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The Battle Has Just Begun

The battle to prevent passage of the Obamacare legislation ended when it was enacted on March 23, 2010. Now the battle turns to how that legislation will be implemented.

Kevin Hassett, in his August 1, 2010 editorial on Bloomberg.com, reported that Obamacare “creates 68 grant programs, 47 bureaucratic entities, 29 demonstration or pilot programs, six regulatory systems, six compliance standards and two entitlements.”

Obamacare will now be handed to these bureaucratic entities to write implementing regulations. Now is the time for those concerned with the encroachments of the federal government to fight those encroachments at the regulatory level. Americans for Limited Government Research Foundation is committed to monitoring regulations from federal agencies in order to prevent the Obama Administration from making an already bad piece of legislation worse through the regulatory process.

How to Prevent Bad Regulations

The legal framework to promulgate regulations

requires significant time. Several statutes including the Administrative Procedures Act, the Paperwork Reduction Act, and others govern the process and structure of

rulemaking proposals and final regulations.

Under the Administrative Procedures Act the public generally must be given the opportunity to comment on regulatory proposals before the agency finalizes a regulation. The agency publishes a “Notice of Proposed Rule Making” for public comment, reviews those

comments, and later publishes a final rule that explains how the agency took the public comments into consideration in its final decision. In its explanation the agency must detail the options it considered and why it choose the one it did. Every comment must be given a reasoned response.

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Regulations We are Watching

How to Comment on a Regulation

1. Go to www.regulations.gov
2. Search for a regulation by entering its RIN number into the search field.
3. Choose a regulation from the search results list
4. Click "Submit a Comment" which is located towards the top of the page.
5. Fill out the comment form

Glossary of Agency Abbreviations

- CMMS:** Centers for Medicare and Medicaid Services
- DOL:** Department of Labor
- EBSA:** Employee Benefits Security Administration
- HHS:** Department of Health and Human Services
- IRS:** Internal Revenue Service
- OCIIO:** Office of Consumer Information and Insurance Oversight

Dependent coverage for adult children under age 26

One of the provisions in the Obamacare legislation is a requirement that group health plans that provide dependent coverage of children make that coverage available until age 26. Instead of defining dependents in a logical fashion, such as using traditional factors of dependency, the Secretary instead defined a dependent as any child under age 26.

10% Excise Tax on Tanning Salons

Obamacare created a new 10% tax on tanning salons. This regulation, creates an onerous tax reporting mechanism for the owners of tanning salons when paying the new tax.

Grandfathered Health Plans Under Obamacare

Certain health insurance coverage and group health plans that existed when Obamacare was enacted are grandfathered (exempted) from some requirements of the Act. However, the Act has left to the regulators the decision to determine when changes to a "grandfathered" plan are significant enough for it to be subject to the new Obamacare regulations. This regulation defines a "Grandfathered Health Plan" and establishes rules to determine what changes in such a plan will cause it to lose its grandfathered classification.

Medicare Part B Payment Policies Under Physician Fee Schedule

A fairly lengthy rule (670 pages), this regulation would make changes to the physician fee schedule and other payment policies under Medicare Part B. According to the rule's summary it also addresses "payments under the Ambulance Fee Schedule, Clinical Laboratory Fee Schedule, payments to ESRD facilities, and payments for Part B drugs. Finally, the proposed rule includes a discussion regarding the Chiropractic Services Demonstration program, the Competitive Bidding Program for Durable Medical Equipment and Provider and Supplier Enrollment Issues associated with Air Ambulances."

Preexisting Conditions, Exclusions, Lifetime & Annual Limits, Rescission, & Patient Protections

First, for individuals with preexisting conditions, this set of regulations prohibits exclusion of benefits (for existing enrollees) and complete exclusion from the plan (for those who wish to enroll). These "protections" take effect for plans

RIN 0991-AB66

Agency: DOL-EBSA

Status: The period for public comment ended on August 11, 2010.

RIN 1545-BJ40

Agency: IRS

Status: **Comment Now!** Public comments are being accepted through September 13, 2010.

RIN 0991-AB68

Agency: HHS-OCIIO; IRS; DOL-EBSA

Status: The period for public comment ended on August 16, 2010.

RIN 0938-AP79

Agency: HHS-CMMS

Status: **Comment Now!** Public comments are being accepted through August 24, 2010.

