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March 22, 2011

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Interim Final Rules for Group Health Plans and Health Insurance Coverage
Relating to Status as Grandfathered Plan under the Patient Protection and Affordable Care
Act

Dear Commissioner Shulman:

Enclosed are comments on interim final rules for group health plans and health insurance coverage relating to status as grandfathered plan. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Charles H. Egerton
Chair, Section of Taxation

Enclosure

cc: Michael Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury
William Wilkins, Chief Counsel, Internal Revenue Service
J. Mark Iwry, Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, Department of the Treasury
Jeffrey Van Hove, Acting Tax Legislative Counsel, Department of the Treasury
George H. Bostick, Benefits Tax Counsel, Department of the Treasury
Alan N. Tawshunsky, Deputy Division Counsel/Deputy Associate Chief Counsel (Employee Benefits), Internal Revenue Service
William Evans, Attorney Advisor, Department of the Treasury

**ABA SECTION OF TAXATION
COMMENTS ON INTERIM FINAL RULES FOR GROUP HEALTH
PLANS AND HEALTH INSURANCE COVERAGE
RELATING TO STATUS AS A GRANDFATHERED PLAN UNDER
THE PATIENT PROTECTION AND AFFORDABLE CARE ACT**

REGULATION IDENTIFIER NUMBER (RIN) 1210-AB42

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these comments was exercised by Alden J. Bianchi, Co-Chair of the Subcommittee on Welfare Plan Design and Funding of the Employee Benefits Committee of the Section of Taxation. Substantive contributions were made by Julie Burbank, Chad DeGroot, Matthew J. Eickman, Linda R. Mendel, Jeremy M. Pelphrey, and Mark Stember. These Comments were reviewed by Robert A. Miller, a Committee Vice Chair, and John L. Utz, Committee Chair. The Comments were further reviewed by Roberta Casper Watson and James R. Raborn on behalf of the Section’s Committee on Government Submissions and by Thomas R. Hoecker, Council Director for the Employee Benefits Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: March 22, 2011

EXECUTIVE SUMMARY

These Comments pertain to the coordinated interim final rules issued by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services (collectively, the “Agencies”) on June 17, 2010 (the “Interim Final Rules”).¹ The Interim Final Rules implement section 1251 of the Patient Protection and Affordable Care Act of 2010² (the “Affordable Care Act” or “ACA”), as modified by section 10103 of the Affordable Care Act, and section 2301 of the Health Care and Education Reconciliation Act of 2010³ (the “Grandfather Provisions”), which provide certain limited exemptions from the insurance market reforms for “grandfathered” group health plans and health insurance. The following comments are submitted in response to the request for comments contained in the Interim Final Rules.

- A. We recommend that the Agencies expand the relief provided by the November 17, 2010, amendment (the “November 2010 Amendment”)⁴ to the Interim Final Rules to permit retroactive reinstatement of grandfather status for fully insured group health plans that entered into a new policy, certificate, or contract of insurance before November 16, 2010.
- B. We recommend that the Agencies clarify the “statement of grandfathered status” applies to *plan* documents and materials but not to insurance policies, contracts, or certificates prepared and circulated by state-licensed health insurance issuers, provided that notice of grandfather status is included in all other plan materials (other than explanations-of-benefits (“EOBs”)).
- C. We recommend that the Agencies expand the exceptions⁵ to the broad anti-abuse rule (under which a plan ceases to be a grandfathered plan in the case of a merger, acquisition, or similar business restructuring aimed at covering new individuals)⁶ in the Interim Final Rules to accommodate elimination of a benefit package when additional benefit packages remain and participants are allowed to elect from among the remaining benefit options.
- D. We recommend that the relief accorded to fully insured collectively bargained grandfathered plans be expanded to provide that none of the requirements of the Affordable Care Act apply until the expiration of the last collective bargaining agreement entered into before March 23, 2010 (without regard to any subsequent extensions or renewals).

¹ 75 Fed. Reg. 34,538 (2010).

² Pub. L. 111-148, 124 Stat. 119.

³ Pub. L. 111-152, 124 Stat. 1029.

⁴ 75 Fed. Reg. 70,114 (2010).

⁵ 26 C.F.R. § 54.9815-1251T(b)(2)(ii), 29 C.F.R. § 2590.715-1251(b)(2)(ii), 45 C.F.R. § 147.140(b)(2)(ii).

