May 20, 2013

Submitted electronically via http://www.regulations.gov

Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Waiting Periods

RE: Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act (REG-122706-12)

Sir or Madam:

We write on behalf of the American Benefits Council ("Council") to provide comment in connection with the proposed rules ("Proposed Rules") issued by the Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments") regarding the 90-day waiting period limitation under Section 2708 of the Public Health Service Act ("PHSA"), as added by the Patient Protection and Affordable Care Act, as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 ("Code"), 78 Fed. Reg. 17,313 (Mar. 21, 2013).

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

PHSA Section 2708 provides that, in plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period (as defined in PHSA Section 2704(b)(4)) that exceeds 90 days. The term "waiting period" is defined to be the period that must pass with respect to the individual before the individual is *eligible* to be covered for benefits under the terms of the plan.

The Council appreciates the clarifications and guidance provided in the proposed rules and the opportunity to provide comments.

MEASURING THE 90-DAY WAITING PERIOD

The Proposed Rules provide that eligibility conditions that are based solely on the lapse of a time period are permissible for no more than 90 days and that if, under the terms of a plan, an employee may elect coverage that would begin on a date that does not exceed the 90-day waiting period limitation, the 90-day waiting period limitation is considered satisfied. The Council strongly recommends that the Departments to provide that the 90-day waiting period limitation will be considered satisfied if coverage is made effective no later than the first day of the fourth full calendar month beginning after the employee's start date.

As explained in previous comment letters[1], the vast majority of employers carry out enrollment activities as of the first day of a month, rather than in terms of the lapse of a certain number of days. Therefore, by requiring that the waiting period not exceed 90 days, employers that hire new employees mid-month would practically be afforded less than 90 days to make coverage available. This is because such employers would need to offer coverage as of the first day of the *third* full month following the start of employment which could be well in advance of the 90th day following the start of employment.

In light of the common practices of health plans to enroll new employees on the first day of a calendar month, we do not believe that Congress intended, by implementing a 90-day waiting period, that most health plans would, in practice, be effectively required to enroll participants as soon as two months following the date of hire. Thus, as stated above, the Council strongly urges the Departments to provide that the 90-day waiting

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[1] Council letter dated October 1, 2012, *available at*

http://www.americanbenefitscouncil.org/documents2012/hcr_90day-notice2012-59_comments100112.pdf;

Council letter dated April 6, 2012, *available at*

http://www.americanbenefitscouncil.org/documents2012/hcr_shared-autoenroll_faq-cmnts040612.pdf.

period limitation will be considered satisfied if coverage is made effective no later than the first day of the fourth full calendar month following an employee's start date.[2]

APPLICATION OF 90-DAY WAITING PERIOD LIMITATION ONLY TO WAITING PERIODS STARTING IN PLAN YEARS BEGINNING ON OR AFTER JANUARY 1, 2014

We urge the Departments to provide in final regulations that the 90-day waiting period limitation will become effective only with respect to waiting periods *starting* in plan years beginning on or after January 1, 2014. We believe such a construction is consistent with the statutory language, which provides that the waiting period limitation becomes effective for plan years starting on or after January 1, 2014. Moreover, we believe a requirement that makes the waiting period limitation effective for waiting periods that begin prior to the start of the January 1, 2014 plan year but end after the start of the January 1, 2014 plan year would be inconsistent with the statutory language, as it would essentially result in the application of the waiting period limitations to plan years starting before January 1, 2014.

The preamble to the Proposed Rules states that, "[a]s with the applicability of the 2004 HIPAA regulations, with respect to individuals who are in a waiting period for coverage before the applicability date, beginning on the first day these rules apply to the plan, any waiting period can no longer apply in a manner that exceeds 90 days." However, we note that Congress used very different statutory language when it enacted HIPAA compared to the ACA. Specifically, whereas Congress provided for HIPAA to become effective on a given calendar date (and the corresponding regulations also became effective on a given calendar date, with limited plan year relief for collectively bargained plans), when Congress enacted the ACA it expressly provided that new PHSA Section 2708 should only apply with respect to *plan years* beginning on or after January 1, 2014. We believe that Congress' reference to "plan year" in the ACA itself provides the Departments with more than sufficient authority to reach a different conclusion than was reached by the Departments with respect to the HIPAA regulations. Moreover, we believe the most reasonable reading of the statutory language – and the one that best gives effect to Congressional intent – is that new PHSA Section 2708 should only apply to waiting periods commencing on or after the start of a

