

June 16, 2010

Interim Rule on Grandfathered Group Health Plans Released

The federal agencies charged with drafting regulations under the Patient Protection and Affordable Care Act (PPACA) have released long-awaited interim [final regulations](#) on the application of PPACA's grandfather provisions. A [fact sheet](#) describing the regulations and a list of [frequently asked questions](#) were also posted on the [healthreform.gov](#) Web site. In a prior [Legal Alert](#), we outlined the 10 most frequently asked questions concerning grandfathered coverage. This Legal Alert revisits those issues and highlights the guidance in the interim final regulations.

Q-1: What is grandfathered group health coverage under the regulations?

A-1: Grandfathered group health coverage is coverage under an insured or self-insured plan in which an individual was enrolled on March 23, 2010, as long as (a) the coverage complies with the maintenance provisions of the regulations (see Q&A-6 below) and (b) the anti-abuse enrollment rules are not violated (see Q&A-5 below). The regulations clarify that the grandfather rules apply separately to each benefit package within a plan; therefore, a plan may contain, for instance, a grandfathered PPO option and a non-grandfathered HMO option. However, if an insured plan enters into a new policy, certificate, or contract of insurance after March 23, 2010, the new coverage is not grandfathered, even if the product was offered to the group market before March 23, 2010.

Q-2: If my coverage is grandfathered, what does that mean, and what do I do now?

A-2: Grandfathered coverage is subject only to certain provisions¹ of the insurance market reforms found in subtitles A and C of PPACA, even if that coverage is renewed after March 23, 2010. However, the rule clarifies that grandfathered plans or coverage must take certain steps in order to maintain grandfathered status, specifically:

- Participant and beneficiary communications that describe the benefits provided under the plan or coverage must confirm that the plan or coverage is believed to be grandfathered. Presumably, this includes open enrollment materials and plan documents, as well as summary plan descriptions and summaries of material modifications that describe benefits. The statement must also include contact information for questions and complaints. The regulations include model statement language.
- The plan sponsor must maintain records documenting the terms of the coverage as in effect on March 23, 2010, and any other documents necessary to verify, explain, or clarify the plan's status as a grandfathered plan. These records must be made available upon request, and the preamble indicates the records must be made available to participants and beneficiaries, as well as the Department of Health and Human Services and other agencies.

¹ For a detailed explanation of the provisions that apply to grandfathered plans (and the effective dates), please see Sutherland's May 5, 2010 [Legal Alert](#).

Grandfathered health plans are still obligated to comply with applicable pre-PPACA provisions of the Public Health Services Act (*i.e.*, HIPAA, Genetic Information Nondiscrimination Act (GINA), Michelle's Law, etc.).

Q-3: Is my retiree-only coverage considered "grandfathered" coverage?

A-3: No, but the rule provides that plans with fewer than two active participants and certain retiree-only plans are not subject to the provisions of subtitles A and C of PPACA, meaning that these plans are not required to comply with the market reforms contained in those two subtitles.

Q-4: Is grandfathering indefinite? In other words, does this mean that we will never need to amend our grandfathered plan for the provisions that do not currently apply to these plans?

A-4: The regulations do not provide a sunset date for grandfathered status; however, given the detailed maintenance provisions, it is unlikely that most plans will remain grandfathered indefinitely. Instead, most employers will eventually elect to make changes to coverage or other amendments that will cause their plans to lose grandfathered status.

Q-5: If I add new employees (or new enrollees) to my currently grandfathered plan, does the plan lose its grandfathered status?

A-5: Generally, no. Section 1251(c) of PPACA and the regulations specifically provide that a grandfathered plan may enroll new employees and their families in the plan without losing the plan's grandfathered status. The regulations clarify that current employees who were not enrolled in a plan on March 23, 2010, may also enroll without affecting the plan's grandfathered status. However, the regulations also apply two anti-abuse caveats to limit the general rule:

- The regulations provide that if the principal purpose of a merger, acquisition, or similar business restructuring is to cover new individuals under a grandfathered plan, the plan loses its grandfathered status.
- If participants in a grandfathered health plan are transferred to another grandfathered plan, the transferee plan loses its grandfathered status if (a) the change in benefits resulting from the transfer is such that the original plan would have lost grandfathered status under the maintenance provisions of the regulations if that plan had been amended to provide those benefits, and (b) there was no bona fide employment-based reason for the transfer between plans.

