



The
ERISA
Industry
Committee

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Submitted by e-mail to:
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Office of Health Plan Standards and Compliance Assistance
Employee Benefit Security Administration
Room N-5653
U. S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: RIN 1210-AB52

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the request of the Departments of Health and Human Services, Labor, and the Treasury (collectively, the “Departments”) for comments regarding the implementation of the uniform summary of benefits and coverage (“SBC”) provisions under the Patient Protection and Affordable Care Act (“ACA”). This comment addresses both the proposed regulation issued under section 2715 of the Public Health Service Act (“PHSA”) and the proposed template and instructions published concurrently by the Departments.

ERIC’s Interest in the SBC Requirements

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America’s largest employers. ERIC’s members sponsor many of the largest private group health plans in the country. These plans provide health care to tens of millions of workers and their families. Given their size and comprehensive nature, these plans have unique requirements.

ERIC’s members have spent many decades developing benefit summaries that allow employees to make ready comparisons among the employer’s group health plan options. They are, in effect, ahead of the field. These employer-designed benefit summaries are concise and easy to understand; they use vocabulary that matches the terms of the employer’s group health plan, in a format and style that is familiar to the employer’s workforce. In many cases, employer-designed benefit summaries provide

side-by-side comparisons that allow employees to see at a glance the coverage and cost-sharing provisions of each option.

ERIC's members are deeply concerned that the proposed regulations will force them to provide benefit summaries that will frustrate, confuse, and even mislead their employees. The proposed SBC template is designed for insured plans in the individual and small group markets: it is poorly suited to communicate the essential terms of the group health plans offered by large employers. Producing, updating, and distributing the SBC will impose substantial new administrative costs on employers that are already struggling to bear the burdens of escalating health costs and expensive ACA mandates.

ERIC's members believe that group health plans governed by ERISA should not be subject to the SBC requirements at all. Employer group health plans are subject to detailed disclosure rules that already require them to provide much of the same information in summary plan descriptions, summaries of material modification, COBRA continuation coverage notices, and similar documents. Because the content of these disclosure documents is prescribed by statute, all employers provide the same basic information concerning their group health plans, including information about the scope of coverage and cost-sharing requirements.

The ERISA-mandated summaries are written "in a manner calculated to be understood by the average plan participant."¹ The Department of Labor has urged employers to "exercise considered judgment and discretion" when they design benefit summaries "by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan."² ERIC's members have implemented ERISA's disclosure requirements by designing benefit summaries that are tailored to the specific needs of their workforce.

The SBC template developed by the National Association of Insurance Commissioners ("NAIC") is designed to allow individuals and small groups to compare a variety of insurance options offered by unrelated insurers. Because individual insurance policies are not subject to ERISA's comprehensive disclosure requirements, the SBC template provides information that might not otherwise be available in the individual market. The SBC template also gives small employers a tool that they can use to compare the cost and coverage of group policies offered by different insurers.

These considerations do not apply to the ERISA-governed group health plans offered by large employers. Most of these plans are self-insured: the employer does not need to compare group health insurance policies offered by different insurers. Employees who are eligible for coverage under these plans generally have no need to compare the employer's group health coverage with other coverage available from

¹ ERISA § 102.

² 29 C.F.R. § 2520.102-2(a).

external sources: instead, their interest is in comparing the different coverage options offered under the employer's plan.

ERIC's members already spend considerable financial and personnel resources to produce carefully designed benefit summaries that allow their employees to make these essential comparisons much more accurately and efficiently than will any SBC based on a one-size-fits-all standard template.

ERIC recognizes, however, that the requirement to provide an SBC is a statutory requirement, and that the Departments might believe they do not have authority to exempt ERISA-governed group health plans from this requirement. If the Departments take this view, ERIC urges the Departments at least to recognize that they should implement the SBC requirement in a way that minimizes the duplicative and misleading information employers are forced to provide to their employees, and that makes the administrative burdens and expenses associated with the SBC as light as possible. Employers' health care costs increased 7.5% in 2010 and are expected to increase another 8% in 2011 and 8.5% in 2012.³

Employers struggling to preserve jobs and provide comprehensive benefits in a difficult economy cannot afford to waste precious health care resources developing and distributing a document that will have little value to employees and their families and is likely to create confusion.

ERIC's members have a vital interest in ensuring that the SBC provisions do not prevent large employers from designing effective health benefit communications for their employees, or require them to distribute summaries that will needlessly confuse workers and their families. ERIC's members also have a vital interest in ensuring that the SBC requirements do not impose unnecessary administrative burdens and costs on employers.

ERIC offers a number of recommendations below to help achieve these objectives. ERIC's principal recommendations are included in its first two comments:

- the regulations should permit employers to adapt their existing communications to satisfy the SBC requirement rather than force them into a one-size-fits-all template, and
- the regulations should minimize the cost of distributing the SBC by allowing employers to post the SBC on a website.

³ See the annual *Behind the Numbers* report on medical cost trends, based on a survey of approximately 1,700 U.S. employers from 32 industries, which is published by PricewaterhouseCoopers LLP's Health Research Institute. The report is available at <http://www.pwc.com/us/en/press-releases/2011/employer-medical-costs-expected-to-increase.jhtml>.