⁶ 26 C.F.R. § 54.9815-1251T(b)(2)(i), 29 C.F.R. § 2590.715-1251(b)(2)(i), 45 C.F.R. § 147.140(b)(2)(i).

- E. In response to the Preamble to the Interim Final Rules⁷ inviting comments on specific issues relating to the maintenance of grandfather status, we recommend that:
1. Structural changes that do not materially affect benefits not disturb grandfather status;
 2. Changes in a network plan's provider network not disturb grandfather status, provided that the plan's design features and coverage options remain substantially the same;
 3. Changes to a prescription drug formulary or pharmacy benefit manager ("PBM") not disturb grandfather status, provided that the plan's prescription drug benefits remain substantially the same;
 4. Benefit design changes be permitted in response to changes required by Federal, state, or local law, including legal requirements created by a permissible design change (such as a reduction in highly compensated individual benefits to conform with section 105(h)⁸ if an insured grandfathered plan becomes self-insured);
 5. Benefits and benefit enhancements be permitted to be added without risking the loss of grandfather status; and
 6. New classes of employees with no prior coverage, or with less generous coverage, be permitted to be added to existing grandfathered plans without loss of grandfather status.
- F. In response to the Preamble to the Interim Final Rules inquiring whether changes in cost sharing and employer contributions required by law "should be drawn differently in light of the fact that changes made by the Affordable Care Act may alter plan or issuer practices in the next several years,"⁹ we recommend that the changes required by the ACA be ignored in determining grandfather status under the Interim Final Rules.
- G. We recommend that the Agencies quantify the additional latitude for changes provided by the transitional rules in the Interim Final Rules,¹⁰ which currently would permit changes made in "good faith" that only "modestly exceed" the changes described in the Interim Final Rules.¹¹
- H. We recommend that the Agencies adopt a rule under which grandfather status is lost: (i) in the case of a change that is deemed material under section 2715(d)(4)

⁷ 75 Fed. Reg. 34,538, 34,544 (2010).

⁸ References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

⁹ 75 Fed. Reg. 34,538, 34,544-45 (2010).

¹⁰ 26 C.F.R. § 54.9815-1251T(g)(2), 29 C.F.R. § 2590.715-1251(g)(2), 45 C.F.R. § 147.140(g)(2).

¹¹ 26 C.F.R. § 54.9815-1251T(g)(1), 29 C.F.R. § 2590.715-1251(g)(1), 45 C.F.R. § 147.140(g)(1).

of the Public Health Service Act (the “PHSA”),¹² 90 days after the date on which such change takes effect, particularly if the change occurs inadvertently or results from actions beyond the employer’s control; or (ii) with respect to all other changes, the first day of the next following plan or policy year.

¹² Pub. L. No. 78-410, 58 Stat. 682 (1944).

COMMENTS

BACKGROUND

The subject of these Comments is the Interim Final Rules implementing the Grandfather Provisions. The Grandfather Provisions, and the substantive insurance market reforms with respect to which relief is granted to grandfathered plans, are incorporated by reference into the Code by section 9815 and into the Employee Retirement Income Security Act (“ERISA”)¹³ by section 715 of ERISA.¹⁴

We commend the extraordinary efforts the Agencies have made to rapidly provide comprehensive regulations regarding the provisions of the Affordable Care Act, including those that have become effective this year. We hope that these Comments advance the Agencies’ ongoing process of developing guidance that applies the myriad new requirements applicable to group health plans in a clear, fair, and practical manner.

As a preliminary matter, we note that the Interim Final Rules appear to reflect the view that the Grandfather Provisions are designed to protect the “economic deal” that individual policy holders or plan participants have under health plans and policies in existence prior to ACA, and that the grandfather protections should be extended only to plans that largely maintain that deal. Our comments below take this apparent policy stance as a given and are intended to be consistent with it. We note, however, that the statutory Grandfather Provisions do not state that modifications to a plan in existence prior to March 23, 2010, will cause the plan to lose grandfather status. Consequently, one could reasonably question the degree to which this policy stance comports with the statute. These Comments should not be construed as an endorsement of this policy stance, but rather as a set of suggestions regarding modifications to the Interim Final Rules that would appear to be appropriate even within the context of that stance.

