UFCW
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LEGAL DEPARTMENT

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General Counsel

***VIA* ELECTRONIC MAIL AND**
HAND DELIVERY

August 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**

To Whom It May Concern:

The United Food and Commercial Workers International Union (UFCW), an international union representing more than 1.3 million workers, welcomes the opportunity to submit the enclosed comments on the interim final regulations implementing the 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.

Respectfully submitted,

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Enclosure

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COMMENTS OF
UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION
REGARDING INTERIM FINAL REGULATIONS
RELATING TO GRANDFATHERED HEALTH PLANS AND REGARDING CERTAIN OTHER ASPECTS OF THE AFFORDABLE CARE ACT (ANNUAL LIMITS, PART-TIME EMPLOYEES, DENTAL AND VISION COVERAGE)

August 16, 2010

1.
INTRODUCTION

The United Food and Commercial Workers International Union ("UFCW") submits these comments to the Interim Final and Proposed Rules and Regulations ("Proposed Rules") published on June 17, 2010 concerning "Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act ("ACA")." Fed. Reg. 75, No. 116, 34538-34570 (June 17, 2010). Although the Proposed Rules generally ensure that the health care reform will result in meaningful and positive change for millions of Americans, aspects of the rules regarding collectively bargained plans are inconsistent with Congressional intent and would harm, not benefit working families.

UFCW is a labor organization which represents working men and women across the United States. UFCW's 1.3 million members work in a range of industries, with the majority working in retail food, meatpacking and poultry, food processing and manufacturing, and retail stores. We are North America's neighborhood union, and the largest union of young workers with 40 percent of UFCW members under the age of 30. UFCW members are from many backgrounds and walks of life, but come together as the UFCW for the shared goal of achieving the American Dream. The UFCW is about workers helping workers improve working and living standards through better wages, benefits, and working conditions. Accordingly, UFCW supported Congress's and this Administration's efforts to address the deficiencies in our healthcare system through the enactment of ACA.

With respect to grandfathered plans which are not subject to collective bargaining, the Proposed Rules generally strike a good balance between the need to implement reforms to improve the quality and affordability of health care for all Americans and a recognition that a transition period is needed to implement all of the reforms with respect to health plans that are currently in effect. In addition, UFCW agrees with the Departments' goal of inhibiting the ability of employers to modify, to the employees' detriment, cost-sharing with employees, although some modifications to the Proposed Rules in this regard are warranted.

Likewise, we support the Proposed Rules' requirement that to maintain grandfathered status, a plan or health insurance coverage must (1) include a statement in any plan materials describing the benefits that the plan is grandfathering and (2) provide contact information for questions and complaints. Moreover, we agree that a plan or issuer must maintain records of terms of plan of

coverage that were in effect on March 23, 2010 and any other documents to verify, explain or clarify its status as a grandfathered plan, which are subject to inspection by individual policy holder, state or federal agencies.

However, the Proposed Rules fail to implement Congressional intent with respect to Section 1251(d), entitled "Effect on Collective Bargaining Agreements."[1] Unless modified, the rules regarding Section 1251(d) may cause substantial damage to workers who are covered by collective bargaining agreements, and their families by, for example, giving employers an incentive to reduce wages or work hours, or otherwise to make detrimental changes to employment terms in response to mandated health plan changes during the term of current collective bargaining agreements. This result would be the exact opposite of the reform legislation's purpose. UFCW therefore proposes some changes to the Proposed Rules which are designed to protect workers and their families.

First, the Proposed Rules should apply Section 1251(d) to group health plans, both insured and self-insured. Second, to avoid both rendering Section 1251(d) meaningless and frustrating Congressional intent, the Proposed Rules should delay the mandatory implementation of the requirements of subtitles A and C of ACA until the termination of the collective bargaining agreements tied to those group health plans.

Moreover, we address in these comments a few more narrowly focused issues which are either directly related to the grandfathering Proposed Rules or, although not specifically addressed there by the Departments, are important to raise in the context of these rules because they also have a substantial impact on UFCW health plans. For example, we highlight that many of our plans cannot meet the annual limit standards without a severe downside to the economic well-being of employees and their families and, thus, waiver standards should not be unduly strict. In addition, there are circumstances where grandfathered status should not be lost because an employer's plan contributions are reduced by more than five per cent, so long as employees' contributions are not increased or benefits reduced. Further, we describe the serious problems that may occur as a result of the exclusion of employees who work less than 30 hours per week from employer mandates and penalties. Finally, we submit that dental and vision plan coverage should be treated as exempt from the newly imposed group plan requirements.

