



EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION

927 15th Street, NW • Suite 1000 • Washington, DC 20005 • (202) 659-4300

October 20, 2011

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210
RIN 1210-AB52

Submitted Via Electronic Mail to E-OHPSCA2715.EBSA@ dol.gov

Re: Summary of Benefits and Coverage Proposed Regulations

Dear Ladies and Gentlemen:

The Employers Council on Flexible Compensation (ECFC) appreciates the opportunity to offer comments on the proposed regulations and solicitation of comments issued by the agencies ("Proposed Rules") with respect to new Public Health Service Act Section 2715 ("Section 2715"). The Proposed Rules identify proposed standards for completion and distribution of the summary of benefits and coverage ("SBC") set forth in Section 2715. Group health plans and health insurers are required to furnish SBCs in accordance with the Proposed Rules beginning March 23, 2012.

ECFC is a membership association dedicated to maintaining and expanding employee benefit programs offered on a pre-tax basis, including health care, transportation, dependent/child care assistance and retirement plans. ECFC's members include employers who provide these important benefits, as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans throughout the nation. Together, ECFC companies design, offer, or administer flexible benefits for tens of millions of working Americans, a majority of whom have middle class incomes.

ECFC commends the agencies for their efforts in seeking public input prior to finalizing the Proposed Rules. As discussed more fully herein, ECFC believes that clarifications and revisions are required to align the goals of Congress set forth in Section 2715 with the practicalities associated with group health plan administration.

The reasons for our concern are set forth in detail below.

Delay the effective date until the annual enrollment period for the first plan year that begins on or after the date that is one year after the final regulations are issued

The applicable effective date for group health plans to furnish SBCs is March 23, 2012. Sufficient time is required to digest and identify the full impact of the new legal requirements on current enrollment systems and procedures. Taking into consideration that March 23, 2012 is only five (5) months away, and we do not yet have the final regulations, a delay is warranted to ensure accurate and effective implementation of the rules. Consequently, we recommend that the agencies delay the effective date until the first annual enrollment period for the plan year that begins on or after the date that is 12 months after the final regulations are issued. We believe such a delay is supported by Section 2715, which provides no less than 12 months between the date the agencies develop the applicable standards and the implementation date.¹ Since we do not yet have the final regulations and the original effective date is only five (5) months away, the delayed effective date is necessary and consistent with Congress' intent. Moreover, we believe a further delay until the next annual enrollment following that date because the annual enrollment period represents the most natural transition point. If the SBC rules are effective prior to the annual enrollment period for the plan year beginning on or after the date that is one year after the final regulations are issued, then group health plan sponsors must create SBCs for mid-year enrollments and then shortly thereafter revise the SBCs to incorporate plan changes, which are typically effective on the first day of the plan year.

Electronic distribution requirements should be relaxed.

The Proposed Rules indicate that SBCs furnished through electronic media (e.g. email, website, etc.) must satisfy ERISA's distribution requirements, which require plans to furnish notices required under ERISA by measures reasonably calculated to ensure actual receipt.² The Department of Labor has created a safe harbor for documents and materials furnished through electronic media.³ Under the safe harbor, recipients who are not otherwise expected to access the employer's electronic information system must provide advance, electronic consent.⁴ Many of the enrollees to whom a plan is required by the Proposed Rules to furnish an SBC will be required to provide advance consent; however, obtaining consent will impose significant obstacles on plans such that the requirement, if not waived, will practically prevent plans from furnishing SBCs electronically. This creates a substantial burden on electronic commerce that fails to consider improvements in technologies that have increased access to electronic media (a possibility acknowledged by the Department of Labor in its request for comments on the ERISA electronic disclosure safe harbor)⁵ and alternative measures used by a plan in conjunction with the electronic media that ensure actual receipt of the SBC—the fundamental standard under ERISA.

¹ See 2715(a) ("Not later than 12 months after the date of enactment of the Patient Protection and Affordable Care Act, the Secretary shall develop standards for use by a group health plan and a health insurance issuer.")

² See 29 C.F.R. 2520.104b-1. Under the Proposed Regulations, nonfederal governmental plans may furnish an SBC electronically in accordance with ERISA's disclosure rules or rules established in the Proposed Regulations for issuers in the individual market.

³ See 29 C.F.R. 2520.104b-1(c).

⁴ See 29 C.F.R. 2520.104(b)-1(c)(2)

⁵ See 76 Fed. Reg. 19285 (April 7, 2011)

By way of illustration, a plan that makes the SBCs available on a website would comply with the SBC disclosure requirements to the extent that the plan provides, at the time of enrollment, written notice of the right to request a copy. Under this approach, if the individual is not effectively able to access the electronic media, the participant is able to request a paper copy. Thus, the measures adopted under this approach reasonably ensure actual receipt of the SBC consistent with ERISA's fundamental disclosure rules. Such an approach is also consistent with current employee benefit plan related electronic disclosure rules under the Internal Revenue Code, which waive the consent requirement if the participant is effectively able to access the information⁶, and E-Sign legislation, which allows federal agencies to exempt disclosures from the consent requirement where such a requirement would impose a substantial burden on electronic commerce and exempting the disclosure will not increase the material risk of harm to recipients.⁷

Require plans to automatically furnish the SBC to “participants” only.

