ARNOLD & PORTER LLP

ADVISORY

June 2010

# Healthcare Reform: Government Issues Grandfathered Health Plan Coverage Regulations

On June 14, 2010, the US Departments of Treasury, Labor, and Health and Human Services jointly released interim final regulations (the Interim Regulations) under the new healthcare reform laws (commonly referred to as the Affordable Care Act)[1] that set forth standards for determining whether coverage provided under a health plan is grandfathered for purposes of the Affordable Care Act. As discussed in this Advisory, health plans that are not grandfathered are required to comply with all of the Affordable Care Act's requirements as they become effective starting later this year, while grandfathered health plans are subject to some but not all of these requirements. Thus, the Interim Regulations are of vital importance to employers and other health plan sponsors as they move forward with bringing their plans into compliance. For sponsors of plans that are grandfathered, the grandfathered plan rules also will be an important factor in evaluating whether and when to make future plan changes.

Generally, all health plan and other health insurance coverage, whether or not grandfathered, must comply with some of the Affordable Care Act's mandates. Key requirements that apply in plan years beginning on or after September 23, 2010, to most grandfathered and to non-grandfathered health coverage include:

- A prohibition on overall lifetime limits (and, starting in 2014, except in the case of grandfathered individual health insurance coverage, overall annual limits as well).
- The expansion of coverage to adult dependent children up to age 26 (but prior to 2014, in the case of a grandfathered group health plan, only if the child is not eligible for coverage under another employer-sponsored plan).
- Except in the case of grandfathered individual health insurance coverage, a prohibition on preexisting condition exclusions for covered individuals under age 19 (all covered individuals starting in 2014).
- In the case of insured coverage, restrictions on medical loss ratios (generally requiring annual premium rebates to enrollees if at least a specified portion of premium income is not spent on clinical services and quality improvement).

1 The Patient Protection and Affordable Care Act (Affordable Care Act), enacted March 23, 2010, as amended by the Health Care and Education Reconciliation Act, enacted March 30, 2010.

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- A prohibition on rescission of coverage.

In addition to the above requirements, non-grandfathered health coverage must comply with a number of additional requirements of the Affordable Care Act. Key among these are the following:

- Mandatory coverage of certain preventative health services without any cost-sharing requirement (for plan years beginning on or after September 23, 2010).
- Appeals processes that include an external review (for plan years beginning on or after September 23, 2010).
- A prohibition against insured coverage under a group health plan that discriminates in favor of highly compensated employees (for plan years beginning on or after September 23, 2010).[2]
- In the case of insured coverage, limitations on variations in premium rates (generally allowing premium rates charged by a health insurance issuer for coverage in the individual or small group market to vary based only on (i) type of coverage (i.e., individual or family); (ii) geographic rating area; (iii) age (variation limited to 3-to-1 for adults); and (iv) tobacco use (limited to 1.5-to-1)) (starting in 2014).
- In the case of insured coverage, requirements relating to "essential benefits" (starting in 2014).
- Coverage of routine patient care costs for individuals participating in "approved clinical trials" that involve cancer or other life-threatening diseases and meet additional criteria (starting in 2014).
- A prohibition on discrimination based on health status (starting in 2014).

## Grandfathered Health Plan Coverage

The Interim Regulations provide that grandfathered health plan coverage is coverage provided by a group health plan or a health insurance issuer in which at least one person was enrolled on March 23, 2010. Grandfathered status continues indefinitely until an event occurs that results in the loss of grandfathered status. Events triggering the loss of grandfathered status are discussed below.

According to the Interim Regulations, grandfathered status is determined on a benefits package by benefits package basis rather than on a plan-wide basis. As a result, it will be possible for a single group health plan to have some benefits packages that continue to qualify as "grandfathered health plan coverage" while other benefits packages available under the plan will have lost their grandfathered status and thus be subject to different requirements under the Affordable Care Act.

## Changes Resulting in Loss of Grandfathered Status

The Interim Regulations set forth an exclusive list of events that result in the loss of grandfathered status:

- **Issuance of New Insurance Policy.** If an employer or employee organization (such as a union) enters into a new policy, certificate, or contract of insurance after March 23, 2010 (e.g., upon nonrenewal of a prior policy), the Interim Regulations provide that coverage under the new policy is not grandfathered. No exception appears to be available for instances where the employer or employee organization does not have the option to renew an old policy, such as where an insurer withdraws from a particular market, declines to renew, or goes out of business, or in cases where a change is made from a self-insured arrangement to an insured arrangement, even if identical coverage is maintained. On the other hand, it appears that changing from an insured arrangement to a self-insured arrangement alone would not result in the loss of grandfathered status under the Interim Regulations. The Interim Regulations specifically invite comment on the issue of changing from an insured arrangement to a self-insured arrangement.