Summary of ERIC's Comments

ERIC urges the Departments to adopt the following recommendations:

1. Permit employers to design their own SBCs that meet certain requirements as to length, content, and format.
2. Permit employers to provide the SBC by posting it on a website.
3. Develop a model SBC, with input from employers and third-party administrators, that employers may use as a safe harbor or as a guide for designing their own SBCs.
4. Substantially revise the proposed template to make it appropriate for self-insured plans.
5. If, contrary to ERIC's recommendation, the final regulations require employers to use the SBC template, permit employers to satisfy the statutory requirement by providing one SBC to each employee.
6. Do not require employers to provide SBCs to beneficiaries.
7. Make clear that the SBC requirement does not apply to retiree-only plans.
8. Do not require employers to provide SBCs to individuals for whom Medicare is the primary payer.
9. Provide that the SBC requirement will be effective no earlier than the first plan year beginning more than twelve months after final regulations are published.

1. The final regulations should permit employers to design their own SBCs.

The proposed regulations require employers to create an SBC by filling out the SBC template in accordance with the instructions provided in the regulations. ERIC strongly objects to this "one size fits all" approach. ERIC urges the Departments to permit employers to design their own SBCs that meet certain standards for length, content, and format.

The great majority of group health plans offered by large employers are self-insured plans. The proposed SBC template is not appropriate for these plans. Even with substantial revisions, the SBC template will be far inferior to the group health plan summaries that large employers currently provide to their employees. ERIC's members are concerned that the SBC template will confuse and even mislead employees who wish to understand their employer-provided coverage.

The proposed SBC template was developed by the NAIC for insured plans, primarily in the individual and small group markets. The structure, the content, and even the vocabulary of the NAIC template are ill-suited to describe the self-insured plans offered by large employers. The problem that large employers will face as they try to fit their group health plans into the template is evident from the very first question, “What is the premium?” A self-insured plan does not pay a “premium” for coverage. The cost of coverage, in most cases, is borne in part by the employer and in part by the employee. Most employer plans offer multiple coverage tiers (individual, individual plus one, family, and so on) and charge employees different contributions depending on the coverage tier they select. Some employers determine the employee’s contribution by job classifications or salary bands, charging higher contributions to employees whose pay is greater.

The NAIC template does not accommodate these complexities. The template itself refers the employee to the employer for information about “the employee’s share of the premium amount.” The instructions for group insurance policies require the employer to attach an addendum to the insurer’s template in order to provide schedules of premiums for different coverage tiers under a group insurance policy. As the Departments recognize in the preamble of the proposed regulation, however, this approach “raises issues regarding the ability to compare premium or cost information between coverage options.”⁴ Large employers have developed much better, more specific, and more appropriate solutions in their own benefit summaries, which often include individual benefit statements showing the contributions, deductibles, and other cost-sharing amounts that would apply to each benefit package and coverage tier that is available to a specific employee.

The treatment of the cost of coverage, or “premium,” as the template calls it, is only one of many problems large employers will face if they attempt to fit their self-insured group health plan coverage into the proposed SBC template. In some cases, the problems will be intractable. For example, if an employer offers a high-deductible health plan coupled with an annual contribution to a health savings account, the proposed SBC template will provide a misleading picture of this option by disclosing the high deductible but not the employer’s health savings account contribution.

The recent decision of the Supreme Court in *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011), illustrates the risks that employers will face if they are forced to fit their group health plan summaries into a template that will confuse and mislead their employees. In *Amara*, the Court observed that if an employer was found to have breached its fiduciary duty by providing misleading benefit summaries to its employees, the employer could be liable for a variety of equitable remedies, including reformation of the plan document and monetary relief such as “surcharge.” The Department of Labor has urged courts to apply the Court’s *Amara* decision expansively, even in situations in which it has not been shown that participants relied on misleading communications to

⁴ 76 *Fed. Reg.* 52,442, 52,446 (Aug. 22, 2011).

their detriment.⁵ The Departments should not require employers to face fiduciary liability for the misleading communications that will result if employers are forced to fit their benefit summaries into the NAIC template.

The NAIC template serves a very different purpose from an employer group health plan communication: the template permits individuals and small groups to compare policies offered by competing insurance companies in a marketplace that is otherwise not transparent. Because the issuers of the policies are unrelated, it is not possible for them to provide comparative information in a single summary. As a result, an individual who wishes to compare policies must collect an SBC from the issuer of each policy, place the SBCs side by side, and compare the information disclosed in each SBC point by point.

In contrast, as we have explained, an employee who is offered health coverage under an employer's group health plan generally has no need (and no desire) to compare the employer's group health plan with health coverage available under individual and small group insurance policies: instead, the employee wishes to compare the various coverage options available under the employer's plan in order to identify the one best suited to his or her family's needs. In order to facilitate this comparison, many large employers provide side-by-side summaries of different benefit options in chart form, so that employees can see at a glance how the options compare at each relevant point (contributions, deductibles, coverage of specific services, and so on).

The proposed regulations would eliminate this useful and popular feature by requiring the employer to provide a separate SBC for each benefit package available to an employee. For employers that offer a variety of coverage options and cost-sharing features, this requirement will result in SBCs totaling hundreds of pages that cannot be easily compared. ERIC believes that this requirement turns the objective of the SBC on its head: it forces large employers to make their disclosure documents *less* appropriate, *less* useful, and *less* accessible to employees, all for the sake of forcing the employer's SBCs to match SBCs produced by insurance companies operating in an entirely different market.

