



March 27, 2019

The Honorable R. Alexander Acosta  
Secretary, Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

The Honorable Alex Azar  
Secretary, Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

The Honorable Steven Mnuchen  
Secretary, Department of Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220  
RE: CMS-9923-NC  
*Submitted Electronically via [www.regulations.gov](http://www.regulations.gov)*

Dear Secretaries Acosta, Azar and Mnuchen,

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefits specialists. We are pleased to have the opportunity to provide comments in response to your request for information titled "Request for Information Regarding Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage" published in the *Federal Register* on February 25, 2019.

The members of NAHU work daily to help millions of individuals and employers of all sizes purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health-plan purchasing and administration and the real-world challenges employers face therein. NAHU members are exceptionally well versed on the coverage options that businesses of all sizes and individual consumers, have available to them, as well as the plan choices they ultimately make. We hope that with this response we can share our expertise in health insurance markets with your Departments as it relates to grandfathered group health insurance plans.

A representative group of brokers who work exclusively in the small and large employer group marketplaces serving employer group clients located in all 50 states have contributed their insight about the prevalence of grandfathered group health plans, the issues associated with maintaining grandfathered coverage, and the reasons why certain businesses and employees elect to keep health insurance coverage under a grandfathered plan. We have provided direct answers to the 14 questions in your request for information, and we have also submitted additional information about a related and time-sensitive issue that NAHU members view as more urgent, the long-term status of "grandmothered plans."



## **Responses to Part A Questions**

1. What actions could the Departments take, consistent with the law, assisting group health plan sponsors and group health insurance issuers to preserve the grandfathered status of a group health plan or coverage?

If the Trump Administration were to relax current restrictions on changing the level of employer contributions and cost-sharing caps, it would be very beneficial to group health plan sponsors that offer grandfathered coverage. It would also help ease the administrative burden for group health insurance issuers that allow business owners to renew grandfathered plan coverage options.

Currently, businesses owners and issuers who offer grandfathered coverage only may raise fixed amount cost-sharing other than co-pays (for example, a deductible) by more than medical inflation plus 15 percent cumulative over the life of the plan. The 15 percent over the life of the plan restriction, with the plan end date an unknown, is administratively cumbersome. A more functional limitation would be a set percentage of allowable increase annually.

Also, under the existing rules, group plan sponsors of grandfathered coverage may not lower the employer contribution percentage rate by more than five percent for any group of covered persons (cumulative over the life of the plan). This requirement has nothing to do with the content of the plan design and simply reflects the balance of employee versus employer payments for premiums. So in NAHU's view, either relaxing this provision of the rules or eliminating it would in no way violate the original intent of the grandfathered plan design. However, relaxing the requirement or ideally, eliminating it would help employers who are experiencing business changes or an economic downturn tremendously, and allow them to maintain their current plan options for employees. Since issuers do not typically track the level of employer contribution changes over time, relaxation or elimination of this requirement would also help them reduce administrative costs.

2. What challenges do group health plan sponsors and group health insurance issuers face regarding retaining the grandfathered status of a plan or coverage? Does any particular requirement(s) for maintaining grandfathered status create more challenges than others, and if so, how could the requirement(s) be modified to reduce such challenges?

For small group plan sponsors and those entities that offer fully insured coverage, a significant issue has been the willingness of the issuer to continue to renew grandfathered plans. If issuers in a service area will no longer cooperate, then the vast majority of business owners have no other choice than to terminate their grandfathered plan option, as self-funding is not typically a realistic option for groups of this size and resource level. Other challenges include the limitations on employer contribution level



changes and cost sharing, premium increases for the grandfathered plan and possible participation issues based on employee plan elections, particularly if the employer is considering offering alternative plan options through a different issuer.

3. For group health plan sponsors and group health insurance issuers that have chosen to preserve the grandfathered status of their plans or coverage, what are the primary reasons for doing so? If the grandfathered status is preserved so that particular PPACA requirements will not apply to the plan, please specify the specific PPACA requirements not included in the grandfathered plan and explain any related concerns.

