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# THE IMPLEMENTATION OF THE AFFORDABLE CARE ACT'S PROHIBITION OF PRE-EXISTING CONDITION EXCLUSIONS

Allison Cohen\*

Prohibiting pre-existing condition exclusions for children under nineteen is one of the significant reforms in the Patient Protection and Affordable Care Act (PPACA).<sup>1</sup> This provision took effect after September 23, 2010.<sup>2</sup> On June 28, 2010, the Department of Health and Human Services, the Department of Treasury (Internal Revenue Service), and the Department of Labor (Employee Benefits Security Administration) published interim final regulations implementing the PPACA provision on disallowing pre-existing condition exclusions for dependents.<sup>3</sup>

The regulations apply to new group plans (including self-insured plans) and new individual health insurance plans.<sup>4</sup> They also apply to "grandfathered group health plans and group health insurance coverage but do not apply to grandfathered individual health insurance coverage that was in existence on March 23, 2010."<sup>5</sup>

The interim final regulations clarify that, until the PPACA rules on pre-existing condition exclusions take effect, the Health Insurance Portability and Accountability Act (HIPAA) rules related to such exclusions apply. The regulations reference the definition of pre-existing condition exclusion used in HIPAA: "a limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the date of enrollment for the coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that date."<sup>6</sup> The PPACA amended Section 2704 of the Public Health Service Act (PHSA) to prohibit such pre-existing condition exclusions both for "specific benefits associated with a preexisting condition" and "complete exclusion from such plan or coverage, if that exclusion is based on a preexisting condition."<sup>7</sup>

The provision protecting children from exclusion from health coverage due to pre-existing conditions addresses a critical gap in coverage. It represents

an important requirement imposed by the PPACA to prohibit denying coverage to a segment of the population that otherwise would be excluded. The PPACA requires coverage of adults with pre-existing conditions as well.<sup>8</sup> The provision applies to group health plans and health insurance issuers offering group or individual coverage and takes effect in 2014.<sup>9</sup>

Initially, there was some confusion over how the provision preventing exclusions of children with pre-existing conditions would apply to grandfathered plans.<sup>10</sup> The language of the provision prohibits pre-existing condition exclusions related to children under 19, and therefore, would apply to such exclusions on grandfathered plans. The language alone essentially makes the PPACA's changes to "the provisions of section 2704 of the Public Health Services Act" effective as to "enrollees under 19 years of age" "6 months after the date of enactment of this Act."<sup>11</sup>

The Amendment to section 2704 provides that "a group plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage."<sup>12</sup> Therefore, the two provisions combined can be read to prevent plans from imposing preexisting condition exclusions on children under nineteen, beginning six months after enactment. HHS has clarified that grandfathered child-only plans issued on the individual health insurance market are exempt from these regulations.<sup>13</sup> Despite this exemption, prior law and provisions in the PPACA prohibit these plans from cancelling or choosing not to renew coverage if a child with a pre-existing condition is already covered by the grandfathered plan.<sup>14</sup>

The precise language of the PPACA does not require plans to guarantee coverage to children with preexisting conditions at this point.<sup>15</sup> In fact, the provision does not set up a universal requirement that all group, grandfathered, and individual plans that fall within the scope of this directive cover dependents with preexisting conditions. A plan would not be subject to this requirement if it does not offer any dependent coverage, since dependent coverage is not required by the provision or by the PPACA. If no dependent coverage is offered, it does not need to be offered to dependents with preexisting conditions.<sup>16</sup>

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The PPACA provision still provides critical coverage for a population that was often denied coverage, despite having members with health conditions and economic dependencies that increased their need. At least 20,000 children with preexisting conditions whose applications for coverage were formerly denied will now have health insurance.<sup>17</sup> It is a moral victory of health reform that such a provision was passed and will immediately take effect.

