0015

A Partnership Including Professional Corporations
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

Paul M. Hamburger, P.C.
Attorney at Law
phamburger@mwe.com
202-756-8306

Boston
Chicago
London
Los Angeles
Miami
Moscow
New York
Orange County
Silicon Valley
Vilnius
Washington, D.C.

MCDERMOTT, WILL & EMERY

July 28, 2003

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

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Attn: COBRA Notice Regulations

Dear Sir/Madam:

This letter provides comments to the U.S. Department of Labor ("DOL") in connection with the proposed regulations on the continuation health care provisions under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA") which were issued on May 28, 2003.

Final regulatory guidance from the DOL will provide a great deal of help and guidance to plan administrators and other COBRA service providers that are trying to address the COBRA notice and disclosure requirements under a general good faith standard. Many of the DOL proposals will be quite helpful to plan administrators and qualified beneficiaries by providing certainty on various rules and required plan documentation. However, there are a number of areas in the proposed regulations that need to be reviewed before they are finalized. If the proposed regulations are finalized without significant clarifications or revisions, rather than providing certainty, the regulations may result in much more difficulty in COBRA administration.

We are writing this comment letter on behalf of certain third-party administrators ("TPAs"), including specifically COBRA Compliance Systems, Inc. These TPAs have many years of day-to-day COBRA administration expertise, and they regularly provide COBRA compliance services to thousands of employers. For example, these TPAs collectively provide notification and premium collection services to over 14,000 employers and 1,000,000 covered employees nationwide. They have also trained over 225,000 human resource and insurance professionals on COBRA matters. This extensive experience with COBRA administration provides a valuable view of the practical side of COBRA administration. We offer the following comments based on this experience as well as our own in advising employers and plan administrators throughout the country.

I. GENERAL ISSUES

(1) Examples Should be Used

(A) Summary of Proposed Regulation. Currently the proposed regulation does not contain any specific examples to help illustrate the application of the regulatory concepts.

(B) Recommendation. Specific examples should be added throughout the regulation. Throughout this comment letter, we will note specific provisions where we believe examples would be helpful.

(C) Explanation. As indicated in the regulatory preamble, the purpose of a final DOL COBRA regulation is to add certainty and improve consistency and quality of information provided to participants. In addition, many of those who will rely on DOL guidance in this area are not attorneys or others with legal training. Therefore, a dry final regulation with numerous cross-references, sub-clauses, and legal citations will not help those who must administer the rules understand how the various rules will apply in practice. Adding examples is a relatively easy way to clarify and improve the proposed regulations through real-life scenarios. In many instances, this would further the DOL's purpose in issuing the regulation by leaving less room for guesswork and interpretation. Examples would make the regulations more understandable to the average plan administrator, average plan participant (who will also need to rely on the regulatory guidance), and courts who have to interpret these requirements without any particular understanding of ERISA or COBRA.

(2) Role of Third-Party Administrators ("TPAs") Should be Clarified

(A) Summary of Proposed Regulation. The proposed regulations for the first time introduce the existence of TPAs and other service providers into the COBRA notification structure through the use of broad language referring to "the party responsible" for COBRA administration as distinguished from the official "plan administrator."

(B) Recommendations and Explanations

(i) Recommendation No. 1. The regulations should clarify how the COBRA requirements apply when a plan administrator uses the services of a TPA or other service provider to administer COBRA. Specifically, the following issues should be more clear: (1) that the use of a TPA in and of itself will not affect the timing requirements for COBRA notices, and (2) penalties under ERISA section 502(c) for late COBRA notices cannot be assessed against TPAs (or other service providers), unless the TPA (or other service provider) explicitly agrees to become the plan administrator, at least for the limited purpose of COBRA administration.

Explanation. Generally, TPAs and other service providers as distinct entities are not recognized in the COBRA statutory provisions or legislative history.[1] Instead, the COBRA administrative requirements are generally imposed on employers and plan administrators. Of course, it is now well-known that non-plan administrator service providers serve a valuable role in the COBRA administrative process and the proposed regulations appear to address this reality. However, typically, a COBRA service provider is not the official ERISA plan administrator and this means that the legal liabilities for service providers need to be clearly different from those applicable to plan administrators.

