



AMERICANS FOR LIMITED GOVERNMENT

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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave, N.W.
Washington, DC 20210

Submitted Electronically Via Regulations.gov

**RE: Comments of Americans for Limited Government on RIN 1210-AB43
Interim Final Rules for Group Health Plans and Health Insurance
Coverage Related to Preexisting Conditions, Lifetime and Annual
Limits, Rescissions, and Patient Protections**

To Whom It May Concern:

These comments are submitted pursuant to the Interim Final Rule that was published by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services (herein after “Secretary” or “Secretaries”) on June 28, 2010 at 75 Fed. Reg. 37188. The Interim Final Rule deals with the requirements that health insurance plans must meet under Public Law 111-148, the Patient Protection and Affordable Care Act (hereinafter “Act”).

As will be discussed in further detail below, we have significant concerns regarding the analysis used to support the conclusions found in the Interim Final Rule. Additionally, the burden analysis found in the Paperwork Reduction Act section fails to accurately reflect the true cost of legal advice that members of the regulated community will need to use in order to comply with the Rule.

Relevant Authority

The Interim Final Rule implements Sections 2704, 2711, 2712, and 2791A of the Public Health Service Act (PHS Act), 42 U.S.C. § 201 *et seq.* These sections were added to the PHS Act by Public Law 111-148. Section 2704 of the PHS Act concerns prohibitions on excluding participants due to preexisting conditions; section 2711 concerns prohibitions on lifetime and annual dollar limits on benefits; section 2712 concerns restrictions on rescissions of plans, and section 2917A concerns patient protections.

Analysis of the Substance of the Rule

The pervasive notion that there are social benefits to these regulations permeates the Interim Final Rule. For instance, in “TABLE 1.1 – *Accounting Table*” which describes the supposed benefits, the following language is used, “Many of these benefits have a distributional component, and promote equity.”¹ Later, the following justification is given, “This represents a meaningful improvement in equity, which is a benefit associated with these interim final regulations.”² In other words, the Act and the Interim Final Rule are operating to take from the productive and give to the unproductive.

The Secretary also admits that these supposed benefits are not free:

To the extent that higher premiums (or other plan or policy changes) are passed on to all employees, there will be an explicit transfer from workers who would not incur high medical costs to those who do incur high medical costs. If, instead, the employers do not pass on the higher costs of insurance coverage to their workers, this could result in lower profits or higher prices for the employer’s goods or services.³

At the end of the day someone has to pay for all these benefits. Either the employer pays, the employee pays, or the consumer of the employer’s goods or service pays. If the employer absorbs the costs this means that this employer now has less free capital with which to hire employees. Given that the national unemployment rate sits at 9.5%, representing 14.6 million unemployed persons, it makes little economic sense for the federal government to be mandating policies that constrict the ability of employers to hire employees.⁴

¹ 75 Fed. Reg. 37188, 37196.

² 75 Fed. Reg. 37188, 37206.

³ *Id.*

⁴ *The Employment Situation – July 2010*, Bureau of Labor Statistics, U.S. Department of Labor, August 6, 2010. Available online at: <http://www.bls.gov/news.release/empsit.nr0.htm>. (Accessed August 27, 2010.)

The interplay between the instant regulation and the “Grandfathered” plans regulation puts an additional squeeze on employers, further complicating their decision on whether to absorb costs or pass them along to their employees. Under the “Grandfathered” plans rule, 75 Fed. Reg. 34538, if an employer incurs substantial costs increases and passes those cost increases along to their employees through either higher employee contributions to plan premiums or increased “cost sharing,” *e.g.*, higher co-pays, then the employer runs the substantial risk of their existing plan losing its grandfathered status. In such situations this may well cause the employer to either raise costs for its goods and services or absorb the costs increases itself. In the former situation this will lead to inflation. In the later the employment situation in the U.S. will be negatively impacted.

