

Comments re Interim Final Regulations on Grandfathered Plans under PPACA

The following comments concern the impact of the grandfathered regulations (26 CFR 54.9815-1215T/29 CFR 2590.715-1251/45 CFR 147.140) on Taft-Hartley multiemployer welfare funds. In the collective bargaining context, employers and unions negotiate over benefits, wages and other issues important to employees/union members. When an agreement between an employer and a union is reached, that agreement is then submitted to the union's membership for approval. As a result of that agreement, a welfare fund to be jointly administered by trustees representing participating unions and employers may be created or continued. Typically, the amount of contributions to these funds is negotiated between participating unions and employers. Among other welfare benefits, these funds may provide group health care coverage for employee/union members. Often these funds offer various options for health care coverage. In many instances, these funds are self-insured. Usually, any change in benefits or contributions requires the approval of the trustees of the fund (half of whom are appointed by participating unions and the other half by participating employers).

Unanswered questions concerning the PPACA grandfathered regulations and the uncertainty surrounding their interpretation are interfering with the collective bargaining process and are having an adverse effect on the sustainability of Taft-Hartley welfare funds.

In particular, the regulations should address the following scenarios.

The first scenario involves a fund which has several health care coverage benefit packages in existence on March 23, 2010. After March 23, 2010, an employer and a union participating in the fund negotiate a new benefit package which would apply only to union employees hired after March 23, 2010. The trustees are amenable to implementing this new health care benefits package, provided that adoption of the new benefits package does not affect the grandfathered status of the fund's previously existing benefit packages. This new benefit package would only exist because union members approved the agreement authorizing it. It is not created solely at the direction of the employer as it requires the approval of the employees through their ratification of the collective bargaining agreement. It also requires consent of the trustees of the fund. Thus, there is a "bona fide employment-based reason" for the new option within the meaning of 26 CFR 54.9815-1215T(b)(2)(ii)/29 CFR 2590.715-1251(b)(2)(ii)/45 CFR 147.140(b)(2)(ii)—the employees' entry into a collective bargaining agreement between their employer and their representative, the union, that specifies the source of their health benefits, which is the fund. Furthermore, there has been no transfer of employees from any existing benefit package. The grandfathered regulations should provide that the creation of a new tier of benefits for new hires will not affect the grandfathered status of existing benefit options. The contrary interpretation would interfere with the collective bargaining rights of unionized employees.

The second scenario involves transfers between existing health care benefit options. It should be clarified that any transfer after March 23, 2010 of union employees from one health care benefit package to another benefit package under a Taft-Hartley fund, as a result of collective bargaining, will be treated as a voluntary transfer between options resulting in no loss of grandfathered status for either benefit package. (See, Example 1 of 26 CFR 54.9815-1215T(b)(3)/29 CFR 2590.715-1251(b)(3)/45 CFR 147.140(b)(3).) This is because the transfer

requires the approval of the employees through their ratification of the collective bargaining agreement, so the change in their coverage by the fund cannot be made solely at the direction of the employer. Furthermore, such a change typically requires the approval of the fund's trustees.

The regulation should also be clarified that if a fund adopts a new benefit package after March 23, 2010 and pursuant to the collective bargaining process some union employees are switched to that new option, the switch will not affect the grandfathered status of the benefit packages existing on March 23, 2010. Again, this should be treated as a voluntary transfer because the employees joined in the decision.

The regulations should also address the following common situation. One of the unions participating in a fund successfully organizes the employees of an employer. After March 23, 2010, as part of the collective bargaining process, the union and the employer agree that the employer's newly unionized employees will participate in the fund and in one of the fund's health care benefit packages in existence on March 23, 2010, subject to the approval of the trustees of the fund. Previously, the employees had health care coverage under the employer's plan. The trustees should be able to permit this new group of employees to transfer to the fund without causing the fund to lose its grandfathered status. These newly organized employees should be treated as new employees within the meaning of 26 CFR 54.9815-1215T(b)(1)/29 CFR 2590.715-1251(b)(1)/45 CFR 147.140(b)(1). Furthermore, these union members approved the agreement, and therefore, the transfer of these union members from the employer's plan to the fund is voluntary. (See, Example 1 of 26 CFR 54.9815-1215T(b)(3)/29 CFR 2590.715-1251(b)(3)/45 CFR 147.140(b)(3).) The employees' coverage by the fund cannot be made solely at the direction of the employer, because the transfer requires the approval of the employees through their ratification of the collective bargaining agreement. Moreover, their participation requires the consent of the trustees of the fund. Thus, there is a "bona fide employment-based reason" within the meaning of 26 CFR 54.9815-1215T(b)(2)(ii)/29 CFR 2590.715-1251(b)(2)(ii)/45 CFR 147.140(b)(2)(ii) to transfer these employees into coverage available through the fund—their entry into a collective bargaining agreement between their employer and their representative, the union, that dictates the source of their health benefits, which is the fund. Again, the regulations should allow the trustees of the fund to admit newly organized union employees into the fund without fear that doing so will cause the fund to lose its grandfathered status. The trustees should not be required to do a comparative analysis between the new union employees' prior coverage and the fund coverage available to these new employees nor should the fund's grandfathered status be affected by such an analysis, because the new union employees consented to the change in coverage through the bargaining process. The contrary interpretation would inhibit the fund's ability to grow and also interfere with the collective bargaining rights of unionized employees.