

To: Our Clients and Friends

June 16, 2010

Grandfathered Plan Regulations Provide Vital Compliance Information for Employer-Sponsored Health Plans

On June 14, 2010, the Departments of Labor, Treasury and Health & Human Services (the “Departments”) issued much-anticipated guidance on how a group health plan maintains or loses its status as a grandfathered plan under the Patient Protection and Affordable Care Act (the “Act”). A grandfathered plan under the Act is generally a plan that was in effect on March 23, 2010. Because grandfathered plans are exempt from many (but not all) of the Act’s requirements, maintaining a plan’s grandfathered status has important plan design and cost implications.

Losing Grandfathered Status

The interim final regulations provide an exclusive list of changes that will trigger a loss of grandfathered status. The preamble expressly provides that any change other than those listed in the regulations will not cause a plan to lose grandfathered status.

Events that trigger a loss of grandfathered status are as follows.

1. **Insured Plans:** Entering into a new policy or insurance contract after March 23, 2010 (not including renewals of existing policies).
2. **Reduction of Benefits:** Elimination of all or substantially all benefits to diagnose or treat a particular condition.
3. **Percentage Cost-Sharing Increase:** Any increase in a percentage cost-sharing requirement (e.g., coinsurance increases from 20% to 30%).
4. **Flat Dollar Cost-Sharing Increase:** For fixed-amount cost-sharing other than copayments (e.g., deductibles, out-of-pocket maximums), any increase since March 23, 2010 greater than the “maximum percentage increase” (medical inflation plus 15% points).

5. Co-payment Increase: For fixed-amount copayments, any increase since March 23, 2010 that exceeds the greater of the maximum percentage increase or \$5 increased by medical inflation.
6. Decreased Contribution Rate: An employer or employee organization decreases its contribution rate toward cost of any tier of coverage for any class of individuals by more than 5% points below the rate in effect on March 23, 2010. The contribution rate is the amount contributed for coverage by the employer divided by the entire cost of coverage, expressed as a percentage.
7. Certain Changes to Annual or Lifetime Limits on Dollar Value of Benefits: If a plan that on March 23, 2010:
 - did not impose an overall annual or lifetime limit on the dollar value of benefits, imposes an overall annual limit;
 - imposed an overall lifetime limit on the dollar value of benefits but no overall annual limit on the dollar value of benefits, imposes an overall annual limit lower than the lifetime limit in effect on March 23, 2010; or
 - imposed an overall annual limit on the dollar value of benefits, decreases the dollar value of the annual limit.

The Departments also solicited comments on what other changes, if any, should result in a loss of a plan's grandfathered status.

Separate Benefit Packages

The analysis of whether a plan is grandfathered applies separately to each benefit package available under a plan. This means that if one benefit package is modified in a manner that would cause it to lose grandfathered status while others remain unmodified, the modified benefit package option will cease to be grandfathered. Unfortunately, the regulations do not offer guidance as to what constitutes a "benefit package". Furthermore, it is not clear what effect offering a new benefit package under an existing group health plan will have upon the grandfathered status of the existing benefit packages.

Notice and Recordkeeping Requirements

For a plan to maintain its grandfathered status, the regulations require that a statement asserting grandfathered status be included in participants' plan materials. The regulations include a model statement that can be used to satisfy this requirement. Plan documents in effect on March 23, 2010, current plan documents and other plan documentation must be open for inspection.

Transitional Relief

The regulations provide the following transitional relief for plans:

- If a plan made changes after March 23, 2010 due to a legally binding contract entered into prior to that date, due to a filing before that date with a State insurance department or with written amendments adopted prior to that date, the changes are considered part of the plan's terms on March 23 even though they were not effective then.

- When determining grandfathered status, if the plan made changes after March 23, 2010 but before issuance of these regulations, changes will not destroy grandfathered status if changes are revoked or modified effective the first day of the first plan year on or after September 23, 2010 and the terms on that date, as modified, do not cause the plan to lose grandfathered status.

The preamble provides the following additional transitional relief:

- The Departments offer a “good faith” compliance period for plans that made changes between March 23, 2010 and the date regulations were made public. If changes only modestly exceed the changes described in items two through seven, above, those changes will be disregarded for enforcement purposes.

Anti-Abuse Provision

A plan loses grandfathered status if the principal purpose of a business restructuring is to cover newly hired or enrolled persons in a grandfathered plan, or if the following circumstances are present:

- Employees previously covered by a grandfathered plan are transferred to another grandfathered plan;
- Treating the terms of the transferee plan as an amendment to the transferor plan would cause the transferor plan to lose grandfathered status; and
- There is no bona fide employment reason for the transfer.

Special Rules For Certain Plans

Collectively-Bargained Plans

The regulations clarified an ambiguity in the statute regarding the treatment of plans maintained pursuant to one or more collective bargaining agreements (“CBAs”):

- An insured plan maintained pursuant to one or more CBAs ratified before March 23, 2010 is automatically grandfathered until at least the date on which the last CBA terminates. The plan still must comply with the mandates applicable to grandfathered plans within the same compliance period. After the last CBA terminates, whether the plan maintains grandfathered status requires a separate analysis made under the previously described rules.
- A self-funded plan maintained pursuant to one or more CBAs receives no special treatment. There is no automatic grandfathered status through the date of CBA termination.

Retiree-Only and Excepted Benefit Plans

The preamble provides important relief, unrelated to the grandfathering issue, for sponsors of self-funded retiree-only and stand-alone excepted benefit plans (such as stand-alone dental plans) subject to ERISA. Certain Public Health Service Act mandates do not apply to such plans. Accordingly, these plans do not have to: extend dependent coverage, remove lifetime limits or comply with many other mandates.

Because States have authority to enforce the Public Health Service Act upon group health insurance issuers, the Departments cannot require States to apply this exception to insured retiree-only or stand-alone excepted benefit plans. However in the preamble, Health & Human Services encourages States to refrain from applying these mandates to such plans.

The attorneys of the Employee Benefits and Executive Compensation group of Bryan Cave LLP are available to answer your questions.

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