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EXECUTIVE COMPENSATION**

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Internal Revenue Service
CC:PA:LPD:PR (REG-118412-10)
Room 5205; P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Plan under the Patient Protection and Affordable Care Act; Interim Final Rule and Proposed Rule

Ladies and Gentlemen:

The Committee on Employee Benefits and Executive Compensation of the New York City Bar Association (the “Committee”) is composed of attorneys with diverse perspectives on employee benefit issues, including members of law firms and counsel to corporations. We commend the Department of Treasury, Department of Labor and Department of Health and Human Services (collectively, the “Departments”) for expeditiously issuing the interim final rule referenced above¹ (the “Grandfathering Rules”) following enactment of the Patient Protection and

¹ 75 FR 34538 (June 17, 2010).

Affordable Care Act (the “PPAC”),² as amended by the Health Care and Education Reconciliation Act³ (collectively with the PPAC, the “Act”).

The purpose of our letter⁴ is to seek clarification regarding the ability of self-insured plans to be classified as grandfathered plans and to respond to the Departments’ request for comments on the changes to a plan’s benefits, costs, or annual limits that would cause a group health plan or health insurance coverage to cease to be a grandfathered plan (the “Status Changes”).⁵ We also address whether certain of the additional types of changes outlined in the preamble to the Grandfathering Rules should cause a loss in grandfather status. In this letter, references to a “plan” are limited to references to a group health plan.

We note that the Departments anticipate that few large employer plans will retain their grandfather status by the time the health insurance exchanges are established in 2014.⁶ We are, of course, not in a position to predict how many employers that sponsor group health plans (the “Plan Sponsors”) will want to preserve the grandfathered status of their plans. We do note that the Congress believed it was important to include a grandfather exception in the Act for the purpose of allowing employees who so elect to continue to maintain the health coverage in place under their employers’ plans at the time the Act was adopted into law. With this principle in mind, we believe that the Departments should structure the Grandfathering Rules in a flexible manner so as to make it possible for employers to maintain the grandfather status for their plans without the risk of inadvertent or unintended loss of this status. Most importantly, we believe the Departments should not use the Grandfathering Rules as a way of narrowing the grandfathering exception or subverting the clear intent of the Act to allow plans to avoid certain provisions of the Act by being grandfathered.

Our comments are based on the premise that the Grandfathering Rules should be revised and clarified to ensure that grandfather status is not forfeited due to arbitrary distinctions imposed by the Grandfathering Rules. As noted above, the Grandfathering Rules should be written in a way that minimizes the chance that a plan will lose its grandfather status because of inadvertent errors or unintended consequences resulting from a good-faith attempt by employers to preserve grandfather status. Our comments also ask the Departments to reconsider certain of the Status Changes to make them less restrictive so as to allow Plan Sponsors more flexibility to respond to changing circumstances affecting the design and implementation of their plans.

² Pub. L. No. 111-148.

³ Pub. L. No. 111-152.

⁴ This letter was prepared by a subcommittee of the Committee on Employee Benefits and Executive Compensation of the New York City Bar Association chaired by Kenneth J. Laverriere. The other members of the subcommittee were David Gallai and Sarah Richards and Vipin Varghese (at the time a Student Member of the Committee). Mr. Laverriere’s colleague Sharon Lippett assisted in the drafting and revision of the letter.

⁵ These changes are set forth in Treas. Reg. § 54.9815-1251T(g).

⁶ See <http://healthreform.gov/about/grandfathering.html>.

Further, given that a stated purpose of the Act is to allow individuals to keep the coverage they had at the time the Act was adopted into law,⁷ we urge the Departments to clarify an apparent ambiguity in the Act (discussed in more detail below) and unambiguously state in the Grandfathering Rules that self-insured plans may be grandfathered plans.

Each of the comments discussed below is being made with the intent of furthering one major purpose of the Act, which is to make it more likely for employees who so choose to continue the coverage in effect under their employers' plans at the time of the Act's adoption without losing grandfather status.

A. Self-Insured Plans as Grandfathered Plans.

We request that the Departments use the Grandfathering Rules as an opportunity to clarify an ambiguity in the Act by adding a statement in the Grandfathering Rules indicating that self-insured plans are eligible to be grandfathered plans. The ambiguity arises because self-insured medical plans may not fit within the definition of an eligible employer-sponsored plan, which suggests that an eligible employer-sponsored plan must be an insured plan.⁸ To be an eligible employer-sponsored plan, a plan must, among other things, be either a governmental plan (not applicable to private employers) or "any other plan or coverage offered in the small or large group market within a state."⁹ The Act defines "small and large group market" as the health insurance market under which individuals obtain health insurance coverage...through a group health plan maintained by a large employer...or by a small employer."¹⁰ The term "health insurance coverage" is defined in a somewhat ambiguous manner, but could be read as being limited to insured arrangements.¹¹ Further, the Act provides that a grandfathered plan may qualify as an eligible employer-sponsored plan, but only if it is a grandfathered plan "offered in a

⁷ Press Release, The White House, Office of the Press Secretary, Remarks by the President in Town Hall on Health Care, Grand Junction, Colorado (Aug. 15, 2009) (available at www.whitehouse.gov/the_press_office/Remarks-By-The-President-In-Town-Hall-On-Health-Care-Grand-Junction-Colorado).