It is important to recognize that UFCW's position on the delayed implementation of certain reforms with respect to collectively bargained health plans stems from the knowledge that its plans, as do most collectively bargained plans, provide better benefits to its employees and their families than the plans, if any, of non-union employers, that union employees receive better wages than non-union workers, that the collective bargaining process ensures this economic

[1] ACA Section 1251 (d) states in relevant part: **EFFECT ON COLLECTIVE BARGAINING AGREEMENTS**- In the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers that was ratified before the date of enactment of this Act, the provisions of this subtitle *[Subtitle C Quality Health Insurance Coverage for All Americans]* and subtitle A *[immediate Improvements in Health Care Coverage for All Americans*](and amendments made by such subtitles) shall not apply until the date on which the last of the collective bargaining agreements relating to the coverage terminates…

well-being for employees during the set term of the labor agreement, and that compelling changes to these plans during the term of the contract may have damaging consequences to the very workers and their families whom the ACA seeks to protect.

Before we address each of those areas, we will provide a brief background of the nature of collective bargaining.

2.
THE COLLECTIVE BARGAINING PROCESS AND COLLECTIVE BARGAINING AGREEMENTS

There were sound policy grounds for Congress to distinguish "health insurance coverage maintained pursuant to one or more collective bargaining agreements" as of March 23, 2010 from other grandfathered plans. (ACA, Section 1251 (d)). Collective bargaining is a process in which employees, most often through their labor organizations, join together to negotiate with their employer to achieve the best possible wages, benefits (including health care coverage) and other terms of employment to be provided over an agreed upon period of time, In reaching an agreement on the economic package during the term of the labor contract, the parties take into account many factors, including a balance between wages and benefits, and projections of the economic picture over the term of the collective bargaining agreement. Unlike other health plans, in the collective bargaining setting, employees' rights to demand a fair economic package are generally protected.

Indeed, federal law recognizes the sanctity of collective bargaining. Specifically, Section 7 of the National Labor Relations Act ("NLRA") provides that "Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . ." 29 U.S.C. Section 157. Collective bargaining means that the employer and employee representatives "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . " 29 U.S.C. Section 158 (d). An employer must furnish relevant information to employee representatives during contract negotiations. *NLRB v. Truitt Manufacturing Co.* 351 U.S. 149 (1956). Many states have similar protections for their employees and those of their political subdivisions.[2]

With the above in mind, it is apparent that health care coverage provided to employees and their families through the term of the collective bargaining agreement is the result of a process in

[2] The respect accorded to the collective bargaining process is further illuminated by the International Labor Organization Convention No. 98, described as the "Right to Organize and Collective Bargaining Convention." Convention No. 98 states, in part:

> The right to freely run their own activities means that workers and employers' organizations can independently determine how they best wish to promote and defend their occupational interests…

which the employees' health care and other economic interests have been promoted and there should be limited government intrusion in the terms of that agreement while it remains in effect.

3.
TO IMPLEMENT CONGRESSIONAL INTENT REGARDING COLLECTIVE BARGAINING AGREEMENTS AND TO AVOID HARM TO EMPLOYEES AND THEIR FAMILIES, THE PROPOSED RULES SHOULD BE MODIFIED IN SEVERAL RESPECTS AND THE DEPARTMENTS SHOULD TAKE INTO ACCOUNT SEVERAL CONSIDERATIONS WITH RESPECT TO FUTURE RULES AND GUIDANCE

A. Section 1251(d)'s reference to "health insurance coverage" is ambiguous and to avoid an absurd result and implement Congressional intent, such reference should be deemed to apply to both self-insured and insured group health plans.

Placing an unduly narrow interpretation on Section 1251(d)'s reference to "health insurance coverage," the Proposed Rules restrict the application of Section 1251(d) to "insured" health plans, excluding self-insured group health plans from its protections. We submit such a reading would lead to absurd results and would frustrate Congressional intent. Accordingly, we request that the Departments modify the Proposed Regulations to include both insured and self-insured group health plans within coverage of Section 1251(d).