The regulations also provide several examples of changes in enrollment that will or will not affect a plan's grandfathered status:

- Assume a plan includes two or more grandfathered benefit packages or coverage options; employees' elections of a different option during open enrollment will not impact the plan's grandfathered status.
- Under a plan that includes at least two grandfathered options, the employer eliminates one option because of high cost and transfers the covered employees to another, less generous package. In that case, the option to which the employees are transferred loses its grandfathered status because there is no bona fide employment reason for the transfer. Presumably, if an employer offered multiple grandfathered options and eliminated one in connection with open enrollment but allowed employees to choose their coverage option for the next year, none of the options would

lose grandfathered status since the employer did not transfer any employees among options, but this is not entirely clear under the regulations.

- A plan includes an option that is available at only one of the employer's facilities. That facility is closed, and the benefit package is eliminated. Some of the employees are transferred to another facility and into the benefit package offered at that new facility. No matter whether the new option is less generous than the original benefit package, this transfer does not affect the grandfathered status of the benefit package to which the employees are transferred because there is a bona fide employment reason for transferring the employees' coverage.

Q-6: Can I amend my grandfathered plan or coverage without losing the grandfathered status?

A-6: Yes, but the regulations clarify that certain changes made after March 23, 2010, will cause a plan or coverage to lose its grandfathered status. Specifically, each of the following changes will cause a plan or coverage to lose grandfathered status:

- Amendments that constrain the scope of benefits, such as amendments that eliminate all or substantially all of the benefits relating to a specific illness or condition;
- Amendments that increase the percentage of a cost-sharing requirement;
- Amendments that increase fixed copayments by an amount that exceeds the greater of (a) medical inflation² plus 15 percentage points (the "maximum percentage increase") or (b) \$5 increased by medical inflation;
- Amendments that increase fixed-amount cost sharing requirements other than copayments, such as deductibles, in an amount that is greater than the maximum percentage increase; and
- Certain amendments that lower or add annual or lifetime dollar limits on benefits.

The regulations specifically provide that certain changes made after March 23, 2010, will not cause a plan or coverage to lose its grandfathered status, including:

- Changes to premiums;
- Changes to comply with legal requirements;
- Changes to voluntarily comply with PPACA; and
- Changes to third-party administrators;

provided that these changes are made without exceeding the limitations described above. Furthermore, changes to the terms of health insurance coverage pursuant to a filing with a State insurance department before March 23, 2010, and changes made with respect to plan amendments adopted before March 23, 2010, will be considered part of the plan terms on March 23, 2010, even if effective as of a later date.

The regulations provide a number of examples to help clarify the rules regarding the types of changes in coverage, copays, or other aspects of a plan that will cause the plan to cease to be grandfathered:

- A plan covers a mental health condition that is treated by drugs and counseling. The plan continues to cover the condition but eliminates coverage for counseling related to that condition. The change causes the plan to lose its grandfathered status since the counseling was necessary

² From March 23, 2010

to treat the condition and eliminating the counseling effectively eliminates the coverage for the condition.

