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MEMORANDUM

TO: **Clients and Colleagues**
FROM: **Christine P. Roberts**
RE: **Amendment to Grandfathering Regulations Allows Change in Carrier**
DATE: **November 17, 2010**

The Departments of Health and Human Services, Labor and Treasury have just released text of an amendment to grandfathering regulations, allowing an insured group health plan to change insurance carrier without losing grandfathered status of their plan in effect as of March 23, 2010, so long as certain requirements are followed. The amendment will be published in the Federal Register on November 17, 2010 and is available in draft form here: http://www.ofr.gov/OFRUpload/OFRData/2010-28861_PI.pdf.

The Agencies made this amendment due to several listed concerns, including unequal treatment of insured and self-funded plans (because self-funded plans were free to switch third party administrators without losing GF status), unfair leverage enjoyed by insurers who knew that employers could not leave them if they wanted their plans to remain grandfathered, and situations in which an employer had to switch issuers involuntarily.

Under the new rule a group health plan that was in existence on March 23, 2010 may change its insurance carrier so long as it does not in the process make any changes that would revoke its GF status. The impermissible changes – which apply on a "benefit package" basis – include eliminating coverage for a particular illness, increasing employee coinsurance above March 23, 2010 levels at all, or increasing other employee cost-sharing (deductibles, out-of-pocket limits, etc.) beyond incremental percentages and amounts set forth in the original grandfathering regulations.

The regulations require that employers who wish their plan to remain grandfathered while switching carriers provide the new carrier with plan documentation, such as a summary plan description, that will allow the new carrier to "map" coverage from the old policy to the new.

The new rule does not apply retroactively to carrier changes that were effective before November 17, 2010. The "effective" date for these purposes is the beginning of the new policy year. Employers who are planning to change carriers

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on, say, January 1, 2011, however, can take advantage of the new rule and keep GF status for their plan.

The new rule applies only to group policies, not in the individual market.

There is one more "thumb on the scales" in favor of GF status to consider. I have discussed in prior updates the $100 per participant, per day excise tax that will result from failing nondiscrimination testing. The excise tax, which applies not just to health care reform violations but also to violations of other health plan provisions including COBRA and mental health parity, is set forth in Internal Revenue Code Section 4980D. That section contains an exception for plans maintained by small employers (between 2 and 50 employees) where the violation is "solely because of the health insurance coverage offered by such issuer." Because of this wording, representatives of the Treasury Department have indicated that they will view this exception as applying only when the prohibited discrimination results from the underlying insurance policy, not when it is a result of employer plan design.

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