Backgrounder

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Broken Promises: How Obamacare Undercuts Existing Health Insurance

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Abstract: *In response to public opposition to enactment of the Patient Protection and Affordable Care Act (PPACA), President Obama assured Americans that if they were happy with their current health insurance, nothing in the PPACA would force them to change their coverage. This promise has been broken. Not only does the PPACA itself require changes in existing coverage, but regulations issued by the Administration further undercut the ability of Americans to continue with their current insurance plans. The rules are arbitrary and confusing. Health care expert John S. Hoff lays out the bare truth.*

> *Nothing in our plan requires you to change what you have.*
>
> —President Barack Obama,
> Address to the U.S. Congress,
> September 9, 2009

To sell his overhaul of the United States health care system, President Barack Obama repeatedly assured Americans that if they liked their current health insurance plan they could keep it under the Patient Protection and Affordable Care Act (PPACA). This broad assurance was designed to disarm opposition from the great majority of Americans who have health insurance and are satisfied with it. Americans did not stop to parse the President's assurance; they took him at his word.

However, what was proffered as an expansive political concession has been constricted and put into a

Talking Points

- To sell his overhaul of the country's health care system, President Obama repeatedly assured Americans that if they liked their current health insurance plan they could keep it even after enactment of the Patient Protection and Affordable Care Act (PPACA).
- The reality is different: The bottom line is that all insurance plans, including coverage people already have, must meet some portions of the new law, and most plans will soon be subject to all its requirements.
- The regulations triggered by the PPACA severely limit what is considered to be existing coverage, and the Administration's regulations and regulatory "guidance" are arbitrary and confusing.
- President Obama's promise that Americans could keep their current plan has already been breached. Damage is already being done, and more damage is guaranteed. The only remedy is to repeal the law before the damage becomes permanent.

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legalistic straitjacket, first by the law itself, and then by confused regulations issued by the Administration. The bottom line is that all insurance plans, including coverage people already have, must meet some portions of the new law, and most plans will soon be subject to all its requirements. The President's assurance of continuing with existing plans is essentially a dead letter for all Americans.

Americans find themselves in this situation because of three things. First, the PPACA itself requires changes in existing coverage. Second, the regulations that are triggered by the PPACA severely limit what is considered to be existing coverage. And Americans' anxiety and uncertainty are fueled by the confusing "guidance" that accompanies the regulations. Indeed, given the PPACA's broad statutory language and the transference of enormous regulatory authority to federal officials, much of what has already happened during the course of the law's implementation was entirely predictable.[1] Damage is already being done, and more damage is guaranteed. The only remedy is to repeal the law before the damage becomes permanent.

How PPACA Undercuts Obama's Promise

Section 1251 of the PPACA states that no one can be required to terminate a plan that was providing coverage at the time that the PPACA was enacted.[2] It also says that plans in which a person was enrolled on that date are grandfathered and do not have to comply with the provisions of the PPACA.

But Section 1251 goes on to make exceptions. It applies numerous PPACA provisions even to grandfathered plans.[3] The exceptions are themselves a deviation from the President's assurances.[4] Even plans that were in effect on March 23, 2010, the date the President signed the health legislation into law, must comply with a number of the PPACA's requirements. These include prohibitions against excluding coverage for preexisting conditions, imposing lifetime or annual limits on coverage, or rescinding coverage.[5]

That is not all. Grandfathered plans are also required to spend a percentage of their premium income (80 percent in the case of plans in the individual and small group markets and 85 percent for plans in the large group market) on paying claims and undertaking quality improvement activities.[6] This medical loss ratio (MLR) requirement limits the amount that plans can spend on administration, fraud prevention, and other activities that do not fit within the qualified types of expenditure.

