoline Dealers Association
Service Station Dealers of America and Allied Trades
Small Business & Entrepreneurship Council
Society of American Florists
Society of Sport and Event Photographers
Specialty Equipment Market Association
Stock Artist Alliance
Textile Rental Services Association
Tire Industry Association