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The Honorable Tom Harkin
Chairman
The Honorable Michael B. Enzi
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable George Miller
Chairman
The Honorable John Kline
Ranking Member
Committee on Education and Labor
House of Representatives

The Honorable Henry A. Waxman
Chairman
The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service; Department of Labor, Employee Benefits Security Administration; Department of Health and Human Services: 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*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service (IRS); Department of Labor, Employee Benefits Security Administration (EBSA); Department of Health and Human Services (HHS) (collectively, the agencies), entitled "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" (RIN: 1545-BJ51; 1210-AB42; 0991-AB68). We received the rule on June 17, 2010. It was published in the *Federal Register* as "interim final rules with request for comments" on June 17, 2010. 75 Fed. Reg. 34,538.

The interim final rules implement the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Patient Protection and Affordable Care Act (Affordable Care Act) regarding status as a grandfathered health plan. The Affordable Care Act and these interim final regulations allow family members of individuals already enrolled in a grandfathered health plan to enroll in the plan after March 23, 2010; in such cases, the plan or coverage is also a grandfathered health plan with respect to the family members. New employees (whether newly hired or newly enrolled) and their families can enroll in a grandfathered group health plan after March 23, 2010, without affecting status as a grandfathered health plan.

The interim final regulations are effective on June 14, 2010, except that the amendments to 26 C.F.R. §§ 54.9815–2714T, 29 C.F.R. §§ 2590.715–2714, and 45 C.F.R. § 147.120 are effective July 12, 2010. Comments are due on or before August 16, 2010. The Congressional Review Act requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and public procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. §§ 553(d)(3), 808(2). Accordingly, the agencies found good cause to forego the notice and comment procedures based on specific statutory authority granted in section 9833 of the Internal Revenue Code (the Code), section 734 of the Employee Retirement Income Security Act (ERISA), and section 2792 of the Public Health Service Act (PHS Act).

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that the agencies complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

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ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE;
DEPARTMENT OF LABOR,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION;
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ENTITLED
"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"
(RIN: 1545-BJ51; 1210-AB42; 0991-AB68)

(i) Cost-benefit analysis

With an estimated 2.2 million grandfathered plans in 2011, EBSA and IRS estimate an hour burden of approximately 538,000 hours with equivalent costs of $30.7 million. The Departments have estimated this as a one-time cost incurred in 2011, because after the first year, the Departments anticipate that any future costs will be *de minimis.* Overall, for both the grandfathering notice and the recordkeeping requirement, the Departments expect there to be a total hour burden of 1.1 million hours and a cost burden of $291,000.

With an estimated 98,000 grandfathered plans and 7,400 grandfathered individual insurance products in 2011, HHS estimates an hour burden of approximately 26,000 hours with equivalent costs of $1.5 million. HHS has estimated this as a one-time cost incurred in 2011, because after the first year, HHS assumes any future costs will be *de minimis.* Overall, for both the grandfathering notice and the recordkeeping requirement, HHS expects there to be a total hour burden of 53,000 hours and a cost burden of $318,000.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The agencies determined that the Act does not apply to these interim final rules and the agencies are not required to either certify that the regulations would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis. The agencies reached this determination because the Act applies to rules subject to notice-and-comment procedures and the agencies made a good cause finding that no notice of proposed rulemaking was necessary. Nevertheless, the agencies stated that they carefully considered the likely impact of

the regulations on small entities in connection with their assessment under Executive Order 12,866 (discussed below).

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The agencies determined that these interim final regulations are not subject to the Act because they are being issued as interim final regulations. However, the agencies note that, consistent with the policy embodied in the Act, they designed these interim final regulations to be the least burdensome alternative for state, local, and tribal governments, and the private sector, while achieving their objectives.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.

The agencies state that section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act authorize the Secretaries of the IRS, EBSA, and HHS (collectively, the Secretaries) to promulgate any interim final rules that they determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and Code section 9815. The agencies state that rules set forth in these interim final regulations govern the applicability of the requirements in these sections and are therefore appropriate to carry them out. Therefore, according to the agencies the foregoing interim final rule authority applies to these interim final regulations.

In addition, the agencies note that under section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. § 551 et seq.) a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. The agencies state that the provisions of the APA that ordinarily require a notice of proposed rulemaking do not apply here because of the specific authority granted by section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act. However, even if the APA were applicable, the Secretaries have determined that it would be impracticable and contrary to the public interest to delay putting the provisions in these interim final regulations in place until a full public notice and comment process was completed. The Secretaries believe it is not possible to have a full notice and comment process and to publish final regulations in the brief 6-month time period between enactment of the Affordable Care Act and the date regulations are needed.

The Secretaries further find that issuance of proposed regulations would be insufficient because the provisions of the Affordable Care Act protect significant rights of plan participants and beneficiaries and individuals covered by individual

health insurance policies and it is essential that participants, beneficiaries, insureds, plan sponsors, and issuers have certainty about their rights and responsibilities. The Secretaries state that the proposed regulations are not binding and cannot provide the necessary certainty. By contrast, the agencies note that the interim final regulations provide the public with an opportunity for comment, but without delaying the effective date of the regulations.

Additionally, IRS has determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The agencies state that the Affordable Care Act grandfathered health plan disclosure and recordkeeping requirements are information collection requests subject to the Paperwork Reduction Act. Currently, the agencies are soliciting public comments for 60 days concerning these disclosures. The agencies have submitted a copy of these interim final regulations to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. § 3705(d) for review.

Statutory authorization for the rule

IRS' temporary regulations are adopted pursuant to the authority contained in sections 7805 and 9833 of the Internal Revenue Code.

EBSA's interim final regulations are adopted pursuant to the authority contained in 29 U.S.C. §§ 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1191, 1191a, 1191b, and 1191c; section 101(g), Pub. L. No. 104–191, 110 Stat. 1936; section 401(b), Pub. L. No. 105–200, 112 Stat. 645 (42 U.S.C. § 651 note); section 512(d), Pub. L. No. 110–343, 122 Stat. 3881; section 1001, 1201, and 1562(e), Pub. L. No. 111–148, 124 Stat. 119, as amended by Pub. L. No. 111–152, 124 Stat. 1029; Secretary of Labor's Order 6–2009, 74 Fed. Reg. 21,524 (May 7, 2009).

HHS' interim final regulations are adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. §§ 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

Executive Order No. 12,866 (Regulatory Planning and Review)

HHS and EBSA state that OMB determined that the interim final regulations were economically significant under the Order because they are likely to have an annual effect on the economy of $100 million or more in any one year. Accordingly, OMB has reviewed these rules pursuant to the Executive Order.

According to IRS, notwithstanding the determinations of EBSA and HHS, IRS has determined that this Treasury decision is not a significant regulatory action for

purposes of Executive Order 12,866 and, therefore, a regulatory assessment is not required.

Executive Order No. 13,132 (Federalism)

In the Departments' view, this regulation has federalism implications, because it has direct effects on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among various levels of government. However, in the Departments' view, the federalism implications of the regulation are substantially mitigated because, with respect to health insurance issuers, the Departments expect that the majority of states will enact laws or take other appropriate action resulting in their meeting or exceeding the federal standard.