- A plan increases its copay for visits to a specialist by \$10, from \$30 to \$40. The employer must calculate whether the increase exceeds the maximum percentage increase permitted based on medical cost inflation under the methodology described in the regulations. The example assumes that the \$10 increase is within the permissible limits; thus, the plan remains grandfathered. The next example, however, assumes that the same plan raises the copay again in a few years. Even though the second increase is only \$5, the same calculation must be made and the permissible increase has to be determined based on the original (*i.e.*, the March 23, 2010) copay. In this case, the cumulative increase is too high, and the plan ceases to be grandfathered when the second increase is adopted.
- Another plan has no copay for a visit to a primary care provider on March 23, 2010. The rules allow the plan to add a copay for these services without losing its grandfathered status, as long as the dollar amount of the new copay is less than the amount permitted applying the medical inflation calculation.
- A plan allows employees to choose self-only or family coverage. The employer pays 80% of the cost of self-only coverage, but only 60% of the cost of family coverage. The employer reduces its contribution for family coverage but maintains its contribution for self-only coverage. This change causes the entire plan to cease to be grandfathered (*i.e.*, both the self-only coverage and the family coverage) since it is a change in the employer's subsidy, not a change in a benefit package.

Q-7: What if I decrease the amount of the employer contribution for coverage? Will that jeopardize my plan's grandfathered status?

A-7: Yes. The regulations generally provide that a group health plan ceases to be grandfathered if the employer decreases its contribution rate 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.

Q-8: If I have made any of the changes to my plan described above after March 23, 2010, has my plan automatically lost grandfathered status?

A-8: Not necessarily. The preamble indicates there is a "good faith compliance" standard under which amendments made after March 23, 2010, and before June 14, 2010, may be disregarded if the plan has made a good faith effort to comply with a reasonable interpretation of the statutory provisions of PPACA. Note, however, that this is a subjective determination that may be subject to second guessing by the agencies on a case-by-case basis. More significantly, the regulations provide employers and issuers with a grace period within which to revoke or modify any changes adopted before June 14, 2010, if the change is revoked effective as of the first date of the first plan or policy year beginning on or after September 23, 2010.

Q-9: How does grandfathering apply with respect to collectively bargained plans?

A-9: PPACA provided that the market reforms found in subtitles A and C will not apply to health insurance coverage maintained pursuant to one or more collective bargaining agreements until the date on which the last agreement relating to that coverage terminates. The regulations clarify that this provision was not intended to provide all collectively bargained plans with a delayed effective date for subtitle A and C provisions. Instead, the regulations provide that:

A fully insured collectively bargained plan – generally must comply with the provisions of subtitles A and C that are applicable to grandfathered health plans as of the effective dates applicable to all other grandfathered health plans, but in no event will the plan lose its grandfathered status prior to the termination date of the last bargaining agreement relating to the coverage that was in effect on March 23, 2010. Thus, a fully insured collectively bargained plan will not lose its grandfathered status until the last applicable collective bargaining agreement expires even if the sponsor changes carriers, amends coverage, or takes any of the other actions described in Q&A-5 and Q&A-6.

A self-insured collectively bargained plan – is subject to the general grandfather rules. Self-insured collectively bargained plans must therefore comply with the provisions of subtitles A and C of PPACA in the same manner as a non-collectively bargained plan. Therefore, these plans lose grandfathered status as of the effective date of any action that would otherwise be prohibited under the maintenance provisions described in Q&A-6, or the enrollment abuse rules described in Q&A-5.

Q-10: Once the last agreement relating to coverage in effect on March 23, 2010, terminates, is my collectively bargained coverage still grandfathered?

A-10: If the coverage is fully insured and therefore eligible for extended grandfather protection, the general grandfather rules will apply after the date on which the last collective bargaining agreement terminates. Thereafter, in order remain grandfathered, the plan must satisfy the enrollment and maintenance provisions in the rule. Continued status as grandfathered coverage will depend on the terms of any amended coverage as compared to the coverage offered on March 23, 2010, not as compared to the coverage offered upon termination of the last agreement. This means that the plan may automatically lose grandfathering as of the termination date of the last bargaining agreement if the coverage has been amended in a manner that would eliminate grandfathering under the maintenance provisions of the regulations. However, the regulations make clear that a change in issuers between March 23, 2010 and the termination of the last agreement will not, on its own, cause the coverage to cease to be grandfathered upon the termination of the last applicable collective bargaining agreement.



If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com