As the DOL previously indicated in DOL Advisory Opinion 90-16A, a plan administrator cannot be relieved of its COBRA notification responsibilities. Therefore, a plan administrator remains liable for its COBRA notice obligations even if it has contracted with a TPA for the provision of COBRA administration services. In other words, a plan administrator's outsourcing of service to a TPA is to be treated as if the plan administrator itself was performing the service. This principle should be stated clearly in the regulations because all parties involved (qualified beneficiaries as well as employers and others involved in COBRA) need to know where the legal liabilities fall for COBRA violations. For instance, if an employer that self-administers COBRA has 44 days from the date of a qualifying event within which to provide a COBRA notification upon the occurrence of a termination or reduction in hours of employment, then its use of a TPA to provide this COBRA notice should neither lengthen nor shorten the 44-day time limit as long as the TPA is not named as the plan administrator. Moreover, if the employer/plan administrator is late in notifying the TPA of the qualifying event so that the TPA cannot provide a qualifying event notice within the 44-day time period, the regulation should be clear that the legal liability for the failure rests with the plan administrator and not the TPA. (Of course, the parties are free to negotiate over the circumstances under which a TPA would (or would not) agree to assume certain liability or indemnify the employer/plan administrator for that liability. However, this should not be the subject of any regulatory guidance.)

Thus, from a regulatory perspective, the regulations must be clear that it is the plan administrator, and only the plan administrator, that is responsible for providing various COBRA notices and for any associated penalties for non-compliance. On the other hand, the regulations should also make it clear that an employer is permitted to designate a service provider as the plan administrator *for the limited purpose of* COBRA notification requirements. In that case, if a TPA explicitly agrees to become the plan administrator for that purpose, then the TPA would have the responsibility for providing notices within the specified time periods (typically within 14 days of the date it receives notification of a qualifying event). It is important that the regulations confirm that a TPA could be designated as the plan administrator for the sole purpose of the COBRA notification requirements and not for any other purposes under the plan, however.

[1] One exception to this statement is that the tax provisions include the possibility of a COBRA excise tax being imposed on a COBRA service provider whose act or failure to act caused the COBRA failure. See Internal Revenue Code of 1986, as amended (the "Code") §4980B(e)(1)(B). However, there is no other specific guidance interpreting the substantive administrative requirements as they apply to parties other than the employer or official plan administrator.

In this regard, examples would be helpful. One example could illustrate that if an employer/plan administrator is late in advising a TPA of a qualifying event, the employer/plan administrator is liable for COBRA notice penalties. By contrast, a separate example could show that if a TPA is appointed as a limited purpose plan administrator, then as long as the TPA provides a qualifying event notice within the 14-day period of when it is notified of a qualifying event, neither the TPA nor the employer would be responsible for any late notice penalties.

(ii) Recommendation No. 2. The final regulation should be precise and consistent in its use of terminology regarding various parties involved in COBRA administration.

Explanation. Throughout the proposed regulation, the preamble, and the model notices, the guidance refers to three different entities: the "plan administrator," the "party responsible for COBRA administration," and simply the "administrator." This creates a good deal of confusion, especially for non-lawyers (or others who are not familiar with ERISA technical rules) reading and interpreting this regulation. In the field of plan administration, TPAs and other service providers are often referred to colloquially as "administrators," even though they are not the ERISA "plan administrator" as indicated in the plan's SPD and other documentation. Therefore, by using the term "administrator," the DOL is creating an ambiguity based on what is happening in the COBRA administration field.

For the most part, it seems that when the proposed regulations refer to the "administrator" they mean the ERISA "plan administrator." But this is not always true. See for example, §2590.606-1(c)(1) (which refers to the "party responsible" for COBRA administration), as compared to §2590.606-1(c)(2) (which refers to the "plan administrator"), as compared to §2590.606-1(c)(3) (which refers simply to the "administrator")), all within the same subsection. In addition, in some instances, as in §2590.606-2(a), the proposed regulation refers to a notice being provided by employers to "the administrator of the plan." This type of reference is not accurate and should not be used when the regulation is trying to distinguish between the "plan administrator" and others who are responsible for administration.