Some providers of small plans have said they may not be able to meet the MLR requirements and may pull out of the market. This would result in another, if indirect, breach of the President's assurances. A provider who leaves the market because he cannot comply with the MLR requirement is no longer available to people who were insured by his plan. Plan members would be forced to find coverage elsewhere.[7]

1. For a discussion of the impending regulatory regime guaranteed by the Patient Protection and Affordable Care Act of 2010, see John S. Hoff, "Implementing Obamacare: A New Exercise in Old-Fashioned Central Planning," Heritage Foundation *Backgrounder* No. 2459, September 10, 2010, at *http://www.heritage.org/research/reports/2010/09/implementing-obamacare-a-new-exercise-in-old-fashioned-central-planning*.
2. PPACA, Section 1251(a)(1). References in this paper to the PPACA include amendments made to it after enactment by the Health Care and Education Reconciliation Act of 2010.
3. PPACA, Section 1251(a)(2), (3), and (4).
4. The Administration characterizes the PPACA as striking a balance between "preserving the ability to maintain existing coverage with the goals of expanding access to and improving the quality of health coverage"—in other words, the provisions that the PPACA makes applicable even to grandfathered plans. *Federal Register* Vol. 75, June 17, 2010, p. 34,540.
5. *Federal Register* Vol. 75, p. 34,542. As discussed below, it is unclear whether these provisions also apply to grandfathered health plans provided pursuant to a collective bargaining agreement. Under the terms of the law itself these plans appear to be exempt from all the provisions of PPACA. The regulations, however, assume that these grandfathered plans are subject to the same terms of the PPACA as are the others.
6. Public Health Service Act, Section 2718(b), added by PPACA, Section 1001.
7. Reed Abelson, "Insurer Cuts Health Plans as New Law Takes Hold," *The New York Times*, September 30, 2010.

That is still not all. PPACA also reduces payments to Medicare Advantage plans by $145 billion over 10 years.[8] These reduced payments will force those plans to reduce benefits or leave the market entirely. Again, members will not be able to keep their current plan. The chief actuary of Medicare estimates that these reductions in payments will cut enrollment in Medicare Advantage plans by half.[9] Medicare beneficiaries who have chosen these plans will take little comfort from the President's previous assurances.

As bad as the PPACA provisions are, they are only half the story. The Obama Administration has issued regulations under the PPACA that make grandfathered status uncertain, and the process is still ongoing. The Administration has issued interim final regulations, provided administrative guidance, amended one discrete portion of the interim final regulations, and intends soon to issue the regulations in final form.

How the Regulations Undercut Obama's Promise Even More

The Administration limits the ability of people to keep the plans they had on March 23, 2010, by undermining the plans' capacity to remain under grandfathered status. Three agencies of the Administration issued regulations on June 14, 2010, as an interim final rule. It became effective before comments from the public had been received.[10] The regulation attempts to address what is necessary to be a grandfathered plan and thus to avoid the PPACA requirements (other than those that the act itself specifically made applicable even to grandfathered plans). The regulation restricts plans' ability to make certain changes, but does not determine whether other changes can be made, leaving plans and employers uncertain of the rules. The regulation makes some plan changes disqualifying and discourages others by vagueness. The regulation is confusing—since it is, itself, confused.

The lynchpin of the Administration's approach is its assertion that a plan loses grandfathered status if it makes changes "significant enough to cause" the plan to lose grandfathered status—a test both circular and subjective. This standard is not in the PPACA, which says nothing about plan changes. In fact, it is not even in the text of the regulation itself. This standard is set out briefly in one sentence in the preamble to the regulation.[11]

Losing Grandfathered Status. The preamble recognizes that plans regularly make changes and that they must have "some ability to make some adjustments" without forgoing grandfathered status. It mentions changes in premiums, networks, drug formularies, covered items, and cost-sharing, but the Administration is concerned about allowing "unfettered changes." Accordingly, it says, its regulation is designed to permit plans to make "reasonable changes routinely made" without losing grandfathered status. It gives as examples of reasonable changes those that would increase benefits, conform to legal requirements, or adopt "voluntarily" other consumer protections in the PPACA.[12] But these exceptions, which in any event are not as broad as the stated need, are not in the text of the regulation itself.

8. Richard S. Foster, "Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended," Centers for Medicare and Medicaid Services, April 22, 2010, at *https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf* (January 28, 2011).
9. *Ibid.*
10. The regulations were issued jointly by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services. *Federal Register* Vol. 75, June 17, 2010, pp. 34,537 *et seq*. The citations to the text of the regulation in this paper are to the HHS regulations, 45 Code of Federal Regulations, Section 147.140. The IRS and Department of Labor regulations for the issues discussed are the same. Although the rule was effective on issuance, the agencies requested public comment and are now considering those comments. On November 17, 2010, in connection with an amendment to the regulations discussed below, the agencies said that the final regulations on grandfathered plans would be issued "in the near future."
11. *Federal Register* Vol. 75, p. 34,541.
12. *Federal Register* Vol. 75, p. 34,546.

