August 27, 2010

Submitted via Federal Rulemaking Portal: http://www.regulations.gov

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

RE: OCIIO-9994-IFC: Interim final rules: Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections

Dear Sir/Madam:

On behalf of the National Restaurant Association, we appreciate the opportunity to submit our comments on the interim final regulations (ñthe Regulationsò) published under the requirements of the Patient Protections and Affordable Care Act (ñPPACAò) implementing rules on preexisting condition exclusions, lifetime and annual limits, rescissions, and patient protections.

Before delving into the substance of our comments, we will provide some background information to place into context the reasons why our industry needs flexibility, particularly during the transition years, to minimize the negative impact these changes could have on our members and millions of their employees. To facilitate review, we will address the first three areas of the Regulations in the order that they appear, i.e., exclusions, limits, and rescissions.

However, we would like to emphasize the importance to our membership of the rules dealing with restrictions on annual limits. Finally, we decline to comment on patient protections because we do not have enough information to analyze whether the lower cost-sharing program for emergency services will induce much higher usage of out-of-network emergency services.

1200 SEVENTEENTH STREET, NW • WASHINGTON, DC 20036-3097
TEL: 202.331.5900 • FAX: 202.331.2429 • WWW.RESTAURANT.ORG

THE RESTAURANT INDUSTRY PROVIDES HEALTHCARE THROUGH DIVERSE PROGRAMS AND NEEDS FLEXIBILITY TO COVER A LARGER PROPORTION OF ITS WORKFORCE

The National Restaurant Association is the leading business association for the restaurant and food service industry. Our mission is to help our members establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 945,000 restaurant and foodservice outlets employing 12.7 million people who serve 130 million guests daily. Despite being an industry of predominately small businesses, the restaurant industry is the nationôs second-largest private-sector employer.

The restaurant and food service industry is unique for several reasons. First and foremost, small businesses dominate the industryï with more than seven out of 10 eating and drinking establishments being single-unit operators. We employ a high proportion of part-time, seasonal, and temporary workers. Many of them, together with those workers that are in an eligibility waiting period, are part of the 1.4 million workers nationwide that have group healthcare coverage under limited benefit plans because they are ineligible for coverage under the employerôs regular group healthcare plan.

Our workforce is typically young, with nearly half under the age of 25. We also have a high average workforce turnover rate relative to other industriesï a 75 percent average turnover rate in 2008 compared to 49 percent for the overall private sector. In addition, the business model of the restaurant industry produces relatively low profit margins of 4 to 6 percent before taxes, with labor costs being one of the most significant line items for a restaurant.

Staying competitive in recruiting and retaining employees is vital to the restaurant industry. Restaurateurs want to continue to provide healthcare coverage to their employees and flexibility is essential to design such coverage to meet the needs of their employees and the business. Current coverage offerings have been crafted to strike and maintain that balance.

THE RULES ON PROHIBITION OF PREEXISTING CONDITION EXCLUSIONS PROVIDE NEEDED AND HELPFUL CLARIFICATION

It is helpful that the definition of a preexisting condition will remain the same as what is provided in the Health Insurance Portability and Account Act of 1996 (ñHIPAAò), Pub. L. 104-191. This brings stability to the industry. In particular, we welcome the explanation making clear that, as under HIPAA, group healthcare plans may still exclude benefits for a condition generally, provided that the exclusion applies regardless of when the condition arose.

STRICT ENFORCEMENT, PRIOR TO THE DEFINING OF THE TERMS "ESSENTIAL HEALTH BENEFITS," ON ALLOWED ANNUAL LIMITS COULD BECOME A TRAP FOR THE UNWARY

Before discussing some ideas on providing employers the flexibility needed to cover the largest amount of workers possible, a discussion on the need for clarification of the terms

ñessential health benefitsò is needed. Specifically, Section 2711 of the Public Health Service Act (ñPHSAò), as added by PPACA, allows for annual limits to be established for non-essential health benefits.

Regretfully, as acknowledged by the Departments, the definition of ñessential health benefitsò found in the Regulations merely cross-reference back to the relevant section in PPACA (Section 1302(b)). In complete circular fashion, Section 1302(b) of PPACA lists only ñgeneral categoriesò and calls for regulations to define the meaning of ñessential health benefits.ò

We appreciate that the Regulations call for the Departments, in enforcement actions prior to the issuance of rules defining the terms, to ñtake into account good faith efforts to comply with a reasonable interpretation of ôessential health benefits.öò At that point, this can become a trap for even the most vigilant employer, particularly if the Departments decide to take ñinto consideration the benefits provided under a typical employer planò to decide whether an employerôs efforts were done in good faith. (*See* Section 1302(b)(2) of PPACA.)