In this time of great economic duress, clearly, these additional requirements are not helpful. These additional requirements – and the corresponding burdens placed on employers who are attempting to keep this country at work – will only exacerbate the already bad employment situation.

The Secretary also attempts to downplay the costs by asserting that these provisions in the Act and the Interim Final Rule will only result in, “a premium increase of one-half of a percent or less for lifetime limits and one-tenth of a percent or less for annual limits.”⁵ The Secretary does admit, though, that the government just doesn’t know for sure, “However, as this discussion demonstrates, there is substantial uncertainty in data and in the choices plans will decide to make in response to these interim final regulations.”⁶ As such, the real world costs could actually be much higher than the Secretary would lead us to believe.

Paperwork Reduction Act Analysis – The Secretary Seriously Underestimated the Paperwork Burden Imposed on the Regulated Community by the Interim Final Rule

The Interim Final Rule imposes certain paperwork and corresponding recordkeeping burdens on the regulated community. The Paperwork Reduction Act Analysis found in the Interim Final Rule is deficient in that it fails to take certain necessary tasks into consideration. Additionally, the hourly cost estimates for attorney time necessary to comply with the Interim Final Rule are completely out of line with real world costs for this type of service. The Secretary seems to think that experienced, competent legal representation on issues that are highly complex can be bought for only \$119 per hour. This is ludicrous. Even worse, the Secretary also seems to think that even if you could get experienced, competent legal representation for this price that these attorneys

⁵ 75 Fed. Reg. 37188, 37206.

⁶ *Id.*

would be instantly endowed with magical abilities that enable them to direct compliance with the Interim Final Rule, without ever reading it. This is also ludicrous.

There are three separate notice requirements in the Interim Final Rule that constitute a paperwork requirement that is subject to the Paperwork Reduction Act, 44 U.S.C. § 3506 *et seq.* These requirements are as follows (1) enrollment opportunity notice, (2) rescission notice, and (3) patient protection disclosures. For the reasons which follow the analysis used by the Secretary to estimate and justify the paperwork costs severely underestimate the actual costs that will occur.

Time Necessary to Review the Interim Final Rule is Missing from the Secretary's Paperwork Reduction Act Analysis

The burden analysis found in the Interim Final Rule assumes that no one will read the requirements of the Interim Final Rule but that they will somehow just come into possession of the knowledge of how to comply with the mandated paperwork requirements. As such, the estimated burden in time found in the Interim Final Rule seriously understates the total time burden that will actually occur.

The estimates below are based on the more reasonable assumption that an attorney would actually read the Interim Final Rule before beginning the work necessary to help the plan begin comply with its paperwork requirements.

The Interim Final Rule as published in the Federal Register on July 28, 2010 contains over 69,900 words.

Persons reading text in English do so at an average of 250 to 300 words per minute. However, when reading text with an eye for detail, such as proofreading or reading legal documents, the average rate falls to approximately 200 words per minute.⁷

Using this understanding as a baseline, the average attorney could be expected to expend between 233 minutes and 350 minutes to read the Interim Final Rule one time. (69,900/200 or 69,900/300.) In order to be able to provide competent and zealous representation to his or her client as required under the ethical standards applicable to attorneys it is likely necessary for each attorney to read the Interim Final Rule at least two or three times, making notes each time as to particular subject matter areas which might require further research. Thus, an attorney who reads the Interim Final Rule three times at 200 words per minute will expend approximately 1,049 minutes just for this one task. (69,900/200*3.)

⁷ Ziefle, M. (1998), *Effects of display resolution on visual performance*, Human Factors, 40(4), 555-568.

Number of Words	Words Per Minute	Total Minutes	Minutes if Read 2x	Minutes if Read 3x
69,900	300	233	466	699
69,900	200	350	699	1,049 ⁸

Assuming that the attorney read only the Interim Final Rule and no other material, this still amounts to 17.49 hours of attorney time.