[2] The proposed Treasury regulations with respect to Code Section 4980H generally provide that an employer has until the first day of the fourth calendar month following a full-time employee's date of hire to make available qualifying coverage or pay an assessable payment. To help minimize the extent of employer and employee confusion and to better coordinate the proposed rules of Code Section 4980H with the requirements of PHSA Section 2708, we encourage the Departments to issue a final rule that provides that a plan sponsor will not be in violation of PHSA Section 2708 to the extent it allows an employee to enroll in coverage by the first day of the fourth month following such employee's date of hire.

plan's 2014 plan year. We urge the Departments to adopt this statutory interpretation as part of their final rulemaking on new PHSA Section 2708.

In addition to the above, we note that plan sponsors would face significant administrative difficulties in preparing their systems to take effect with respect to any waiting period that may begin prior to the plan's 2014 plan year but end after the start of the plan's 2014 plan year. Accordingly, we urge the Departments to provide in final regulations that the 90-day waiting period limitation will become effective only with respect to waiting periods *starting* in plan years beginning on or after January 1, 2014.

TRANSITION RELIEF NEEDED FOR COLLECTIVELY BARGAINED PLANS

We request that the Departments provide limited transition relief with respect to PHSA Section 2708 for those individuals whose coverage is currently covered by a collective bargaining arrangement until the later of (i) the first day of the first related plan year beginning on or after January 1, 2014, and (ii) the expiration of the current collective bargaining agreement. It is our understanding that many existing collective bargaining arrangements do not currently take into account the 90-day waiting period limitation imposed by PHSA Section 2708 in establishing the health benefits to be offered under the arrangement.

This is due in large part to the fact that these collective bargaining agreements may have been negotiated several years ago, well in advance of 2014. Moreover, it is our understanding that these agreements, which are highly regulated by federal law, including the National Labor Relations Act with respect to private employers, are the product of careful and considered bargaining. Absent transition relief, employer plan sponsors could be required to re-open bargaining solely for purposes of seeking to amend their collective bargaining agreements. Doing so would impose significant and material costs on employer plan sponsors and direct attention and limited resources away from other ACA-related compliance efforts by employers.

We note that the Departments, specifically the Treasury Department, have issued certain transition rules with respect to the ACA for collectively bargained plans in the absence of an express statutory mandate. More specifically, with respect to new Code Section 4980H, the Treasury Department issued a set of proposed regulations that provide that employers will be deemed in compliance for 2014 to the extent they make certain monetary contributions to a multiemployer plan and certain other criteria are satisfied. We urge the issuance of such transition relief for multiemployer plans and urge the Departments to use such similar authority in issuing the requested transition relief for collectively bargained plans with respect to new PHSA Section 2708.

In light of the foregoing, we encourage the Departments to not find an employer in violation of PHSA Section 2708 to the extent an existing collective bargaining agreement

provides for a waiting or probationary period that is otherwise longer than that which would be permitted under the rules. A contrary rule would unjustly penalize employers for decisions made in concert with the employee's collective bargaining representatives. To the extent that the Departments disagree with the exception as requested, we urge the Departments to provide transition relief that would give employers sufficient time to work with their employees' labor representatives to seek to negotiate the needed changes to the collective bargaining agreements.

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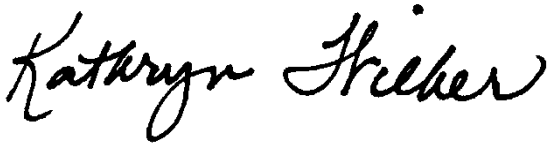
Thank you for considering these comments submitted in response to the Proposed Rules issued with regard to the 90-day waiting period. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,



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