



## CLIENT BULLETIN

### ***Reminder - SBC Distribution Dates and the SBC "Flexibility Rule"***

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As part of the *Affordable Care Act (ACA)* reforms, the statute and implementing regulations require creation and distribution of a Summary of Benefits and Coverage (SBC) by a group health plan to participants and beneficiaries on the following dates:

- **Initial Distribution** – 30 days before 1<sup>st</sup> Plan Year beginning on or after September 23, 2012 [A special rule apparently applies to "automatic renewal" plans that use an "evergreen election." As discussed in detail below, the rule would consider an initial distribution of 30 days before the 2<sup>nd</sup> Plan Year beginning on or after September 23, 2012 as good-faith compliance];
- **Special Enrollment** – within 90 days of enrollment;
- **Renewals** – *If the plan requires renewal* to maintain coverage and *if* renewal is automatic, then no later than 30 days prior to the 1<sup>st</sup> day of the new Plan Year;
- **60 Days Prior To Material Modifications** – Generally, notice of any material modification in any of the terms of the Plan that would affect the content of the SBC must be given not later than 60 days prior to the date on which the modification will become effective; and
- **On request** – No later than seven business days following receipt of the participant's or beneficiary's request.

The SBC regulations are found at 29 CFR 2590.715-2715. More information on SBCs can be found at the DOL page at: <http://www.dol.gov/ebsa/healthreform>.

Previous Research Department publications on the SBC can be found as follows:  
2011 publications at: [http://www.unitedactuarial.com/research/ytd\\_titles/2011.pdf](http://www.unitedactuarial.com/research/ytd_titles/2011.pdf)  
2012 publications at: [http://www.unitedactuarial.com/research/ytd\\_titles/2012.pdf](http://www.unitedactuarial.com/research/ytd_titles/2012.pdf)

Let's take a closer look at these rules and use the *FAQs About Affordable Care Act Implementation (Part VIII)*, Q&A's 1 and 9 as the basis for our review.

**Q1: When must plans and issuers begin providing the SBC?**

For group health plan coverage, the regulations provide that, for disclosures with respect to participants and beneficiaries who enroll or re-enroll through an open enrollment period (including late enrollees and re-enrollees), the SBC must be provided beginning on the first day of the first open enrollment period that begins on or after September 23, 2012.

For disclosures with respect to participants and beneficiaries who enroll in coverage other than through an open enrollment period (including individuals who are newly eligible for coverage and special enrollees), the SBC must be provided beginning *on the first day of the first plan year that begins on or after September 23, 2012*.

**Q9: What circumstances will trigger the requirement to provide an SBC to a participant or beneficiary in a group health plan? In particular, how do the terms "application" and "renewal" apply to a self-insured plan?**

The final regulations require that the SBC be provided in several instances:

• ***Upon application***

- If a plan (including a self-insured group health plan) or an issuer distributes written application materials for enrollment, the SBC must be provided as part of those materials. For this purpose, written application materials include *any* forms or requests for information, in paper form or through a website or email, that must be completed for enrollment.
- If the plan or issuer does not distribute written application materials for enrollment (in either paper or electronic form), the SBC must be provided no later than the first date on which the participant is eligible to enroll in coverage.

• ***By the first day of coverage (if there are any changes)***

If there is any change in the information required to be in the SBC that was provided upon application and before the first day of coverage, the plan or issuer must update and provide a current SBC no later than the first day of coverage.

• ***Special enrollees***

The SBC must be provided to special enrollees no later than the date on which a summary plan description is required to be provided (90 days from enrollment).

• ***Upon renewal***

If a plan or issuer requires participants and beneficiaries to actively elect to maintain coverage during an open season, or provides them with the opportunity to change coverage options in an open season, the plan or issuer must provide the SBC at the same time it distributes open season materials. **If there is no**

**requirement to renew (sometimes referred to as an “evergreen” election), and no opportunity to change coverage options, renewal is considered to be automatic and the SBC must be provided no later than 30 days prior to the first day of the new plan or policy year.** (emphasis added)

- ***Upon request***

The SBC must be provided upon request for an SBC or summary information about the health coverage as soon as practicable but in no event later than seven business days following receipt of the request.

Many multiemployer self-insured group health plans are distributing their Plan’s SBC on a mass basis to participants 30 days before first day of the first Plan Year beginning on or after September 23, 2012. However, statements by the DOL indicate that Plans that use an automatic renewal (the “evergreen election” referenced above) would be considered compliant if they sent out the initial mass SBC distribution *on the first day of the second plan year that begins on or after September 23, 2012.*

This interpretation is based on several reports of statements made by Assistant Secretary of Labor Phyllis Borzi at various benefit conferences, and confirmed through our conversations with DOL staff. That is, the DOL would consider it “good-faith” compliance if an automatic renewal plan (evergreen election) plan sent out the initial mass SBC distribution *on the first day of the second plan year that begins on or after September 23, 2012.* Most multiemployer plans, at least in the construction industry, appear to be automatic renewal plans.

During the period of the first Plan Year beginning on or after September 23, 2012, the Plan would still need to provide SBCs upon request, to special enrollees and in a timely manner for any material modifications to the SBC, etc., even if it didn’t send out a mass distribution until 30 days before the second Plan Year on or after September 23, 2012.

Thus, a Calendar Year automatic renewal/evergreen election Plan could send the first mass SBC distribution to current enrollees 30 days before the second Plan Year on or after September 23, 2012, which would be 30 days before January 1, 2014, but would still have to provide one to newcomers and for any other required reason (upon request, a material modification to SBC, etc.) during the first Plan Year on or after September 23, 2012.

Some have noted that Medicare eligible participants will not get an SBC because the Plan is a Supplement to Medicare and the Plan is not primary.

### **The Flexibility Rule**

In addition, even though the SBC regulation calls for 8-pages to be the norm, IRS spokespeople have been reported in various industry publications as noting the regulations have a “flexibility” rule built in that would allow longer SBCs if necessary. According to news reports, at a September 20, 2012 conference

sponsored by the American Law Institute Continuing Legal Education, Russell E. Weinheimer, senior counsel in the Office of the Chief Counsel for IRS's Tax Exempt and Government Entities Division, noted "the [SBC] rule does not give guidance on what to do if the summaries exceed the limit."

The SBC "flexibility rule," states:

"To the extent a plan's terms that are required to be in the SBC template cannot reasonably be described in a manner consistent with the template and instructions, the plan or issuer must accurately describe the relevant plan terms while using its best efforts to do so in a manner that is still consistent with the instructions and template format as reasonably possible."

According to various reports, Weinheimer said it would be reasonable for employers to read the final rule and think they should only provide the most pertinent information about their health plan on the SBC and "skimp on the rest." He was quoted as saying:

"I can tell you that wasn't our intent. Our intent was that you go over eight pages. That wasn't clear in the guidance, but if you do confront that situation, I would encourage you to go ahead and use 10 or 12 pages. If you need to, use legal size if that's going to work better than letter size."

One might hope this sentiment had been clarified in the regulations or *Preamble*. For Plans struggling to keep the SBC at 8-pages, Mr. Weinheimer's words offer some solace.

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