Although an employer could continue to provide its own benefit summaries in addition to the SBC, this approach will not be satisfactory to most employers. For an employer that offers even a moderate number of coverage options, it will be prohibitively expensive to produce, update, and distribute two sets of benefit summaries for each benefit package. Worse still, by providing competing summaries that present

⁵ See *Supplemental Brief for Secretary of Labor as Amicus Curiae Supporting Plaintiffs, McCravy v. Metropolitan Life Insurance Co.*, No. 10-1074 (4th Cir.), filed Sept. 28, 2011 ("As a fiduciary, MetLife is subject to the full range of equitable remedies available against trustees under the common law of trusts, including the equitable remedy of surcharge"); *Brief for Secretary of Labor as Amicus Curiae Supporting Plaintiffs, Amara v. Cigna Corp.*, No. 3:01 CV 2361 (D. Conn.), filed Sept. 22, 2011 (urging the court on remand to "take cognizance of the sea change the *Amara* decision has wrought in the field of ERISA remedies").

similar information in different ways, the employer will make its own communications much less effective. As communications experts have recognized (and as ERIC's members have learned by experience), employees are frustrated and overwhelmed when they receive too much information. Accordingly, even if the SBCs accurately described the employer's health coverage options, they would obscure the more useful information in the employer's own benefit summaries.

The problem of competing summaries is exacerbated by the fact that the SBC generally will *not* describe the employer's coverage options accurately: because the SBCs use standardized terminology and provide information that is not customized to a particular coverage option, they will conflict with the benefit summaries that the employer has designed specifically to describe its own health coverage options, and will leave employees confused and misinformed.

ERIC recognizes that the statute requires the SBC to be "presented in a uniform format," and that the proposed SBC template is designed to allow employees to make comparisons among many different health coverage options that might be available to them. When health coverage options differ widely in their fundamental design, however, uniformity is possible only up to a point; the proposed template goes well beyond that point. The Departments themselves have recognized that "changes to the SBC template may be appropriate to accommodate various types of plan and coverage designs"⁶ A more flexible set of rules that will accommodate the full range of plan designs is not merely appropriate—it is essential.

ERIC believes that the Departments can achieve the statutory objective without requiring employers to fit all of their group health plan options into a single template. Instead, the Departments should provide standards for the length, content, and format of the SBC, and should allow employers to design their own SBCs that meet these standards. Giving employers the flexibility to adapt their current enrollment materials to satisfy the SBC requirements will avoid unnecessary burdens on group health plan sponsors, consistent with the President's executive order.⁷

Below we describe the standards that should apply to employer-designed SBCs.

Content. The final regulations should require that an employer-designed SBC meet minimum standards for content. These minimum standards will ensure that employees covered by group health plans have sufficient information to make an informed choice among the plan's available coverage options and to make comparisons with other health coverage for which they might be eligible, such as a spouse's group

⁶ *Id.* at 52,444.

⁷ E.O. 13563, *Improving Regulation and Regulatory Review* § 4 (Jan. 18, 2011). The order requires that "where relevant, feasible, and consistent with regulatory objectives . . . each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public."

health plan or coverage through an exchange. The final regulations should not require employer group health plans to use specific terms, punctuation, or explanations that appear in the proposed template, but that might not be applicable to the employer's plan.

The employer-designed SBC should provide the following information:

- A. For each coverage option, the coinsurance or co-payment amount for each of the categories of benefits provided under the group health plan.

Employers should be permitted to combine specific services within each category if the services are covered and the cost-sharing provisions are the same. The list of services in each category included in the proposed template is too detailed: it is likely to be confusing rather than helpful to employees. The final regulations should allow employers to provide a more or less extensive list of services, as long as they provide a description of each category of essential health benefits, including cost-sharing and any limitations on coverage under that category.

- B. For each coverage option (or for the group health plan if the exclusions are uniform), a list of exclusions under the terms of the group health plan.

- C. For each coverage option and coverage tier, the applicable deductibles.

The final regulations should make clear that this information may be provided in the body of the SBC or in a separate document provided with the SBC (for example, an individual benefit statement that identifies employee-specific data, such as employee contributions and deductibles that vary based on employee salary, classification, position, or other factors). In addition, as we explain below, the final regulation should not require separate SBCs for benefit packages that differ only with respect to cost-sharing requirements.

- D. A list of events that might result in the termination of coverage under the group health plan.

- E. For plan years beginning after 2013, a statement whether the group health plan provides minimum essential coverage and ensures that the plan's share of the total allowed costs of benefits is not less than 60 percent.

- F. A clear disclaimer explaining that the SBC is only a summary, that it includes information and examples that are not specific to the plan, and that the actual plan document will govern in the event of any conflict.

- G. A contact number and website address for additional questions.

The final regulations should make clear that this information may identify a third-party administrator, corporate human resources department, benefits department, or other appropriate individual, department, or organization.

H. No more than three coverage examples, based on information available on the Department of Health and Human Services' website at least 180 days before the start of the plan year.

