



August 16, 2010

*Submitted Electronically*

The Honorable Hilda L. Solis  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Room S-2018  
Washington, DC 20210

RIN 1210-AB42

**Re: 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. 34538 (June 17, 2010)**

Dear Madam Secretary:

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the interim final rules (IFRs) implementing the regulations for group health plans and health insurance coverage in the group market under provisions of the Patient Protection and Affordable Care Act<sup>1</sup> (PPACA) regarding status as a grandfathered health plan. FMI is submitting these comments to the Department of Labor (DOL) with the understanding that they will be shared with the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury).

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies—food retailers and wholesalers—in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets.

The food retail and wholesale industry ranks among the largest industries in our country, providing nearly 4 million wage-and-salary jobs.<sup>2</sup> These workers are employed in a wide range of settings from small corner stores to large supercenters and million square foot distribution centers. The

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<sup>1</sup> P.L. 111-148.

<sup>2</sup> Food Marketing Institute, Supermarket Facts <[http://www.fmi.org/facts\\_figs/?fuseaction=superfact](http://www.fmi.org/facts_figs/?fuseaction=superfact)>.

industry provides a diverse range of employment opportunities and requires a combination of full-time and part-time workers to operate. For many employees, the grocery industry is their entry or re-entry point into the workforce. The industry has a constantly changing workforce at entry level positions and is also reliant on seasonal employees. Part-time employees in the industry include students, retirees and others with unique training or scheduling needs. Many Americans first enter the workforce through the grocery industry. Young workers between the ages of 16-24 held nearly a third of grocery jobs which the Bureau of Labor Statistics attributes to “the large number of jobs in this industry open to young workers who have little or no work experience.”<sup>3</sup>

The diverse nature of our workforce requires the flexibility to design and create benefit packages that meet the needs of our employees, and react to changes in how our industry operates as well as medical cost trends. We encourage the DOL, HHS and Treasury to build upon their statement in the IFRs that recognizes that retaining grandfathered status is important in “fulfilling a goal of the legislation, which is to allow those that like their health care to keep it”.<sup>4</sup>

### **Plan Design and Employer Contribution**

The IFRs impose restrictive limits on the plan design changes with respect to benefits, cost-sharing and employer contribution rates that would effectively freeze the plan and policy terms effective on March 23, 2010. As a result, many plans will have to give up grandfathered status unless more flexibility is provided. Employers (and bargaining parties in collectively bargained plans) must be allowed to make basic changes to plans—provided that the fundamental benefits to the beneficiary remain the same—to accommodate changes in the marketplace and overall industry.

### **Employer Premiums**

Under the IFRs, grandfathered plans effectively may not increase the employee portion of the cost of coverage relative to the portion of such cost paid for by the employer by more than five percent from March 23, 2010. However, the HIPAA regulations permit employers to provide incentives of up to a 20 percent reduction in the cost of coverage for employee participation in certain wellness programs. A change in PPACA will allow employers to provide incentives of up to a 30 percent reduction in the cost of coverage for employee participation in certain wellness programs beginning January 2014. This allows employers to reward employees for making healthy living choices. Employers should be able to implement such wellness programs in compliance with the law without jeopardizing their grandfathered status.

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<sup>3</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Career Guide to Industries, 2010-11 Edition*, Grocery Stores <<http://www.bls.gov/oco/cg/cgs024.htm>>.

<sup>4</sup> 75 Fed. Reg. 34546 (June 17, 2010).

### **Cost-Sharing**

Grandfathered plans must have the ability to make needed and appropriate changes in cost-sharing without jeopardizing grandfathered status. For example, plans need to be able to adjust cost-sharing amounts to react to medical cost trends, demographic changes and changes in benefit utilization that can have a significant impact on plan costs. In addition, cost-sharing with respect to non-essential benefits should be allowed.

### **Administrative Changes**

Plans should be able to make administrative changes without losing grandfathered status. These types of changes would include changes in the plan structure (e.g., insured to self-funded, switch from health reimbursement arrangement to major medical coverage, changes to drug formulary or pharmacy network, changes to a provider network) that do not cause a meaningful change in coverage or the benefits received.

### **Issuance of a New Policy by an Issuer**

Grandfathered status should not be lost if the benefits under a new insurance policy are substantially the same as the prior policy.

### **Collectively Bargained Plans**

Over 40 percent of FMI's members employ union members and therefore are subject to the application of these regulations to collectively bargained plans.<sup>5</sup> PPACA states in part that "[i]n the case of health insurance coverage maintained pursuant to one or more collective bargaining agreements, . . . the provisions of [subtitles A and C of Title I of PPACA] (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."<sup>6</sup> Notwithstanding the fact that this language on its face clearly appears to provide for a delayed effective date, the regulation provides only that certain collectively bargained plans are treated as grandfathered plans. Plans maintained pursuant to one or more collective bargaining agreements ratified before March 23, 2010, should be provided with a delayed effective date, as provided in PPACA, and this delayed effective date should apply to both fully-insured and self-funded collectively bargained plans.

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<sup>5</sup> FMI - The Food Retailing Industry Speaks 2009, p. 49.

<sup>6</sup> PPACA § 1251(d).

### **Multiemployer Plans**

Multiemployer plans should not lose grandfathering status if a new employer joins the plan and the new employer's prior plan was more favorable as to one or more of the factors on which the regulations limit changes. In addition, multiemployer plans typically offer many different "plans of benefits" that provide different levels of benefits. Under current rules, bargaining parties may choose to move to a different plan of benefits in collective bargaining. If the bargaining parties move to a plan of benefits that provides a lower level of benefits than previously provided, grandfathered status should not be lost.

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FMI appreciates the opportunity to submit comments on this important matter and is available to discuss any impact that these regulations will have on our members. In conclusion, FMI believes that it is vital that DOL, HHS and Treasury provide as much flexibility as possible to help ensure that those that wish to keep the coverage they currently have are able to do so.

Sincerely,



Erik R. Lieberman  
Regulatory Counsel