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July 15, 2010

Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Attention: OCIO-9991-IFC
PO Box 8016
Baltimore, MD 21244-1850

In 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 (PPACA)

To Whom It May Concern:

Throughout the health care reform debate and to the present day, American citizens and businesses have been reassured that if they like their health insurance they can keep it. Choice has long been a cornerstone of America's insurance industry, with great diversity in levels of coverage and corresponding premiums available. Mandating specific coverage levels removes that choice, requiring the premium-payer to forego options desirable to them in favor of coverage levels selected by government.

The promise to Americans to be able to keep their coverage was substantially undercut by the statute, which already provided they could not keep their current waiting periods, lifetime and some annual limits, or dependent limiting age – they had to pay for the coverage elected by Congress. Rather than protecting employers' rights to keep their existing coverage, the subject rules put to final rest any hope of keeping it. Even with the expansions compelled by the law described above, the Interim Rules 'let' employers keep their current coverage only if they:

- Don't make any reductions of benefits or increases to cost-sharing to offset the added expenses required by the law;
- Don't shop for another insurer willing to write the same plan for a lower premium;
- Provide employees with a notice disparaging their coverage;
- Don't terminate a different, more expensive plan; and
- Jump through administrative hoops to prove plan terms in existence on March 23.

None of this is necessary, and none of this is consistent with the spirit of the promise. Employers have a right to expect maximum flexibility and administrative simplicity in keeping their current plans.

As the Department notes in the preamble, many plan sponsors make changes to the terms of their plans on an annual basis. Change can also occur organically. Some of the structural changes include shopping for new administrators or insurers, and adjustments to cost-sharing and contributions to maintain economic viability. Organic changes include changes in the medical delivery system that result in different formulary configurations and medical necessity determinations, and changes in networks as health care providers join and terminate. The ability for employers to keep their plans should include keeping that ability to continue to react to the changing market dynamics, rather than an obligation to cast in stone the detail that existed on the day the President signed the law. Instead, the Department's own analysis estimates that just continuing to make these changes would compel between 50 and 80 percent of small employers to lose grandfather status under these rules by 2013.

The Constitution guarantees all Americans the right to free speech, and this includes the right not to be compelled to broadcast positions with which they disagree¹. Employers who want to maintain their existing coverage do not believe that "Being a grandfathered plan means that your [plan or policy] may not include certain consumer protections of the Affordable Care Act that apply to other plans" as the model notice would compel them to notify their employees. Being a grandfathered plan means no more or less than that their employer has decided to retain the level of coverage that has worked for them rather than the level selected by Congress.

In line with the foregoing general comments, the following are specific comments on the Interim Final Regulations. The citations are to the Treasury regulations, but the same comments apply to the corollary provisions in the DOL and HHS regulations:

54.9815-1251T (a)(1)(ii) – Entering into a new policy with substantially the same benefits as the existing policy should not cause a plan to cease to be grandfathered. Plans should continue to have the ability to shop for less expensive vendors.

54.9815-1251T (a)(2) – Plan sponsors should not be required to provide notice of the grandfathered status to employees in grandfathered plans. By defining grandfathered plans as excluding 'consumer protections that apply to other plans' and inviting questions and complaints, the model notice requirement appears designed to discourage grandfathering by disparaging the plan that the employer has been providing. This will have a chilling effect on employers, that by the estimates of the Departments will add at least \$39.6 million in costs.

54.9815-1251T (a)(3) – Plans should not be required to perform recordkeeping above and beyond their existing obligations in order to maintain grandfathered status. Again, by the Departments' own estimates, this adds \$32.2 million to the cost of grandfathered plans, further disincenting the exercise of their 'right' under PPACA.

1. See *International Dairy Foods Association v. Amestoy* (2d Cir., 1996) (striking down Vermont law requiring milk producers to label milk from cows treated with synthetic growth hormones that had no effect on the safety of the milk); *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

54.9815-1251T (b)(2)(ii) – Employers should be permitted to drop plans without causing remaining plans to lose grandfathered status, even if the basis of dropping the plan is cost of coverage. This is a direct denial of their right to keep their existing coverage.

54.9815-1251T (g) – Plan sponsors should be entitled to continue to make changes to cost-sharing amounts and contribution levels without losing grandfathered status.

In summary, the regulations should be recast to support, rather than deny, the rights of employers to keep their existing coverage.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tom Considine". The signature is fluid and cursive, with a large initial "T" and "C".

Thomas B. Considine
Commissioner