ERIC strongly encourages the Departments to limit the number of required coverage examples to three. Three examples are sufficient to illustrate the option's coverage and cost-sharing provisions and to allow employees to make informed choices about the relative value of each coverage option. Presenting additional examples would provide little, if any, added benefit.

In addition, the final regulations should provide that the coverage examples and cost detail posted on the website of the Department of Health and Human Services 180 days prior to the start of a plan year are required for all enrollments during and with respect to that plan year (including any open enrollment period for that plan year). For example, for a calendar year plan, the SBC for the 2015 plan year (including the open enrollment period in the fall of 2014) will be based on the coverage examples and cost detail posted on the Department's website as of July 5, 2014. This rule will provide reasonably timely coverage examples to employees while giving employers sufficient time to update the examples in their enrollment materials.

I. A link to the government-provided uniform glossary.

ERIC's members are concerned that employees covered by group health plans might mistakenly believe that the defined terms in the uniform glossary apply to the employees' coverage under the plan. In many cases, the uniform glossary uses terms different from those in the employer's plan document. To help distinguish the uniform glossary from the plan's defined terms, the final regulations should permit an employer to satisfy the uniform glossary requirement by providing a link to a website maintained by the Departments rather than to a website maintained by the employer or its third-party administrator.⁸ In addition, the final regulations should make clear that an employer may include a disclaimer with this link to caution employees that the definitions provided in the glossary are general in nature, and may refer employees to the summary plan description or plan document for plan-specific definitions.

Uniform Format. The final regulations should provide that an employer-designed SBC will satisfy the formatting and uniformity requirements of the statute if its total length is not more than eight pages for each coverage option described (four double-sided pages per option) and if it is as visually accessible as the model SBC. The

⁸ The preamble of the proposed SBC template appears to contemplate that the Departments of Labor and Health and Human Services will maintain the uniform glossary on their websites and will allow employers to link to the governmental website. *See 76 Fed. Reg.* at 52,478. ERIC endorses this proposal.

final regulation should expressly permit the employer to provide information about more than one benefit option on each page of the SBC.

The proposed regulations and template reasonably interpret the statutory requirement that the SBC be four pages in length to mean four double-sided pages. Under the proposed regulations, each coverage option under a group health plan would have a separate SBC that includes the required descriptions of coverage, cost-sharing, exclusions, and other information for that option. The final regulations should permit an employer-designed SBC to have a maximum length determined by multiplying eight by the number of benefit options described in the SBC. For example, if a group health plan offered an HMO, a PPO, and a high-deductible plan, the employer-designed SBC could not exceed 24 pages (8 pages x 3 benefit options), or 12 double-sided pages. By allowing employers to aggregate the length requirement and to present information about more than one benefit option on each page of the SBC, the final regulations would make it possible for employers to include side-by-side comparisons of benefit options. Many employers have found that a side-by-side chart allows employees to compare the essential features of the employer's benefit options more quickly and easily than a separate description of each option.

In addition to the maximum-length requirement, employer-designed SBCs would be required to be as visually accessible as the model SBC. This requirement would ensure that employer-designed SBCs use typefaces, font sizes, and white space that make the document user-friendly and easy to read. An employer that provides comparative information in chart form should be permitted to use a smaller font size, as long as the font is reasonably legible. Although we recognize that the statute calls for 12-point type, we believe that this requirement should be modified in cases where information for more than one coverage option is presented on a single page. The greater ease of comparison that a side-by-side chart provides is well worth some reduction in font size, and the chart format is entirely consistent with the objective of providing information in a format that allows individuals to compare different options easily and efficiently.

The final regulations should also allow employers to include an employer-designed SBC in an enrollment booklet or other health plan enrollment materials. Employers should be allowed to provide one document that describes the comprehensive benefits package offered to employees. To ensure that the integrity of the SBC is maintained, the final regulations could require that the SBC appear on consecutive pages. Including an employer-designed SBC as an integral part of the employer's enrollment materials would be more useful and effective than including an SBC in the summary plan description, an approach that the Departments have already expressed a willingness to consider.⁹

⁹ See 76 *Fed. Reg.* at 52,444.

Employer-designed SBCs that satisfy these requirements will provide comparable information in a short, visually accessible format. ERIC believes that this proposal properly balances the need for uniformity with the need for flexibility to accommodate different plan designs. If, despite this recommendation, the Departments wish to consider additional uniformity requirements, ERIC urges the Departments to confer with the working group of employers and third-party administrators proposed below in ERIC's third comment. Input from employers and administrators is necessary to ensure that any additional uniformity requirement will not impair employers' ability to design communications that will be useful and informative to their workforce.

2. The final regulations should permit employers to provide the SBC by posting it on a website.

The statute deems the SBC disclosure requirement to be met if the sponsor or administrator of a group health plan provides the SBC to participants in electronic form.¹⁰ Regardless of whether the final regulations permit the use of employer-designed SBCs, the regulations should recognize that an employer will satisfy the SBC requirement if the employer posts and periodically updates the SBC on a website that is accessible to participants who are eligible to receive an SBC.

