



Melissa Davis Hartranft  
Senior Legal Counsel

July 28, 2003

VIA ELECTRONIC MAIL [e-ORI@EBSA.dol.gov](mailto:e-ORI@EBSA.dol.gov)  
AND OVERNIGHT DELIVERY

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210  
Attn: COBRA Notice Regulations

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OFFICE OF REGULATIONS  
AND INTERPRETATIONS  
2003 JUL 29 AM 10:51

Re: Proposed COBRA Notice Regulations

Dear Madam/Sir:

This letter will respond to the request by the Department of Labor (the 'Department') for comments regarding the May 2003 proposed regulations which implement the notice requirements of the health care continuation coverage ('COBRA') provisions of Part 6 of title I of the Employee Retirement Income Security Act of 1974, as amended ('ERISA').

These comments are submitted on behalf of FMR Corporation, the parent corporation of a group of financial services companies known as Fidelity Investments ('Fidelity'), and its subsidiary, Fidelity Employer Services Company LLC ('FESCO'), which provides various benefit plan record-keeping services to plan sponsors.

Fidelity, as an employer, has approximately 27, 335 full-time and part-time employees for whom it sponsors group health plans (hereinafter referred to as the 'Plans') under which the employees may elect group health coverage for themselves, as well as for their eligible dependents. Upon commencement of such coverage, Fidelity, acting in its employer capacity on behalf of the Plans, is responsible for providing the initial written notice to covered employees and their spouses containing general information about their COBRA rights. Furthermore, upon the occurrence of a qualifying event, Fidelity also is responsible for providing qualified beneficiaries with the notice of right to elect continuation coverage.

FESCO, as a provider of administrative services on behalf of certain employers, performs the following types of COBRA record-keeping services on behalf of its clients:



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COBRA enrollment, premium collection and notice services. FESCO provides these COBRA record-keeping services on behalf of 39 plan sponsor clients and over 17,000 participants under such client plans.

We would like to begin our letter by commending the Department for recognizing the importance of establishing a uniform set of COBRA notice procedures that are easy to understand and implement, as reflected in the proposed regulations that the Department issued in May 2003 (the "Proposed Regulations"). We also would like to thank the Department for providing us with the opportunity to submit comments on the Proposed Regulations, including the two proposed model notices that are set forth in the Appendices to the Proposed Regulations.

Our comments focus on three broad areas under the Proposed Regulations: the general notice of continuation coverage, the notice requirements for plan administrators and the effective date of the provisions.

### **Section 2590.606-1 of the Proposed Regulations - General Notice of Continuation Coverage**

With respect to the proposed model general notice ("Proposed Model General Notice") set forth in the Appendix to Section 2590.606-1 of the Proposed Regulations, we commend the Department in its efforts to provide a comprehensive model general notice which takes into account the various changes to COBRA that have occurred since it became effective in 1986. However, we believe that the Department's desired result of providing a model notice to each covered employee and his/her spouse that contains a *general* description of their COBRA rights may need modification in order to be useful to the participant and practical for the employer to produce. Therefore, as a general matter, we request that the Proposed General Model Notice be limited to that information that will assist the covered employee and his/her spouse gain a general understanding of their COBRA rights at the point in time in which they receive the general notice (i.e., upon commencement of coverage under the plan).

The following examples highlight two areas in which we believe the Proposed Model General Notice should be revised to structure the general notice in a way that focuses on the desired goal of providing a covered employee and his/her spouse with a general understanding of their COBRA rights upon commencement of coverage under the plan.

#### Example 1:

The Proposed Model General Notice contains a sentence which sets forth the name, address and telephone number of the party responsible for administering COBRA continuation coverage. However, at the time an employee and his/her spouse commence coverage under a group health plan, this information does not assist them in gaining a general understanding of their COBRA rights; rather, it likely will become important to them at some point in the future, when they lose coverage under the plan. Because the



Proposed Model must be distributed in conjunction with a covered employee and his/her spouse commencing coverage under the plan, the sentence containing the contact information for the party responsible for administering COBRA continuation coverage should be deleted from the Proposed Model General Notice.

Another benefit of removing this contact information from the Proposed Model General Notice is that plan administrators would be relieved of the additional administrative and systems costs that likely would be associated with monitoring and updating this information if it is required to be included in the general notice. According to a Gartner Dataquest report issued in June 2000, plan sponsors are outsourcing their benefit plan recordkeeping functions (including COBRA continuation administrative functions) in growing numbers. This data indicates that requiring the contact information to appear on the initial COBRA notice would indeed be very onerous and costly to the employer.

