THE COUNCIL of INSURANCE AGENTS & BROKERS

August 16, 2010

VIA ELECTRONIC FILING – www.regulations.gov

The Honorable Kathleen Sebelius
Secretary
United States Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

The Honorable Hilda L. Solis
Secretary
United States Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

The Honorable Timothy F. Geithner
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Plan Under the Patient Protection and Affordable Care Act,
HHS File Code OCIIO-9991-IFC; DOL File No. RIN 1210-AB42;
IRS File No. REG-118412

Dear Secretaries Sebelius, Solis and Geithner:

The Council of Insurance Agents & Brokers (CIAB) appreciates this opportunity to provide comments on the Departments' Interim Final Rule (IFR) relating to status as a grandfathered plan under the Patient Protection and Affordable Care Act (PPACA).[1] CIAB is the premier association for commercial insurance and employee benefits intermediaries in the United States. We represent leading commercial insurance agencies and brokerage firms, with members in over 3,000 locations placing more than $90 billion of U.S. insurance products and services, including group health insurance. Our members help employers provide their

[1] Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34538 (June 17, 2010) (hereafter, "Grandfather IFR").

employees with the health coverage they need at a cost they can afford, serving tens of thousands of employer-based health insurance plans covering millions of American workers. As such, our membership has a thorough understanding of the group health insurance market, and has had a unique opportunity to observe the challenges group health plans have faced thus far in the PPACA implementation process.

Overview

Our comments on the Grandfather IFR focus on preserving healthy competition among carriers serving grandfathered plans, and the need for certain clarifications, particularly regarding plan design, that will better facilitate compliance and allow plans to meet the expectations of the participants they serve.

While we understand the Departments' desire to enable participants to maintain the plan they had as of PPACA's enactment if they so choose, we believe that some of the restrictions on design changes will not afford sufficient flexibility to allow plans to continue offering the coverage participants have come to expect at a reasonable premium. For example, we are concerned that the rule precluding insured plans from retaining grandfathered status if they change health insurance issuers will have the unintended consequence of stifling competition among issuers in the group market. Such changes have no impact on the product consumers receive.

Finally, our members have received countless questions from plan sponsors regarding the restrictions contained in the IFR, particularly those pertaining to changes to plan structure. We seek clarification of these matters here.

Preservation of Healthy Competition Among Issuers

The IFR imposes several limitations on the ability to alter a plan's structure while maintaining grandfather status, including a limitation on the ability of insured plans to change issuers.[2] This restriction appears to apply even if there are no changes in the benefits or cost structure – that is, there is no change whatsoever from the participants' perspective – and the only thing that happens is a switch to a new issuer.

This rule is unduly restrictive, particularly because it applies even where a change in issuers would be transparent as far as participants are concerned. More importantly, as plans seek to maintain grandfathered status, they would forego the ability to change issuers even if a change would be desirable from a cost or service perspective. Plans could thus be held "hostage" by issuers. And issuers, in turn, would have less incentive to provide employers with the most competitive cost and service offerings. Such a scenario would also compound the already troubling phenomenon of dwindling competition in the health insurance industry.[3] In sum,

[2] *See* Grandfather IFR, 75 Fed. Reg. at 34542.

[3] *See* U.S. Gov't Accountability Office, GAO-09-864R, Competition in Health Insurance Markets 1-7 (2009), *available at* http://www.gao.gov/new.items/d09864r.pdf.

participants would not be well served by a regulatory framework that discourages insured group health plans from changing issuers.

Moreover, the IFR presently permits plans to make similar structural changes—for example, changing from a fully-insured to a self-insured product, or from Health Reimbursement Account (HRA) arrangements to major medical coverage—without loss of grandfathered status. No rationale is provided to explain why it is necessary to prohibit plans from changing issuers, while allowing plans to drop insured products and become self-insured.

The flexibility the IFR currently provides plans to transition from fully-insured to self-insured status, or from HRAs to major medical, is sound policy because such changes are among the types of "reasonable changes routinely made by plan sponsors" each year, and the IFR recognizes and seeks to accommodate this fact.[4] Plans may seek to change issuers for the same reasons they may transition from fully-insured to self-insured or from HRAs to major medical. It follows that the grandfather rule should afford plans the same flexibility to move between insured and self-insured products, which will also discourage the creation of an anti-competitive environment.

In addition, the IFR refers to a "new policy, certificate, or contract of insurance" as not being grandfathered under the rules.[5] However, the Departments should be aware that there are instances where, for reasons dictated by various state insurance requirements, a policy must be numbered differently or identified as a different policy or contract even when the carrier and all the terms remain identical (for instance where there might be corporate structural changes). In such circumstances the policy is exactly the same as the prior policy but for technical reasons, it is considered to be a "new" policy. In the event the Departments decide not to afford plans the flexibility to change issuers without losing grandfather status, the CIAB requests clarification that policies that are renumbered or are subject to similar technicalities can remain grandfathered.