⁸ See PPAC § 1501(b) (adding new I.R.C. § 5000A(f)) (defining an "eligible employer-sponsored plan" as a group health plan or group health insurance coverage offered by an employer to the employee which is (A) a governmental plan...or (B) any other plan or coverage offered in the small or large group market within a State).

⁹ PPAC § 1501(b) (adding new I.R.C. § 5000A(f)).

¹⁰ PPAC § 1304(a)(3).

¹¹ See PPAC § 1301(b)(2) (referencing the Public Health Service Act, 42 U.S.C. 300gg et seq. (the "PHSA") § 2791(b)). Under the PHSA, "health insurance coverage" is defined as "benefits consisting of medical care...under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer." A "health insurance issuer" does not include a self-insured group health plan. It is unclear if the phrase "offered by a health insurance issuer" modifies the entire definition (in which case a self-insured plan is not offered in a small or large group market) or if the phrase only modifies the reference to a health maintenance organization. If the latter, then a self-insured plan would offer benefits consisting of medical care under a medical service policy and would offer coverage in a small or large group market.

group market.”¹² The net result of these provisions is that self-insured group health plans may not fit within the definition of plans that the Act deems eligible for grandfathering.

This seems like an unintended result that could be addressed through a clarification in the Grandfathering Rules of the ambiguity in the Act. Failure to qualify as an eligible employer-sponsored plan could subject a self-insured plan to the excise tax provisions imposed on employers by the employer-mandate provisions of the Act.¹³ Given the importance of this issue to sponsors of self-insured plans, we urge the Departments to clarify the status of self-insured plans as eligible employer-sponsored plans.

B. Comments on Status Changes.

1. *Conform Increases in Co-Insurance to Decreases in Employer Contributions.* We urge the Departments to conform the trigger for a loss of grandfather status due to an increase in co-insurance to the trigger for a loss of grandfather status due to a decrease in the employer contribution rate. As currently proposed, the Grandfathering Rules provide that any increase in the level of co-insurance will cause a plan to lose grandfather status, but that a decrease in the contribution rate based on the cost of coverage will not result in the loss of grandfather status, unless the decrease exceeds the threshold in the applicable Status Change.¹⁴ We note that the Departments provided relief for increases in fixed-amount cost-sharing requirements by permitting increases up to a maximum percentage increase.

As the Departments are aware, the economic components of a plan (co-insurance, co-payments, out-of-pocket maximums, premium contribution rates and covered benefits) are interrelated, and Plan Sponsors look at the totality of these components each year when considering design changes. For some Plan Sponsors, an increase in co-insurance may be tied to a decrease in employer contributions (or vice versa). Therefore, we suggest that a threshold comparable to that available for decreases in employer contributions apply to increases in co-insurance.

We also urge the Departments to add to the Grandfathering Rules an overall measure of projected plan cost for participants that would allow for the preservation of grandfathered status as long as the overall projected cost for the plan did not increase at a rate that was greater than the growth of overall participant cost for the plan permitted under the Grandfathering Rules.

2. *Modify the Status Changes Relating to Annual Limits to Provide Flexibility to Plan Sponsors Without Causing a Loss of Grandfather Status.* We ask the Departments to consider modifying the Grandfathering Rules applicable to plans that, on March 23, 2010 (the date on which the Act was enacted), imposed a lifetime limit or annual limit on the dollar value of

¹² See PPAC § 1501(b) (adding new I.R.C. § 5000A(f)).

¹³ PPAC § 1513(a) (adding new I.R.C. § 4980H(a)), as amended by the Health Care and Education Reconciliation Act § 1003.