Example 2:

The Proposed Model General Notice explicitly contains a provision which directs the covered employee and his/her spouse to review a plan's summary plan description (the 'SPD') for additional information regarding COBRA rights and obligations. However, the COBRA provisions contained in a plan's SPD often are substantially similar, if not identical, to the information set forth in the notice that is provided upon commencement of coverage under the plan. As the information contained in the SPD is unlikely to contain any *additional* information that would assist the covered employee and his/her spouse in gaining a general understanding of their COBRA rights, the sentence referencing the SPD should be removed from the Proposed Model General Notice.

**Section 2590.606-4 of the Proposed Regulations – Notice Requirements for Plan Administrators**

Section 2590.606-4(b)–Notice of Right to Elect Continuation Coverage

Section 2590.606-4(b)(4) of the Proposed Regulations lists the information that must be included in the notice of right to elect continuation coverage ('Election Notice'). While we agree with the Department that a plan administrator has a duty to apprise each qualified beneficiary of his/her rights to elect continuation coverage under COBRA, and clearly communicate the steps necessary to make such election, we do not believe that it is necessary to include all of the information set forth in Section 2590.606-4(b)(4) for a plan administrator to satisfy that obligation. Furthermore, if all of the information set forth in Section 2590.606-4(b)(4) of the Proposed Regulations is included in the Election Notice, the true purpose of the Election Notice (i.e., to describe each qualified beneficiary's right to continuation coverage under COBRA and the steps necessary to elect such coverage) is jeopardized because of the resulting length and complexity of the Election Notice.



For example, Section 2590.606-4(b)(4)(xiii) of the Proposed Regulations states that plan administrators must describe any other opportunity for other health coverage for which the individual would be eligible, specifically, if applicable, his/her right to convert to an individual policy after exhaustion of continuation coverage. As conversion information already is required to be provided to a qualified beneficiary within 180 days from the date COBRA coverage would terminate pursuant to Section 602(5) of ERISA, it is not necessary to require information regarding conversion coverage be included in the Election Notice. Therefore, to ensure the purpose of the Election Notice remains focused on describing each qualified beneficiary's right to continuation coverage under COBRA, and the steps that must be taken to elect such coverage, the information regarding alternative continuation and conversion coverage, as set forth in Section 2590.606-4(b)(4)(xiii) of the Proposed Regulations, should be removed from the list of required information that must be contained in the Election Notice.

Section 2590.606-4(c)–Notice of Unavailability of Continuation Coverage

Section 2590.606-4(c)(1) of the Proposed Regulations would impose the following new notice obligation on plan administrators: upon receipt of a notice of a qualifying event from a participant or beneficiary who is not eligible to receive COBRA continuation coverage under the plan, the plan administrator would be required to provide a notice to such individual(s) explaining why he/she is not entitled to coverage. We agree with the Department that there is the potential for a misunderstanding when a participant or beneficiary mistakenly believes that a qualifying event has occurred and provides what he/she believes to be notice of such qualifying event to a plan administrator. However, the statutory language under Section 606(a)(4) of ERISA only imposes a notice obligation on a plan administrator who receives notice of a *qualifying event*; the statutory language does not impose a notice obligation on a plan administrator who receives notice from a participant or beneficiary regarding an event that the participant or beneficiary believes to be a qualifying event. Thus, there is no statutory language to support the notice obligation imposed under Section 2590.606-4(c) of the Proposed Regulations.

Furthermore, most plan administrators verbally provide the type of notice contemplated in Section 2590.606-4(c) upon the receipt of a notice of an event that an individual mistakenly believes is a qualifying event. Specifically, when an individual calls FESCO to provide notice of what he/she believes to be a qualifying event, a FESCO representative will inform the individual whether or not the individual is entitled to continuation coverage. If the individual is not entitled to continuation coverage, the FESCO representative will explain the reason(s) that continuation rights are not available to him/her.

Based on the foregoing reasons, the notice of unavailability of continuation coverage provision should be removed from the Proposed Regulations. In the event the Department disagrees with the proposal to remove subparagraph (c) from 2590.606-4, we request further clarification that this notice requirement may be satisfied by verbally communicating the information over a recorded line.



In addition, we also request clarification under this provision that this notice requirement would not apply in situations involving an employee or a dependent that never had coverage under the applicable group health plan. For example, the Proposed Regulations, as currently drafted, may be interpreted in a way that would require a plan administrator to provide an individual who divorces an employee with a notice of unavailability of COBRA coverage upon receipt of a notice from the ex-spouse, even if that ex-spouse was never covered by the employer's group health plan.

