ALERT

HEALTH CARE REFORM
NEW GUIDANCE ON "GRANDFATHERED" PLANS

December 14, 2010

New guidance has been issued on "grandfathered" group health plans. As you may remember from our July 13, 2010, Alert on "grandfathered" plans, "grandfathered" plans qualify for special treatment under the Patient Protection and Affordable Care Act ("PPACA"). Under PPACA, if a group health plan is "grandfathered," it will not be subject to many of the new PPACA requirements and it will be given additional time to comply with a number of other PPACA requirements.

The conditions that must be met to qualify (and to continue to qualify) as a "grandfathered" plan were addressed in regulations that were issued this summer. To be "grandfathered," a plan had to be in existence on March 23, 2010 – the date PPACA was enacted – *and* certain other requirements were met. These additional requirements include notice provisions – employees must be told that a plan is "grandfathered" – and a prohibition against making certain types of changes to the plan.

Under the regulations that were issued this summer, one of the changes that would result in the loss of "grandfathered" status was the entry into a new policy, certificate, or contract of insurance. This meant that, if an employer with a fully insured plan changed insurance companies, "grandfathered" status would automatically be lost, even if there was no change in the coverage being provided under the plan.

Last month, new regulations were issued relaxing this requirement. ***Under the new regulations, coverage may be changed without losing "grandfathered" status if the new coverage is the same as the old coverage (and if all of the other conditions for being "grandfathered" continue to be satisfied).*** Unfortunately, this change is not retroactive and it comes too late in the year to be of much help to employers with calendar year plans.

Additionally, a series of "frequently asked questions" have been published. These FAQs clarify the situations in which a "grandfathered plan notice" must be provided and they address the employer subsidy (if any) that must be provided when an employer with a "grandfathered" plan adds a new coverage tier (such as adding "employee plus spouse" coverage to a plan that previously offered only "employee only" and "employee plus family" coverage).

These FAQs are explained in more detail along with the new "grandfathered" plan regulations in the attached client Memorandum.

If you have any questions regarding the "grandfathered" plan rules or regarding health care reform in general, please feel free to call Eric Namee, Steven Smith, Ruhe Wadud Rutter, or Brad Schlozman at (316) 267-2000.

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MEMORANDUM

HEALTH CARE REFORM: CATCHING UP ON THE GRANDFATHERED PLAN RULES

December 14, 2010

When Congress enacted the new health care reform law – the Patient Protection and Affordable Care Act ("PPACA") – earlier this year, it included a special set of rules for "grandfathered plans." Under PPACA, if a group health plan was in existence on March 23, 2010 – the date PPACA was enacted into law – it will be treated as a "grandfathered plan." A grandfathered plan is not subject to many of the requirements of the new law, and is given additional time to comply with many other requirements, *but only if certain conditions are met*.

I. – Recent Revisions to Grandfathered Plan Regulations

The conditions that must be met were spelled out in regulations that were issued in June 2010. Under those regulations, if any of seven different types of changes are made to a grandfathered plan, the plan's grandfathered status is lost. (For more information on the grandfathered plan regulations, please see our Alert dated July 13, 2010.)

A. – <u>Entry into A New Contract of Insurance</u>

One of the changes that would have resulted in the loss of "grandfathered" status under the June 2010 regulations was an employer's entry into a new policy, certificate, or contract of insurance.

This regulatory provision led to a number of different consequences. It meant, among other things, that a fully insured group health plan could not change insurance carriers without losing its grandfathered status. This, in turn, meant that fully insured employers who wanted to remain grandfathered were effectively prevented from shopping for other coverage. And, unless they were large enough to become self-insured, employers had no choice but to accept whatever rate increases were proposed by their current insurance carrier since moving coverage to another carrier would result in a loss of grandfathered status.

B. – <u>Revised "Grandfathered Plan" Regulations – November 2010</u>

Last month, new regulations were issued addressing these concerns. Under the new regulations, entering into a new policy, certificate, or contract of insurance will <u>not</u>, by itself, result in the loss of a plan's grandfathered status. If an employer changes insurance carriers but does not make any other change that would result in the loss of grandfathered status, the new regulations provide that the plan may continue to be grandfathered.

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This change is helpful, but, for most employers, it is coming a bit late in the game. The new regulations do not apply to employers who changed insurance carriers before November 15, 2010, and whose new plan year has already begun. For those employers, grandfathered plan status has already been lost and cannot be regained.

For employers with calendar year plans, it may be theoretically possible to change insurance carriers without losing grandfathered plan status, but, as a practical matter, it is probably too late. Renewals have already been placed, enrollment materials have been printed and distributed, and enrollment meetings have already been held. Trying to "undo" all of that so that other coverage can be put in place is not a realistic option.