I. New Policies, Certificates, and Contracts

A. Issue

As originally issued, the Interim Final Rules provided that (other than in the case of certain collective bargaining arrangements), when a fully insured group health plan entered into a new policy, certificate, or contract of insurance, grandfather status was forfeited.¹⁵ The November 2010 Amendment subsequently amended this rule such that entering into a new policy, certificate, or contract of insurance, after November 15, 2010, would not result in the loss of grandfather status, provided the plan complies with the other substantive “grandfather” requirements.¹⁶ Plans that forfeited grandfather status before November 16, 2010, do not benefit under this change to the Interim Final Rules.

¹³ Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

¹⁴ 29 U.S.C. § 1185d. Section 9815 and section 715 of ERISA were added by subsections (e) and (f), respectively, of section 1563 of ACA, entitled “CONFORMING AMENDMENTS.”

¹⁵ 26 C.F.R. § 54.9815-1251T(a)(1)(ii), 29 C.F.R. § 2590.715-1251(a)(1)(ii), 45 C.F.R. § 147.140(a)(1)(ii).

¹⁶ 75 Fed. Reg. 70,114 (2010).

B. Recommendation

We recommend that Agencies expand the relief provided by the November 2010 Amendment to the Interim Final Rules to permit retroactive reinstatement of grandfather status for fully insured group health plans that entered into a new policy, certificate, or contract of insurance before November 16, 2010.

C. Explanation

We see no reason why the relief afforded by the November 2010 Amendment to the Interim Final Rules should apply only prospectively.

II. Notice Regarding Grandfather Status

A. Issue

The Interim Final Rules require that a statement of grandfather status be included in “any plan materials provided to a participant or beneficiary describing the benefits provided under the plan or health insurance coverage, that the plan or coverage believes it is a grandfathered health plan within the meaning of the Patient Protection and Affordable Care Act.”¹⁷ This standard was subsequently clarified in a set of “Frequently Asked Questions” (“FAQs”) issued by the Department of Labor¹⁸ that, among other things, clarified that the statement is not required on EOBs. Although this clarification is helpful, it leaves unanswered questions about the scope of the participant notice requirements as applied to standard insurance policies, contracts, or certificates prepared and circulated by state-licensed health insurance issuers.

B. Recommendation

We recommend that the Agencies clarify that the “statement of grandfathered status” requirement applies to *plan* documents and materials but not to insurance policies, contracts, or certificates prepared and circulated by state-licensed health insurance issuers, provided that notice of grandfather status is included in all other plan materials (other than EOBs).

C. Explanation

The “statement of grandfathered status” serves an important plan-related purpose of ensuring that participants and beneficiaries are made aware of plan limits and exclusions that may apply to them despite certain well-publicized features of the Affordable Care Act (*e.g.*, first-dollar coverage of preventative care services). If this requirement is imposed on standard insurance policies, contracts, or certificates, health insurance issuers would need to maintain two sets of standard documents—one for grandfathered plans and the other for non-grandfathered plans. Moreover, plan sponsors would need to be certain that they received the right documents from the carrier, and the failure to obtain the correct document could result in loss of grandfather

¹⁷ 26 C.F.R. § 54.9815-1251T(a)(2), 29 C.F.R. § 2590.715-1251(a)(2), 45 C.F.R. § 147.140(a)(2).

¹⁸ FAQs About Affordable Care Act Implementation Part IV, U.S. Department of Labor, Employee Benefits Security Administration (Oct. 29, 2010), available at <http://www.dol.gov/ebsa/pdf/faq-aca4.pdf>.

status. We see this as an unnecessary administrative burden, which should not be imposed on carriers or plan sponsors.

III. Anti-Abuse Rule for Mergers and Acquisitions; Elimination of One Option when Others Remain

A. Issue

These Interim Final Rules establish a broad anti-abuse rule, under which a plan ceases to be a grandfathered plan in the case of a merger, acquisition, or similar business restructuring when the purpose of such merger, acquisition, or similar business restructuring is to cover new individuals.¹⁹ The Interim Final Rules provide for an exception,²⁰ however, in the case of changes in plan eligibility in the following two instances: (i) when the transfer, if treated as a plan amendment, satisfies the substantive requirement of the Interim Final Rules; and (ii) in the case of an employee transfer when there is a bona fide employment-based reason for the transfer (e.g., in connection with a plant closing)

B. Recommendation

We recommend that the exception for changes in plan eligibility be expanded to accommodate the elimination of a benefit package when additional benefit packages remain and participants are allowed to elect from among the remaining benefit options. If the Agencies are not willing to adopt this rule generally, then we recommend that it be applied at least in the context of mergers, acquisitions, or similar business restructurings so as to furnish the parties to the transaction additional flexibility to accommodate legitimate business needs.