The Secretary estimates that the attorney who drafts the required notices has an hourly labor rate of \$119 per hour.⁹ Given the real world costs of obtaining legal advice it is very unlikely that this estimate is even remotely close to the actual cost per hour that will be incurred. First, no insurance provider would use inexperienced counsel for dealing with issues surrounding the Act. An attorney tasked with reviewing the Interim Final Rule and drafting the required notice would likely have a minimum of five years experience and would likely have over ten years experience. Attorneys with this level of experience do not bill at \$119 an hour in metropolitan areas where most insurance providers are headquartered.

The so-called “Laffey Matrix” has been relied upon time and time again by the courts in determining the level of market rates for reasonable attorney’s fees when those fees are owed to a prevailing party for litigation in the Washington, DC area. See for instance, *Salazar v. District of Columbia*, 123 F. Supp. 2d 8 (D.D.C. 2000). In *Salazar* the court explained how the plaintiff calculated its fees and how those fees were in line with the market rate for the area:

Plaintiffs have arrived at these hourly rates in the following fashion. They have relied on the so-called Laffey matrix which was first approved in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 371-375 (D.D.C. 1983), aff’d, 241 U.S. App. D.C. 11, 746 F.2d 4 (D.C. Cir. 1094), overruled in part on other grounds by SOCM, 857 F.2d at 1525. The original *Laffey* matrix presented a grid which established hourly rates for law-yers of differing levels of experience during the period from June 1, 1981, through May 31, 1982. The Court of Appeals accepted the 1981-1982 matrix in SOCM, 857 F.2d at 1525, and the parties to that case updated it through May 31, 1989, as part of a settlement. *Covington*, 839 F. Supp. 894, 898 (D.D.C. 1993); the updated *Laffey* matrix has often been relied upon to

⁸ Figures may not add due to rounding.

⁹ 75 Fed. Reg. 37188, 37218.

determine appropriate fee awards. See *Trout v. Ball*, 705 F. Supp. 705, 709, n. 10 (D.D.C. 1989); *Sexcius v. District of Columbia*, 839 F. Supp. 919, 924 (D.D.C. 1993); *Palmer v. Barry*, 704 F. Supp. 296, 298 (D.D.C. 1989).

See *Salazar, supra*, at 17. The court further stated:

Consequently, the Court concludes that the updated *Laffey* matrix more accurately reflects the prevailing rates for legal services in the D.C. community. *Salazar, supra*, at 23.

An updated version of the “Laffey Matrix” gives the following billing rates for attorneys in the Washington, DC area:¹⁰

	Years Out of Law School				
	1-3	4-7	8-10	11-19	20+
Rate Per Hour	\$294	\$361	\$522	\$589	\$709
Rate Per Minute	\$4.90	\$6.02	\$8.70	\$9.82	\$11.82

Note further that the current billing rate in the matrix for a Paralegal/Law Clerk is \$161 per hour, far in excess of the \$119 per hour of attorney time that the Secretary estimates in the Interim Final Rule. As stated above, the insurance provider would use experienced counsel to review the requirement to provide notice to its participants. Based on the Laffey Matrix the market rate for attorneys in the Washington, DC area with five to ten years of experience ranges from \$361 to \$522 per hour. An average of the ends of these ranges comes to \$441.50 per hour. This amounts to \$7.36 per minute. Using the figure of \$7.36 per minute amounts to \$7,715.67 in attorney time per affected entity.

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
\$441.50	17.48	\$7,715.67

¹⁰ The full, updated Laffey Matrix is available online at: <http://www.laffeymatrix.com/see.html>. (Accessed August 27, 2010.)

Applying the per entity cost across the estimated 630 affected entities, the total cost runs into the millions of dollars.¹¹

Cost Per Entity	Entities Affected	Total Cost
\$7,715.67	630	\$4,860,872.10

Using these costs as a baseline, the Secretary's estimates for the three disclosures discussed below are also severely understating the burden.