So, although this change is welcome, it would have been a lot more helpful if it had been made several months ago.

II. – Clarifications and Guidance Regarding Current Grandfathered Plan Regulations

Since the grandfathered plan regulations were issued last summer, the regulators have also clarified a number of ambiguities in the regulations. One involves the mandatory notice that must be issued by grandfathered plans.

A. – <u>Grandfathered Plan Notice</u>

To be grandfathered, a group health plan must provide a grandfathered plan notice to all employees who are eligible to enroll in the plan. The regulations issued in June state that this notice has to be included in "any materials" describing benefits under the plan that are distributed to participants or their beneficiaries, including the plan's summary plan description.

This requirement has led to a number of questions. Many people were not sure how literally or how broadly the phrase "any materials" should be read.

In response to these and other questions, the Departments of Labor, Treasury, and Health & Human Services have jointly issued a series of Frequently Asked Questions ("FAQs"). These FAQs clarify that employers wanting to maintain grandfathered status for their group health plans must include a grandfathered plan notice "whenever a summary of the benefits under the plan is provided to participants and beneficiaries," such as during a plan's open enrollment period. A grandfathered plan notice does not, however, need to be included with other communications that a plan or insurance carrier has with participants and beneficiaries.

B. – <u>New Tiers of Coverage in a Grandfathered Plan</u>

Another area in which there has been confusion relates to the degree of flexibility employers might have to add new tiers of coverage in their group health plans without jeopardizing the plans' grandfathered status. Many plans, for example, provide for only three tiers of coverage: (i) employee only coverage; (ii) employee plus spouse coverage; and (iii) employee plus family coverage. As a result of increasing

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costs, however, many employers want to introduce additional tiers, such as "employee plus one dependent," "employee plus two dependents," "employee plus three dependents," etc.

The confusion flows from the fact that, under the grandfathered plan regulations, any changes to the employer's contribution towards the cost of coverage that exceed a specified threshold will cause the plan to lose its grandfathered status. In determining if the threshold has been crossed, the regulations require that the plan compare the employer's contribution towards the cost of coverage of a particular tier on the date that PPACA became law (i.e., March 23, 2010), with the employer's new contribution rate towards the cost of coverage for that particular tier. If the coverage tiers have all remained the same, this is an easy comparison and calculation. But if an employer introduces a new tier of coverage that didn't exist on March 23, 2010, what is the plan supposed to compare that to?

Federal regulators recently provided some guidance on this issue. They announced in one of their FAQs that if a "plan adds one or more new coverage tiers *without eliminating or modifying any previous tiers and those new coverage tiers cover classes of individuals who were not covered previously under the plan,"* the introduction of the new tier(s) will not impact the plan's grandfathered status. Thus, if a plan with only an employee-only coverage tier added a family coverage tier, the level of the employer's contribution towards the cost of the family coverage tier would not cause the plan to lose its grandfathered status.

But if the new coverage tiers include classes of individuals *who were covered previously under the plan*, then the employer's contribution rate towards the new tier of coverage would have to be compared to the employer's contribution rate – as of March 23, 2010 – towards the current coverage tier most closely corresponding to the new coverage tier. For example, assume a group health plan modifies its tiers of coverage from what it had in place on March 23, 2010, by going from merely two tiers – employee-only coverage and family coverage – to four tiers – employee-only, employee-plus-one, employee-plus-two, and employee-plus-three-or-more. Because the new tiers of coverage include classes of individuals who were previously covered under the plan as part of family coverage, the employer's contribution rate towards each of the new tiers of coverage would have to be compared to the employer's contribution rate towards family coverage on March 23, 2010.

This new clarification does not give employers much flexibility. Because an employer's contribution rate towards the cost of coverage cannot decrease by more than 5% without causing the plan to lose its grandfathered status, the ability of employers with grandfathered plans to add new tiers of coverage to their plan may be quite limited.

III. – Conclusion

As we noted in our Alert on the grandfathered plan regulations back in July, employers do not have much latitude in adjusting the coverage of their health care plans or in imposing additional cost sharing burdens on participants if they wish to maintain their plans' grandfathered status. The latest regulatory revisions are somewhat helpful but, for many employers, they are a day late and a dollar short.

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These are complex issues, and we strongly encourage you to consult with experienced benefits counsel before undertaking changes to your health care plans. If you have any questions regarding the impact of health care reform on employers, please feel free to call Eric Namee, Steven Smith, Ruhe Wadud Rutter, or Brad Schlozman at (316) 267-2000.

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