The proposed regulations permit an employer to provide the SBC electronically only if the employer satisfies the Department of Labor's electronic disclosure requirements. The Department of Labor's existing safe harbor for electronic disclosure is unworkable for most large employers: it requires the employer to obtain the participant's affirmative consent to receive documents electronically unless access to the applicable electronic medium is an "integral part of [the participant's] duties."¹¹

ERIC has pointed out that this safe harbor is too narrow even when it applies to statutory provisions that do not specifically endorse electronic disclosure.¹² It is especially inappropriate for the Departments to apply this restrictive rule in a situation where the statute itself recognizes that electronic disclosure is appropriate and expressly provides that important documents, such as a copy of the insurance policy or certificate, can be made available on the Internet. An employer that provides the SBC on a website is clearly in compliance with the statute, regardless of whether a participant has a computer on his or her desk, uses email as part of his or her job, or has affirmatively consented to electronic disclosure.

¹⁰ PHSa § 2715(c).

¹¹ 29 C.F.R. § 2520.104b-1(c).

¹² ERIC has filed a comment urging that this safe harbor be expanded in response to the Department of Labor's request for information on the electronic disclosure requirements. See <http://www.dol.gov/ebsa/pdf/1210-AB50-031.pdf>.

The Departments have already recognized that disclosure on a website satisfies the statutory requirement: the Departments propose to provide the uniform glossary of terms, which is part of the statutory SBC content, by including a link to a website where the glossary will be posted. ERIC urges the Departments to expand this concept to permit the entire SBC to be disclosed on a website maintained by an employer or third-party administrator.

To ensure that all participants have access to the SBC, including participants without a computer, the final regulations could require the employer to disclose the website address for the SBC in the enrollment material and summary plan description for the group health plan, and to explain in the same documents that the employer will provide a paper copy of the SBC upon request at no cost to the participant. The final regulations could require that a telephone number or other contact information for requesting a paper copy accompany the website address.

The final regulations should make clear that the seven-day period in which the plan administrator must provide a paper copy of the SBC does not begin until the participant requests a paper copy by calling the telephone number designated for such requests. Large employers with business operations in many different locations frequently find that employees request information from their local supervisors or other persons who are not trained to handle such requests. By the time the request is referred to the proper person, the deadline for responding has passed. Requiring employees to call the telephone number identified in the enrollment material and summary plan description will help to ensure that employers are able to meet their obligation to provide a paper copy of the SBC promptly upon request.

A rule permitting website disclosure would be an important step in addressing some of the concerns that the SBC requirement raises for large employers. If the regulations do not require that a paper copy of the SBC be included in the employer's enrollment material, the duplicative and sometimes misleading information contained in the SBC is less likely to confuse and frustrate employees. In addition, website disclosure of the SBC would greatly reduce the administrative burdens and costs that employers must bear if they are required to print and mail SBCs. ERIC's members have calculated that the SBC requirements in the proposed regulations, which mandate a separate 8-page SBC for each benefit package, generally would add more than 50 pages—and in some cases hundreds of pages—to their enrollment material. The cost of printing this additional material and mailing it to tens of thousands of employees is prohibitive.

Website disclosure of the SBC, with paper copies available upon request, will be sufficient to ensure that all employees who wish to use the SBC will be able to do so. The use of electronic media and communication is widespread. According to a 2008 Pew Internet and American Life Project study, 62% of workers used email or the

Internet at work and 81% of workers have either a personal or work email address.¹³ With the broad adoption of new technologies, employees have become accustomed to receiving important information electronically. Those who are unable or unwilling to receive information electronically have become accustomed to requesting a paper version.

3. The Departments should develop a model SBC, with input from employers and third-party administrators, that employers can use as a safe harbor.

For the reasons explained above, ERIC does not believe that employers should be required to use the proposed SBC template. It is important, however, for the Departments to provide a model SBC that employers can use either as a safe harbor or as a guide in developing their own SBCs. ERIC urges the Departments to develop a model SBC that will be suitable for use by self-insured plans.

ERIC believes that the Departments could use the NAIC template as a starting point for a model SBC. The template should be substantially revised, however, so that it will accommodate the diverse health plan options offered by large employers. ERIC offers specific suggestions below for revisions to the NAIC template.

The NAIC working group that developed the proposed template included insurers, health professionals, and consumer advocates, but did not include the sponsors or administrators of employer group health plans. ERIC believes that an open dialogue among the Departments and the sponsors and administrators of group health plans, especially self-insured plans, is essential. ERIC strongly recommends that the Departments convene a working group of employers, third-party administrators, and other stakeholders to assist the Departments in designing a model SBC that is appropriate for self-insured group health plans, consumer-driven plans, and other plans maintained by large employers.

4. The Departments should revise the proposed template to ensure that it is appropriate for large employers' group health plans.

ERIC recommends that the Departments make the following changes in the proposed SBC template:

- The proposed SBC template includes many terms that are specific to insured health plans. As the Departments have recognized,¹⁴ these terms are inconsistent with the terms used by many group health plans, and particularly by self-insured plans. Accordingly, the Departments should consider alternative

¹³ Mary Madden and Sydney Jones, Pew Internet and American Life Project, NETWORKED WORKERS (Sept. 24, 2008), available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Networked_Workers_FINAL.pdf.

