AMERICANS FOR
LIMITED GOVERNMENT

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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 Ave, N.W.
Washington, DC 20210

Submitted Electronically Via Regulations.gov

RE: Comments of Americans for Limited Government on RIN 1210-AB42 Interim Final Rules for Group Health Plans and Health Insurance Coverage Related to Status as a Grandfathered Health Plan Under the 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 June 17, 2010 at 75 Fed. Reg. 34538. The Interim Final Rule deals with the requirements existing health insurance plans must meet under Public Law 111-148, the Patient Protection and Affordable Care Act (hereinafter "Act").

In the days and weeks preceding passage of the Act the American public repeatedly heard this promise from President Obama, "if you like your plan you can keep it." This promise was repeated by a "Questions and Answers" page published by the Department of Health and Human Services. That page discussed the Interim Final Rule and stated:

> During the health reform debate, President Obama made clear to Americans "if you like your health plan you can keep it." He emphasized that nothing in the

> health reform law would force businesses or consumers to change health plans or change their doctor.[1]

Given the requirements of Interim Final Rule and the provisions of the Act a more appropriate promise would have been "you can keep your current plan, just so long as it continues to exist, but the circumstances we are creating make it unlikely that such plans will continue to exist." Due to the necessity to boil down complex issues into seconds-long sound bites the later promise could obviously not be made, even if the President so intended.

As will be discussed in further detail below, we have significant concerns with the substance of the Interim Final Rule. 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 to implement Section 1251 of the Act. That section states as follows:

> PRESERVATION OF RIGHT TO MAINTAIN EXISTING COVERAGE.
>
> (a) No Changes to Existing Coverage.--
>
> (1) In general.-- Nothing in this Act (or an amendment made by this Act) shall be construed to require that an individual terminate coverage under a group health plan or health insurance coverage in which such individual was enrolled on the date of enactment of this Act.
>
> (2) Continuation of coverage.-- With respect to a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of this Act, this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after such date of enactment.
>
> (b) Allowance for Family Members To Join Current Coverage.--With respect to a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of this Act and which is renewed after such date, family members of such individual shall be permitted to enroll in such plan

[1] *Questions and Answers: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans*, U.S. Department of Health and Human Services, undated. Available online at: http://www.healthreform.gov/about/grandfathering.html. (Accessed August 16, 2010.)

> or coverage if such enrollment is permitted under the terms of the plan in effect as of such date of enactment.
>
> (c) Allowance for New Employees To Join Current Plan.--A group health plan that provides coverage on the date of enactment of this Act may provide for the enrolling of new employees (and their families) in such plan, and this subtitle and subtitle A (and the amendments made by such subtitles) shall not apply with respect to such plan and such new employees (and their families).
>
> (d) 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 and subtitle A (and the 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. Any coverage amendment made pursuant to a collective bargaining agreement relating to the coverage which amends the coverage solely to conform to any requirement added by this subtitle or subtitle A (or amendments) shall not be treated as a termination of such collective bargaining agreement.
>
> (e) Definition.--In this title, the term "grandfathered health plan" means any group health plan or health insurance coverage to which this section applies.

As noted in the Interim Final Rule:

> The statute, however, is silent regarding changes plan sponsors and issuers can make to plans and health insurance coverage while retaining grandfather status. 75 Fed. Reg. 34538, 34546.

Thus the Secretary issued the Interim Final Rule.

Analysis of the Substance of the Rule

Throughout the Interim Final Rule lip service is given to the notion that the Interim Final Rule is "fulfilling a goal of the legislation, which is to allow those that like their healthcare to keep it." *Id*. However, just a few paragraphs after this statement the Secretary notes:

> The Departments considered allowing looser cost-sharing requirements, such as 25 percent plus medical inflation. However, the data analysis led the Departments to believe that the **cost-sharing windows provided in these interim final regulations permit enough flexibility to enable a smooth transition in the group market over time**, and further widening this window

> was not necessary and could conflict with the goal of allowing those who like their healthcare to keep it. *Id*. (Emphasis added.)

