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Amendment to Regulation on "Grandfathered" Health Plans under the PPACA

November 16, 2010

On June 17, 2010, the Departments of Labor, Health and Human Services, and Treasury (the "Departments") released interim final regulations relating to the status of grandfathered health plans under the Patient Protection and Affordable Care Act (the "IFRs"). The IFRs set forth the rules for determining whether a group health plan or health insurance coverage qualifies as a grandfathered health plan, how that status is maintained, and how a grandfathered health plan may lose its grandfathered status. One such rule provided that a group health plan would lose its grandfathered status if the plan entered into a new policy, certificate, or contract of insurance after March 23, 2010.

On November 15, 2010, the Departments issued an amendment to the IFRs (the "Amendment") generally allowing group health plans to switch insurance companies without forfeiting grandfathered status, so long as the plan is not otherwise changed in a manner that violates one of the other rules for maintaining grandfathered plan status. Read our 6/21 alert on grandfathering]. However, the Amendment makes clear that a group health plan (including a group health plan that was self-funded on March 23, 2010) that enters into a new policy, certificate, or contract of insurance after March 23, 2010 loses its grandfathered status to the extent the new policy, certificate, or contract of insurance is effective prior to November 15, 2010, the date of the Amendment. For example, if a group health plan enters into an agreement on September 28, 2010 for a new policy to be effective on January 1, 2011, then January 1, 2011 is the relevant date for purposes of determining application of the amended rule. In this example, the amended rule would apply and the plan would remain grandfathered. If, however, the group health plan entered into an agreement on July 1, 2010 for a new policy to be effective on September 1, 2010, then the amended rule would not apply and the plan would cease to be grandfathered.

The Amendment also provides that, to maintain grandfathered status, a group health plan that enters into a new policy, certificate, or contract of insurance must provide the new insurance issuer documentation describing the prior health coverage sufficient for the issuer to determine whether any change made to the coverage triggers a loss of grandfathering under the other rules set forth in the IFRs. For this purpose, the documentation provided may include a copy of the prior policy or summary plan description.

The Amendment does not apply to the individual market. Thus, an individual policy, certificate, or contract of insurance issued after March 23, 2010 would not be a grandfathered health plan.

The Amendment also includes a new example illustrating that a non-collectively bargained plan loses its grandfathered status on the date the offending change to the plan is made. For example, if a plan increases co-insurance effective July 1, 2013 in a manner that triggers a loss of grandfathering under the IFRs, then the loss of grandfathering is itself effective July 1, 2013. With respect to insured collectively bargained plans, the Amendment clarifies that if the plan is maintained pursuant to a collective bargaining agreement in effect on March 23, 2010, the plan will remain grandfathered at least until the collective bargaining agreement terminates. At that time, the terms of the plan are compared with the terms of the plan on March 23, 2010 to determine if the plan will remain grandfathered.

The Amendment affirms that each benefit option is evaluated separately in terms of grandfathered status. For example, a plan offers two benefit packages on March 23, 2010, Options A and B. Beginning January 1, 2011, the plan increases coinsurance under Option A from 10% to 15%. Coverage under Option A will cease to be grandfathered as of January 1, 2011. Whether the coverage under Option B is grandfathered is determined separately.

As with previous guidance in this area, the Departments encourage comments on the Amendment, which itself was a product of comments received by the Departments with respect to the IFRs.

We will continue to update our clients on new developments in this rapidly changing area of the law. In the meantime, please feel free to contact your Proskauer attorney or any member of our Health Care Reform Task Force should you have questions regarding any aspect of health care reform.