The Departments' view is seemingly that ACA and other laws have described "group health plans" and "health insurance coverage" independently and that Congress' failure to include a reference to "group health plans" in Section 1251(d) leaves them with no discretion to apply such provisions to group health plans which may be self-insured. This reasoning is faulty.

Initially, it is important to recognize that the Department of Health and Human Services ("HHS") has already interpreted "health insurance coverage" in ACA Section 1102 to apply to self-insured as well as insured health plans. Section 1102 directs HHS to establish a "temporary reinsurance program to provide reimbursement to participating employment-based plans for a portion of the cost of providing **health insurance coverage** to early retirees . . " (emphasis added.) Yet, HHS issued interim final rules to provide reimbursement for "health coverage" for early retirees to include coverage under self-insured plans as well as insured plans. 75 F.R. 24450 (May 5, 2010.)

Additionally, seeking to exclude group health plans from 1251(d) would effectively render the provision meaningless, a result which must be avoided in statutory construction. By its very nature, health insurance coverage maintained pursuant to a collective bargaining agreement is coverage under a group health plan. UFCW health plans and, we believe, all or nearly all other health insurance coverage negotiated pursuant to a collective bargaining agreement are group health plans.

Indeed, the Proposed Rules appear to conflate "group health plans" with "self-insured plans," even though group health plans include insured plans as well as self-insured plans. Thus, they appear not to exclude insured group health plans from 1251(d) coverage, even though there is no

basis to distinguish insured from self-insured group health plans. In other words, there is no reasonable interpretation of Section 1251 (d) to include insured group health plans in that section but not self-insured group health plans.[3]

In light of the above, the term "health insurance coverage" as used in Section 1251(d) is ambiguous and the Departments may reasonably reject its literal definition under the ACA to apply the common usage of that term--health insurance coverage for employees under a collective bargaining agreement regardless of whether such coverage is through a self-insured or insured group health plan. See, e.g. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Church of The Holy Trinity v. United States,* 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed to avoid the absurdity"); *Green v Bock Laundry Machine Co.,* 490 U.S. 504, 509 (1989) ("where the literal reading of a statutory term would "compel an odd result [courts] must search for other evidence of congressional intent to lend the term its proper scope.")

Significantly, even where a term is defined in a statute, such definition should not be followed if to do so would cause an absurd result.[4] For example, in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U. S. 755, (1949), the Supreme Court held a specific use of a statutorily-defined term to be meant in a more general sense, rather than the "artificial and special sense in which it was defined" in the statute. *Id*. at 764. See also, *Philko Aviation, Inc. v. Shacket*, 462 U. S. 406, 412 (1983), where the Supreme Court looked beyond the statutory definition of the word "conveyance," which omitted the mention of unrecorded title transfers of aircrafts, and interpreted the term to include such transfers because "[a]ny other construction would defeat the primary congressional purpose for the enactment of [the provision].

In sum, Section 1251(d) makes little sense unless it applies to both insured and self-insured group health plans. Congress may have inadvertently failed to insert "group health plans" into 1251(d), but such failure should not frustrate legislative intent to recognize the unique nature of the collective bargaining process and the harm that would be caused to employees and their families if this legislation immediately modified with a broad brush the terms of the thousands of contracts negotiated by employees and employers.

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[3] ACA §1301 (b)(3), by reference to section 2791(a) of the Public Health Service Act, defines the term ''group health plan'' as "an employee welfare benefit plan (as defined in section 3(1) of the Employee Retirement Income Security Act of 1974) to the extent that the plan provides medical care (as defined in paragraph (2)) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) **directly or through insurance, reimbursement, or otherwise**." *Id.* (citing Public Health Service Act § 2791(a), 42 U.S.C. § 300gg–91(a)) (emphasis added).

[4] ACA §1301 (b)(2), by reference to section 2791(b) of the Public Health Service Act, defines the term ''health insurance coverage'' as "benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer" and the term "health insurance issuer'' as "an insurance company, insurance service, or insurance organization (including a health maintenance organization, as defined in paragraph (3)) which is licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance . . . Such term does not include a group health plan."