¹⁴ *Id.* at 52,479.

terms that could be used to customize the model SBC to reflect the terms used by a group health plan. At a minimum, a list of alternative terms should be developed for the terms “policy,” “insurer,” “policy period,” “grievance,” and “premium.”

- The Departments should include space on the model SBC for the plan sponsor’s name and the name of its human resources department or plan administrator.
- The proposed regulations require the employer to provide a separate SBC for each benefit package for which an employee is eligible. In other regulations, the Departments have said that “any difference in benefits or cost-sharing requirements constitutes a different benefit package.”¹⁵ Assuming that the same rule applies to SBCs, the proposed regulations appear to require a separate SBC for each difference in cost-sharing requirements, even if the coverage is otherwise the same. For employers that apply different contributions or co-payments to employees in different salary bands, for example, this requirement could force the employer to create dozens or even hundreds of separate SBCs. The Departments should revise the template so that an employer can refer to a separate document that provides either an individual benefit statement (showing the cost-sharing requirements applicable to each employee) or a schedule of cost-sharing requirements.
- The instructions to the proposed template require an employer to deliver an SBC before an individual enrolls in the plan, and again (with minor changes) after the individual enrolls in the plan. The requirement to produce and deliver a post-enrollment SBC is unnecessary, and it imposes an unjustified cost on employers. The Departments should eliminate the requirement that an SBC be delivered at any time other than before an employee makes an enrollment decision.
- The proposed SBC template requires an employer to show the cost of coverage for a self-insured group health plan. Because this information is not required by the statute and often varies from participant to participant based on salary, job classification, or other factors, the Departments should not require that it be included in the SBC.
- The proposed SBC template would require sponsors to provide contact information for a state agency related to grievance and appeal rights. The reference to grievance rights is misplaced and is likely to confuse union-represented employees, for whom grievance rights have a specific meaning. In addition, self-insured plans are not subject to state insurance department grievance procedures, and the reference has no relevance to those plans. The Departments should allow employers to replace the reference to grievance rights

¹⁵ See, e.g., Treas. Reg. § 54.9815-2711T(e)(4), 29 C.F.R. § 2590.715-2711(e)(4), 45 C.F.R. § 147.126(e)(4); Treas. Reg. § 54.9815-2714T(f)(4); 29 C.F.R. § 2590.715-2714(f)(4); 45 C.F.R. § 147.120(f)(4).

with relevant references to the person or entity that administers the plan's claims procedure.

- The proposed SBC template includes a disclaimer stating that the SBC is not the policy and that the policy should be consulted for more detail. The Departments should develop a disclaimer that more clearly states that the SBC is only a non-binding and incomplete summary; that full information concerning the plan's rules, coverage, exceptions, limitations, and cost-sharing appears in the plan document; and that a more complete summary is provided in the plan's summary plan description.
 - The proposed SBC template includes a list of events that might result in the termination of an employee's coverage. Many of the events included in the proposed template are inappropriate for a self-insured group health plans (for example, "the insurer stops offering services in the area" and "you move outside the coverage area"). The Departments should develop an alternative list of events for the model SBC that more accurately reflects the circumstances under which employees in a self-insured group health plan might lose coverage.
 - The proposed SBC template includes several statements that are not true for every group health plan. For example, even if a plan has the same cost-sharing percentage for in-network and out-of-network services, the SBC would be required to include a statement that "[y]our costs for in-network providers will be lower than out-of-network providers." Similarly, for non-networked plans, the SBC would be required to state, "Your costs are the same no matter which provider you see." This statement will be false if the employee has the option of seeing a provider who charges a lower fee. The Departments should carefully examine the required statements throughout the template to ensure that they are accurate for all plans.
 - The Departments should revise the uniform glossary to include an unambiguous disclosure that the definitions provided are general in nature and that many terms are defined in the policy or plan document. The disclaimer should make clear that the definitions in the policy or plan document always govern.
5. **If, contrary to ERIC's recommendation, the final regulations require employers to use the SBC template, the regulations should require no more than one SBC for each employee.**

ERIC strongly encourages the Departments to permit the use of employer-designed SBCs that will provide useful comparisons of the employer's health coverage options. If, contrary to this recommendation, the final regulations require employers to use the SBC template, the regulations should permit an employer to satisfy this requirement by giving each employee one SBC that describes the least expensive option available to the employee that provides minimum essential coverage.

The statute does not compel the Departments to require an SBC for every benefit package available under the plan. Instead, the statute requires that an employer provide a summary of benefits and coverage for a group health plan.¹⁶ Providing the SBC template for one coverage option under the plan is sufficient to satisfy the statutory requirement. This conclusion is especially appropriate in view of the fact that employers are already subject to detailed disclosure obligations under ERISA: employers are required to provide summary plan descriptions, summaries of material modification, written claims procedures, COBRA notices, and other disclosures for their group health plans that include the same information provided in the SBC.

As explained above in ERIC's first comment, large employers already provide their employees with informative, easy-to-use summaries that allow each employee to compare the coverage options offered under the employer's group health plans. Employers have developed these summaries based on employee preferences determined using focus groups, surveys, and informal feedback. These employer-designed summaries are much more useful to the employee than a summary based on the SBC template will be, even if the template is substantially revised, as ERIC has recommended, to address some of its deficiencies.