NAHU reached out to members representing tens of thousands of small and large business owners across all states to gather information for this request for information. Unfortunately, our data collection efforts yielded far fewer real-life examples of grandfathered plans than the national survey data offered by the Kaiser Family Foundation would suggest. Due to the limited examples we found, we were not able to identify a primary reason most group health plan sponsors cite as their rationale for maintaining a grandfathered health plan. Reasons most commonly given include: (1) concerns about the eventual expansion of rules similar to the IRC 105(h) nondiscrimination rules to all fully insured group plans - the group either maintains different benefit offerings or contribution strategies for different classes of employees or since the group is small, or has lower take-up of its employee benefit offerings than is typical, concern exists that the group would fail discrimination testing due to participation requirements. It is important to note that due to IRS Notice 2011-1, the ACA's provision to expand the IRC 105(h) nondiscrimination rules to all fully insured group plans is not enforced; (2) the presence of one or more collective bargaining agreements; (3) the grandfathered plan option includes a more robust network or benefit package or both; (4) the grandfathered plan is a qualified high-deductible plan option, so it is not much different from a non-grandfathered equivalent; (5) desire to avoid the ACA's age rating requirements and the way these requirements have affected composite rating; (6) a key party in the business likes the plan option and wants to keep it.

4. What are the reasons why participants and beneficiaries have remained enrolled in grandfathered group health plans if alternatives are available?

Employees generally report a high degree of satisfaction with their specific group benefit coverage choice and they often avoid switching their plan option from year-to-year if their current choice remains available. This trend of employees sticking with what is familiar applies to both grandfathered plan choices and other types of coverage offered by group health plan sponsors.

5. What are the costs, benefits, and other factors considered by plan sponsors and health insurance issuers when considering whether to retain a grandfathered status of their plans or coverage?



For employers, the cost of the premiums and also the issue of limits to changing the structure of their employer premium contributions, appear to be the most significant factors. Fully-insured issuers have administrative costs associated with maintaining grandfathered plan offerings, including the cost of separating risk pools and monitoring employer-premium contribution levels that may come into play when deciding whether to continue to allow group health plans to renew their grandfathered plan options.

6. Is preserving grandfathered status important to group health plan participants and beneficiaries? If so, which participants and beneficiaries benefit the most and which, if any, are affected detrimentally by the employer offering grandfathered group health plan coverage?

NAHU members work with group health insurance beneficiaries daily on all kinds of issues related to benefit plan claims and administration. They report almost uniformly that group health plan beneficiaries are largely unaware of the status of their health plan, even though participants receive an annual grandfathered plan notice. The terminology is meaningless to them, and there is no type of plan beneficiary that routinely expresses any point of view about whether their grandfathered plan option is more or less beneficial to them than other potential coverage options.

That said, employees generally like benefit stability and grandfathered plans and typically resist any plan option changes or any elimination of plan options, particularly if the replacement options result in a significant cost increase. Furthermore, employers with groups of employees covered under multiple collective bargaining agreements appear to be more likely than other employers to maintain a grandfathered plan option. Due to the rigidity of a grandfathered plan's design parameters, the maintenance of such a plan option could help simplify benefit negotiations.

7. What is the typical change in benefits, employer contributions or employee organization contributions, and cost-sharing requirements that cause a grandfathered group health plan or grandfathered group health insurance coverage to lose its grandfathered status?

The most typical change that would result in the loss of grandfathered status is a necessitated change in the amount the employer can contribute to employee plan premiums. Employers with changing economic outlooks may need to alter their contribution structure to be able to keep offering benefits. Additionally, the limits on cost-sharing changes, including deductibles, can cause premiums on a grandfathered plan to soar out-of-reach to both the employer and the covered employees.

8. Do the grandfathered health plan disclosure requirements in the November 2015 final rules provide adequate, useful, and timely information to plan participants and beneficiaries regarding grandfathered status? If not, how could the disclosure be improved?



NAHU members and their clients have no concerns with the content of the required grandfathered plan notice. However, we note that like all required health plan notices, the grandfathered plan notice is often ignored and is virtually meaningless to most employees. NAHU strongly backs the concept of consolidating all ERISA disclosures into a single notice to be distributed annually. Currently, the broad range of notice distribution due dates, as well as various delivery mechanisms and formats for disclosure is confusing to both employers and employees alike. Companies often make compliance mistakes in this area unintentionally, and employees do not benefit from a multitude of paper notices provided at different points during the plan year.

Similarly, NAHU supports a complete modernization of the ERISA electronic disclosure rules. These distribution requirements were drafted and finalized over a decade ago. Since then, technology has changed significantly, both for consumers generally and for employee benefit plans. An update of the ERISA electronic distribution guidance would benefit all stakeholders. Allowing more efficient use of online distribution resources and employee benefit administration systems will reduce the costs of mailing, distribution, and printing that many businesses endure. Enhanced online delivery methods would also be advantageous for beneficiaries by making critical documents easy to find and easy to search when needed, which can be much more meaningful than often discarded printed notices.

