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August 13, 2010

Office of Consumer Information and Insurance Oversight
Department of Health and Human Services
Attention: OCIIO-9991-IFC
P.O. Box 8016
Baltimore, MD 21244-1850
Submitted electronically via www.regulations.gov

Dear Sir or Madam:

I am writing on behalf of the American Federation of State, County & Municipal Employees (AFSCME), a union of 1.6 million active members and retirees throughout the United States. AFSCME appreciates this opportunity to comment on the Interim Final Rule implementing the provision regarding the grandfathered status of health plans and health insurance coverage under the Patient Protection and Affordable Care Act (PPACA).

AFSCME has fought to improve our health care system for decades and through the tremendous energy and commitment of our members, activists and leaders all over the country we played an important role in the passage of the PPACA. Because our members have fought and sacrificed for their health benefits coverage won at the bargaining table, one of our main health care reform objectives was to maintain and improve existing health coverage. We believe that these regulations help to address this goal. We commend the agencies for developing regulations that strike a balance between preserving an individual's right to keep their current health plan while ensuring all will benefit from some of the most important provisions in PPACA that will improve access to quality health care coverage. We strongly support many of the rules defining changes that would cause a plan to lose grandfather status.

However, there are a few areas we believe need strengthening and/or clarification in order to safeguard participants from eroding coverage.

Elimination of benefits

Under this rule, the "elimination of all or substantially all benefits to diagnose or treat a particular condition causes a group health plan or health insurance coverage to cease to be a grandfathered health plan." While the rule specifies that this elimination refers to that of "any necessary element to diagnose or treat a condition," we feel that this creates ambiguity when determining whether or not the element in question is "necessary" for diagnosis or treatment. We recommend that the regulations be modified to state that the elimination of *any* current benefit utilized to diagnose or treat a condition will cause the plan to lose grandfather status. However, based upon credible evidence, plans should be permitted to eliminate techniques or treatments that have been proven to be less effective or produce clinical results similar to other techniques or treatment but at higher cost. A system such as that provided for in the rule implementing the coverage of preventive services under the PPACA could be utilized where plans are not required to cover or waive cost-sharing requirements for items/services no longer recommended by the U.S. Preventive Services Task Force, CDC Advisory Committee or the Health Resources and Services Administration.

American Federation of State, County and Municipal Employees, AFL-CIO
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Changes in annual limits – addition or decrease

Although the regulations address and make clear that the imposition of a new overall annual limit on the *dollar* value of benefits (or reduction in the dollar value of such a limit) will cause a plan to lose grandfather status, quantitative limits on the scope or duration of treatment such as, the number of visits, the frequency of treatment or the days of coverage are not addressed. We believe plans adding these types of limits (or decreasing such limits) should cease to be grandfathered as well. The end result of such quantitative limits is the same as actual dollar value limits – restriction of access to needed care.

Clarification of Term "Benefit Package"

We suggest that the Departments provide further clarification of the meaning of the term "benefit package." While this term is not defined in the regulations, the illustrative examples given appear to suggest that more than the type of insurance arrangement (e.g. HMO, PPO) determines what may be considered separate benefit packages. According to the *McGraw-Hill Concise Dictionary of Modern Medicine,* benefits package is defined as "health insurance services covered by a health insurance contract or plan and the financial terms of such coverage, including cost sharing and limitations on amounts of services." Because grandfathered status is determined on a benefit package by benefit package basis it is important that this matter be clarified.

Other changes leading to loss of grandfather status

In addition, while the regulations address a variety of plan changes that will result in the loss of grandfather status, the Departments specifically invited comments on whether other changes in a plan, such as changes to plan structure, changes in provider network or changes to a prescription drug formulary could trigger its loss. AFSCME believes substantial changes in networks and formularies, and the implementation of changes such as pre-authorization for specialty care or the implementation of "gatekeeper" features, should cause a plan to lose grandfathered status.

Changes to plan structure

We believe that the changes a participant experiences when the structure of a health plan is altered – such as from an indemnity plan to a managed care plan or even within managed care plans such as from a PPO to POS or HMO plan – are significant and should affect the plan's grandfather status. This type of change considerably restricts the participants' access to facilities and providers that they have depended upon and with whom they have built relationships.

However, a change in plan structure involving a move from an insured plan to a self-insured plan that merely affects the financing of the coverage and not the participants' benefits or access to providers should not affect the plan's grandfather status.

Changes in a network plan's provider network

Like changes in plan structure, changes to a plan's provider network can have significant and sometimes deleterious effects on participants. Before passage of PPACA, President Obama made the promise that "if you like your health plan, you can keep it." What this means to most individuals is that they will not be forced to change the physicians or facilities they have come to rely on. While small changes in a provider network may be unavoidable, changes leading to the loss of providers and/or facilities affecting more than ten percent of plan participants – with the last plan year prior to the passage of PPACA deemed the base year - should be considered significant enough to result in the loss of a plan's grandfather status. This could be measured by conducting geoaccess reports and disruption analyses by a plan when there is a change in provider networks or substantial change in the composition of a provider network.

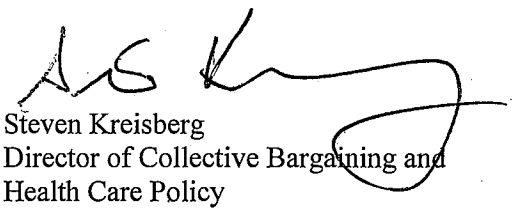
Changes to a prescription drug formulary

Generally speaking, changes to prescription drug formularies should not cause the loss of grandfather status. Many of the changes in a plan's drug formulary are as a result of the plan's or PBM's pharmacy and therapeutics committee review of a medication's safety and efficacy. These types of changes, along with those required to maintain consistency with FDA guidelines should be considered routine. However, significant changes to the formulary such as moving from an open formulary to a closed formulary should mean the loss of grandfather status. In addition, changes to a formulary - other than from a brand name drug to its generic substitute - for reasons other than safety or efficacy, for example financial considerations such as rebates, that require plan participants to seek changes in medication in order to maintain coverage at the current level of reimbursement (allowing for increases in employee co-insurance or co-payment as described in the IFR) should lead to a loss of grandfathered status.

According to the Kaiser Family Foundation, in 2007, 90 percent of seniors and 58 percent of nonelderly adults relied on a prescription medicine on a regular basis. Further, the average number of prescriptions per capita has been rising, totaling 12.6 in 2009. With so many people relying on prescriptions, considerable changes in drug formularies could have a devastating impact not only on participants' physical health but also their financial well-being.

AFSCME appreciates the opportunity to comment on this interim final rule and looks forward to continuing to work with the Department of Health and Human Services as the various provisions of health care reform are implemented.

Respectfully submitted,



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SK/bd