



August 27, 2010

*Submitted Electronically*

The Honorable Kathleen Sebelius  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

**Re: Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. 37188 (June 28, 2010)**

**File Code: OCIO-9994-IFC**

Dear Madam Secretary:

The Food Marketing Institute (FMI) appreciates the opportunity to respond to the interim final regulation (IFR) implementing the prohibition of lifetime limits and restrictions on annual limits that apply to group health plans and health insurance coverage in the group market under provisions of the Patient Protection and Affordable Care Act<sup>1</sup> (PPACA). In particular, FMI wishes to comment on the program to waive the restricted annual limits in certain circumstances, including in the case of limited benefit or "mini-med" plans, that the Department of Health and Human Services (HHS) intends to establish. FMI is submitting these comments to HHS with the understanding that they will be shared with the Department of Labor (DOL) and the Department of the Treasury (Treasury).

FMI is the national trade association that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies—food retailers and wholesalers—in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of \$680 billion represents three quarters of all retail food store sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms, and independent supermarkets.

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<sup>1</sup> P.L. 111-148.

The food retail and wholesale industry ranks among the largest industries in our country, providing nearly 4 million wage-and-salary jobs.<sup>2</sup> These workers are employed in a wide range of settings from small corner stores to large supercenters and million square foot distribution centers. The industry provides a diverse range of employment opportunities and requires a combination of full-time and part-time workers to operate. For many employees, the grocery industry is their entry or re-entry point into the workforce. The industry has a constantly changing workforce at entry level positions and is also reliant on seasonal employees. Part-time employees in the industry include students, retirees and others with unique training or scheduling needs. Many Americans first enter the workforce through the grocery industry. Young workers between the ages of 16-24 held nearly a third of grocery jobs which the Bureau of Labor Statistics attributes to "the large number of jobs in this industry open to young workers who have little or no work experience."<sup>3</sup>

Given the nature of this workforce, it is vital that food retailers have the flexibility to offer their employees a variety of benefit options that meet the needs of both their long-term and temporary workers. Limited benefit plans are a key tool that food retailers use to provide affordable health coverage to their part-time or temporary employees during their tenure at the company. Immediately eliminating the ability to offer these plans before the health care exchanges are available in 2014 will result in the loss of health coverage for many part-time and temporary employees in the retail food industry.

We were pleased that the IFR provides for the "Secretary of Health and Human Services to establish a program under which the requirements relating to restricted annual limits may be waived if compliance with these interim final regulations would result in a significant decrease in access to benefits or a significant increase in premiums." In particular, we welcome the fact that the preamble to the IFR implicitly recognizes that limited benefit plans play an important role in providing certain individuals access to needed health services in an affordable manner. As you work to create this waiver program, FMI encourages the following considerations be included:

- Self-funded, group health limited benefit plans should be eligible for a waiver in the same manner as insured "mini-med" policies;
- For purposes of assessing whether compliance with the restrictions would result in a significant decrease in access to benefits or a significant increase in premiums, self-funded group health plan premiums should be determined based on the total cost of coverage, including all employee and employer contributions to pay for the coverage;
- Multiemployer plans should be permitted to provide annual benefit limits under the waiver program that are not less than the plan's annual limit (or what was previously the plan's lifetime limit) in place on March 23, 2010, in recognition of the fact that the limits are the

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<sup>2</sup> Food Marketing Institute, Supermarket Facts <[http://www.fmi.org/facts\\_figs/?fuseaction=superfact](http://www.fmi.org/facts_figs/?fuseaction=superfact)>.

<sup>3</sup> Bureau of Labor Statistics, U.S. Department of Labor, Career Guide to Industries, 2010-11 Edition, Grocery Stores <<http://www.bls.gov/oco/cg/cgs024.htm>>.

product of intense bargaining by employer and union representatives as to the maximum health benefit levels the parties determine are affordable given the wage, pension and other obligations that must be covered out of the overall wage package;

- A timely-filed waiver application should delay the effective date of the annual limit restrictions so that the plan is not deemed to violate the restrictions if the Secretary does not rule on the application in sufficient time for the plan to comply if the waiver application is denied;
- Approved waivers should be valid for the duration of the period before the establishment of the health care exchanges and should not have to be renewed on a yearly basis; and
- New employees and new enrollees should be allowed to participate in any plan approved in the waiver process.

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FMI appreciates the opportunity to submit comments on this important matter and we are available to discuss any impact that these regulations will have on our members. In conclusion, FMI believes that it is vital that HHS, DOL and Treasury provide as much flexibility as possible to help ensure that those that wish to keep the coverage they currently have are able to do so.

Sincerely,



Erik R. Lieberman  
Regulatory Counsel