We also urge you consider making recommendations for more flexibility in the current work-related access to technology requirements, perhaps through the use of a "reasonably accessible" standard whereby any employee could acknowledge through online enrollment that disclosure documents provided online are reasonably available. Furthermore, NAHU encourages the modernization of rules for updating benefit plan documents stored online and the accommodation for apps to store and access notices and plan documents. NAHU suggests an update to the types of technology that constitute a valid address for electronic delivery notifications, such as phone numbers for text messages and social media accounts. Also, our membership supports the use of an opt-out standard relative to electronic delivery so that modern processes will be the default and we urge the Administration to consider more flexibility in timing so employers can customize and tailor to their communication efforts appropriately to different workforces. Finally, if the Administration considers updating grandfathered plan notification requirements and other ERISA disclosures too, then NAHU strongly suggests harmonizing both Department of Labor and Department of Treasury requirements, so that employers and employees are not subject to different conditions based on the agency requiring the disclosure.

## **Responses To Part B Questions**

1. Other than the Kaiser Family Foundation's "Employer Health Benefits Annual Survey," and the MEPS-IC survey, what data resources are available to help the Departments better understand how many group health plans and group health insurance policies are considered grandfathered and how many participants and beneficiaries are enrolled in such plans and coverage?



NAHU members from around the country who work with employer groups of all sizes on plan design and administration report far lower incidence rates of grandfathered plan options than what is shown in the Kaiser Family Foundation's survey. As such, NAHU suggests that the Trump Administration conduct other research to accurately determine grandfathered plan enrollment, including reaching out to issuers and third-party administrators of self-funded plans, perhaps through professional organizations. We would be happy to work with you on survey questions for NAHU members to conduct more formalized research.

During our data collection efforts, NAHU members offered two interesting insights that may be helpful to the Administration moving forward. One, it is much easier for self-funded plans to maintain a grandfathered plan, should they choose to do so, as all related decisions are within the control of the group health plan sponsor, rather than sharing decision-making authority with a health plan issuer. While employer size is not the only criteria as to whether a business should self-fund its health benefits plan, it is an important criterion, and the larger an employer is, the higher the likelihood that its health plan options will be self-funded. Given the discrepancy between the experience of NAHU members concerning the frequency of grandfathered coverage and the available survey data results, some of our members theorize that mega-employers with self-funded grandfathered plan options may be responsible for a disproportionate share of the total grandfathered plan coverage reported through survey data.

The second insight is that employer plan sponsors may not be accurately reporting their plan status. NAHU members who work in the small group market in states and regions that still have grandmothers plans available report that large numbers of their employer clients offer grandmothers coverage. These employers may be confused about the differences between the two plan types and erroneously report that they have grandfathered coverage instead. Furthermore, our members indicate that sometimes employer clients that previously had a grandfathered plan but had to drop it due to the decision of their issuer to cease offering grandfathered small group coverage years ago may erroneously still believe that they have a "non-ACA" policy in place. Many business owners, particularly those with limited or no human resources staff, delegate virtually all health plan administrative functions to their health insurance agent and are less versed on health plan terminology. Employer plan sponsors that fall into this category may unintentionally misreport their plan status in survey results.

2. What are the characteristics (for example, plan size, geographic areas, or industries) of grandfathered group health plans and the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage? Do grandfathered group health plans or the plan sponsors and group health insurance issuers that have chosen to retain the grandfathered status of their plans or coverage share common characteristics?



As we noted in our response to Part A, Question 2, NAHU reached out members representing tens of thousands of small and large business owners across all states to gather information for this request for information. Unfortunately, our data collection efforts yielded far fewer real-life examples of grandfathered plans than the national survey data offered by the Kaiser Family Foundation would suggest. Due to the limited cases we found, it is hard to identify common characteristics of grandfathered group health plan sponsors definitively. One factor we did observe is the apparent limited or lack of availability of fully-insured issuers willing to renew grandfathered plan policies in specific states and regions. As such, any grandfathered plans in those states and areas would most likely be self-funded.

Entities like municipalities dealing with collective bargaining agreements and multiple unions seem more likely to retain a grandfathered plan option than other employers, and qualified high deductible plan options seem to be more likely to be a grandfathered plan option than different benefit designs. A final factor we noticed is that employers that fully-fund employee plan premiums and have a culture of providing rich benefit packages may be slightly more inclined to maintain a grandfathered plan option than other entities, since the employer contribution restrictions would not be as significant of consideration as they are for other types of group health plan sponsors.

3. Do group health plan sponsors and group health insurance issuers that have chosen to retain grandfathered status for certain plans, benefit packages, or policies also offer other plans, benefit packages, or policies that are not grandfathered? If so, why?

