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July 20, 2010

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The Honorable Kathleen Sebelius  
Department of Health and Human Services  
Hubert H. Humphrey Building,  
Room 445-G  
200 Independence Avenue, SW  
Washington, DC 20201

Re: Interim Final Rule Concerning Grandfather Status—Request for  
Issuance of FAQs

Dear Secretary Sebelius:

On behalf of Aetna, Inc., I am writing to request that the Departments of Health and Human Services ("HHS"), Labor, and Treasury (the "Departments") issue near-term guidance addressing two important issues relating to the Interim Final Rule (the "IFR") for "Grandfather" Status under the Patient Protection and Affordable Care Act ("PPACA"), 75 Fed. Reg. 34538 (June 17, 2010).

Aetna is one of the nation's leading diversified health care benefits companies, providing members with information and resources to help them make better informed decisions about their health care. Our programs and services strive to improve the quality of health care while controlling rising employee benefits costs. As a key stakeholder affected by PPACA, Aetna is committed to working with the Departments in developing reasonable and administrable standards for the implementation of PPACA.

Aetna will submit more extensive comments regarding the IFR before the close of the comment period, but believes that the issues discussed in this letter are of such importance to the insurer and plan sponsor community that the Departments should issue FAQs in the near-term. For purposes of assisting the Departments with such guidance, Aetna submits the following questions and proposed responses.

**Question Number 1: If the sponsor of an insured plan takes action that could trigger the loss of grandfather status *without* notifying the plan's insurer (such as decreasing the sponsor's contribution rate by more than five percent measured from March 23, 2010 or transferring employees to grandfathered coverage without a *bona fide* employment-based reason), will the insurer be treated as non-compliant with PPACA if it continues to offer a grandfathered policy to the plan?**

## **Background**

Under the IFR, there are a number of actions that the sponsor of a grandfathered plan can take which could trigger the loss of grandfather status, about which the plan's insurer may have no notice or control. For example, employers determine how to allocate the cost of health insurance coverage between themselves and their employees, typically on an annual basis. Insurers of group health plans do not know what an employer (or an employee organization) contributes to the cost of coverage, or whether the employer (or employee organization) may modify its contribution rate. Instead, insurers receive a monthly remittance from the employer which covers the monthly premium, and the remittance does not detail the contribution formula as between the employer and plan participants. Likewise, an employer could transfer employees from coverage under one plan to another, without notifying the insurer of the transferee plan of such action.

The IFR provides that a group health plan or health insurance coverage ceases to be a grandfathered plan if an employer (or employee organization) decreases its contribution rate "towards the cost of any tier of coverage for any class of similarly situated individuals . . . by more than 5 percentage points below the contribution rate for the coverage period that includes March 23, 2010." 45 C.F.R. § 147.140(g)(1)(v). And, the IFR sets forth two "anti-abuse" rules, which provide, in pertinent part, that a plan will lose grandfather status if:

1. The principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered plan; or
2. Employees are transferred into a plan or health insurance coverage (the transferee plan) from a plan or health insurance coverage under which employees were covered on March 23, 2010 (the transferor plan), and (a) comparing the transferee plan to the transferor plan would cause a loss of grandfather status, and (b) there was no *bona fide* employment-based reason for the transfer. 45 C.F.R. § 147.140(b)(2)

However, the IFR does not address how these rules apply in the context of an insurer of a grandfathered group health plan where the insurer has no notice as to whether an employer has decreased its contribution rate toward coverage, undergone a business restructuring, or transferred employees from one plan to the plan for which the insurer is providing health insurance coverage. Without clarification, an insurer could be deemed non-compliant with PPACA (and therefore subject to penalties under the Public Health Services Act as well as lawsuits under ERISA for not providing all of the PPACA required benefits for non-grandfathered plans) for continuing to offer a grandfathered policy to an employer that has unilaterally taken action that could trigger loss of grandfather status, even if the insurer had no notice of the employer's action.