The regulation text does not set out any general standard for which changes are disqualifying. It does not include the "significant" change (disqualifying) or the "reasonable" change (permitted) standards mentioned briefly in the preamble. Statements in the preamble are not legally effective; only the regulation text itself is binding. There is therefore no legally binding general standard on whether changes in a plan preclude grandfathering.

Instead, the regulation text describes several specific changes that rule out grandfather status. It leaves entirely open whether other changes, not dealt with in the regulation text, are disqualifying. The main disqualifying events included in the text of the regulation are:[13]

- Elimination of "all or substantially all" benefits with regard to a particular disease;
- Increase of stated cost-sharing amounts;
- Reduction in the employer's contribution (by more than a stated amount);
- Imposition of annual or lifetime limit on benefits; and
- Merger of employers for the purpose of trading in grandfather status.

The interim final rule issued in June 2010 provided that if a plan changed its insurance company, this would terminate grandfather status (self-insured plans could change their administrators, however). The Obama Administration issued a new rule on November 17, 2010, to change this. Recognizing that making a change in issuer would give an incumbent carrier bargaining leverage and discourage new entrants, the amendment provides that a group plan can change its insurer without losing its grandfather status (but an individual cannot).[14]

A Guessing Game. What about other changes that are not addressed by the regulation? The Administration's discussion of this question is confusing.

Significantly, at one point the preamble to the regulation states that "changes other than the changes described in [the regulation text] will *not* cause a plan or coverage to cease to be a grandfathered health plan" (emphasis added) and names changes to adjust premiums to comply with legal requirements, or to voluntarily comply with the PPACA, as examples.[15] This statement in the preamble implies that other changes also would be permitted—but without any standard for determining which ones.

At another point, however, the preamble states that the regulation text provides rules "for determining when changes to the terms of a plan or health insurance coverage cause the plan or coverage to cease to be a grandfathered health plan," implying that the list in the regulation is the totality of what is permitted.[16]

This leaves the treatment of other customary changes in limbo. The regulation does not, for instance, deal with whether a plan can change the providers with whom it contracts, make coverage changes to reflect new technology, take advantage of innovative ways of providing coverage, or introduce creative mechanisms to reduce costs.[17] Nor does it determine whether changes in the procedures for pre-authorization of a treatment or a hospital stay or changes in the drugs available on the plan's formula constitute a disqualifying change. The preamble asks for comment on whether changes such as these should be disqualifying, but does not clarify whether these changes can be made while it ponders the question.[18]

13. Section 147.140 (a), (b), and (g). The different rule for union plans is discussed below in the text.
14. *Federal Register* Vol. 75, November 17, 2010, p. 70,114.
15. *Federal Register* Vol. 75, p. 34,544.
16. *Federal Register* Vol. 75, p. 34,543.
17. At one point, the preamble discloses that the regulation is intended to prevent plans from reducing their costs because this "excessive flexibility…might lead to longer term market segmentation as the least costly plans remain grandfathered the longest." *Federal Register* Vol. 75, p. 34,546.
18. *Federal Register* Vol. 75, p. 34,544.

At the same time, the regulation brandishes a thinly veiled hammer. It states that the Administration will provide "additional administrative guidance" to explain how plans must act to continue to be grandfathered.[19] This leaves it to the Administration to decide on an *ad hoc* basis, and without standards, which changes a plan can make and still remain grandfathered. In fact, the Administration has issued several bits of administrative guidance in the form of "FAQs" (frequently asked questions).[20] "Q & A 1" of October 8, 2010, interestingly, states that the disqualifying changes contained in the regulation text "are the *only* changes that would cause a cessation of grandfather status under the interim final regulations."

Plans and employers may not feel comfortable relying merely on a brief statement in a "FAQ" to make plan changes. What the final regulations will say is uncertain. Facing the need to make changes to adjust their plans to provide the best balance between cost and coverage in a dynamic health care world, plans and employers are faced with the dilemma of either forgoing needed changes or taking the risk that the changes could result in loss of grandfathered status and subject them to all the new requirements imposed by the PPACA.