Later the Secretary acknowledges that the Interim Final Rule only ratchets one way, in the direction of less plans retaining their grandfathered status. The Secretary describes this as "a one-way sorting process: after some period of time, more plans will relinquish their grandfather status." 75 Fed. Reg. 34538, 34547. The Secretary even acknowledges that the Interim Final Rule will be a contributing factor in plans deciding to relinquish their status. "These interim final regulations will likely influence plan sponsors' decisions to relinquish grandfather status."

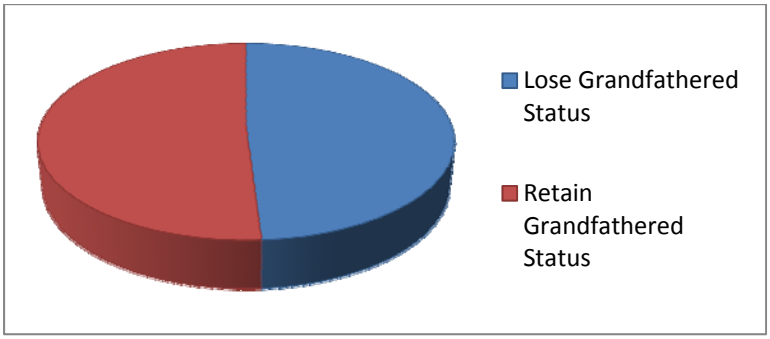
This begs the question of how are people supposed to "keep it" if "it," *i.e.*, their pre-existing plan, no longer exists. As such the Secretary is being duplicitous. On the one hand the public is told that all is fine and their current plans will not be touched. On the other hand the Secretary acknowledges that the Interim Final Rule will cause the very same people at which the attempt to mollify is made that they will soon be out of luck because their plans are going away in the near future.

The Secretary's own analysis bears this out further. For instance, for small employer plans the Secretary estimates that by the end of 2013 that between 49% and 80% of all such plans will lose their grandfathered status. 75 Fed. Reg. 34538, 34553. Overall the Secretary estimates that between 49% and 69% of all employer plans will lose their grandfathered status by 2013.

The following charts illustrate the striking impact that will occur to existing plans.

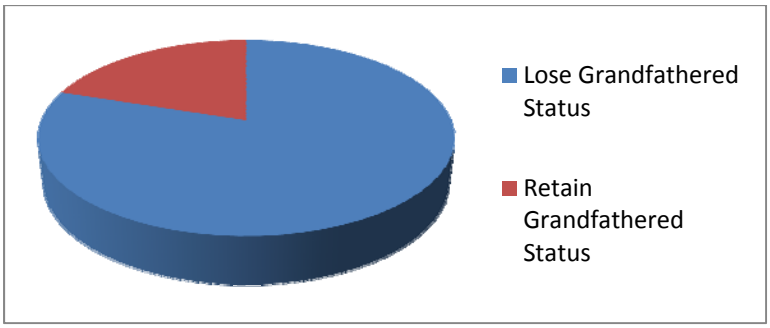
Secretary's Estimate (Low End) of Small Employer Plans That Will Lose Grandfathered Status Through 2013

Lose Grandfathered Status	49%
Retain Grandfathered Status	51%



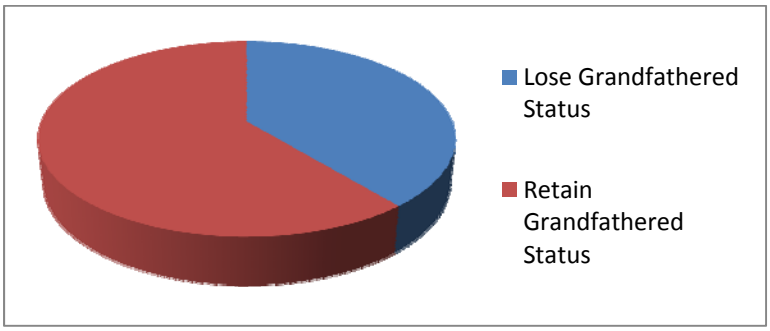
Secretary's Estimate (High End) of Small Employer Plans That Will Lose Grandfathered Status Through 2013