## **Proposed Response**

The Departments have determined that, with respect to the period of March 23, 2010 until September 23, 2010, a health insurance issuer will not be treated as non-compliant with PPACA where, without notifying the insurer, an employer (or employee organization) has taken action that could cause the health insurance coverage to cease to be a grandfathered plan, such as decreasing the sponsor's contribution rate by more than five percent measured from March 23,

2010 or transferring employees to the grandfathered coverage without a *bona fide* employment-based reason.

For plan years beginning on or after September 23, 2010, the Departments will not treat a health insurance issuer as non-compliant with PPACA if it continues to offer a grandfathered policy to an employer or employee organization that has taken action that could cause the coverage to cease to be a grandfathered plan (such as decreasing the sponsor's contribution rate by more than five percent measured from March 23, 2010 or transferring employees to the grandfathered coverage without a *bona fide* employment-based reason), but only where the insurer has taken steps to require that an employer (or employee organization) disclose any actions by the employer (or employee organization) that could cause the loss of grandfather status under the IFR, and the employer or employee organization fails to do so notwithstanding the insurer's requirement. In such circumstances, the Department will treat the insurer's efforts to obtain notice of the employer's actions as good faith compliance with the IFR.

**Question Number 2: If a health insurance issuer issues a new policy or certificate of insurance to a policyholder with grandfathered coverage which provides benefits that are identical or substantially the same as the benefits provided under the prior policy or certificate, will the new policy or certificate be treated as a continuation of the grandfathered coverage and retain its grandfathered status?**

### **Background**

It is common for health insurance issuers to issue new policies or certificates of insurance to policyholders which are substantially the same as a previously issued policy or certificate for *bona fide* business reasons. For example, an insurer may consolidate duplicate policy forms into a smaller number of substantially similar policy forms for purposes of simplifying the insurer's administration. In such cases, a new policy or certificate is issued by the same insurer to the same policyholder, which details the new policy or certificate number, but the benefits under the new policy or certificate are nearly the same as the benefits offered under the previous policy or certificate.

The IFR defines a grandfathered health plan as "coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for so long as it maintains that status under the rules [of the IFR])." 45 C.F.R. § 147.140(a). The IFR also provides that "if an employer or employee organization enters into a new policy, certificate, or contract of insurance after March 23, 2010 (because, for example, any previous policy, certificate, or contract of insurance is not being renewed), then that policy, certificate, or contract of insurance is not a grandfathered health plan with respect to the individuals in that group health plan." 45 C.F.R. § 147.140(b)(2). The IFR includes a special anti-abuse rule that effectively permits a group health plan and health insurance coverage to retain its grandfathered status where (1) employees are transferred into existing coverage, (2) comparing the transferee plan to the transferor plan would not cause the loss of grandfathered plan status, and (3) there is a *bona fide* employment based reason for the transfer. 45 C.F.R. § 147.140(a)(ii).

The IFR does not address whether a grandfathered health plan will cease to be treated as such where a new policy or certificate of insurance is issued by the same insurer to the same

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policyholder for *bona fide* business reasons, and the coverage is substantially the same as was in force on March 23, 2010. We note that, in other circumstances, the Department of Labor has recognized that non-substantive changes to policy terms should not disqualify an insurance policy from grandfather status. See Department of Labor Adv. Op. 2000-12A (October 4, 2000) (amendments to group annuity contracts to accommodate changes in a plan sponsor's corporate structure are not material, and will not disqualify such policies from their status as "transition policies" under DOL regulation issued pursuant to ERISA § 401(c)(1)).

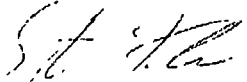
**Proposed Response**

The Departments have determined that a new policy or certificate will be grandfathered where (1) the new policy or certificate is issued by a health insurance issuer to the same policyholder for *bona fide* business reasons and (2) the coverage under the new policy, when compared to the coverage under the old policy, would not cause the loss of grandfathered status under the provisions of section (g)(1) of the IFR. In these circumstances, the new policy or certificate will be considered as continuing in force the same insurance coverage that was in effect on March 23, 2010.

\* \* \*

Aetna appreciates the Department's consideration of these proposed FAQs, and looks forward to working with the Departments in developing final regulations regarding grandfather status under PPACA. Should you have any questions, please feel free to contact me.

Sincerely,



Steven B. Kelmar

CC: Jay Angoff  
Steve Larsen