



SITZMANN ■ MORRIS ■ LAVIS

**TO: Clients of Sitzmann Morris & Lavis Inc.**

**RE: Grandfathered Plans' Interim Final Regulations**

Background:

The Patient Protection and Affordable Care Act (PPACA) provides that certain group health plans existing as of March 23, 2010 are “grandfathered” and, therefore, not subject to certain provisions of PPACA. The details of how a grandfathered plan is defined were left to future regulatory guidance.

On June 14, 2010, the Office of the Federal Register published a draft of the Interim Final Regulations written by the Department of Health and Human Services (HHS), Department of Labor (DOL) and the Internal Revenue Service (IRS). These regulations are expected to be published in final form in the Federal Register on June 17, 2010.

Key Provisions:

**Definition of a Grandfathered Plan:** The rules of these interim final regulations apply separately to each benefit package made available under a group health plan or health insurance coverage. This means that an employer can change one policy and not affect the grandfathered status of another policy they offer under the same ERISA Plan.

A Grandfathered Plan may do the following and still be considered grandfathered:

- a. Add new employees
- b. Enroll new dependents
- c. Disenroll some or all employees as long as plan has continually covered someone since 3/23/10
- d. Make changes to comply with PPACA and state laws
- e. Change premiums
- f. Change third party administrators for self-insured plans.

A Grandfathered Plan will lose grandfathered status by:

- a. Eliminating all or substantially all benefits to diagnose or treat a condition
- b. Any increase in a percentage cost-sharing arrangement (e.g. increasing 20% co-insurance to 30%)
- c. Raising fixed amount cost-sharing greater than the maximum % increase. The maximum % increase is defined as medical inflation since 3/23/10 + 15%.  
Examples of cost sharing include deductibles and out of pocket limits.

- d. Raising fixed amount copayments by an amount that exceeds the greater of (A) the maximum % increase or (B) \$5 increased by medical inflation.
- e. Lowering employer contributions towards any tier of coverage by more than 5% from that in effect on 3/23/10. The contribution rate is defined as the % made by the employer compared to the total cost of coverage. For plans that on 3/23/10 made contributions based on a formula such as hours worked, the rate is the formula.
- f. Changing insurance carriers;
- g. Mergers or acquisitions for the principal purpose of covering new individuals in a grandfathered plan
- h. Transferring employees from one policy to another if the move to the remaining policy results in any of the above changes. For example, an employer maintains two medical policies and terminates one due to high costs. If the remaining policy has a higher cost-sharing arrangement than the terminated plan the remaining plan loses its grandfather status. There is an exception to this if there is a “bona fide employment-based reason” to transfer the employees. Closure of a location and cancellation of the coverage provided to those employees being transferred to another location would be a bona fide employment-based reason to transfer employees.

### **Disclosure Requirements**

Grandfathered plans must include a statement, in any plan materials provided to a participant or beneficiary describing the benefits under the plan or health insurance coverage, that the plan believes it is a grandfathered plan as defined in PPACA and provide contact information for questions and complaints.

The following model language can be used to satisfy this disclosure requirement:

This [group health plan or health insurance issuer] believes this [plan or coverage] is a “grandfathered health plan” under the Patient Protection and Affordable Care Act (the Affordable Care Act). Being a grandfathered health plan means that your [plan or policy] does not include certain consumer protections of the Affordable Care Act. Questions regarding which protections apply and which protections do not apply to a grandfathered health plan and what might cause a plan to change from grandfathered health plan status can be directed to the plan administrator at [insert contact information]. You may also contact the Employee Benefits Security Administration, U.S. Department of Labor at 1-866-444-3272 or [www.dol.gov/ebsa](http://www.dol.gov/ebsa).

In addition, the plan must maintain records documenting the plan or policy terms in connection with the coverage in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify its status as a grandfathered plan. These documents must be available for examination upon request.

### **Transitional Rules**

Changes made under the following circumstances will not cause a loss of grandfathered status:

- a. Changes after March 23, 2010 pursuant to a legally binding contract entered into before March 23, 2010
- b. Changes to the terms of health insurance coverage pursuant to a filing before March 23, 2010 with a State insurance department, that became effective after March 23, 2010; and
- c. Changes pursuant to written amendments to a plan that were adopted prior to March 23, 2010

Plans that made changes after March 23, 2010 during their annual renewals will have the opportunity to revoke or modify changes made prior to the publication of the interim final rules (June 14, 2010). Grandfather status is preserved if the changes are revoked and the plan is modified effective as of the first day of the first plan or policy year beginning on or after September 23, 2010.

### **Collectively Bargained Plans**

Collective bargain agreements that were ratified before March 23, 2010, are considered grandfathered until at least the date on which the last of the agreements relating to the coverage that was in effect on March 23, 2010 terminates. Any coverage amendment made solely to conform with a PPACA requirement will not affect grandfathered status. After the date on which the last agreement terminates, status will be determined by comparing the terms of the health insurance coverage on March 23, 2010, with the terms of coverage after the termination date.

### **Request for Comments**

The HHS, DOL and IRS have invited comments on whether the following changes should result in loss of grandfathered status:

- a. Changes to plan structure (such as switching from an HRA to major medical coverage or from an insured product to a self-insured product);
- b. Changes in a network plan's provider network; and if so, what level of changes would have to be made;
- c. Changes to a prescription drug formulary, and if so, what level of changes would have to be made;
- d. Any other substantial change to the overall benefit design.

Comments are due 60 days from publication in the federal register. To submit your comments use the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments to DOL reference RIN 1210-AB42. Comments to HHS refer to file code OCIO-9991-IFC. Comments to the IRS refer to REG-118412-10.

### What's Next:

We will provide you with more detail as it becomes available. As always, contact your SML Account team if you have any questions.