B. The health benefit changes under Subtitles A and C should not be mandated for collectively bargained health plans until the date on which the last collective bargaining agreement relating to a plan terminates.

We urge reconsideration of the determination that all collectively bargained plans must take action on the next plan year after September 23, 2010 to comply with requirements regarding lifetime and annual limits, adult children coverage and other items enumerated in subtitles A and C without regard to the expiration date of the collective bargaining agreement to which a plan relates. While as the Departments note, collectively bargained plans fall under the general umbrella of grandfathered plans, Section 1251(d) grants them an exemption from implementation of Subtitle A [Immediate Improvements in Health Care Coverage for All Americans] and Subtitle C [Quality Health Insurance Coverage for All Americans] until the expiration of the labor contract. Again, Congress recognized the unique aspects of the collective bargaining process and the economic protections to employees provided by collectively bargaining agreements.

Title X, Sections 10103 (d) of the ACA and Subtitle B, Section 2301 of the Health Care and Education Reconciliation Act ("HCERA") amend ACA Section 1251(a) to apply certain reforms in Part A to grandfathered plans in the first plan year after September 23, 2010. But there was no amendment to Section 1251(d), which continues the exemption for grandfathered collectively bargained plans. The Proposed Rules' immediate application of these changes to collectively bargained plans has no statutory basis and frustrates the clear language of Section 1251(d) that certain provisions of the legislation which apply to grandfathered plans generally do not apply to grandfathered collectively bargained plans.[5]

C. The permissible annual limits on essential health benefits prior to 2014 should be reduced and, in any event, the waiver process should be flexible to protect the interests of working families.

In many cases, the imposition of a floor on annual limits for essential health benefits starting at $750,000 in 2010 and rapidly rising to $2,000,000 in 2013 presents a cost hardship for many plans which could work against working families' overall economic interests through reduced wages or other economic benefits. These numbers should be lowered in the final regulations. But, in any event, we urge flexibility in the guidelines to be established later on waiver conditions. See *Interim Final Regulations on Annual Limits [and other reforms]*, Fed. Reg. 75, No. 123, 37190-37192, 37230 (June 28, 2010).

The UFCW has a long and proud history of providing health benefits to part-time workers in the grocery industry, but in many cases competitive pressures have forced us to adopt less costly and more modest benefit designs in recognition of the fact that non-union operators offer little or no

[5] The Mental Health Parity and Addiction Equity Act of 2008 is the latest in a long string of federal laws that recognize the different nature of collectively bargained plans by delaying the implementation of changes to permit the bargaining parties to address plan changes at the expiration of their collective bargaining agreement. Fed. Reg. 75, No. 21, p. 5419 (February 2, 2010.)

health benefits whatsoever to part-time workers, or who make some health benefits available with high co-premium requirements resulting in low take-up rates. We seek flexibility in the application of annual limits to our plans where employees and their families covered by them would suffer if the limits are strictly applied.

D. The exclusion of employees who work less than 30 hours per week from the employer mandates and penalties further requires flexibility in the implementation of potentially costly plan modifications to collectively bargained plans. Failure to provide for such flexibility will likely lead to manipulation of employee work schedules to reduce the health care cost for union employers and will place union employers at a competitive disadvantage with non-union companies, thereby harming employees and their families.

There is no employer mandate per se to provide health care benefits to employees, but beginning in 2014 a modest penalty will be imposed on employers who do not provide coverage to employees who regularly work an average of at least 30 hours per week. However, there are no requirements and no penalties applied to employers who do not provide health benefits to employees who work less than 30 hours per week. (ACA Section 1513, HCERA Section 1003.)

The majority of UFCW 1.3 million members are employed in the grocery industry, and the majority of our members are part-time employees. As previously noted, our unionized grocery employers generally face strong competitive pressure from nonunion operators who provide little or no benefits to their part-time employees. To the extent that the law and its interim regulations impose new and sometimes onerous cost increases to our part-time employee plans, it only exacerbates the labor cost differential. Clearly the law provides a huge incentive to nonunion operators to refuse to extend health coverage to currently non-covered part-time employees since the law imposes no financial penalty for them to continue their current practices. Their employees will increasingly gravitate to taxpayer supported Medicaid programs and to the new Exchanges starting in 2014. The UFCW and its unionized employers now face some tough challenges to maintain affordable and reasonable employer-supported health plans, whether they are single employer or multiemployer plan structures, especially for our part-time members.