2 Self-insured plans have been long restricted under the Internal Revenue Code from providing coverage that discriminates in favor of highly compensated employees. However, it is not uncommon for executives (current and retired) to be provided with special coverage under insured arrangements in order to avoid the nondiscrimination requirements applicable to self-insured plans. The impact of the Affordable Care Act on any such insured executive arrangements will need to be assessed.

- **Elimination of Benefits for any Particular Condition.** The Interim Regulations state that the modification of health coverage to eliminate all, or substantially all, benefits to diagnose or treat any particular condition causes the loss of grandfathered status. Further, the Interim Regulations state that the elimination of benefits "for any necessary element to diagnose or treat a condition" will be treated as an elimination of benefits for a specific condition that results in the loss of grandfathered status. For instance, if treatment of a particular mental health condition involves both drugs and counseling, the plan would have to maintain coverage of both treatments to retain grandfathered status.
- **Any Increase in Percentage Cost Sharing Requirements.** The modification of health coverage to increase, using as the baseline the terms of coverage in effect as of March 23, 2010, any cost-sharing requirement that is measured on a percentage basis results in the loss of grandfathered status according to the Interim Regulations. For example, if coverage in effect on March 23, 2010, paid for 90 percent of the cost of in-patient hospital stays and the participant was responsible for the remaining 10 percent, any modification to the coverage that increased the percentage paid by the participant above 10 percent would result in the loss of grandfathered status.
- **Certain Increases in Fixed Amount Cost Sharing Requirements (Other than Fixed Amount Copayments).** The Interim Regulations provide that grandfathered status is lost if a fixed amount cost-sharing requirement, such as a fixed amount deductible or out-of-pocket limit, is increased, measured from March 23, 2010, by a percentage that exceeds the "maximum percentage increase." Generally, the "maximum percentage increase," as defined in the Interim Regulations, is the rate of medical inflation (derived from the Consumer Price Index for All Urban Consumers (CPI-U)) since March 2010 plus 15 percentage points.
- **Certain Increases in Fixed Amount Copayment Requirements.** An increase in a fixed amount copayment requirement results in the loss of grandfathered status under the Interim Regulations if the increase, measured from March 23, 2010, exceeds the greater of (i) US$5 as adjusted for medical inflation (derived from CPI-U); and (ii) the "maximum percentage increase" described above.
- **Decrease in the Rate of Contribution by Employers or Employee Organizations**. In the case of coverage to which an employer or employee organization contributes toward the cost, grandfathered status is lost according to the Interim Regulations if the employer or employee organization decreases its rate of contribution (expressed as a percentage) by more than five percentage points (generally measured from March 23, 2010) "towards the cost of any tier of coverage for any class of similarly situated individuals." Special rules apply where employer or employee organization contributions are determined based on a formula, such as hours worked or tons of coal mined, rather than on the cost of the coverage.
- **New or Modified Annual Limits**. The Interim Regulations provide three rules providing for the loss of grandfathered status resulting from changes in annual limits on the dollar value of benefits.[3] First, for plans or other group insurance coverage that did not impose an overall annual or lifetime limit on the dollar value of benefits on March 23, 2010, grandfathered status is lost if an overall annual limit is imposed. Second, for plans or other group insurance coverage that imposed an overall lifetime limit on the dollar value of benefits, but no annual limit, as of March 23, 2010, grandfathered status is lost if the plan or other group insurance imposes an overall annual limit that is lower than the dollar amount of the lifetime limit in effect on March 23, 2010. (As noted above, the Affordable Care Act prohibits both

3 Grandfathered group plans and other group insurance coverage may not impose overall annual limits in plan years beginning on or after January 1, 2014. Before such time, the preamble to the Interim Regulations notes that "restricted" annual limits are permissible to the extent allowed by Section 2711 of the Public Health Service Act, as enacted by the Affordable Care Act. Additional regulations issued by the Departments on June 22, 2010, address this topic.

grandfathered and non-grandfathered plans and group insurance arrangements from including overall lifetime limits, so any lifetime limit must be removed in any event for plan years beginning on or after September 23, 2010.) Third, in the case of a plan or other group insurance coverage that imposed an annual limit on March 23, 2010, any reduction in that limit results in the loss of grandfathered status.

