

GRANDFATHERED HEALTH PLANS AND THE PROHIBITION ON ANNUAL AND LIFETIME DOLLAR LIMITS ON BENEFITS

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As part of the Patient Protection and Affordable Care Act and the accompanying reconciliation bill, the Health Care and Education Reconciliation Act (together, “PPACA”), Congress established certain prohibitions on lifetime and annual limits on the dollar value of benefits. These prohibitions are applicable to all group health plans and group and individual health insurance, regardless of grandfathered status (although grandfathered individual health coverage is not subject to otherwise applicable restrictions on annual limits for plan years beginning before January 1, 2014). The modifications that grandfathered plans may make in connection with the prohibitions without losing grandfathered status are often unclear and are discussed in the interim final regulations issued on June 17, 2010 regarding grandfathered plans generally, and June 22, 2010 regarding lifetime and annual dollar limits on benefits, preexisting condition exclusions, rescissions, and patient protections (collectively “IFR”). This document briefly describes the prohibitions on lifetime and annual limits on the dollar value of benefits and addresses the steps that grandfathered plans may take in complying and working within the contours of the prohibitions.

Prohibitions on Lifetime and Annual Limits – Generally

Starting with plan years beginning on or after September 23, 2010 (*i.e.*, January 1, 2011 for calendar year plans), a plan or issuer must not establish or maintain lifetime or annual limits on the dollar amount of “essential health benefits” (“EHBs”) for any individual.¹ However, with regard to annual limits, PPACA provides transition relief prior to January 1, 2014, during which time a plan or issuer may impose “restricted” annual limits on EHBs.² (Grandfathered individual coverage may impose annual limits without regard to the restricted annual limits for plan years beginning before January 1, 2014). The prohibition on annual limits is fully effective for plan years beginning on or after January 1, 2014.

Grandfathered Health Plans and the Prohibitions

PPACA and the rules issued thereunder establish restrictions on the modifications a grandfathered plan may make while retaining its grandfathered status. Grandfathered plans are significantly restricted from modifying lifetime and annual limits on the dollar value of EHBs. One misstep can cost a plan its grandfathered plan status. Significantly, for grandfathered plans

¹ In general, essential health benefits are (i) ambulatory patient services, (ii) emergency services, (iii) hospitalization, (iv) maternity and newborn care, (v) mental health and substance use disorder services, including behavioral health treatment, (vi) prescription drugs, (vii) rehabilitative and habilitative services and devices, (viii) laboratory services, (ix) preventive and wellness services and chronic disease management, and (x) pediatric services, including oral and vision care.

² Specifically, (i) for plan years beginning on or after September 23, 2010 but before September 23, 2011, the maximum annual restricted limit is \$750,000, (ii) for plan years beginning on or after September 23, 2011 but before September 23, 2012, the maximum annual restricted limit is \$1,250,000, and (iii) for plan years beginning on or after September 23, 2012 but before January 1, 2014, the maximum annual restricted limit is \$2,000,000.

that may have modified their annual and/or lifetime limits after March 22, 2010 and prior to the date of the issuance of the regulations, the IFR provides limited relief under which such modifications may be voided so long as this occurs prior to the start of the next plan year.

For ease of discussion, we address the application of the annual/lifetime limit rules to the following four categories of grandfathered plans: plans that as of March 23, 2010 (i) had NEITHER lifetime nor annual limits, (ii) had lifetime limits but NO annual limits, (iii) had annual limits but NO lifetime limits, or (iv) had BOTH lifetime and annual limits.

1. Grandfathered Plan with No Lifetime or Annual Limits on March 23, 2010

Under the terms of the IFR, plans that had no lifetime limits but did have annual limits as of March 23, 2010 will cease to be grandfathered health plans if they are modified to impose either lifetime limits OR annual limits on the dollar value of benefits at any point thereafter. Although the prohibition on lifetime and annual limits generally applies only with respect to EHBs, the wording of the regulations indicates that with respect to grandfathered plans no distinction is made between EHBs and non-EHBs (*i.e.*, the phrase “essential health benefits” is specifically used elsewhere in the statute, whereas the rules applicable to grandfathered plans refer more generically to “benefits”). In other words, it appears that, whereas a non-grandfathered plan could establish lifetime and/or annual limits with respect to non-EHBs after March 23, 2010, a grandfathered plan could not do so while retaining its grandfathered status.

As noted above, the prohibition on annual limits is phased in and becomes fully effective for plan years beginning on or after January 1, 2014. Accordingly, non-grandfathered plans may add annual limits that otherwise comply with the restricted benefit limits, but it appears that grandfathered plans may not.

Example 1 – Adds restricted annual limit on EHBs. Plan Z is a grandfathered calendar year plan with no lifetime or annual limits on the dollar value of all benefits on March 23, 2010. On January 1, 2011, Plan Z imposes an annual limit of \$750,000 on hospitalization benefits. Plan Z will lose its grandfathered status, because grandfathered plans that do not have lifetime or annual limits on March 23, 2010 may not later impose any annual limits on the dollar value of benefits.

Example 2 – Adds restricted annual limit on non-EHBs. Same facts as above, but instead of applying the \$750,000 annual limit to hospitalization benefits, Plan Z applies the limit only to non-EHBs. Based on the literal wording of the IFR, it appears that Plan Z will lose its grandfathered status, because grandfathered plans may not add any annual limits, including where limited to non-EHBs.

