HHS Authority: Extension of Grandmothering/Grandfathering Amendments

As described below, the Department of Health and Human Services ("HHS") retains significant authority, pursuant to HHS's non-enforcement and regulatory authority under the Patient Protection and Affordable Care Act (the "ACA") to both extend the previous administration's transitional policy relief for certain individual policies and small group plans. Additionally, HHS, the Department of Labor ("DOL") and the Department of Treasury ("Treasury") (together, the "Tri-agencies") have strong authority to signal through subregulatory guidance to the regulated community that they intend to revisit and revise existing grandfather policy guidance, and to adopt a non-enforcement policy with respect to the existing grandfather policy guidance.

The extension of the grandmothering policy, in particular, must be provided by March to allow health insurance issuers to avoid transitioning remaining customers into ACA-compliant coverage by the end of 2017. HHS retains the authority to extend the transitional policy for an additional three year period to ensure that the ongoing debate regarding health care reform does not impose undue burdens on both individuals and small group health plans that wish to retain the coverage they had prior to the most onerous insurance market reforms of the ACA becoming effective.

Transitional Policy Extension

- Courts have consistently found that "an agency's decision not to take enforcement action should be presumed immune from judicial review …." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (denying prison inmates' action to compel the Food and Drug Administration to take enforcement action to prevent the off-label use of drugs in lethal injections).
- This presumption of non-reviewability of agency non-enforcement decisions is grounded in agencies' expertise and unique ability to order their priorities. *Chaney*, 470 U.S. at 832 (agency decisions not to enforce "involve[] a complicated balancing of a number of factors which are peculiarly within [the agencies'] expertise"); *Cutler v. Hayes*, 818 F.2d 879, 893-94 (D.C. Cir. 1987) (the FDA "reasonably may assign enforcement of a statutory requirement designed to prevent unnecessary consumer expense to a lower priority than that accorded one concerned with identifying and eliminating threats to human life").
- Importantly, it is also grounded in the notion that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Chaney*, 470 U.S. at 832 (emphasis in original).
- In addition to the transitional policies discussed below, the agencies responsible for implementing the ACA have adopted numerous non-enforcement policies that effectively prevent provisions of the law from becoming effective for a certain period of time. *See, e.g.*, Affordable Care Act Nondiscrimination Provisions Applicable to Insured Group Health Plans, IRS Notice 2011-1 (January 10, 2011) (Compliance with the ACA requirement that non-grandfathered group health plans may not discriminate in favor of highly compensated individuals "should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of

general applicability has been issued."); Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions), IRS Notice 2013-45 (July 29, 2013) (delaying the health insurance and employer responsibility reporting requirements, and declining to impose employer penalties under the employer responsibility requirement for 2014); FAQs about the Affordable Care Act Implementation, Part XIII, Q1 (March 8, 2013) (effectively preventing application of all of the ACA's insurance market reforms to expatriate plans until at least January 2016).

- Under the ACA, for plan years beginning on or after January 1, 2014, plans and issuers were required to meet a number of insurance market reforms, including provisions dealing with premium rating, guaranteed availability, guaranteed renewability, pre-existing condition exclusions, discrimination based on health status, provider non-discrimination, essential health benefits, and participation in approved clinical trials. *See* PHSA §§ 2701-2709.
- On November 13, 2013, in recognition of the likely negative impact on individual and small businesses purchasing health insurance subject to these reforms, HHS issued a letter to state insurance commissioners announcing a transitional policy adopted pursuant to HHS's enforcement authority. The transitional policy permitted otherwise non-compliant coverage in the individual and small group markets issued after the ACA's effective date (and not eligible for formal grandfather treatment) to be renewed for policy years starting between January 1, 2014, and October 1, 2014, without meeting ACA's insurance market reforms that became effective for plan or policy years beginning on or after January 1, 2014. CMS Letter to State Insurance Commissioners (Nov. 14, 2013) *available at https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf.*
- On March 5, 2015, recognizing the ongoing burden of these requirements on individuals and small groups, HHS issued an extension of the transitional policy for an additional two policy years. Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016 *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf. This extension applied to renewals of plan or policy years beginning on or before October 1, 2016, with the condition that those policies were renewed under the original transitional policy.
- Most recently, on February 29, 2016, HHS issued a further extension of the transitional relief through the 2017 calendar year, provided that all policies end by December 31, 2017. Insurance Standards Bulletin Series -- INFORMATION – Extension of Transitional Policy through Calendar Year 2017, *available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf.*
- Based on these previous actions, and on the inherent enforcement discretion the agency retains to implement the statute, HHS retains the authority to extend the transitional policy for an additional three year period to ensure that the ongoing debate regarding health care reform does not impose undue burdens on both individuals and small group health plans that wish to retain the coverage they had prior to the most onerous insurance market reforms of the ACA becoming effective.