¹⁴ This threshold is more than five percentage points below the contribution rate on March 23, 2010. Treas. Reg. § 54.9815-1251T(g)(v)(A).

benefits so that Plan Sponsors have the flexibility to make certain changes that will not result in the loss of the plan's grandfather status. Under the Grandfathering Rules, a plan that on March 23, 2010 imposed a lifetime limit on the dollar value of all benefits, but no annual limit, will cease to be a grandfathered plan if it adopts an annual limit that is less than the lifetime limit.¹⁵ Similarly, a plan that decreases the amount of its annual limit in effect on March 23, 2010 will cease to be a grandfathered plan.¹⁶

We suggest the following two revisions to the Grandfathering Rules:

a. A plan should not lose its grandfather status if such plan adds an annual limit at a dollar value that satisfies a minimum requirement specified by the Departments, which is lower than the dollar value of the lifetime limit.¹⁷

b. Insignificant decreases in the annual limit in effect on March 23, 2010 should not cause a loss of grandfather status. For example, a decrease of up to five percent could be considered insignificant.

3. *Clarification of the Maximum Percentage Increase.* We believe that the rules for determining the maximum percentage increase applicable to increases in fixed-amount cost-sharing requirements should be clarified.¹⁸ If a plan's fixed-amount cost-sharing requirement experiences a maximum percentage increase during a single calendar year equal to medical inflation,¹⁹ plus 15 percentage points, the Grandfathering Rules provide that such increase will not result in the plan's loss of grandfather status. But if the actual percentage increase during a calendar year is less than medical inflation plus 15 percentage points, it is not clear whether, during a subsequent year, an increase in the plan's fixed-amount cost-sharing requirement equal to the difference between the maximum percentage increase and the actual percentage increase during the prior year for the plan will cause the plan to lose its grandfather status. We urge the Departments to provide further guidance on this question.

4. *Clarification of Disclosure and Documentation Requirements.* We appreciate the need for the Departments to be able to track changes to grandfathered plans. However, we request

¹⁵ Treas. Reg. § 54.9815-1251T(g)(vi)(B).

¹⁶ Treas. Reg. § 54.9815-1251T(g)(vi)(C).

¹⁷ We recognize that such minimum would have to satisfy the annual limit minimum specified by the Departments in the recently issued final rule and proposed rule for lifetime and annual limits. 75 Fed. Reg. 37188 (June 28, 2010).

¹⁸ Treas. Reg. § 54.9815-1251T(g)(iii). This Status Change acknowledges that an increase in fixed-amount cost-sharing requirements may be necessary to keep up with the rising cost of medical items and services. Recognizing that medical inflation may not reflect the actual costs incurred by the Plan Sponsor, the Status Change allows for an additional increase in fixed-amount cost-sharing requirements of 15 percentage points over medical inflation from the date of enactment.

¹⁹ Medical inflation means the increase since March 2010 in the medical care component of the CPI-U. Treas. Reg. § 54.9815-1251T(g)(3)(i).

clarification with respect to the Departments' proposed disclosure and documentation requirements.

a. *Disclosure.* To ensure that Plan Sponsors can comply with the requirements for written disclosure regarding a plan's grandfather status,²⁰ we believe that the Departments should provide guidance addressing:

i. the specific plan materials that must include the disclosure. The Grandfathering Rules provide "any plan materials provided to a participant or beneficiary" must include a statement regarding the grandfather status of the plan. We assume that this requirement applies to a plan's summary plan description ("SPD") and any summary of material modifications to the SPD. But application to other documents is unclear. Therefore, we request that the Departments identify those plan materials that must include this disclosure.

ii. the extent to which the model language can be revised while still satisfying the disclosure requirement.²¹ The Grandfathering Rules state that plan materials must include "a statement . . . that the plan believes it is a grandfathered health plan within the meaning of . . . the Act and must provide contact information for questions and complaints." The model language appears to include more than is required by the text of the regulation. Therefore, guidance on this point would be helpful.

iii. the consequences for failure to provide (A) any disclosure or (B) disclosure that the Departments determine satisfies the requirement. We do not believe that consequences for either type of failure should be loss of grandfather status because plan participants would not be harmed by such failure.

iv. confirmation that electronic delivery of this disclosure in accordance with DOL Regulation §2520.104b-1(c) and Treasury Regulation §1.401(a)-21 is permitted.

b. *Documentation.* The Grandfathering Rules should be more specific as to the types of records that a Plan Sponsor must maintain to satisfy the requirement to maintain "records documenting the terms of the plan" or coverage as in effect on March 23, 2010, and "any other documents necessary to verify, *explain* or clarify its status as a grandfathered plan."²² If documentation beyond the plan document, SPD, summaries of material modifications and applicable insurance contract or administrative service agreement is necessary, we suggest that the Grandfathering Rules explicitly enumerate the required documents.

²⁰ See Treas. Reg. § 54.9815-1251T(a)(2).

²¹ See Treas. Reg. § 54.9815-1251T(a)(2)(ii).

²² Treas. Reg. § 54.9815-1251T(a)(3)(i).