In the example set forth above, the notice provided by the ex-spouse would not constitute notice provided pursuant to Section 2590.606-3 because the ex-spouse would not satisfy the definition of a qualified beneficiary. As a result, the plan administrator should not be obligated to provide a notice of unavailability of coverage to such ex-spouse because 2590.606-4(c) provides that the notice obligation is triggered "[i]n the event that an administrator [] receives a notice of qualifying event furnished in accordance with § 2590.606-3". To avoid any misinterpretation of the notice obligation that would be imposed upon plan administrators under 2590.606-4(c), we request that the Department clarify that plan administrators would not be required to provide notice of unavailability of coverage to any individual who was not covered under the plan and therefore is not a covered employee or a qualified beneficiary.

#### Section 2590.606-4(d)–Notice of Termination of Continuation Coverage

Section 2590.606-4(d)(1) of the Proposed Regulations imposes the following new notice obligation on plan administrators: notice of early termination of continuation coverage. We agree with the Department that there is the potential that there could be a misunderstanding regarding the timing of the termination of a qualified beneficiary's continuation coverage. However, most terminations of continuation coverage are either voluntary, or as a result of the qualified beneficiary's failure to pay the required premium. In both situations, the qualified beneficiary is very aware of the fact that his/her continuation coverage will terminate, as well as the timing of such termination. In addition, the events upon which COBRA coverage will terminate are set forth in the initial notice, the Election Notice and the participant's SPD. Thus, there does not appear to be a great deal of value that may be gained from providing this new notice. Also, similar to new notice of unavailability of continuation coverage, there is no statutory language to support the notice obligation imposed under Section 2590.606-4(d) of the Proposed Regulations.

Furthermore, plan administrators often provide the type of notice contemplated in Section 2590.606-4(d). Specifically, when the participant or beneficiary calls FESCO to provide notification that he/she would like to terminate his/her continuation coverage, a FESCO representative immediately notifies the participant or beneficiary via phone exchange of the date his/her continuation coverage will terminate. Therefore, it is not necessary to impose a mandatory obligation upon plan administrators when many already provide this type of notice on a voluntary basis. Accordingly, the notice of termination of continuation coverage provision should be removed from the Proposed Regulations.



In the event the Department disagrees with the proposal to remove subparagraph (d) from 2590.606-4, we request further clarification under this provision regarding whether this notice requirement must be provided when termination of continuation coverage is voluntarily requested, or as a result of the participant's own failure to pay the required premium. Furthermore, we request clarification that this notice obligation may be satisfied by verbally communicating the information over a recorded line.

### **Effective Date**

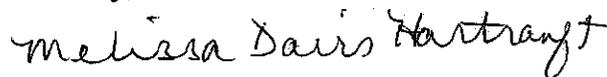
Finally, our last comment is regarding the Department's proposal to use the first day of the first plan year that occurs on or after January 1, 2004 as the effective date of the changes set forth in the Proposed Regulations, once they are issued in final form. Fidelity's group health plans are administered on a calendar year basis. Similarly, over 93 % of the clients for whom FESCO provides COBRA recordkeeping services also maintain their plans on a calendar year basis. Therefore, if the final regulations are issued in substantially the same form as the Proposed Regulations, we are concerned there will be insufficient time to: (i) design and implement the various systems configurations that will be necessary in order to comply with the various content and timing requirements contained in the Proposed Regulations; (ii) make the necessary changes to existing COBRA notices pursuant to Sections 2590.606-1 and 2590.606-4(b) of the Proposed Regulations; (iii) draft the newly required unavailability of continuation coverage and termination of continuation coverage notices, pursuant to Section 2590.606-4(c) and (d) of the Proposed Regulations; and (iv) update the Plans' SPD to describe the Plans' procedures for covered employees and qualified beneficiaries to provide notice of certain qualifying events pursuant to Section 2590.606-3 of the Proposed Regulations. Therefore, the regulations, once they are issued in final form, should have an effective date that is the later of (a) twelve months from the effective date of the regulations, once they are issued in final form, or (b) the first day of the first plan year that begins on or after July 1, 2004, with the ability to elect to operate in accordance with the final regulations at an earlier date.

By adopting a delayed effective date, such as the one that we propose above, employers, such as Fidelity, and record-keepers who provide COBRA services, such as FESCO, will have sufficient time to draft and update both the new and existing COBRA letters and other forms of communication that are used to inform covered employees, their spouses and qualified beneficiaries of their rights under COBRA, and to reconfigure the various administrative systems that are used to manage the COBRA notice processes.

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We appreciate the opportunity to provide these comments on the Proposed Regulations to the Department. We would be happy to provide further information on any of our comments contained herein, and we look forward to continuing further consultations on these important issues as the Department works toward finalization of the Proposed Regulations. Please feel free to contact us with any questions or comments that you may have regarding the issues raised in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Melissa Davis Hartranft".

Melissa Davis Hartranft  
Senior Legal Counsel