Grandfather Plan Regulation

As discussed below, the ACA includes an express grandfather provision for policies issued before its effective date. However, the agencies issued a very restrictive regulation limiting employer and issuer flexibility in administering grandfathered plans. The agencies can and should issue guidance adopting a short term non-enforcement policy with respect to the grandfather plan regulations and indicate that it intends to modify through notice and comment rulemaking under the Administrative Procedure Act.

- Section 1251 of the ACA provides that, "[w]ith respect to a group health plan or health insurance coverage in which an individual was enrolled on the date of enactment of [the ACA], [the ACA's insurance market reforms] shall not apply to such plan or coverage, regardless of whether the individual renews such coverage after such date of enactment." ACA § 1251(a)(2). The statute does not limit the changes those plans can make to their plan and benefit designs that would result in the loss of grandfathered status.
- Through regulations adopted to implement section 1251, the Tri-agencies imposed strict limits on the types of plan changes that a grandfathered health plan could permissibly adopt without a loss of grandfathered status. *See generally*, 45 CFR 147.140(g) (describing plan changes that result in a plan's loss of grandfather status, including: changes to covered benefits; changes in cost-sharing like copay, co-insurance, or deductible; changes in employer contributions; and changes in annual limits).
- The Tri-agencies should consider revisions to these regulations to reduce the economic and regulatory impact of the ACA on individuals and small employers who have retained health insurance coverage with grandfathered status, and to reflect the minimal approach to grandfathering included in the statute.
- As the Tri-agencies move forward with these changes, they should adopt a non-enforcement policy with respect to the grandfather regulations. Importantly, the Tri-agencies together, or separately, have adopted this approach in numerous instances during implementation of the ACA and the federal Mental Health Parity and Addiction Equity Act.[1]

[1] *See, e.g.* Affordable Care Act Implementation FAQs – Part III, Q&A-2 (Oct. 12, 2010) *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs3.html ("Until guidance is issued, the Departments will treat plans described above as satisfying the exemption from HIPAA and the Affordable Care Act's group market reforms for plans with less than two participants who are current employees."); Affordable Care Act Implementation FAQs - Set 10, Q&A-1 (Aug. 7, 2012) *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs10.html ("Pending further guidance, the Departments will not take any enforcement action against a group health plan because it does not provide an SBC with respect to a Medicare Advantage benefit package.") (footnote omitted); Affordable Care Act Implementation FAQs - Set 11, Q&A-6 (Jan. 24, 2013) available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs11.html ("Pending further guidance, the Departments will not take any enforcement action against a group health plan that is an EGWP because the non-Medicare supplemental drug benefit does not comply with the health coverage requirements of title XXVII of the PHS Act, part 7 of ERISA, and chapter 100 of the Code."); Mental Health Parity and Addiction Equity Act (MHPAEA) FAQs, *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/mhpaea-1 ("Until the issuance of final regulations, the Agencies have determined that they will establish an enforcement safe harbor under which the Agencies will not take enforcement action

- Consistent with these precedents, the Tri-agencies should signal to the regulated community both its intent to revisit the grandfather regulations consistent with President Trump's Executive Order, dated January 20, 2017, and a non-enforcement of the existing regulations pending adoption of revised regulations.

against a plan or issuer that divides its benefits furnished on an outpatient basis into two sub-classifications for purposes of applying the financial requirement and treatment limitation rules under MHPAEA: (1) office visits, and (2) all other outpatient items and services.").