The Interim Regulations provide that certain events do not result in the loss of grandfathered status. Specifically, the Interim Regulations state that grandfathered status is not lost if (i) a participant covered on March 23, 2010, enrolls family members after March 23, 2010; or (ii) subject to certain anti-abuse rules, new employees (meaning both newly hired and newly enrolled) and their family members enroll in the coverage after March 23, 2010. Further, the preamble to the Interim Regulations notes that events such as changes to premiums, changes to comply with federal or state legal requirements, changes to voluntarily comply with mandates under the Affordable Care Act, or changes of third-party administrators, do not result in the loss of grandfathered status, unless such changes also implicate one of the events described above that cause the loss of grandfathered status.

The preamble to the Interim Regulations also invites comment on whether certain changes should be added to the list of events that would cause a plan to lose grandfathered status. For example, the preamble asks whether changes to a drug formulary should cause the loss of grandfathered status and, if so, what magnitude of changes would have to be made to the formulary to lose grandfathered status.

### Special Rules for Insured Collectively Bargained Plans

The Interim Regulations provide that insured coverage provided pursuant to a collective bargaining agreement ratified before March 23, 2010, is deemed to be grandfathered until the termination of the last collective bargaining agreement that relates to the coverage that was effective on March 23, 2010 (the Last CBA Termination Date). After such date, whether such insured coverage is grandfathered generally is determined under the regular rules, but using March 23, 2010, as the measuring date (and not the Last CBA Termination Date). In the case of a change in insurer, the Interim Regulations provide that only changes in the insurer occurring after the Last CBA Termination Date are taken into account. Oddly, the Interim Regulations extend this relief only to insured arrangements. The preamble to the Interim Regulations expressly notes that no special relief is provided to self-insured plans maintained pursuant to collective bargaining agreements.

### Transition Rules

Because the Interim Regulations were released in June 2010, well after the March 23, 2010, date used for measuring grandfathered status, the Interim Regulations provide certain transition rules. One transition rule provided by the Interim Regulations treats certain coverage changes made on or prior to March 23, 2010, but that are not effective until after March 23, 2010, as being part of the terms of coverage in effect on March 23, 2010. In addition, in the case of changes to health coverage adopted after March 23, 2010, but before June 14, 2010, the Interim Regulations generally allow them to be revoked or modified by the first day of the plan year beginning on or after September 23, 2010 (January 1, 2011, in the case of a calendar year plan), in order to avoid losing grandfathered status.

### Notice and Recordkeeping Requirements

In the case of any health plan or insurance coverage intended to be grandfathered, the Interim Regulations require that all plan materials describing the coverage that are distributed to participants and beneficiaries include a written notice that the coverage is believed to be grandfathered health plan coverage. Helpfully, the Interim Regulations contain a model notice for this purpose. The Interim Regulations also require that records of the grandfathered coverage's terms in effect on March 23, 2010, be maintained and, upon request, made available for examination to, according to

the preamble, participants, beneficiaries, individual policy holders, and state and government officials.

### Effective Date; Comment Period

The Interim Regulations are generally effective June 14, 2010. Notwithstanding the use of the term "interim," the Interim Regulations have the force of law and sponsors, insurers, and others must comply with them. Interested parties, however, may comment on the Interim Regulations. Comments will be considered by the Departments if they are received on or before August 16, 2010. The Departments have provided no indication as to how quickly they may proceed to final regulations.

### What to Do

Employers and other health plan sponsors should, as a first step, evaluate the status of their plans under the Interim Regulations in order to determine whether they are grandfathered. To the extent that changes may have been made since March 23, 2010, that would result in loss of grandfathered status, consideration should be given to whether the changes can be revoked and/or modified in a manner so as to preserve grandfathered status. Going forward, employers and other sponsors of health plans that remain grandfathered will need to evaluate the effect of proposed changes to their health plans on grandfathered status and weigh the potential trade-offs between making otherwise desirable plan changes and the possible loss of grandfathered status.

*We hope that you find this brief summary helpful. If you would like more information, or assistance in addressing or commenting on the issues raised in this advisory, please feel free to contact:*

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