To borrow a well-worn phrase, the Affordable Care Act could prove to be the law of unintended consequences where some workers may end up losing employment-based health coverage and, therefore, adding to the pool of uninsured workers seeking tax subsidized coverage through one public channel or another. While this is certainly not a desirable direction from our standpoint, it is an option we must prepare for if there is no relief offered in the final regulations.

If the protections and benefits of the law focus solely on the workforce that meets the threshold of 30 hours per week, we believe there is a legitimate concern that employers may shift an even greater portion of its workforce to work schedules below that level in order to either avoid providing health benefits to part-time workers altogether, or significantly reduce the benefit package available to part-time workers.

E. The standard concerning the loss of grandfathered status when an employer's contribution is decreased by more than five per cent should be modified to take into account certain situations where such restriction will harm employees.

One of the conditions triggering loss of grandfathered status is described as a decrease in employer contributions by more than five percent. Our understanding of the intent of this regulation is to safeguard against significant increases in employee contributions. UFCW fully supports this goal. But there are situations where this restriction will harm employees and, thus, we believe the standard should be modified to protect against such harm.

Some of our plans, especially multiemployer plans, base employer contributions rates at least in part on the maintenance of the reserve principle. That is, the Fund seeks to maintain a certain level of benefits and maintain a certain level of reserves. If Fund experience is such that employer contributions may be reduced in any given year so as to not build up an "excess" reserve situation, a lower amount of employer contributions may be applied to support the same level of benefits. Such lower employer contribution rates could be in the form of a "contribution holiday" for one or more months, or a temporary reduction in the hourly or monthly contribution structure. But, benefits remain the same and employee contributions, if any, do not increase. These situations "do no harm" to plan participants and the standard should be clarified to permit such action.

The standard is also flawed in its applicability to year-to-year plan cost fluctuations, especially in situations where employee contributions are fixed dollar amounts, but employer contributions may vary based on insured plan renewals or self-insured plan rates based on fluctuating market conditions. In one year, for example, employer contributions may need to increase significantly in reaction to a year of claims experience including a large claims spike due to unusual catastrophic claims experience. The very next year, the unusual catastrophic claims experience is absent, and employer contributions may be allowed to decrease over five per cent. Again, there is no significant change in plan benefit design or employee contributions, but grandfathered status would be lost.

In short, in adopting the final rules, the Departments should consider the apparent intent of the five per cent standard to protect against increases in employee contributions and the circumstances which may arise where employer contributions are decreased by more than five per cent but employee contributions are not increased and their benefits are not reduced.

F. Dental and vision plans should be treated as exempt from all of the new group health plan standards similar to the Departments' guidance with respect to retiree-only plans.

Further clarity with regard to the applicability or non-applicability of the regulations to dental and vision plans is required. On the one hand, these do not appear to be "essential benefits" in the law. On the other hand, there is some indication that these must be "stand alone" plans to be exempt from standards. Many of UFCW health plans, especially multiemployer plans, include dental coverage and vision coverage along with medical coverage in a package. That is, there is no separate election of dental or vision coverage, but the dental and vision plans have separate

terms related to annual limits, coinsurance, deductibles, etc, and the plans are often provided by carriers different than the medical carrier, or simply self-administered by the Fund office.

In many cases, all benefits are offered without employee co-premiums, and in other cases any required employee co-premium responsibility that flows from a collective bargaining agreement applies to all covered benefits. However, when a COBRA event occurs, it is the norm that participants have the option to elect medical coverage separately without ancillary dental and vision.

In our view, dental and vision plans should be treated as exempt from all of the new group health plan standards similar to guidance with respect to retiree-only plans.

4.
CONCLUSION

UFCW commends the Departments in drafting Proposed Rules relating to current health plans which go along way in ensuring that the health care reform will result in meaningful and positive change for millions of Americans. That said, there are aspects of the rules for which change is required to protect against unintended and damaging consequences to workers and their families. We respectfully request the Departments to institute those changes as we have requested.