Begrudging Attitude. The Administration's negative attitude toward grandfathering is apparent in the procedural requirements it imposes without any specific statutory authorization. To maintain grandfather status, under the regulation, the plan must inform enrollees that it is acting as a grandfathered plan. The regulation offers a begrudgingly worded "model notice" for doing so: Using the model notice, the plan would state that under the PPACA it can "preserve certain basic health coverage that was already in effect" when PPACA was enacted and that being grandfathered means the plan "may not include certain consumer protections" that apply to other plans. In addition, the plan must maintain records to document the terms that were in effect when the PPACA was enacted "and any other documents necessary to verify, explain, or clarify its status as a grandfathered health plan."[21]

Adding to the Confusion: Special Rules for Union Plans

The PPACA appears to contain a different grandfather rule for insured health plans provided under a collective bargaining agreement that was ratified before its enactment. As discussed above, Section 1251(a) makes certain provisions of the PPACA applicable even to supposedly grandfathered plans. But subsection (d) provides that the requirements of the PPACA do not apply to grandfathered *union* plans; it does so, unlike subsection (a), without exception.[22] Despite this provision, however, the Administration's regulation treats grandfathered union plans like other grandfathered plans and subjects them to the same provisions of PPACA.

The authors of the regulation instead read subsection (d) of the statute to govern an entirely different question—i.e., whether a union plan can be changed and still maintain grandfathered status. The preamble states that changes that would otherwise defeat grandfather status do not do so with respect to plans under a collective bargaining agreement: "coverage provided pursuant to the collective bargaining agreements is a grandfathered health plan, even if there is a change in issuers," or "any other change described in" the regulation for other plans.[23] Grandfathered union plans can make *any*

19. *Federal Register* Vol. 75, p. 34,545.
20. FAQs have been issued on September 20, October 8, October 12, October 28, and December 22, 2010. Department of Health and Human Services, "Affordable Care Act Implementation FAQs," at *http://www.hhs.gov/ociio/regulations/implementation_faq.html* (January 28, 2011).
21. Section 147.140 (a)(2).
22. Section 1251(a), similarly, originally exempted grandfathered plans from all of PPACA. However, subsection (a) was changed by Section 10103 of PPACA and by Section 2301 of the Health Care and Education Reconciliation Act to provide that certain PPACA provisions would apply even to grandfathered plans, as discussed in this paper. But subsection (d) was not changed and does not include this language.
23. *Federal Register* Vol. 75, p. 34,542. This preamble was written before the regulation was amended on November 17, as discussed above, to permit a group plan to change issuers without losing grandfathered status.

change and remain grandfathered until the termination of the collective bargaining agreement.[24] At that point, any disqualifying changes would preclude continuing grandfather status.

Conclusion

President Obama's promise that Americans could keep their current plan has already been breached. Americans' ability to continue with their existing plans has been limited first by the PPACA, which makes certain provisions of the new law applicable even to grandfathered plans, and more broadly by the Administration's ambiguous and restrictive regulation on what changes forfeit grandfather status. The Administration itself estimates that 49 percent to 80 percent of small employer plans; 34 percent to 64 percent of large employer plans; and 40 percent to 67 percent of individual insurance coverage will *not* be grandfathered by the end of 2013.[25] This estimate is based on changes that the regulation explicitly disqualifies. It does not take into account changes that the regulation does not deal with and that may be found disqualifying, perhaps by "administrative guidance."

So, for employers and employees, Obamacare's operative principle is simple: You can keep your health plan…maybe, well, not really, to some extent, in certain circumstances, for awhile.

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24. It should also be noted, however, that Section 1251(d), restated in Section 147.140 (f) of the regulation, stipulates that any change in a collective bargaining agreement to change the terms of coverage to comply with the PPACA does not constitute a termination of the collective bargaining agreement. This implies that changes other than to comply with the PPACA would in effect be a termination of the collective bargaining agreement and thus put the health coverage under the same standard as other plans for determining whether it is grandfathered. The preamble to the regulation, however, states that union plans can make changes and retain their grandfather status.
25. *Federal Register* Vol. 75, p. 34,553. The Administration estimates that the change in the regulation made on November 17 permitting a change in issuer will "result in a small increase in the number of plans retaining their grandfathered status…" *Federal Register* Vol. 75, p. 70,118.

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