2. Grandfathered Plan with Lifetime Limits But No Annual Limits on March 23, 2010

The following discussion applies to grandfathered plans that as of March 23, 2010 had lifetime limits but did NOT have any annual limits on benefits.

- Lifetime Limits. Grandfathered plans must eliminate lifetime limits on EHBs for plan years beginning on or after September 23, 2010. Although elimination of lifetime limits

is a substantial plan modification, it will not result in loss of grandfathered status, because PPACA makes clear that changes made to comply with PPACA do not ruin grandfathered status.

Example 3 – Eliminates lifetime limit on EHBs. On March 23, 2010, Plan Y, a calendar year grandfathered plan, had a lifetime limit of \$1 million on maternity and newborn care. Effective January 1, 2011, Plan Y eliminates the lifetime limit on maternity and newborn care. Such a modification would appear to preserve Plan Y’s grandfathered status.

Regarding lifetime limits on non-EHBs, it appears that grandfathered plans can continue to apply the same lifetime limit to non-EHBs only. To the extent that a grandfathered plan decreases the limit to a lower dollar threshold, although unclear, this would seem to result in a loss of grandfather status.

Example 4 – Modifies lifetime limit to apply only to non-EHBs. On March 23, 2010, Plan Q, a calendar year grandfathered plan, had a lifetime limit of \$5 million on all benefits. Effective January 1, 2011, Plan Q is modified to have the same \$5 million dollar lifetime limit apply only to non-EHBs. Such a modification would appear to preserve Plan Q’s grandfathered status and also result in Plan Q’s compliance with the rules regarding no lifetime limits on EHBs. If, however, Plan Q was amended to also lower the limit on non-EHBs to \$750,000, this would appear to result in a loss of grandfathered status for Plan Q.

- Annual Limits. Grandfathered plans with lifetime limits on March 23, 2010 may add an annual limit, but it MUST be equal to or greater than the preexisting lifetime limit. Notably, these rules appear to apply equally regardless of whether the annual limit would apply to EHBs or non-EHBs.

Example. On March 23, 2010, Plan Y, a calendar year grandfathered plan, had a lifetime limit of \$1 million on maternity and newborn care. Effective January 1, 2011, Plan Y eliminates the lifetime limit on maternity and newborn care and implements a \$750,000 annual limit on maternity and newborn care. Plan Y ceases to be a grandfathered plan because the annual limit of \$750,000 is less than the preexisting lifetime limit of \$1 million with regard to maternity and newborn care.

Nothing in the regulations indicates that grandfathered plans get a “pass” on the restricted annual limits if the lifetime limit on EHBs on March 23, 2010 was below the restricted annual limit in effect on January 1, 2011. In other words, for example, a grandfathered plan with a lifetime limit of \$200,000 on maternity and newborn care on March 23, 2010 would have to make any annual limit at least \$750,000 for plan years beginning on or after September 23, 2010 but before September 23, 2011 in order to retain grandfathered status.

3. Grandfathered Plan with Annual Limits But No Lifetime Limits on March 23, 2010

The following discussion applies to grandfathered plans that had annual limits on the dollar amount of benefits but NO lifetime limits on March 23, 2010.

- **Annual Limits.** The IFR indicates that a grandfathered plan may not decrease annual limits in effect on March 23, 2010, even if the limits are higher than the minimum permitted “restricted” limit. This appears to be the case even with regard to non-EHBs.

It appears that a grandfathered plan may increase annual limits above the “restricted” limit, *i.e.*, make the limits more strict than otherwise required.

Example 6 – Reduction or increase of annual limit. Plan W, a calendar year grandfathered plan, has annual limits with regard to preventive care equal to \$1 million on March 23, 2010. Plan W cannot decrease its limit to \$750,000 (the “restricted” limit) for the plan year beginning January 1, 2011 without losing its grandfathered status. It appears, though it is not entirely clear, that Plan W could increase the annual limit with regard to preventive care to \$2 million for the plan year beginning January 1, 2011 (a more restrictive limit than that required by law).

- **Lifetime Limits.** A grandfathered plan cannot add a lifetime limit if it does not already have one in place on March 23, 2010. This appears to be the case even with respect to a lifetime limit that would only apply to non-EHBs.

4. Grandfathered Plan with Both Lifetime and Annual Limits on March 23, 2010

A final group of grandfathered plans are plans that had both lifetime and annual limits with regard to the dollar value of benefits on March 23, 2010.

- **Annual Limits.** The IFR indicates that a grandfathered plan may not decrease annual limits in effect on March 23, 2010, even if the limits are higher than the minimum permitted “restricted” limit. This appears to be the case even with regard to non-EHBs. If the plan’s annual limits are less than the “restricted” limit required by law, it appears the plan **MUST** increase its annual limits to at least the minimum “restricted” limit threshold (*e.g.*, \$750,000 for the first applicable plan year). As noted above, changes undertaken to comply with express PPACA mandates do not jeopardize a plan’s grandfathered status. As noted above, it appears that a grandfathered plan may increase annual limits above the “restricted” limit, *i.e.*, make the limits stricter than otherwise required.
- **Lifetime Limits.** A grandfathered plan must eliminate lifetime limits (at least with regard to EHBs) for plan years beginning on or after September 23, 2010.

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