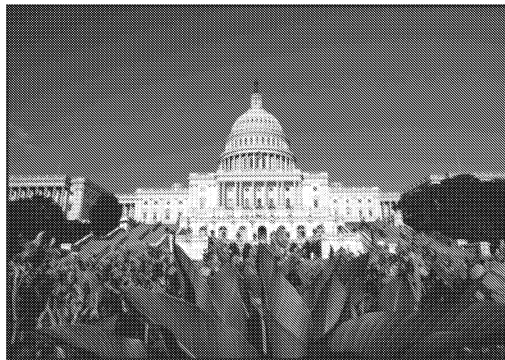
Beginning in 2014, the PPACA also guarantees issue, bans preexisting condition exclusions and prohibits group health plans and issuers of group and individual health insurance from establishing rules for eligibility (including continued eligibility) based on health status-related factors, including health status, medical condition, medical history, and genetic information.<sup>18</sup>

To make these significant and critical modifications, while preserving components of the current health insurance system, Congress had to include a "Requirement to Maintain Minimum Essential Coverage."<sup>19</sup> This PPACA requirement stipulates that, except in certain specified circumstances, individuals acquire coverage for themselves and dependents or pay a monetary penalty.<sup>20</sup> One of the main arguments advanced by plan issuers against guaranteeing coverage by law is that it creates an adverse selection problem if it is not offset by a requirement to purchase health insurance.<sup>21</sup> If health insurance is guaranteed, individuals will tend only to purchase insurance when necessary, such as when long term care or chronic illness requires it. This possibility complicates the process by which issuers manage the risk pool to sustain their businesses. By requiring the purchase of health insurance, the risk pool is enlarged to include more healthy individuals, which results in lower premiums for all beneficiaries.<sup>22</sup>

Thus, the minimum coverage requirement was a necessary component of the PPACA's regulatory scheme. The pre-existing condition exclusion provisions, which undeniably address an important need, had to be paired with a requirement to maintain minimum coverage. The requirement creates sustainable and responsible policy choices in light of the adverse selection problem and forges much-needed compromise among stakeholders to pass comprehensive health care reform, including substantial reform measures directed toward the insurance industry.

For similar reasons, certain exceptions had to be made to the provision prohibiting preexisting condition exclusions for children under nineteen, since it is effective prior to the minimum coverage requirement.

One exception to the provision is if the dependent has an option of obtaining coverage through his or her own employer-sponsored health plan.<sup>23</sup> Issuers in the individual health insurance market are permitted to restrict enrollment of children under nineteen to specific open enrollment periods consistent with state law.<sup>24</sup> Additionally, if states choose to impose open enrollment requirements, they are not preempted by federal law.<sup>25</sup> Recently, the Secretary of HHS has clarified these exceptions.<sup>26</sup> Specifically, insurers may not discriminate against children with pre-existing conditions by enrolling only healthy children for coverage outside the open-enrollment periods.<sup>27</sup>



Contrary to the objectives of the provision, some insurance companies have decided to stop selling child-only policies altogether. Since this practice is not currently against federal law, the Secretary of HHS has encouraged states to protect and promote options for children with pre-existing conditions.<sup>28</sup> For instance, California passed a law that would prohibit insurers that fail to offer child-only coverage from providing policies on the individual market for a five-year period.<sup>29</sup> Other states have allowed middle income families to buy into CHIP at "a full but fair premium." CMS will work with states to adopt this option.<sup>30</sup> The PPACA also created the Pre-Existing Condition Insurance Plan (PCIP), which will provide another insurance option "for eligible children with pre-existing conditions who have been uninsured for at least six months."<sup>31</sup> A few plans are offering to "bridge the gap" in coverage that may occur for some dependents if they turn 26 before 2014.<sup>32</sup>

Although the PPACA's ban on pre-existing condition exclusions for children includes some exceptions, the provision addresses a critical coverage gap and represents an important reform made by this comprehensive health care legislation. The provision seems on track to achieve its purpose of covering a substantial number of dependents with preexisting conditions. Ultimately, the provision marks a

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significant victory for health reform and a step toward ensuring that all Americans can obtain health coverage irrespective of health status.

<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, H.R. 3590, 124 Stat. 119 (2010), [hereinafter P.L. 111-148] (amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter P.L. 111-152]).

<sup>2</sup> Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions and Patient Protections, 75 Fed. Reg. 37188, 37190 (June 28, 2010) (to be codified at 45 CFR Pts. 144, 146, and 147) [hereinafter 75 Fed. Reg.], (this applies to group health plans and group health insurance coverage and is extended to individual insurance coverage).

<sup>3</sup> *Id.* at 37188.