The SBC template will be useful, if at all, as a document that allows an employee to compare coverage under the employer's group health plan with coverage available from other sources, such as a state exchange or a group health plan sponsored by a spouse's employer. Providing each employee with an SBC for one available coverage option under the employer's group health plan will allow employees to make this comparison.

ERIC believes that the employees most likely to seek a comparison to coverage from another source are those for whom the employer's plan is potentially seen as too expensive. Accordingly, providing a model SBC for the least expensive minimum essential coverage option under the employer's group health plan will allow cost-conscious employees to make a comparison between the most relevant plan option and options available on the exchange.

As an alternative, the final regulation could permit an employer to provide an SBC that describes the available coverage option that is elected by the greatest number of employees. Providing a model SBC for the most popular coverage option for which the employee is eligible would allow employees to make a comparison between the option in which an employee is most likely to enroll and other available coverage options.

¹⁶ PHS § 2715(d)(1).

6. The final regulations should not require employers to provide SBCs to beneficiaries.

The statute does not require the sponsor of a group health plan to provide SBCs to beneficiaries. By extending the SBC requirement to beneficiaries, the proposed regulations create a requirement that will be nearly impossible for group health plans to satisfy. ERIC urges the Departments to make clear that only plan participants must receive SBCs, and that an employer is not required to provide SBCs to an employee's spouse, dependents, or other beneficiaries (including beneficiaries named under qualified medical child support orders).

The statute requires that the administrator or sponsor of a group health plan provide an SBC only to:

- an applicant at the time of application;
- an enrollee prior to the time of enrollment or reenrollment; and
- a policyholder or certificate holder at the time of issuance of the policy or delivery of the certificate.¹⁷

A beneficiary, such as the spouse or dependent of a covered employee, is not an "applicant" or "certificate holder" with respect to coverage under a group health plan. Although some ACA provisions seem to include beneficiaries within the term "enrollee," other provisions clearly do not: for example, section 2719A of PHSa refers to a "participant, beneficiary, and enrollee". In the context of the SBC requirement, the term "enrollee" should be interpreted to apply only to the individual who can elect to enroll in health coverage, and not to an individual who could become covered only as a result of another person's election. In the case of an employer group health plan, the term "enrollee" should refer only to the employee who is eligible to participate in the group health plan, and not to a spouse, dependent, or other person who will be covered under the plan only if the employee elects to cover that person.

The purpose of the SBC requirement is to allow an individual who is eligible to elect coverage under a plan or policy to make comparisons among the coverage options he or she is eligible to elect. In light of this purpose, there is no reason for an employer to provide SBCs to beneficiaries. Beneficiaries are not eligible to elect coverage under an employer's group health plan or to select the coverage option in which the participant enrolls. If a spouse or adult child is eligible to enroll in coverage from another source, the spouse or child will receive an SBC for that coverage and will be able to make his or her own election with respect to that coverage.

We recognize that the Departments might believe that a spouse or adult dependent should also receive an SBC for an employer plan under which he or she

¹⁷ PHSa § 2715(d)(1)(A)-(C).

might be covered as a beneficiary, so that the spouse or dependent can compare the available coverage options. We do not think the requirement to provide an SBC to a beneficiary is necessary to serve this purpose, however. The employee-participant, who alone is able to make the election to cover the spouse or dependent, will receive an SBC and will have the information necessary to determine whether to make that election.

Existing disclosure requirements reflect the limited rights of beneficiaries under group health plans. Plans generally have no obligation to provide disclosures to beneficiaries unless the beneficiary has an individual right to make an election under the plan (for example, an election of health care continuation coverage under COBRA). Furthermore, the right to provide beneficiaries with a COBRA notice can generally be satisfied by providing the notice to the employee unless the plan administrator has been notified that the beneficiary does not live with the participant.¹⁸

In contrast, the proposed SBC regulations would allow the employer to provide an SBC to a single address only if the beneficiaries “are known to reside at the same address” as the employee. This requirement will seldom be satisfied, since the employer generally has no reason to obtain addresses for an employee’s family members, particularly over-age dependents.¹⁹ Unless the Departments withdraw the requirement to deliver SBC notices to beneficiaries, this requirement will create burdensome, costly, and unnecessary recordkeeping requirements for employers.

7. The final regulations should make clear that the SBC requirements do not apply to retiree-only plans.

The final regulations should make clear that the SBC requirement does not apply to retiree-only plans. Under section 732(a) of ERISA and section 9831(a) of the Internal Revenue Code, retiree-only plans are exempt from certain health mandates. The Departments have properly recognized that this exemption extends to ACA’s group market reforms.²⁰ The SBC requirement, which appears in PHSA § 2715, is one of the group market reforms covered by the exemption for retiree-only plans.

ERIC has previously explained that it is essential for the Departments to provide additional guidance describing when a plan will qualify as a retiree-only plan.²¹

¹⁸ 29 C.F.R. § 2590.606-4(e).

¹⁹ The Departments appear to recognize this difficulty in their regulations concerning coverage of over-age dependents: the regulations provide that notice of the right to extend a child’s health plan coverage until age 26 “may be provided to the employee on behalf of the employee’s child.” See Treas. Reg. § 54.9815-2714T(f)(2)(ii); 29 C.F.R. § 2590.715-2714(f)(2)(ii); 45 C.F.R. § 147.120(f)(2)(ii).

