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Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210
Attn: RIN 1210-AB42

Re Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act

Ladies and Gentlemen:

We are submitting these comments on behalf of a client which is a mid-size employer and comprehensive health plan sponsor in response to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan under the Patient Protection and Affordable Care Act (the "Regulations"), which were published in the Federal Register on June 17, 2010.[1] The Regulations provide guidance under the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act (collectively, the "Acts"). As with other guidance under these Acts, the Regulations were published jointly by the Department of the Treasury, the Department of Labor and the Department of Health and Human Services (the "Departments").

The purpose of this letter is to comment on the impact under these Regulations of certain structural changes involving group health plans, both insured and self-insured. In particular, the Departments specifically invited comments regarding the impact under the Regulations of changes to plan structure (such as switching from an insured plan to a self-insured product).[2] As explained more fully below, we believe that such a modification to the funding mechanism, *and in particular, switching from an insured plan to a self-insured product*, so long as not coupled with any changes

1 75 Fed. Reg. 34,538 et seq.
2 75 Fed. Reg. 34,544.

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to the plan's benefits, costs or annual limits that would otherwise result in a loss of grandfathering status ("Coverage Changes"), should not itself cause the loss of grandfathered status.

Changes to Plan Funding Mechanism

A stated purpose of the Acts is to allow those who would like to keep their coverage in effect at the time of the Acts' enactment to do so. In fact, the Departments expressly acknowledge this purpose in the preamble to the Regulations.

> These interim final regulations are necessary in order to provide rules that plan sponsors and issuers can use to determine which changes they can make to the terms of the plan or health insurance coverage while retaining their grandfathered status, thus exempting them from certain provisions of the Affordable Care Act and *fulfilling a goal of the legislation, which is to allow those that like their healthcare to keep it. These interim final regulations are designed to allow individuals who wish to maintain their current health insurance plan to do so, ...*[3] (emphasis added)

Changing from an insured arrangement to a self-insured arrangement, or vice versa, so long as not coupled with other Coverage Changes, should not result in loss of grandfathered status. In fact, all plans should be permitted to change policies, insurers and funding mechanisms without the loss of grandfathered status. Locking employers into staying with a particular insurer or funding mechanism in order to maintain grandfathered status is inconsistent with "*fulfilling a goal of the legislation, which is to allow those that like their healthcare to keep it*".

Further, the flexibility to modify a plan's funding mechanism is necessary to react to changes in the market, as well as to an employer's employee population, among other things. Employers should not risk losing a plan's grandfathered status when reacting to such market or employee population movements so long as the modifications to the funding mechanism are not accompanied by other Coverage Changes. Such changes often result in plan improvements, and to prohibit such changes would impede on existing market forces and would inappropriately discourage competition among insurers and third party administrators ("TPAs").

As drafted, the Regulations create a situation in which plans must choose between paying increased premiums without considering alternative arrangements, or losing grandfathered plan status. It eliminates the downward pressure on costs that results from the ability of businesses to consider converting to self-insured or switching insurers or TPAs.

This last point is significant. Modifications to a plan's funding mechanism may result in substantial cost savings to an employer which savings can enable the employer to continue to

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[3] 75 Fed. Reg. 34,546.

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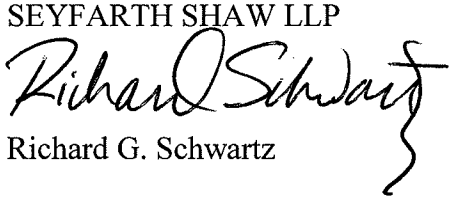
maintain the same coverage and benefits for its employees and covered dependents, and indeed to continue to maintain the plan itself. We are all aware of the many reports recently of insurers increasing their health insurance premiums in excess of 30%. Insurance costs have continued to spiral. Our client has considered converting an insured plan to a self-insured plan, which has been projected to result in cost savings of approximately $1 million annually without any change in coverage or benefits for its employees, even after the additional cost of engaging a TPA. Given that their proposed plan restructuring will not involve any Coverage Changes, they should be permitted to do so without jeopardizing their grandfathered status under the Regulations.

Accordingly, we believe that changes to a plan's funding mechanism (*e.g.*, changing from an insured arrangement to a self-insured arrangement, or vice versa, or changing insurers or TPAs), so long as not accompanied by other Coverage Changes that would themselves result in loss of grandfathered status, should not cause the loss of grandfathered status, and we request that final rules be issued to reflect such intent.

Sincerely,

SEYFARTH SHAW LLP



Richard G. Schwartz

RGS/km

Enclosure

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