RIN 0991-AB69

Agencies: HHS-CMMS; IRS; DOL-EBSA

Status: **Comment Now!** Public comments are being accepted through August 27, 2010.

beginning on or after January 1, 2014, except that it takes effect September 23, 2010 for enrollees under age 19. Second, these regulations generally prohibit insurers from imposing annual or lifetime limits on the value of health benefits. Third, this set of regulations implements, and makes several interpretive clarifications regarding a prohibition on rescinding coverage except for fraud or material misrepresentation. Finally, these regulations implement several patient protections regarding the choice of a physician and access to emergency services.

Medicare - Changes to Hospital Outpatient Prospective Payment System; Changes to Ambulatory Surgical Center Payment System; Changes to Payments to Hospitals for Certain Inpatient Hospital Services and for Graduate Medical Education Costs; Changes to Physical Self-Referral Rules and Related Changes to Provider Agreement Regulations

Makes changes to several hospital payment systems. Implements provisions of the Act to make payments to hospitals for medical education and new limitations on referrals by doctors to hospitals in which they have an investment or ownership interest.

Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act

This set of regulations implements the rules for group health plans and health insurance coverage in the group and individual markets under provisions of the Act regarding preventive health services.

Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act

Implements the requirements under the Act regarding internal claims and appeals and external review processes for group health plans and health insurance coverage in the group and individual markets. The regulations will generally affect health insurance issuers; group health plans; and participants, beneficiaries, and enrollees in health insurance coverage and in group health plans. The regulations provide plans and issuers with the information necessary to comply with the law.

Preexisting Condition Insurance Plan Program

The Act requires the Secretary of Health and Human Services to establish a program to provide temporary insurance to high-risk individuals until Exchanges are established in 2014. This regulation addresses administration of the program, eligibility and enrollment, benefits, premiums, funding, and appeals and oversight rules.

RIN 0938-AP82

Agencies: HHS-CMMS

Status: Comment Now! Public comments are being accepted through 5pm (EST), August 31, 2010.

RIN 0938-AQ07

Agencies: HHS-CMMS; IRS; DOL-EBSA

Status: Comment Now! Public comments are being accepted through September 17, 2010.

RIN 0991-AB70

Agencies: HHS-OCIIO; IRS; DOL-EBSA

Status: Comment Now! Public comments are being accepted through September 21, 2010.

RIN 0991-AB71

Agencies: HHS-OCIIO

Status: Comment Now! Public comments are being accepted through 5pm (EST), September 28, 2010.

The Battle Has Just Begun (continued)

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Our Plan

Step One – **Surveillance:** We are watching news sources and notices in the Federal Register for proposed rules.

Step Two – **Research and Analysis:** Rulemakings tend to be very technical in nature. This necessitates a large amount of background research to ascertain the potential impact of a particular proposal.

Step Three – **Respond** by providing substantive, thorough comments on regulatory proposals and leading the grass-roots response.

Step Four – **Litigation:** We scrutinize rulemakings for compliance with the Administrative Procedures Act and plan to take legal action when it is found that the Department has failed to follow its legal obligations.

Step Five – **Congressional Review Act:** The Congressional Review Act subjects regulations from the Executive Departments and Agencies to review by Congress. After a rulemaking is finalized, a copy of that rulemaking is required to be submitted to Congress. Congress then has 60 legislative days to review the rulemaking and can vote to overturn it. We will work with Members in Congress to insure that “resolutions of disapproval” are introduced to overturn offensive regulations.

Step Six – **Utilize Other Bureaucratic Traps for the Unwary Regulator:** In certain cases, regulations require additional clearance by other federal government offices before becoming effective. Under the Paperwork Reduction Act, an agency must submit an “information collection request” for review to the Office of Management and Budget anytime a regulation makes changes to the type and amount of information that must be reported to the federal government. Unless the Office approves the information collection request, the reporting requirement cannot be enforced by the agency. The analysis and assumptions found in an agency’s information collection request can be challenged again at this point. The Office takes these challenges into consideration when deciding whether to grant the information collection request. Certain parts of the Obamacare legislation require reporting by private entities to the federal government. As such, the information collection request process provides an opportunity to slow down or stop certain parts of these forthcoming regulations.

In some cases, the Small Business Administration must provide certification as to the impact of a regulation on small business.

Some are estimating that 20,000 regulations will be necessary to implement Obamacare. This could represent a decade of work by thousands of government employees. There are a lot of places for them to make mistakes, and we will be watching.

OBAMACARE REG WATCHER

FOR MORE INFORMATION CONTACT:

WILLIAM WILSON, PRESIDENT

AMERICANS FOR LIMITED GOVERNMENT

RESEARCH FOUNDATION

9900 MAIN STREET

SUITE 303

FAIRFAX, VA 22031

703.383.0880

WWW.GETLIBERTY.ORG