²⁰ See 75 Fed. Reg. 34,538, 34,539–40 (June 17, 2010).; see also *FAQs About The Affordable Care Act Implementation Part III*, Q&A-1 (Oct. 12, 2010).

²¹ See Letter from Mark J. Ugoretz, President, The ERISA Industry Committee and Gretchen K. Young, Sr. Vice President, Health Policy, The ERISA Industry Committee to The Hon. Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor, The Hon. J. Mark Iwry, Senior Advisor to the Secretary (continued...)

The SBC requirement is only one of many group health mandates covered by this exemption. Important consequences turn on questions that commonly arise, such as whether a retiree plan will suddenly become subject to the group health mandates if the plan covers the spouse of a retiree when the spouse also happens to be an active employee of the same employer. Few large employers can continue to provide affordable retiree health care if they are forced to comply with the new health mandates. As a practical matter, they must either qualify for the retiree-only exception or discontinue their retiree health plans. As a result, it has become crucial for employers to understand the scope of the statutory exemption for retiree-only plans, so that they can determine how to structure their plans to qualify for the exemption. ERIC urges the Departments to respond to ERIC's prior request for guidance on this issue.

8. The final regulations should not require employers to provide SBCs to individuals for whom Medicare is the primary payer.

The final regulations should make clear that an employer is not required to provide an SBC to any individual who receives primary health coverage from the Medicare program. Medicare is the primary payer for retirees aged 65 and older, disabled former employees, and current or former employees who have been eligible for Medicare on the basis of end-stage renal disease for more than 30 months. Any coverage these individuals receive from an employer group health plan will be supplemental coverage that applies only to expenses not covered by Medicare.

In many cases, Medicare-primary individuals will be covered by a retiree-only plan and will be exempt from the SBC requirement for that reason. Even if they are covered by an employer group health plan that does not qualify as a retiree-only plan, however, individuals who receive primary health coverage from Medicare should not be subject to the SBC requirement.

The SBC is not designed to summarize the limited coverage provided by an employer health plan that pays secondary to Medicare, or to explain the plan's rules for coordinating benefits with Medicare. The coverage information and examples that an employer is required to provide in an SBC will create the false impression that the individual is entitled to primary coverage under the employer's group health plan when in fact the plan provides only secondary coverage. The Departments should not require employers to distribute SBCs in circumstances where they are guaranteed to be misleading.

and Deputy Assistant Secretary, U.S. Department of the Treasury, George Bostick, Benefits Tax Counsel, U.S. Department of the Treasury, and Steven Larsen, Director, Center for Consumer Information and Insurance Oversight, U.S. Department of Health and Human Services (Apr. 6, 2011), available at http://www.eric.org/forms/uploadFiles/284120000046.filename.ERIC_Retiree-Only_Plans_Letter_040611.pdf

9. The SBC requirement should not be effective before the first plan year beginning more than twelve months after final regulations are published.

Most large employers begin designing their group health plan communications in the spring or early summer for the next calendar year. A large group health plan might offer a number of different coverage options in different geographic regions, so that it is necessary for the employer to coordinate with a variety of third-party vendors to ensure that the communications are accurate. Employers must finalize employee communications and open enrollment materials well in advance of the open enrollment period—which usually begins in October or November—to allow sufficient time for printing and website development.

ERIC recommends that any regulations interpreting the SBC requirement become effective for the open enrollment period associated with the first plan year that begins at least twelve months after the final regulations are published in the *Federal Register*. This effective date will permit employers to evaluate the SBC requirement as interpreted in the final regulations, develop a compliance strategy, and design enrollment material that will satisfy the requirement.

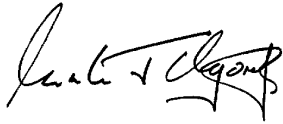
The Departments should not require employers to spend precious time and resources attempting to comply with proposed SBC rules that are fundamentally flawed. Because the statutory effective date is less than six months away, ERIC urges the Departments to issue a notice or similar guidance in the next several weeks announcing that the effective date of the regulations will be delayed. For plan years beginning after the statutory effective date and before the regulatory effective date, the notice should make clear that employers will be deemed to satisfy the SBC requirement as long as they comply with ERISA's disclosure requirements as in effect before ACA and provide enrollment material that fairly and accurately summarizes their group health coverage.

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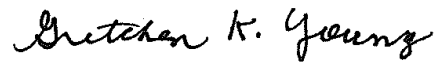
ERIC strongly urges the Departments to reconsider the rigid approach that the proposed regulations take with respect to the SBC requirement. The statute does not compel such an inflexible approach, and the proposed template simply would not work for a great many group health plans. Unless the proposed regulations are substantially modified, they will impose unnecessary costs and administrative burdens on employers with no corresponding benefit to employees.

ERIC appreciates the opportunity to provide these comments in response to the proposed regulations and template. If the Departments have any questions concerning our comments, or if we can be of further assistance, please let us know.

Sincerely,

Handwritten signature of Mark J. Ugoretz in black ink.

Mark J. Ugoretz
President

Handwritten signature of Gretchen K. Young in black ink.

Gretchen K. Young
Senior Vice President, Health Policy