Lose Grandfathered Status	80%
Retain Grandfathered Status	20%



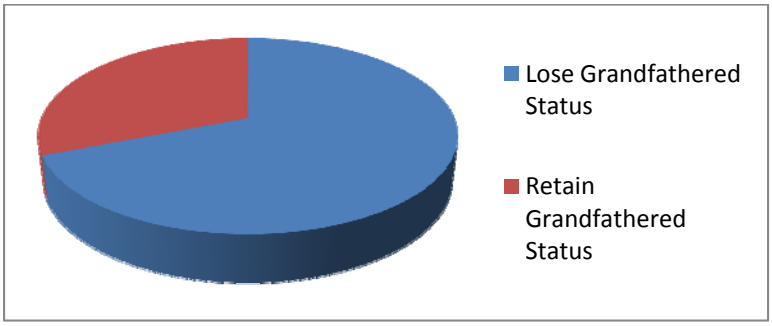
Secretary's Estimate (Low End) of All Employer Plans That Will Lose Grandfathered Status Through 2013

Lose Grandfathered Status	39%
Retain Grandfathered Status	61%



Secretary's Estimate (High End) of All Employer Plans That Will Lose Grandfathered Status Through 2013

Lose Grandfathered Status	69%
Retain Grandfathered Status	31%



Clearly the rhetoric that participants can keep their plan does not match up with the conditions that the Secretary is putting in place for those who wish to retain their current plans.

Paperwork Reduction Act Analysis—The Secretary Seriously Underestimated the Paperwork Burden Imposed on the Regulated Community by the Interim Final Rule

The Interim Final Rule imposes certain paperwork and corresponding recordkeeping burdens on the regulated community. Members of the regulated community that seek to retain their grandfathered status are required under the Interim Final Rule to provide a notice to plan participants of this status.

The Paperwork Reduction Act Analysis found in the Interim Final Rule is deficient in that it fails to take certain necessary tasks into consideration. Additionally, the hourly cost estimates for attorney time necessary to comply with the Interim Final Rule are completely out of line with real world costs for this type of service.

Estimate of Preparation Time Necessary to Notify Participants of the Grandfathered Status Estimate of a Plan

The Interim Final Rule contains a requirement that health plans that desires to retain their status as grandfathered under the Act must disclose to their plan participants that the plan intends to operate as a grandfathered plan. The Interim Final Rule contains a sample disclosure notice that plans can use to meet this requirement. However, the burden analysis found in the Interim Final Rule assumes that no one will read the requirements of the Interim Final Rule but that they will somehow just come into possession of the sample disclosure notice and know what to do with it. As such the estimated burden in time found in the Interim Final Rule seriously understates the total time burden that will actually occur. Additionally the Interim Final Rule assumes that only a clerical staffer and a human resources professional will read the sample disclosure notice. No estimate of time is given for an attorney to review the legal requirements found in the Interim Final Rule to ensure that the plan complies with those requirements.

The estimates below are based on the more reasonable assumption that an attorney would read the Interim Final Rule before the plan begins work to publish its required disclosure.

The Interim Final Rule as published in the Federal Register on July 17, 2010 contains over 39,000 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.[2]

Using this understanding as a baseline the average attorney could be expected to expend between 130 minutes and 195 minutes to read the Interim Final Rule one time. (39,000/200 or 39,000/300.) 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 times at 200 words per minute will expend approximately 585 minutes just for this one task. (39,000/200*3.)