Because all of these terms could refer to different parties involved in the COBRA administrative process, it is crucial that the regulation be precise and consistent in the use of such terminology.

(3) Penalties/Consequences for Non-Compliance

(A) Summary of Proposed Regulation. The proposed regulations do not explain the consequences of non-compliance, such as the penalties under ERISA section 502(c). The preamble refers to the possibility of "fines or other adverse consequences" (68 Fed. Reg. 31833), but there is no discussion of how those fines or other adverse consequences apply in the context of COBRA notice requirements.

(B) Recommendation. Throughout the regulations, the consequences of a failure to comply with the requirements should be explicitly stated. This is true whether the failure is the plan

administrator's failure or the qualified beneficiary's failure to comply with notice requirements. Throughout this comment letter we will point out more specifically those noncompliance issues that should be addressed in the regulation. At a minimum, however, there should be an express statement, either in the preamble or the regulation itself, that only the plan administrator is subject to penalties under ERISA section 502(c) and that ERISA section 502(c) penalties can *only* be imposed due to the failure to timely provide a notice required under ERISA section 606(a)(1) (the initial general notice) and ERISA section 606(a)(4) (a qualifying event notice).

(C) Explanation. The DOL's purpose in providing regulatory guidance is to make the rules clear, consistent, and precise. That will result in giving all parties clear statements of their rights and responsibilities. In part, as the preamble indicates, clear rules will also minimize the risk to plans of needless litigation. One of the most litigated areas of COBRA administration involves COBRA notice penalties. Therefore, if the DOL is going to provide meaningful assistance in this area, there should be a clear statement as to when notice penalties could apply and when they do not apply. In this regard, the DOL has proposed two new notices for plan administrators (§2590.606-4(c) and (d)). Because these notices would be based on the regulation and not the statute, nothing in ERISA section 502(c) would impose any penalties on a plan administrator that is late in providing these notices (as contrasted with the initial COBRA notice under ERISA section 606(a)(1) or the qualifying event notice under ERISA section 606(a)(4)). To avoid any ambiguity, therefore, the regulations should be clear that ERISA late notice penalties under ERISA section 502(c) do not apply to the new DOL regulatory notices.

Apart from penalties imposed on plan administrators, it must also be recognized that qualified beneficiaries risk a loss of COBRA coverage if they fail to provide notices or COBRA elections on time. Final regulations need to be as clear and explicit as possible on this point. Often, qualified beneficiaries will lose their right to elect COBRA coverage because they fail to act in a timely manner and they do not understand that their rights cannot be "revived" by a late COBRA election or late premium payment. It would be in everyone's best interest if the DOL regulations explicitly state that if a qualified beneficiary fails to act in a timely manner, the qualified beneficiary will lose all rights to continue COBRA coverage. The specific areas of concern in the proposed regulation are noted throughout this comment letter.

II. PREAMBLE

(1) Preamble to Prop. Reg. at 68 Fed. Reg. 31834—Effective Date

(A) Summary of Proposed Regulation. The DOL proposes to make the regulations, in their final form, effective as of the first day of the first plan year that occurs on or after January 1, 2004.

(B) Recommendation. We recommend postponing the effective date of the final regulations to the first day of the first plan year beginning on or after January 1, 2005, or if later, at least six months after they become final. In the interim period, the DOL should indicate that early

compliance with the final regulation would be deemed to be good faith compliance with COBRA requirements.

(C) Explanation. Considering that the comment period for these proposed regulations expires July 28, 2003, the earliest that the DOL could issue a finalized regulation, as a practical matter, would be late August. Even if the DOL could issue a final regulation on August 1, 2003, plan administrators would only have five months within which to make significant changes to COBRA administrative practices and notices. Although many plans and plan administrators might already have fully compliant COBRA notification procedures and systems, the proposed regulations are being issued precisely because of the DOL's concern that COBRA notification processes are not adequate or uniform. Therefore, it is not reasonable to expect employers and their service providers to completely review and revise their notices and administrative systems within what is a maximum five-month period.