C. Explanation

Although employers have historically offered multiple medical plan options, the more recent trend is to consolidate the number of options. The Interim Final Rules provide that, when a benefit option under a plan is eliminated, the employer should treat the option to which the participants are transferred as a plan amendment under the Interim Final Rules. Employers may choose to eliminate a benefit option for important reasons other than cost, and in such cases we do not believe employers should be required to satisfy rigid mathematical tests regarding cost impacts. An employer may conclude that having too many benefit options is confusing or that a particular benefit option is underutilized, in which case the employer may permit employees to elect among the remaining plan options (as opposed to automatically transferring them to another plan option). For example, an employer that offers a choice of five medical plan options – three PPO Plans with various levels of benefits and cost-sharing (PPO 1, PPO 2, PPO 3) and two HMOs – decides to terminate PPO 1 because it has low enrollment. The employer permits employees to elect among the other plan options. In our view, this should not be treated as the elimination of one plan and the amendment of the other.

¹⁹ 26 C.F.R. § 54.9815-1251T(b)(2)(i), 29 C.F.R. § 2590.715-1251(b)(2)(i), 45 C.F.R. § 147.140(b)(2)(i).

²⁰ 26 C.F.R. § 54.9815-1251T(b)(2)(ii), 29 C.F.R. § 2590.715-1251(b)(2)(ii), 45 C.F.R. § 147.140(b)(2)(ii).

IV. Collectively Bargained Plans

A. Issue

The Interim Final Rules originally provided limited relief to insured collectively bargained plans, under which insured collectively bargained plans were free to change carriers for a limited period of time without losing grandfather status.²¹ This limited relief was rendered unnecessary by the November 2010 Amendment described above. Although it is common to provide broad transition relief to collectively bargained plans to accommodate the negotiating process, the Interim Final Rule, as amended, does not do so.

B. Recommendation

We recommend that the relief accorded to fully insured collectively bargained grandfathered plans be expanded to provide that none of the requirements of the Affordable Care Act apply until the expiration of the last collective bargaining agreement entered into before March 23, 2010 (without regard to any subsequent extensions or renewals).

C. Explanation

Recognizing the substantial substantive and procedural protections conferred on collectively bargained plans by the National Labor Relations Act,²² it is not uncommon for new Federal laws to give these plans wide berth. Nowhere is this practice illustrated more starkly than in connection with pension benefits, for which Federal laws commencing with ERISA have regularly delayed the impact of new rules to coincide with the next contract renewal.²³ Admittedly, the Grandfather Provisions of the Affordable Care Act are not as expansive as their pension law counterparts. We concede that the terms of the statute limit relief to fully insured collectively bargained plans. Although this appears to be an oversight, the Agencies' decision to confine their rulemaking efforts accordingly is understandable. Nevertheless, in our view the Interim Final Rules are notably and unnecessarily parsimonious, essentially providing fully insured collective bargained plans only the right to change carriers for a time.

V. Requested Comments Regarding Certain Changes to Structure and Design

A. Issue

In the preamble to the Interim Final Rules,²⁴ the Agencies invited comments on whether the following changes should result in cessation of grandfather status:

- (1) Changes to plan structure (such as switching from a health reimbursement arrangement to major medical coverage or from an insured product to a self-insured product);

²¹ 26 C.F.R. § 54.9815-1251T(f), 29 C.F.R. § 2590.715-1251(f), 45 C.F.R. § 147.140(f).

²² Pub. L. No. 74-198, 49 Stat. 449 (1935).

²³ See, e.g., Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 Stat., § 403(c)(3) (establishing a delayed effective date for certain collectively bargained arrangements).

²⁴ 75 Fed. Reg. 34,538, 34,544 (2010).

- (2) Changes in a network plan's provider network and, if so, what magnitude of changes would have to be made;
- (3) Changes to a prescription drug formulary and, if so, what magnitude of changes would have to be made; and
- (4) Any other substantial change to the overall benefit design.