5. *Anti-Abuse Rules.* We believe that the rules for mergers and acquisitions should be expanded to include a transition period for plans that cease to be grandfathered plans if such a transaction occurs and the affected employees become participants in a new plan. We propose that the Departments adopt rules similar to those found in IRC Section 410(b)(6)(C), which provides for special rules in the event of certain dispositions or acquisitions. In accordance with these rules, we believe that the Grandfathering Rules should provide a transition period to a new group health plan comprised of the employees affected by the transaction, during which grandfathered status continues to apply. This transition period would begin on the date of the change in health coverage and end on the last day of the first plan year beginning after the date of such change. The transition period could be subject to the condition that participant costs and coverage remain substantially the same during the transition period. This approach would provide Plan Sponsors with the time necessary to efficiently and effectively implement the non-grandfathered status.

C. Comments on Additional Changes Suggested by the Departments.

1. *Change in Plan Structure.* We believe that changes to a plan's structure, such as changes in the funding mechanism, should not cause forfeiture of grandfather status as long as the structural changes do not result in a Status Change. Accordingly, a change from insured to self-insured should not cause a plan to lose its grandfather status, as long as such change does not result in a Status Change. Plan Sponsors need the flexibility to alter a plan's structure, due to changes in the participant population, changes in the economic climate and changes to the Plan Sponsor. Plan Sponsors should not be penalized for structural changes in response to participant, economic or other factors, as long as these changes do not result in benefit reductions or cost increases that would otherwise result in a loss of grandfather status under the current Grandfathering Rules.

Similarly, we believe that a change in structure from a self-insured plan to an insured plan or a change in the insurance issuer (the "Insurer Changes") should not cause a loss of grandfather status, even if the insurers have a different credit rating or are organized in different states.²³ While the Insurer Changes may result in a different provider network or different service levels, such changes should not result in the loss of grandfather status. Moreover, we believe that the Departments should not discourage Plan Sponsors from making the Insurer Changes, as they potentially improve coverage and service levels, by encouraging competition among issuers without increasing costs or reducing benefits.

For these reasons, we respectfully submit that the Grandfathering Rules should provide that the structural changes described in this Section C.1 will not result in the loss of grandfather status, as long as such changes do not otherwise result in a Status Change. Drafting the Grandfathering

²³ Currently, Treas. Reg. § 54.9815-1251T(a)(1)(ii) provides that if an employer enters a new policy, certificate, or contract of insurance after March 23, 2010, or fails to renew a policy certificate or contract of insurance, then the plan will cease to be a grandfathered plan.

Rules to cause a plan to lose its grandfather status solely on account of such a structural change appears as to us as an arbitrary provision with no reasonable rationale.

2. *Change in Plan Structure.* A change to the provider network available to plan participants should not cause a plan to lose its grandfather status, because such change might be for economic reasons to permit the plan to avoid, or to mitigate, increases in co-payments or deductibles. Alternatively, in an insured plan, the change may be initiated by the insurer and, therefore, beyond the control of the Plan Sponsor. For these reasons, we believe that changes to a plan's provider network that are not accompanied by a Status Change should not result in the loss of a plan's grandfather status.

3. *Changes to Prescription Drug Formulary.* Similarly, changes to the prescription drug formulary used by a plan should not result in the loss of grandfather status, because such changes may be initiated by the insurer or prescription drug provider and, therefore, are beyond the control of the Plan Sponsor. Alternatively, such changes may be in response to scientific findings or the availability of a generic drug.

D. Exception for Extraordinary Circumstances.

Finally, we believe that Grandfathering Rules should include an exception for extraordinary events that are beyond the control of the Plan Sponsor. Alternatively, the Grandfathering Rules should provide a transition period before the loss of grandfather status becomes effective for plans that incur an extraordinary event. In today's economic environment, extraordinary events meriting this type of treatment are not beyond the realm of possibility. For example, if a Plan Sponsor is forced to change the plan's insurance carrier due to the insolvency of the current insurance carrier, we do not believe that such plan should lose its grandfather status, even if such change results in other changes that would be a Status Change (such as an increase in cost-sharing or co-insurance), subject to an anti-abuse rule as necessary. At a minimum, we suggest that the plan be given a transition period before the loss of grandfather status becomes effective.

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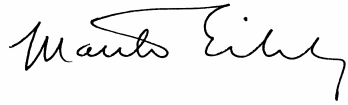
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Members of the Committee would be pleased to answer any questions you might have regarding our comments and to meet with the Departments if that would assist your efforts.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew Eilenberg". The signature is written in a cursive style with a large, sweeping initial "M".

Matthew L. Eilenberg

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