In addition, as a practical matter, it takes time to disseminate the relevant information to plan administrators and sponsors and it then takes time to alter and implement adequate systems. If this process is rushed, the costs (to both employers and their service providers) to implement changes are significantly increased and there is a significant likelihood that revised systems will have flaws.

Instead of imposing a quick deadline for final regulations, it is in everyone's interest to have a reasonably delayed effective date. In the interim, the DOL could indicate that early compliance with the final regulation would be deemed to be good faith compliance. That way, plans would have an incentive to comply with the DOL's final rules as quickly as possible, but would not necessarily face fines and other adverse consequences simply because they could not implement all of the requirements by an early deadline.

(2) Preamble to Prop. Reg. at 68 Fed. Reg. 31833 and Model Qualifying Event Notice—Trade Adjustment Assistance Act Requirements

(A) Summary of Proposed Regulation. The preamble to the proposed regulation states that summary plan descriptions ("SPDs") must include information about the possible availability of a new second election period if the trade adjustment assistance ("TAA") rules apply. Also, the model qualifying event notice refers to the tax credit available for TAA-eligible individuals.

(B) Recommendation. We recommend that the COBRA regulation itself specify the type of TAA-related information that should be included in COBRA notices and that it be clarified that: (1) only those employers who are likely to be subject to the TAA requirements need to include the relevant information; (2) the tax credit provisions, if applicable, apply to PBGC-eligible individuals as well as TAA-eligible individuals; and (3) the second COBRA election period only applies to TAA-eligible individuals.

(C) Explanation. The TAA requirements enacted as part of the Trade Act of 2002 include two basic new rules: (1) a new COBRA election period for TAA-eligible individuals (ERISA section 605(b)), and (2) a new health care tax credit of 65% of premiums paid for qualified

health insurance, including COBRA coverage (Code section 35). The proposed COBRA regulations do not specifically refer to the TAA requirements. Therefore, it is not clear how these requirements must be integrated into COBRA notices.

Admittedly, the preamble to the proposed regulation refers to the information as being required in SPDs and the model qualifying event notice refers to the possibility of the tax credit. However, this does not provide sufficient guidance on this issue. In addition, nowhere in the proposed regulation does the DOL indicate that the health care tax credit is available to eligible PBGC pension recipients (those age 55 or older who are receiving a benefit paid by the PBGC). Instead, the model COBRA qualifying event notice refers to the tax credit being available only to those who are eligible for trade adjustment assistance. The rules in this area are technical and complex and by not including reference to PBGC-eligible individuals, there is a risk that the model notices will unintentionally be used to disseminate inaccurate information to qualified beneficiaries. Therefore, the description of the tax credit and TAA requirements should be clearly thought through and included through the regulation itself and not through cross-reference to the general SPD requirements or model COBRA notices.

Separately, the regulation should be clear that not all employers are required to provide information concerning these issues. There are many employers for whom the TAA or health care tax credit provisions will never likely be relevant. Therefore, to require such information in model notices could mislead participants into thinking they are eligible for a tax credit. This will cause confusion and will likely result in numerous questions for plan administrators who are not otherwise aware of the rules (and would otherwise have no reason to be aware of such rules). The final regulations should, therefore be much more clear that plans are not required to include TAA or health care tax credit information if the plan administrator has determined that these provisions are not likely to apply to a particular employer.

III. INITIAL NOTICE PROVISIONS

(1) Prop. Reg. §2590.606-1(b)—Timing of Initial Notice

(A) Summary of the Proposed Regulation. The proposed regulations impose a 90-day period during which the initial COBRA notice must be provided to covered employees and their covered spouses. The timing is accelerated, however, if a qualifying event notice is required to be provided before the end of the regular 90-day period, in which case the initial notice must be provided at the time that a qualifying event notice is required to be provided (generally, within 14 days of plan administrator being notified of the qualifying event).