B. Recommendation

We offer the following recommendations:

- (1) *Changes to plan structure (such as switching from a health reimbursement arrangement to major medical coverage or from an insured product to a self-insured product);*
 - We recommend that structural changes that do not materially affect benefits not disturb grandfather status. Thus, switching from a health reimbursement arrangement to major medical coverage would result in the loss of grandfather status, but switching from an insured product to a self-insured product would not, provided that the plan's benefit design features and coverage options remain substantially the same.
 - Separately, we request that the Agencies clarify that ceasing to cover a particular class of employees or dependents does not result in the loss of grandfather status as to the class(es) of participants who remain covered. For example, we believe an employer with three divisions (A, B, and C) that provides group health coverage to employees of all three divisions under a group health plan established before March 23, 2010, should be able to cease covering employees of Division C without causing the plan to lose its status as a grandfathered plan. We understand that other applicable rules might limit the extent to which such changes should be made, but we request that such a change not cause the plan to cease to be grandfathered.
- (2) *Changes in a network plan's provider network and, if so, what magnitude of changes would have to be made*
 - We recommend that changes in a network plan's provider network not disturb grandfather status, provided that the plan's design features and coverage options remain substantially the same and provided the network change does not have the effect of violating any of the other requirements limiting changes to a grandfathered plan (*e.g.*, the network change does not, in operation, result in the elimination of in-network coverage for a condition).

(3) *Changes to a prescription drug formulary and, if so, what magnitude of changes would have to be made*

- We recommend that changes to a prescription drug formulary or PBM not disturb grandfather status, provided that the plan's prescription drug benefits remain substantially the same. Thus we believe modifications to a formulary (which, for example, are common in response to development of new drugs or protocols) or a mere change in PBM, without affecting the substance of a plan's prescription benefit, should not result in the loss of grandfather status. When the change is the mix or the employee cost of prescription drugs available under a plan, we suggest that the Agencies adopt a rule based on comparable actuarial value, using the tolerances established elsewhere in the rule (*e.g.*, 15%). We believe the Agencies should also clarify that non-material changes (*e.g.*, adding a mail-order component) do not disturb grandfather status.

(4) *Any other substantial change to the overall benefit design.*

- We recommend that benefit designs, whether substantial or otherwise, be permitted in response to changes required by Federal, state or local law. For example, we believe a plan amendment to comply with the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Wellstone Act"),²⁵ and to pass along the accompanying costs should not result in loss of grandfather status.²⁶ For another example, the Interim Final Rule allows a shift from an insured plan to a self-insured plan, and for many plans that change will require that previously discriminatory features be removed. We do not believe that a plan should lose its grandfather status if certain benefits of highly compensated individuals (*e.g.*, employer payment of higher premiums) are removed to comply with section 105(h), even if the result is that the employer's cost percentage is reduced for the affected highly compensated individuals.
- We believe the Interim Final Rules should make clear that plans may add or enhance benefits without forfeiting grandfather status.
- We believe plans should be able to add new classes of employees with no prior coverage, or with less generous coverage, to existing grandfathered plans without loss of grandfather status. For example, a plan should, in our view, be permitted to add dependent coverage if the plan previously allowed individual or family coverage only. Moreover, we believe it should be possible to add a new class of employees and new tier of benefits (see previous bullet). This approach would be especially useful in the case of a merger, acquisition or other reorganization in which an

²⁵ Pub. L. No. 110-343, 122 Stat. 3861.

²⁶ 26 C.F.R. § 54.9815-1251T(b)(2)(i), 29 C.F.R. § 2590.715-1251(b)(2)(i), 45 C.F.R. § 147.140(b)(2)(i).

employer acquires a new set of employees, but needs lead time to determine whether to establish a separate plan for this group or fold them into an existing, grandfathered plan.

C. Explanation

As noted above, we discern in the Interim Final Rules an overarching theme – that what is being grandfathered is the basic pre-Affordable Care Act “deal” vis-à-vis health coverage that an employer’s or employee organization’s group health plan represents. Toward this end, the Interim Final Rules generally seek to identify the terms of that deal as of March 23, 2010, and establish those terms as the baseline against which grandfather status is measured – within certain limited tolerances. Our recommendations follow this theme: structural changes that do not materially affect benefits should not jeopardize grandfather status, nor should changes in vendors or the locus of risk, because these changes do not affect the underlying “deal” in our view.