Yes, in all cases reported through our outreach to NAHU members nationally about this topic, the involved employer group plan sponsors offer one or more plan option in addition to their grandfathered policy. In the case of fully-insured policies, the issuers involved require an alternative option as a condition of renewing the grandfathered coverage. For employers subject to the employer shared responsibility requirements, an alternative plan choice might be needed for the employer to eliminate potential fine liability.

4. What are the typical differences in benefits, cost-sharing, and premiums (including employer contributions, employee organization contributions, and employee contributions) associated with grandfathered group health plans and grandfathered group health insurance coverage compared to non-grandfathered group health plans?

Cost-sharing requirements are typically lower in a grandfathered plan compared to other plans due to market shifts and the cost-sharing suppression requirements. Consequently, premium costs may be higher depending on the benefit design of the grandfathered plan. Plan networks are often more robust in grandfathered plan options, but all of this is highly dependent on what the employer selects as its alternative coverage options.



5. How many group health plan sponsors and group health insurance issuers are considering making changes to their plans or coverage over the next few years that are likely to cause loss of grandfathered status under the November 2015 final rules? How many individuals would be affected?

NAHU did not gather enough data about grandfathered plans currently in existence to be able to answer this question in any way other than anecdotally. Based on the information provided by our membership, most employers that may have wanted to maintain a grandfathered plan option were precluded from doing so by their health insurance issuer early on. These employer plan sponsors are likely to have a "grandmothered" plan option in place today instead. If the transition relief for grandmothered plans is not extended indefinitely, the sudden imposition of age rating requirements for those small employer group plan sponsors will cause price shock and could result in loss of employer-sponsored coverage for millions of people in the states that still allow grandmothered policies to exist.

6. What impact does grandfathered group health plans and grandfathered group health insurance coverage have on the individual and small group market risk pools?

Due to the small numbers reported through our membership about the existence of grandfathered plans, particularly in the small employer market and in certain states, NAHU believes that grandfathered plans have very little if any impact on the individual and small group market risk pools. If the Trump Administration wants to take additional steps to improve the health of the risk pools in the individual and small group markets, NAHU believes that further economic incentives to allow states to create reinsurance pools to serve those markets would be very consequential.

### **Grandmothered Plans**

A related issue to grandfathered plans is the small group transitional policies known colloquially as "grandmothered" plan. NAHU truly appreciates the Trump Administration's recent action to extend transitional relief for "grandmothered" plans through the end of 2020. We believe it will be helpful for small-group-market consumers in many states, as 32 states still allow insurers to offer grandmothered plans. Our members who provided guidance on the official questions outlined in your RFI indicated that they are far more likely to have employer clients that offer grandmothered coverage than clients with an active grandfathered plan. For example, three different health insurance agencies with extensive business operations in western Pennsylvania, Ohio, and Indiana, reported that between 60-90 percent of their small group business involved at least one grandmothered plan option. Between just these three entities, that is approximately 1000 small businesses. These same three agencies reported no clients with grandfathered group health insurance coverage.

While an additional year of relief is most welcome, we note that for the past five years, business owners and their employees who like their grandmothered coverage have been continuously in limbo, with the



long-term status of their preferred coverage option in question. Unless Congress changes all of the underlying federal health reform statutes concerning market requirements and HHS fully implements all those changes by the time the new relief expires in 2020, millions of individual consumers and employees of small businesses who are covered by grandfathered plans will be unable to renew policies that are serving them well. These individual and business consumers will also likely face a massive premium rate increases when they go to purchase alternative coverage. If the uncertainty of plan options and the potential for significant price increases ahead is weighing on individual and small business consumers of health insurance, it may cause even more market instability. To prevent this, NAHU recommends that CMS build on its recent extension of “grandmothered plan” relief and formally state that the federal transition policy will remain in effect until further notice and the Trump Administration will not rescind it until comprehensive ACA statutory improvements are both law and fully implemented.

### **Conclusion**

The members of NAHU sincerely appreciate the opportunity to provide information to you about grandfathered and grandmothered group health plans. If you have any questions about our comments, or if NAHU can be of assistance as you move forward, please do not hesitate to contact me at either (202) 595-0787 or [jtrautwein@nahu.org](mailto:jtrautwein@nahu.org).

Sincerely,

A handwritten signature in black ink, reading "Janet Stokes Trautwein". The signature is fluid and cursive, with the first name "Janet" being the most prominent.

Janet Stokes Trautwein  
Chief Executive Officer  
National Association of Health Underwriters