(B) Recommendation. The final regulation should state that (1) providing a qualifying event notice within the first 90 days of coverage would meet the requirement for both the initial COBRA notice and the qualifying event notice (the plan administrator does not have to provide both notices); (2) the only time a COBRA election notice must be provided earlier than within the first 90 days of coverage is if the plan administrator becomes aware of a qualifying event (either from the employer or the qualified beneficiary) and must, therefore, provide a qualifying event

notice; and (3) the only individuals for whom the initial COBRA notice requirement is imposed earlier than the 90-day notice period are the qualified beneficiaries affected by the qualifying event, not a covered employee who is not otherwise affected by the qualifying event. Examples should be included to illustrate these timing rules.

(C) Explanation. The 90-day time period for providing an initial notice to covered employees and spouses is generally a reasonable time period within which to fulfill this initial notice requirement. However, for the sake of clarity, the final regulations should state affirmatively that initial COBRA notices need not be provided to dependent children (or anyone else other than an employee and spouse) covered by a group health plan. In addition, it would be helpful if examples were included to illustrate that a spouse must be provided with a COBRA notice separately from the employee if the spouse becomes covered at a later date. Specific examples should include a married employee who covers a spouse at a later date and an unmarried employee who gets married and adds a spouse at a later date. (This issue is further addressed in regard to the comments on §2590.606-1(d).)

There are two key problems with the timing rule for the initial COBRA notice provision, as currently proposed, however. First, it is not clear how many notices must be provided if the 90-day period is accelerated due to the occurrence of a qualifying event within the first 90 days of coverage. Technically, the proposed regulation would appear to require that both an initial notice and a qualifying event notice be provided to affected individuals. This requirement for multiple notices can only increase confusion and does not seem to be necessary to protect participants' interests. After all, if the qualifying event notice includes all of the information needed for such a notice, it would certainly provide as much or more information as the initial COBRA notice. A requirement to provide multiple notices does not seem to add any helpful information.

The reason this issue is important is that there are ERISA section 502(c) notice penalties associated with a failure by the plan administrator to provide each of these notices. Therefore, absent clarification, plan administrators would likely provide both sets of notices even if it causes confusion, information over-load, and significant additional expense. That way, the plan administrators would minimize exposure for penalties. The DOL could solve this problem by providing that if a qualifying event notice is provided in a timely fashion prior to the due date for the initial COBRA notice, then that qualifying event notice will be treated as satisfying the plan administrator's obligation to provide the initial COBRA notice as well.

A second problem with the proposed regulation is that it imposes an early initial notice requirement for both the covered employee and the covered employee's spouse even if the qualifying event that triggered the early notification only affects the employee's spouse. For example, if a divorce occurs during the first 90 days of coverage, the accelerated timing rule for initial notices appears to require that an initial notice be provided early to the covered employee as well as the divorced spouse. There does not appear to be any reason for accelerating the timing of notice delivery to the employee when the employee is not affected by the qualifying event causing the early notification. Therefore, the final regulation should not require that an initial notice be provided earlier than the otherwise applicable 90-day period to the covered employee if the covered

employee is not affected by the qualifying event. Similar questions arise in the case of a dependent child who ceases to be a dependent child. In such a case, it is not clear why the initial notice needs to be accelerated for the employee and covered spouse when the formerly dependent child will be provided with a COBRA notice.

Finally, specific examples illustrating the timing requirements should be provided. These examples should illustrate how to comply if the qualifying event is a termination or reduction in hours of employment as well as how to comply if the qualifying event is a divorce or cessation of dependent child status.

(2) Prop. Reg. §2590.606-1(c)—Content of Initial Notice

(A) Summary of the Proposed Regulation. The proposed regulations impose six specific content requirements for the initial COBRA notice. In addition, the proposed regulations include a model notice for use in meeting the initial COBRA notice requirements.

(B) Recommendation No. 1. The final regulations should allow for the use of more "generic" initial COBRA notices without significant amounts of plan specific information. The key COBRA information should be provided and references to the applicable summary plan description should be permitted for disclosing more detailed information.