<sup>4</sup> HINDA CHAIKIND & BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R41220, PREEXISTING EXCLUSION PROVISIONS FOR CHILDREN AND DEPENDENT COVERAGE UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPPPACA), 1 (July 28, 2010) [hereinafter CRS REPORT].

<sup>5</sup> Office of Consumer Information and Insurance Oversight, US Dep't of Health and Human Services, "Questions & Answers on Enrollment of Children Under 19 Under the New Policy that Prohibits Pre-Existing Condition Exclusions," available at <http://www.hhs.gov/ociio/regulations/children19/factsheet.html>.

<sup>6</sup> 75 Fed. Reg., *supra* note 2, at 37190.

<sup>7</sup> *Id.*

<sup>8</sup> P.L. 111-148, *supra* note 1, §10103(e) (2010) (further amended by §2301 of P.L. 111-152, *supra* note 1), cited in CRS REPORT, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> Lynn Shapiro Snyder, BNA's Health Care Policy Report, (May 3, 2010) [hereinafter Snyder Health Care Policy Report].

<sup>11</sup> P.L. 111-148, *supra* note 1. *See generally id.*

<sup>12</sup> *Supra* note 1, § 2704(a)

<sup>13</sup> *Questions and Answers on Enrollment of Children Under 19 Under the New Policy that Prohibits Pre-Existing Condition Exclusions*, HHS.gov, (Oct. 13, 2010), available at <http://www.hhs.gov/ociio/regulations/children19/factsheet.html>.

<sup>14</sup> *Id.*

<sup>15</sup> CRS REPORT, *supra* note 4, at 4.

<sup>16</sup> *Id.*

<sup>17</sup> CRS REPORT, *supra* note 4, at 3 (This figure does not even include those who had to pay higher premiums and be excluded for certain conditions or those who did not apply, realizing they would be denied).

<sup>18</sup> P.L. 111-148, *supra* note 1, § 1201 .

<sup>19</sup> P.L. 111-148, *supra* note 1, §1501 ("Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter: "Chapter 48 – Maintenance of Minimum Essential Coverage, Sec. 5000A. Requirement to maintain minimum essential coverage. (a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.— An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."). *See also Focus on Health Reform: Summary of the New Health Reform Law*, KAISER FAMILY FOUNDATION, 1 (last modified March 26, 2010) (This provision will "[r]equire U.S. citizens and legal residents to have qualifying health coverage. Those without coverage pay a tax penalty of the greater of \$695 per year up to a maximum of three times that amount (\$2,085) per family or 2.5% of household income. The penalty will be phased-in according to the following schedule: \$95 in 2014, \$325 in 2015, and \$695 in 2016 for the flat fee or 1.0% of taxable income in 2014, 2.0% of taxable income in 2015, and 2.5% of taxable income in 2016 . Beginning after 2016, the penalty will be increased annually by the cost-of-living adjustment. Exemptions will be granted for financial hardship, religious objections, American Indians, those without coverage for less than three months, undocumented immigrants, incarcerated individuals, those for whom the lowest cost plan option exceeds 8% of an individual's income, and those with incomes below the tax filing threshold (in 2009 the threshold for taxpayers under age 65 was \$9,350 for singles and \$18,700 for couples).").

<sup>20</sup> *Id.*

<sup>21</sup> P.L. 111-148, *supra* note 1, § 1501(a)(2)(G), as amended by § 10106. *See also* CRS REPORT, *supra* note 3, at 3 n.14

<sup>22</sup> P.L. 111-148, *supra* note 1, § 1501(a)(2)(F).

<sup>23</sup> P.L. 111-152 *supra* note 1, § 2301(a)(4)(B)(ii), cited in CRS REPORT, *supra* note 4, at 4.

<sup>24</sup> Letter from Kathleen Sebelius to Jane L. Cline, President, National Association of Insurance Commissioners, (Oct. 13, 2010), available at <http://www.hhs.gov/news/press/2010pres/10/20101013a.html>.

<sup>25</sup> CRS REPORT, *supra* note 4, at 3.

<sup>26</sup> Letter from Kathleen Sebelius to Jane L. Cline, President, *supra* note 24.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> CRS REPORT, *supra* note 4, at 4.