Clarification of Issues Pertaining to Changes in Plan Structure

Our members need to assist employers in making informed assessments of the impact that certain plan design changes may have on their health plans. In order to do so, we need greater certainty as to whether various changes in plan structure will or will not result in a loss of grandfathered status.

For example, as discussed above, the IFR states that if an employer decides to buy insurance from a different insurance company, this new insurer will not be considered a grandfathered plan. It is unclear, however, whether changing "stop-loss" carriers[6] or similar

[4] *See* Grandfather IFR, 75 Fed. Reg. at 34546.

[5] *Id.*, 75 Fed. Reg. at 34541.

[6] "Stop-loss" coverage is coverage that enables provider organizations or self-funded groups to place a dollar limit on their liability for paying claims, requiring the insurer issuing the coverage to reimburse the insured organization for claims paid in excess of a specified yearly maximum.

arrangements would constitute the type of change in carriers that would cause loss of grandfather status. While the preamble explained that the IFR does not preclude self-insured plans from changing Third Party Administrators (TPAs),[7] stop loss carriers and similar arrangements that do not directly affect the benefits provided to participants were not addressed. Since the IFR speaks in terms of whether a new policy, certificate, or contract of insurance is a grandfathered "health plan with respect to the individuals in the group health plan,"[8] and since stop-loss insurance is not the "health plan" that provides benefits to the individuals in the plan (but rather the insurance for the plan itself), the logical (though by no means obvious) reading of the regulation appears to be that a change in stop loss carriers would not result in loss of grandfather status.

Additionally, the IFR and the Departments' guidance do not address the impact, if any, that changing the number of benefit tiers (e.g., self-only, self plus one, etc.) would have on a plan's grandfathered status. This issue is very significant for employers attempting to make plan design decisions for the upcoming plan year, and the current lack of clarity in this regard compounds the difficulty of designing benefit offerings that will best serve participants' needs while holding down their costs.

Additional Requests for Clarification

Aside from the foregoing concerns regarding changes in plan structure, our members and their employer-clients have also expressed concerns regarding several other matters in the IFR.

For example, the IFR advises that PPACA's market reforms do not apply to "retiree-only plans,"[9] but it does not provide specific details regarding the definition of "retiree plans." Thus, there is a question as to whether an arrangement must be the subject of a separate DOL Form 5500 filing, for example, or whether it can be part of a single plan filed under Form 5500 that includes active employees but has options available only to retirees. It would be helpful to establish some criteria for determining whether a retiree plan is sufficiently separate from the active employees' plan where both are the subject of a single Form 5500, such as whether the plans have separate underwriting, eligibility criteria, premiums, documents, and the like.

Furthermore, it is important that the retiree-plan exception be codified in the regulations themselves, and not merely discussed in the preamble to the regulations. Concerns have been raised about the weight that the preamble's language would carry if a retiree-only plan faced a legal challenge for not implementing the PPACA reforms, and there appears to be no reason for omitting such a significant exception from the regulations themselves.

Finally, the IFR's interpretation of the "special implementation rule" for plans subject to collective bargaining agreements (CBAs) should be further clarified as to the scope of its application. As we understand the IFR, grandfathered CBA plans must implement the reforms

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[7] *See* Grandfather IFR, 75 Fed. Reg. at 34544.

[8] *See* id. at 34562; 29 C.F.R. 2590.715-21(a)(ii).

[9] *See* Grandfather IFR, 75 Fed. Reg. 34539.

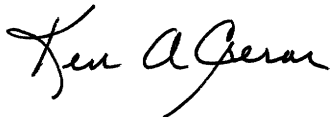
applicable to grandfathered plans at the same time as non-CBA plans. Thus, grandfathered CBA plans (whether insured or self-insured) must implement the required reforms their first plan year after September 23, 2010 regardless of whether, or when the CBA expires.

This has raised questions as to whether the special implementation rule now has any relevance aside from grandfathered insured CBA plans that later make changes leading to loss of grandfathered status. It appears that such plans are the only ones that would have until the expiration of the current CBA to implement the reforms required of non-grandfathered plans, rather than being required to implement these additional reforms immediately upon making the change. We urge the Departments to clarify this issue. We also ask the Departments to advise whether such a delay could apply to both non-union as well as union employees covered under a CBA plan, as the regulatory guidance is silent on this precise issue.

Conclusion

The CIAB appreciates this opportunity to comment on the Departments' grandfathering rules. The Council and its members will continue to work hard assisting employers in their efforts to comply with PPACA and related regulations, and to be part of a robust and efficient marketplace for health insurance. In order to do this, however, we encourage the Departments to allow insured plans to change issuers without losing their grandfathered status. Additionally, we urge the Departments clarify the various issues discussed herein to better facilitate compliance. The CIAB stands ready to provide any additional assistance that may be helpful.

Respectfully submitted,



Ken A. Crerar
President
The Council of Insurance Agents & Brokers
701 Pennsylvania Avenue, NW
Suite 750
Washington, DC 20004-2608
(202) 783-4400
ken.a.crerar@ciab.com