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of New York State

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The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

RE: OCIO-9991-IFC2, Amendment to the *Interim Final Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act*

Dear Secretary Sebelius:

The Healthcare Association of New York State (HANYs), representing more than 550 non-profit and public hospitals, nursing homes, home care agencies, and other health care organizations throughout New York, submits these comments in response to the Department of Health and Human Services' (HHS) publication of an amendment to the *Interim Final Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act* and related requests for comments.

The Act and the interim final rule refer to existing health plans and health insurance coverage as "grandfathered" health plans. Grandfathered health plan status may be seen as advantageous to payers and plan sponsors because such plans are exempted from many of the coverage mandates codified in the Public Health Service Act, such as the premium rating rule (§ 2701), guaranteed availability of coverage (§ 2702), guaranteed renewability of coverage (§ 2703), prohibition of discrimination based on health status (§ 2705), and coverage of preventive services (§ 2713).

The interim final rule, published June 17, 2010, listed changes that would result in the cessation of grandfathered health plan status. Those changes, identified in paragraph (g)(1) of Title 45, Code of Federal Regulations 147.140, relate to the elimination of benefits, increase in a percentage cost-sharing requirement, increase in a fixed amount cost-sharing requirement, increase in a fixed amount copayment, decrease in contribution rate by employers and employee organizations, and changes in annual limits.

In an August 13, 2010 comment letter (attached), HANYs commended HHS for the careful drafting of the interim final rule for group health plans and health insurance

coverage to preserve the right of individuals to maintain their health coverage as it existed on March 23, 2010. At that time, HANYS also expressed concern that changes in a provider network can negatively impact patient choice and access to care.

We now comment on the amendment to the interim final rule that allows fully-insured group health plans to change insurers, policies, certificates, or contracts of insurance without ceasing to be a grandfathered health plan, provided that the standards set forth under paragraph (g)(1) of the interim final regulations are still met. This raises several additional concerns.

Provider contract terms are insurer-specific and frequently contain financial assumptions about the valuation of the contract, such as anticipated case mix and the numbers of admissions that are likely to occur. Because the amendment to the interim final rule allows grandfathered health plans to switch insurers without losing their grandfathered status, an insurer that has a less favorable contract with a provider could theoretically assume the obligations of the insurer that it is replacing, on less favorable terms to the provider.

Moreover, unless we are misunderstanding the impact of the new amendment, allowing fully-insured group health plans to change insurers, policies, certificates, or contracts of insurance may also have the unintended consequence of limiting the provider network available to members of the group insofar as the “new” plan may have a more limited panel than the plan it is replacing and thus may effectively negate the right of individuals to maintain their health coverage as it existed on March 23, 2010.

For the above reasons, HANYS recommends that more direction be provided to limit the ability of fully-insured group health plans to make changes to insurers, policies, certificates, or contracts of insurance that result in substantial changes to contracts with hospitals or to panels of participating providers, while retaining grandfathered health plan status.

HANYS hopes that these comments are useful to HHS as it considers drafting additional implementation guidance related to what changes can cause a group health plan to lose its grandfathered status. If you have any questions about our comments, please contact Jeffrey Gold, Vice President, Managed Care and Special Counsel, at (518) 431-7730.

Sincerely,



Daniel Sisto
President

DS:dd
Enclosure



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Washington, DC 20201

RE: OCIO-9991-IFC, 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

Dear Secretary Sebelius:

The Healthcare Association of New York State (HANYs), representing more than 550 non-profit and public hospitals, nursing homes, home care agencies, and other health care organizations, submits these comments in response to the Department of Health and Human Services' (HHS) publication of *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* and related requests for comments.

HANYs commends HHS for carefully drafting the above referenced interim final rules for group health plans and health insurance coverage in accordance with Section 1251 of the Patient Protection and Affordable Care Act (PPACA), which preserves the right of individuals to maintain their existing health coverage as it existed on March 23, 2010.

PPACA and these interim final rules refer to existing health plans and health insurance coverage as "grandfathered" health plans. Grandfathered health plan status may be seen as advantageous to payers because such plans are exempted from many of the coverage mandates codified in the Public Health Service Act (PHSA) such as premium rating rules (§ 2701 PHSA), guaranteed availability of coverage (§ 2702 PHSA), guaranteed renewability of coverage (§ 2703 PHSA), prohibition of discrimination based on health status (§ 2705 PHSA), and coverage of preventive services (§ 2713 PHSA).

The interim final rules specify what changes to benefits packages, cost-sharing requirements, and employer contributions will cause a grandfathered health plan to lose its protected status.

HANYS recognizes the numerous and complex factors that HHS had to consider when enumerating the specific standards contained in paragraph (g)(1) of 26 Code of Federal Regulations (CFR) 54.9815-1251T, 29 CFR 2590.715-1251, and 45 CFR 147.140 to prevent disruption to the existing health insurance marketplace. HANYS believes that the regulations attempt to strike the proper balance between preserving the ability of individuals to maintain their existing coverage with the dual goals of ensuring access to affordable essential coverage and improving the quality of coverage.

However, HANYS is concerned that grandfathered health plan status will limit the reach of PPACA coverage mandates. Group health plans and health insurance coverage should not be able to seek refuge in grandfathered health plan status if the structure, provider network, prescription drug formulary, or overall benefit designs change. Therefore, as HHS offers further guidance on the termination of grandfathered health plan status, HANYS urges HHS to adopt rules so that changes to a plan's structure, provider network, or prescription drug formulary will cause a plan to lose grandfathered status.

With respect to plan structure, HANYS is very concerned about the disparate regulation of fully insured products and self-insured products. Self-insured products or so-called Employee Retirement Income Security Act (ERISA) plans, have long evaded state regulation and lack many of the consumer and provider protections that accompany insured products. Because ERISA plans are exempted from state regulation, **HANYS recommends that a plan change from an insured product to a self-insured product results in termination of grandfathered health plan status so that these plans are subject to greater regulation under PPACA.**

In addition, HANYS is troubled by potential changes in provider networks that may result in fewer participating providers. Many employers and employees choose a group health plan or health insurance coverage based on the size of a network, the individual providers in that network, or even the admitting privileges that network physicians have with participating hospitals. Changes to provider networks that result in fewer participating providers can negatively impact patient choice and access to care.

For these reasons, **HANYS recommends that careful direction be provided to limit an insurer's ability to shrink provider networks while retaining grandfathered health plan status.**

HANYS believes that prescription drug formularies should be monitored for gaps in coverage. **HANYS recommends that any changes to a grandfathered health plan's prescription drug formulary that result in the elimination of an entire therapeutic class of drugs or substantially all drugs within a class should be looked at as suspect and possibly trigger revocation of grandfathered health plan status.**

However, the reasonable and calculated substitution of high-priced brand name drugs for older, lower-cost generic drugs should be allowed, provided that alternatives are made available to insured individuals when medically necessary to do so.

HANYS hopes that these comments are useful to HHS as it considers drafting additional regulations on what changes to plan structure, provider networks, or prescription drug formularies should cause a plan to lose its grandfathered status. HANYS applauds HHS for its leading role in health care reform under the recently enacted PPACA and looks forward to working with HHS to implement new regulations to ensure affordable, quality health insurance for all.

If you have questions about our comments, please contact Jeffrey Gold, Vice President, Managed Care and Special Counsel, at (518) 431-7730.

Sincerely,



Daniel Sisto
President

DS:dd