Number of Words	Words Per Minute	Total Minutes	Minutes if Read 2x	Minutes if Read 3x
39,000	300	130	260	390
39,000	200	195	390	585

Assuming that the attorney read only the Interim Final Rule, and no other material this still amounts to 9.75 hours minutes of attorney time.

The Secretary estimates that the attorney who drafts the required notice has an hourly labor rate of $119 per hour. 75 Fed. Reg. 34538, 34555. 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

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

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 area[3]:

	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

[3] The full, updated Laffey Matrix is available online at: http://www.laffeymatrix.com/see.html. (Accessed August 16, 2010.)

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 $4,163.25 in attorney time.

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
$427	9.75	$4,163.25

Turning next to the estimates of time necessary to publish the required disclosure, even a cursory examination reveals the estimates to be a small fraction of the actual amount of time that will be required.

The Secretary estimates that 2.2 million plans will expend five minutes of clerical time at a wage rate of $26.14 and that ten minutes of a human resources professional's time at a wage rate of $89.12 an hour will be required.[4] This amounts to a cost of $17.03 per plan.

Secretary's Estimate

Clerical Cost Per Hour	Time Required	Total Clerical Cost
$26.14	5 min.	$2.18
Human Resources Cost Per Hour	Time Required	Total Human Resources Cost
$89.12	10 min.	$14.85
	Total Cost	$17.03

[4] While the Secretary uses the figure of 2.2 million this figure has been rounded up from 2,151,000. In order use a consistent methodology the figure of 2,151,000 is used by ALG in these comments.

Based on the above time and wage estimates the Secretary concludes that the total cost of the disclosure requirement is approximately $36.6 million.

Secretary's Estimate

Total Cost Per Plan	Number of Plans	Total Cost
$17.03	2,151,000	$36,631,530.00

The estimate of five minutes for clerical work is to, "incorporate the required language into the plan document." The estimate of ten minutes is to "review the modified language." 75 Fed. Reg. 34538, 34555. Again, the Secretary assumes that in fifteen minutes time two workers can obtain the sample disclosure notice insert it into a plan document and review that insertion — all without anyone reading the Interim Final Rule.

Adding in the necessary attorney costs to the Secretary's estimates results in a cost of $4,180.29 per plan. Applied to the entire universe of affected entities the total costs are astronomical and could reach to billions of dollars.

Total Cost Per Plan	Number of Plans	Total Cost
$4,180.28	2,151,000	$8,991,782,280.00

Even we one were to assume that only ten percent of the plans in the affected universe required an attorney to read through the Interim Final Rule this still amounts to almost $900 million. The Secretary's estimates of the time and dollar costs associated with the Interim Final Rule are thus far too low.

It should also be noted the Secretary's math is in error as concerns the overall burden, *i.e.*, the total notice and recordkeeping burden. In the Interim Final Rule at 75 Fed. Reg. 34538, 34555 the following paragraph purports to give the total burden associated with this rule:

> Overall, for both the grandfathering notice and the recordkeeping requirement, the Departments expect there to be a total hour burden of 1.1 million hours and a cost burden of $291,000.

There is no way this is true. A cost of $291,000 spread over 1.1 million hours equals approximately $0.26 per hour. The Secretary's own estimates a couple paragraphs

before this contradict this. Due to these rudimentary errors at a minimum this section should be thoroughly reevaluated by the Secretary.

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.

Conclusion

Given the many problems found both in the substance and supporting analysis of the Interim Final Rule, it should be rescinded. Only the statutory requirements found in the Act should apply to grandfathered plans. As such after the Interim Final Rule is rescinded a new Notice of Proposed Rulemaking should be published that uses only the statutory criteria to determine when a plan is considered grandfathered. In publishing a new Notice of Proposed Rulemaking the Secretary should use analysis which actually provides a reasonable estimate of the costs involved in complying with this regulation.

Then and only then should a Final Rule be promulgated on this matter.

Sincerely,

William Wilson
President