(1) Burden Imposed on the Regulated Community by the Enrollment Opportunity Notice

The Secretary in estimating the burden associated with mandating plans to provide an enrollment notice to those participants who have previously reached an annual or lifetime limit states that there are approximately 29,000 persons who are so situated.¹² The Secretary further estimates that the required notices to these 29,000 persons will be prepared by approximately 630 health insurers.¹³ Additionally, the Secretary estimates that these 630 health insurers will each expend only a half-hour of attorney time at \$119 and hour to draft the required notice. *Id.* Using the Secretary's estimates this comes to 315 hours of attorney time at a corresponding cost of \$37,485. As discussed above, the estimate as to the cost per hour of attorney time severely understates the actual burden. Assuming that the time estimate is accurate the Secretary's underestimation of costs per hour means that the total costs for this mandate is also too low.

Using the figure of \$441.50 per hour of attorney time as discussed above, this amounts to an actual cost closer to \$139,000.

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
\$427	315	\$139,072.50

¹¹ See discussion below on the number of affected entities.

¹² 75 Fed. Reg. 37188, 37217.

¹³ 75 Fed. Reg. 37188, 38218.

Contrast this to the Secretary's estimate of \$37,485.

Secretary's Estimate

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
\$119	315	\$37,485.00

(2) Burden Imposed on the Regulated Community by the Rescission Notices

The Interim Final Rule contains a notice requirement that a "group health plan or health insurance issuer offering group health insurance coverage must provide at least 30 calendar days advance notice to an individual before coverage may be rescinded."¹⁴ The Secretary estimates that only "100 group health plan policies are rescinded in a year."¹⁵ The Secretary further estimates that these 100 group health plans will require 15 minutes of attorney time to draft the require notice at a rate of \$119 per hour. As discussed above, the cost per hour estimate severely understated the actual burden. Using the figure of \$119 per hour this amounts to a cost of \$2,975.

Secretary's Estimate

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
\$119	25	\$2,975.00

Compare this to the more reasonable costs per hour estimate of \$441.50 per hour which results in a cost of \$11,037.50.

Attorney Cost Per Hour	Hours Required	Total Attorney Cost
\$441.50	25	\$11,037.50

Further, the Secretary gives no analysis as to the reason why it is believed that the rescission notice only takes 15 minutes of attorney time to draft while the enrollment

¹⁴ 75 Fed. Reg. 37188, 37218.

¹⁵ *Id.*

opportunity notice takes twice as long (30 minutes). At a minimum the Secretary should further explain the basis for these time estimates.

(3) Burden Imposed on the Regulated Community by the Patient Protections Disclosure Requirements

As discussed above, the Secretary does not take into consideration the amount of time needed for the affected entities in the regulated community to read the Interim Final Rule. As such, the Secretary's estimates are far too low. This problem is found again in the requirement that health plans and issuers provide notice to plan participants of their rights under the Interim Final Rule. While the Secretary does give an estimate of the amount of time necessary to provide the sample notice, no estimate of the time necessary to know that the notice was required is given. As such, time to read and analyze the Interim Final Rule (as estimated above) must be added to the Secretary's computation under this section.

Because the Secretary significantly understated the costs associated with preparing the required notice, the notice should not be mandated until a reasonable estimate of the costs is given and approved by the Office of Management and Budget.

Conclusion

Given the problems found both in the supporting analysis and the Paperwork Reduction Act analysis of the Interim Final Rule, it should be rescinded. A new Notice of Proposed Rulemaking should be published that uses a reasonable estimate of the actual burden on the regulated community. Using comments received on this Notice of Proposed Rulemaking the Secretary should then fashion a Final Rule. Until such time as a reasonable estimate is provided and is approved by the Office of Management and Budget and a Final Rule is published, none of the paperwork requirements found in the instant Interim Final Rule should be imposed.

Sincerely,



William Wilson
President