Section 2715(d) requires group health plans and issuers to furnish SBCs to “enrollees”. The term “enrollees” is not defined in the statute but the Proposed Rules define “enrollee” to mean a “participant” or “beneficiary” as defined by ERISA. Beneficiaries (other than qualified beneficiaries under COBRA and perhaps survivors) typically have no right to enroll apart from the employee. Thus, if the employee chooses not to enroll the spouse or dependent child, the spouse or dependent child typically has no independent right to enroll. Although the SBC contains information that impacts a beneficiary’s enrollment decisions for other plans, we note that other plan related documents required by law to be furnished by a plan, such as the summary plan description and the notice of the plan’s special enrollment rights required by the HIPAA portability regulations,⁸ contain information that impact the spouse’s enrollment decisions yet are not required to be provided furnished to the beneficiary. In those other situations, documents and materials required to be furnished to the participant are deemed to be provided to a spouse or other dependent. Therefore, the final regulations should not require plans to furnish SBCs to beneficiaries unless requested by the beneficiary.

Clarify impact of SBC rules on Health Reimbursement Arrangements

Many plan sponsors adopt and maintain a health reimbursement arrangement (“HRA”)--an employer-only funded defined contribution, medical expense reimbursement account. There are typically two types of health reimbursement arrangements: a “stand alone HRA” and an “integrated HRA”. The SBC rules create unique issues with respect to each type of HRA.

Stand Alone HRA

⁶ See 26 C.F.R. 1.401(a)-20(c)

⁷ 17 U.S.C. 7004(d)(1)

⁸ 29 C.F.R. 2590.701-6(c)

The stand-alone HRA is a simple arrangement by nature. Essentially, the employer agrees to reimburse eligible medical expenses, as defined by Internal Revenue Code Section 213(d), up to a specified annual maximum. The template SBC proposed by the NAIC, which appears to be intended primarily for major medical insurance, does not take into consideration such a simple arrangement and completing the SBC as set forth in the Proposed Rules will create an administrative burden on HRA plan sponsors that will outweigh the materiality and scope of information provided. Moreover, there is typically no enrollment associated with an HRA; participants are enrolled automatically if the employer determines that they meet the eligibility requirements. Consequently, we request that the agencies exempt stand-alone HRAs from the SBC requirement to the extent that such HRAs are "health flexible spending arrangements" as defined by Internal Revenue Code Section 106(c).⁹

Alternatively, since there is typically no enrollment opportunity offered in connection with the HRA, HRAs would be deemed to be in compliance with the SBC rules if the plan furnished the participant with a summary plan description that satisfies the timing and content requirements set forth in ERISA (without regard to whether the plan is subject to ERISA).

Integrated HRA

Integrated HRAs are typically defined contribution arrangements with reimbursements limited to those expenses otherwise covered by the employer's major medical plan but for a deductible, coinsurance or other financial limitation. Integrated HRAs are essentially supplemental plans that constitute part of the same benefit package option and that operate to reduce the plan's deductible or other out of pocket expense. In many cases these HRAs are administered by an entity independent of the major medical plan administrator or health insurer. Because they operate to reduce financial limitations under the plan (e.g. the deductible) and they are often administered by a separate entity, preparing the SBC for the benefit package option creates unique coordination issues between the HRA administration and the health plan or health insurer. For example, the health plan insured by ABC has a \$5000 deductible; however, the employer also sponsors a self-insured HRA that will reimburse up to \$3000 of the participant's "deductible" expenses each year. The health insurer, ABC, and the HRA administrator must coordinate to identify the impact of the HRA on the plan's overall deductible. It isn't clear how this would be done. Consequently, integrated HRAs should be subject to the same rules discussed above as stand-alone HRAs-i.e. HRAs would be deemed to be in compliance with the SBC rules if the plan furnished the participant with a summary plan description that satisfies the timing and content requirements set forth in ERISA (without regard to whether the plan is subject to ERISA).

Alternatively, ECFC requests guidance on how the integrated communicated in the SBC. For example, should the potential reimbursements simply be reflected in the plan's overall

⁹ A "health flexible spending arrangement" as defined in Internal Revenue Code Section 106(c) is a plan or arrangement that reimbursed specified expenses for which the maximum reimbursement under the arrangement does not exceed 500% of the value of the coverage.

Internal Revenue Service

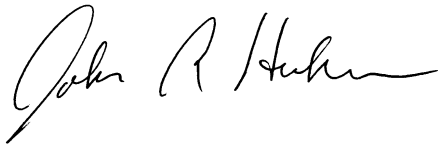
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deductible and other financial limitation amounts identified in the SBC or should the HRA reimbursements be identified separately?

Again, ECFC appreciates the opportunity to offer comments on the interim final rule. If you have any questions or need additional information, please do not hesitate to contact me at 404-881-7885 or john.hickman@alston.com.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Hickman". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

John Hickman
Chairman, Technical Advisory Committee