Similarly, absent the changes made by the Affordable Care Act, plans would still have to be amended to comply with other laws that pre-date the ACA, with respect to which we believe it is reasonable to expect that certain costs would be passed along to participants. These other laws include changes required by Federal, state, or local law, such as the Wellstone Act. To the extent that these costs are borne by plan participants, these costs should neither be included in the grandfather calculus, nor serve as a basis to deny grandfather status, as we see it. In addition, we believe plans should be able to add or enhance benefits without forfeiting grandfather status, because this improves on the “deal” that is being grandfathered. Lastly, we believe classes or cohorts of employees who previously had no or less generous coverage should be able to be added to a grandfathered plan without losing grandfather status – either as a general rule or at least in connection with a merger or acquisition.

VI. Changes Required By Law

A. Issue

The Preamble to the Interim Final Rules also asks whether changes in cost sharing and employer contributions required by law “should be drawn differently in light of the fact that changes made by the Affordable Care Act may alter plan or issuer practices in the next several years.”²⁷

B. Recommendation

We recommend that the changes in cost sharing and employer contributions associated with changes required by the Affordable Care Act be ignored in determining grandfather status under these rules.²⁸

²⁷ 75 Fed. Reg. 34,538, 34,544-45 (2010).

²⁸ 26.C.F.R. § 54.9815-1251T(g)(1), 29 C.F.R. § 2590.715-1251(g)(1), 45 C.F.R. § 147.140(g)(1).

C. Explanation

As explained above, the Interim Final Rules appear to reflect the view that grandfather status is to be determined and tested based on the status quo ante (*i.e.*, the law in effect before March 23, 2010). Applying this standard, we believe amendments to plans adopted for the purpose of complying with the Affordable Care Act should be permitted without the need to comply with the limits on co-insurance, co-payments, deductibles, and employer contributions, all without jeopardizing a plan's grandfather status.

VII. Changes that Modestly Exceed Limits

A. Issue

The transitional rules under the Interim Final Rules²⁹ provide some latitude for changes made in "good faith" that only "modestly exceed" the specifically permitted changes described in the Interim Final Rules.³⁰

B. Recommendation

We recommend that this standard be quantified so as to furnish certainty sufficient to make the rule workable. For example, the tolerances set out in the Interim Final Rules³¹ might simply be expanded upon for the purpose of establishing a safe harbor, but with appropriate ability to exceed the safe harbor limits based on the surrounding facts and circumstances.

C. Explanation

As currently written, the standard is vague. Without added certainty, few plan sponsors would be willing to rely on this provision. We submit that basic notions of fairness dictate that reliable transitional relief be made available.

VIII. Time of Loss of Grandfather Status

A. Issue

The Interim Final Rules do not specify *when* grandfather status is lost.

²⁹ 26 C.F.R. § 54.9815-1251T(g)(2), 29 C.F.R. § 2590.715-1251(g)(2), 45 C.F.R. § 147.140(g)(2).

³⁰ 26 C.F.R. § 54.9815-1251T(g)(1), 29 C.F.R. § 2590.715-1251(g)(1), 45 C.F.R. § 147.140(g)(1).

³¹ 26 C.F.R. § 54.9815-1251T(g)(1), 29 C.F.R. § 2590.715-1251(g)(1), 45 C.F.R. § 147.140(g)(1).

B. Recommendation

We recommend that the Agencies adopt a rule under which grandfather status is lost as of the following dates:

- In the case of a change that is deemed material under section 2715(d)(4) of the PHSA,³² 90 days after the date on which such change takes effect, particularly if the change occurs inadvertently or results from actions beyond the employer's control; or
- With respect to all other changes, the first day of the next following plan or policy year.

C. Explanation

Although the Interim Final Rules are reasonably clear on what actions will result in the loss of grandfather status, the Interim Final Rules are silent as to when grandfather status is lost. Issuers, employers, and plans need clarification on this point. The loss of grandfather status mid-year would cause significant administrative difficulties (such as the need to shift claims review procedures in mid-stream) that could be problematic for parties other than just the employer. Therefore we urge that, at least generally, material changes trigger a loss of grandfather status after 90 days. For all other changes, we believe grandfather status should expire at year end.

³² ACA § 1001.