When the definition finally comes out, the Departments would have the benefit of a survey of employer-sponsored coverage, so they can ensure that the scope of the essential health benefits is equal to the scope of benefits provided under a typical employer plan, as required by Section 1302(b)(2) of PPACA. However, employers acting now in good faith to comply with the law would have no such luxury in trying to decide what are and what are not ñessential health benefits.ò Thus, we call for the outmost restraint and latitude in enforcement for plan years before the issuance of regulations defining the terms ñessential health benefits.ò

RESTAURANTS AND OTHER EMPLOYERS NEED FLEXIBILITY IN THE PHASE-IN YEARS TO BE ABLE TO PROVIDE HEALTHCARE COVERAGE TO MORE WORKERS

As mentioned earlier, we employ a high proportion of part-time, seasonal, and temporary workers. Many of them, together with those workers that are in an eligibility waiting period, are part of the 1.4 million workers nationwide that have group healthcare coverage under limited benefit, also known as ñmini-med,ò plans. We understand that beginning in 2014 other options will become available.

However, until 2014, these workers would not be able to either take advantage of federal subsidies found in the Exchanges or have guaranteed issuance of coverage in the individual market. Thus, in the interim, it is important to continue to be able to offer mini-med plans for part-time, seasonal, and temporary workers, as well as for those workers that are in an eligibility waiting period, to make sure a larger number of workers have at least some type of meaningful health insurance.

Section 2711(a)(2) of the Public Health Service Act (ñPHSAò), as added by PPACA, calls on the Secretary to ñensure that access to needed services is made available with a minimal impact on premiums.ò This requirement applies specifically to any regulation defining what ñrestricted annual limitsò may be imposed in the years preceding January

1, 2014, when annual dollar limits are no longer allowed. The Regulations phased approach for restricted annual limits would have a direct impact on limited benefit plans.

We expect that under the outline phased approach found in the Regulatons, without proper relief, mini-med plans would either no longer be offered or lead to a significant increase in premiums. Thus, as it pertains to the mini-med plans and the workers they cover, without proper relief, the annual limit restrictions found in the Regulations would infringe both the spirit and the letter of the law.

Clearly, the Regulations seem to acknowledge as much by providing for the Secretary of Health and Human Services (ñHHSò) to establish a program under which the minimum annual limit requirement could be waived if compliance ñwould result in a significant decrease in access to benefits or significant increase in premiums.ò However, the waiver does not seem to be guaranteed and it involves a yet unspecified process.

It is questionable how many employers would attempt to avail themselves of the waiver process, particularly depending on the level of complexity and likelihood of success. In order to protect the healthcare coverage of workers in mini-med programs until other options become available in 2014, we would like to recommend that a blanket waiver on annual limit restrictions be given to limited benefit plansð at least for part-time, seasonal, and temporary workers, as well as workers that are in an eligibility waiting period.

Providing a blanket waiver for limited benefit plans until 2014 would be in full harmony with both the spirit and the letter of the law by ensuring that access to needed services is made available and with a minimal impact on premiums. (*See* Section 2711(a)(2) of PHSA.) We appreciate that the Departments recognize that these plans currently serve those who may not have other options. If some of these plans were eliminated before 2014 because of the annual limit restrictions, they would leave some of the most vulnerable members of our workforce, and their dependents, with no healthcare coverage.

In the alternative, if the Departments move forward with its proposal to have the Secretary of HHS create a case-by-case waiver program. We would urge the Secretary to craft a procedure that is fast and easy to utilize by employers. Likewise, we would ask the Secretary to permit providers or plan administrators to apply for the waiver on the employerôs behalf. These entities often offer the same plans to multiple employers and should also be allowed to apply for the waiver once on behalf of all their employer customers. This would also ease the administrative burden of the waiver.

WITH REGARD TO RESCISSIONS, THE DEPARTMENTS MUST BE VIGILANT OF THE NUMBER OF APPLICANTS MISREPRESENTING THEIR HEALTH STATUS

We are concerned that the Departments state in the Regulations a willingness to both track attempts to circumvent the rescission rules and issue future regulations to ensure more due process before an individual loses health coverage, but no mention of being vigilant for any increase in the number of applicants misrepresenting their health status.

This is important because an increase in misrepresentations could lead to increase premiums for the group as a whole. The Departments acknowledge in their economic analysis that they are ñunable to precisely estimate an overall or average premium impact from this provision.ò This uncertainty should suggest to the Departments the need to be vigilant of abuses on both sides of the equation.

Finally, the example provided in the Regulations forbidding an employer to rescind coverage that was only provided due to an employer error or carrier mistake seems draconian. Employers are diligent in monitoring their employee eligibility for health plan coverage, but errors will happen. An opportunity to fix such errors retroactively should be provided, at least within a reasonable time period.

CONCLUSION

Thank you again for the opportunity to share our views on the Regulations. We urge you to seriously consider our recommendations, particularly as they pertain to limited benefit plans. We support the general principles of health reform and our recommendations would help prevent some meaningful coverage from disappearing, due to unintended consequences.

We look forward to working with you and your staff as we move forward on our common goal of creating an affordable and reasonable health care system.

Sincerely,

Angelo I. Amador, Esq.
Vice President
Labor and Workforce Policy

Michelle Reinke
Senior Policy Analyst
Labor and Workforce Policy