

HEALTH LAW ALERT

June 17, 2010

Federal Agencies Establish Guidelines for Health Plans to Maintain “Grandfathered” Status

Notice, Recordkeeping Requirements Apply

Today, the Department of Health and Human Services’ Office of Consumer Information and Insurance Oversight, the Department of the Treasury’s Internal Revenue Service, and the Department of Labor’s Employee Benefits Security Administration (the “Agencies”) jointly issued interim final rules concerning the status of “grandfathered” plans under the health reform provisions enacted earlier this year (the “Affordable Care Act”). Grandfathered health plans are exempt from some provisions of the Affordable Care Act. The rules clarify the changes that cause a health plan to lose its “grandfathered” status and which Affordable Care Act provisions apply to grandfathered plans.

The rules generally permit “grandfathered health plans” to make changes necessary to comply with State or Federal laws or to improve or make minor adjustments to enrollees’ benefits without jeopardizing their status. Plans that reduce benefits or increase enrollees’ out-of-pocket costs substantially in excess of medical inflation, however, will lose their status as grandfathered health plans and will be subject to all Affordable Care Act provisions. The rules also require plans that wish to retain grandfathered status to include a statement of the plan’s grandfather status in all materials that describe plan benefits.

The interim final rules went into effect on June 14 and are published at 75 *Federal Register* 34537. The Rules are codified in 45 C.F.R. Part 147 (Office of Consumer Information and Insurance Oversight (“OCIIO”)), 29 C.F.R. Part 2590 (Employee Benefits Security Administration), and 26 C.F.R. Parts 54 and 602 (Internal Revenue Service).

Resources Available

[Click here](#) for a table showing the Affordable Care Act provisions that apply to grandfathered plans (or go to tbixbylaw.com and click on “Resources”) (*see* “Affordable Care Act Provisions Applicable to Grandfathered Plans” under “Other Resources”).

The OCIIO version of the new rules is incorporated into my compilation of Selected Federal Health Insurance Provisions, which is also available on the “Resources” page (*see* first line under “Compiled Rules”) at tbixbylaw.com.

Maintaining Grandfathered Health Plan Status

Changes to Plan. The Agencies explain that a group health plan (or group health insurance coverage for a group health plan) does not lose its grandfathered status “merely because one (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan . . . has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person).” An insured group health plan that changes health insurers, however, loses its grandfathered status (but see special rule for collectively bargained plans, below).

Other changes that will terminate a health plan’s grandfathered status include:

- Any increase in the rate of coinsurance (*e.g.*, from 20% - 30%) or other percentage cost-sharing requirements.
- Increasing fixed-amount cost-sharing requirements (other than copayments) by more than medical inflation plus 15%. Thus, a plan could increase a deductible, for example, from \$1,000 to \$1,150—15%—without jeopardizing its grandfather status.¹
- Increasing copayments by more than the greater of (a) medical inflation plus 15% or (b) \$5 plus medical inflation.
- Decreasing the employer’s (or other plan sponsor’s) rate of contribution towards premium or (for self-funded plans) the cost of coverage by more than 5%.
- Eliminating “all or substantially all benefits to diagnose or treat a particular condition.”

The rules use the overall medical care component of the “All Urban Consumers” Consumer Price Index (CPI-U) as published on the Department of Labor website for the definition of medical inflation. See Department of Labor website at <http://www.bls.gov/cpi/#tables>.

Grandfathered health plans may, without losing their grandfathered status, make changes to premiums, hire new third party administrators or other business associates, or change plan benefits as necessary to comply with State and Federal law or for other purposes, as long as the changes do not violate the specific provisions established in the rules that terminate grandfathered status, such as those described above.

¹ This assumes medical inflation is not negative.

Notice of Grandfathered Status; Documentation

A plan that wishes to maintain grandfathered status must explain “in any plan materials provided to a participant or beneficiary [that describe] the benefits under the plan” that the plan claims to be a grandfathered plan under the Affordable Care Act and provide “contact information for questions and complaints.” The rules provide a (fairly lengthy) model notice for the statement, which includes contact information for the Department of Labor (for ERISA plans) or the Department of Health and Human Services (for individual policies and nonfederal governmental plans). The Agencies seek comments on the model notice and warn that changes to the model notice arising out of such comments “could be published in additional administrative guidance other than in the form of regulations.”

Health plans that wish to claim grandfathered status must also retain records necessary to demonstrate eligibility to be a grandfathered health plan. This includes (but is not limited to) “intervening and current plan documents, health insurance policies, certificates or contracts of insurance, summary plan descriptions, documentation of premiums or the cost of coverage, and documentation of required employee contribution rates.” A grandfathered health plan must make this documentation available to “a participant, beneficiary, individual policy subscriber, or State or Federal agency official . . . to verify the status of the plan . . . as a grandfathered health plan.”

Collectively Bargained Plans. Special rules apply to insured collectively-bargained grandfathered plans. These plans do *not* lose their status as grandfathered plans if they change insurers before all applicable collective bargaining agreements terminate. Moreover, once the last applicable collectively bargained agreement terminates, the plan will continue to qualify as a grandfathered health plan if it otherwise meets the requirements for employer-sponsored grandfathered health plans that are not collectively bargained.

Transitional and Other Issues

The rules allow plans that adopted changes prior to publication of the rules flexibility in maintaining grandfathered status. Changes adopted prior to March 23, but not effective on that date will not affect a plan’s status. The Agencies will “take into account” for purposes of enforcement, good-faith changes made prior to publication of the rules “that only modestly exceed” standards established in the rules. And the rules allow plans to revoke, effective the first day of the next plan year, some changes that would otherwise invalidate grandfather status.

The rules terminate the grandfather status of plans “to prevent abuse” under two circumstances. First, mergers, acquisitions, or other restructuring will terminate a plan’s grandfathered status if the primary purpose of the restructuring is to provide grandfathered health plan coverage to new individuals. Similarly, requiring (as opposed to permitting) employees previously enrolled in one grandfathered health plan to enroll in a different grandfathered health plan would also terminate the plan’s grandfathered status. This

provision “is intended to prevent efforts to retain grandfather status by indirectly making changes that would result in loss of that status if those changes were made directly.”

Request for Comments

The Agencies request public comments on the appropriateness of the interim final rules for determining when health plans lose grandfathered status, including requesting suggestions for other plan changes that should be allowed or prohibited. Specifically, the Agencies ask for input on whether provider network or prescription drug formulary changes should be considered in determining when a health plan loses its status as a grandfathered plan and, if so, what magnitude of change would trigger loss of the status. Comments are due on or before August 16, 2010.

The Agencies advise that they may provide “additional administrative guidance other than in the form of regulations to clarify or interpret the rules contained in these interim final regulations for maintaining grandfathered health plan status prior to the issuance of final regulations.”

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For more information, please contact Tom Bixby at (608) 661-4310 or
TBixby@tbixbylaw.com

Thomas D. Bixby Law Office LLC
(608) 661-4310 | www.tbixbylaw.com

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