Explanation. The current proposed regulation requirement for detailed specific plan related information can create a great deal of confusion for covered employees and spouses over time. For example, the proposed regulation requires the disclosure of the "party responsible" for COBRA administration as well as other specific plan related information (such as COBRA notice procedures and other optional plan provisions). The problem arises when this information changes, as it will over time. As an example, if an initial notice indicates that a particular TPA is providing COBRA services today, that does not mean that a new provider will not be providing COBRA administrative services when a qualifying event occurs several years later. In the meantime, the earlier notice will be outstanding indicating that an earlier recordkeeper was involved.

Admittedly, covered employees should be informed of changes in the relevant information through updated SPDs and summaries of material modifications (SMMs). However, covered spouses might not otherwise obtain copies of those updated documents as such disclosure is not specifically required by ERISA. Therefore, by requiring that initial COBRA notices include current plan-specific information, the proposed regulation could cause confusion for covered spouses who later get divorced and are not sure whom to contact about the qualifying event. These divorced spouses may end up notifying an old service provider only to find out that this service provider is not the current TPA. This could cause them to lose valuable time in trying to identify and locate the proper service provider and provide notice in a timely fashion. As a result, they may lose their rights to COBRA coverage.

Instead of a requirement to provide this specific information, plan administrators should be allowed to use a more generic form of initial COBRA notice (more along the lines of the model

notice included in ERISA Technical Release 86-2, as modified for changes in the law). This notice could also apprise the covered employees and spouses that there are plan procedures to follow for providing notice of COBRA qualifying events and that a summary of those procedures in effect at the time could be provided upon request. This notice would be effective at explaining COBRA rights in a general way and could refer covered employees and spouses to the SPD and the plan administrator for more detailed information.

Another advantage of a more general initial notice is that it can reduce the cost of COBRA administration for all group health plans. As the DOL indicated in the preamble to the proposed regulation, many employers use the services of COBRA service providers in administering COBRA. The use of COBRA service providers is a benefit for plans as well as qualified beneficiaries as a cost-effective way to fulfill the plan's legal requirements and provide uniform COBRA administration. By requiring individualized detailed initial COBRA notices, the cost of providing this service is increased (because service providers will have to individually tailor initial COBRA notices in a significant way) without delivering any significant benefit to qualified beneficiaries that is not otherwise provided through the use of a more generic notice.

(C) Recommendation No. 2. Regardless of the content requirements in final regulations, the final regulations should clarify that there is no requirement to re-send initial COBRA notices to all existing covered employees and spouses solely due to the final regulations. Instead, if the plan administrator determines that the initial notice already provided meets the requirements of good faith compliance, any new notices should be required to be provided prospectively only.

Explanation. Since the issuance of ERISA Technical Release 86-2, plan administrators have prepared initial COBRA notices based on the DOL-approved model, as modified for changes in the law. The basic style of these initial notices has been of a more generic nature because the DOL's safe harbor notice did not require as much plan-specific information as would be required by the new proposed COBRA regulations. If the DOL finalizes the regulation with the requirement for more plan-specific information to be included in initial COBRA notices, there will be a question as to whether plan administrators are required to re-notify all covered employees and spouses based on a new standard. If plan administrators were to be required to re-notify all covered employees and spouses, the costs and burdens of plan administration would be significantly strained for no significant benefit to any covered employees or spouses. At a minimum, any new information would be included in updated SPDs or summaries of material modifications. To avoid this question and minimize the extent to which significant disruption would occur, the final regulations should make it clear that any notice standards imposed in the final regulations are applicable on a prospective basis only. The standard for notices issued prior to the effective date of final regulations should continue to be whether the notices were prepared in compliance with a good faith interpretation of the statutory requirements and legislative history.

(3) Prop. Reg. §2590.606-1(d)—Single Notice Rule

(A) Summary of Proposed Regulation. The proposed regulation would incorporate the single notice rule under which a plan administrator is allowed to provide a single initial COBRA

notice to an employee and covered spouse if they both reside at the same address. This rule would not apply if a spouse's coverage under a plan commences after the covered employee's coverage. However, if the spouse's coverage commences before the end of the initial 90-day notice period, even if that coverage is after the covered employee's coverage, then the single notice rule still applies.

(B) Recommendation. The proposed regulation is technically not clear on the exception to the single notice rule. It should be clarified in final regulations.

(C) Explanation. Under the current proposed regulation, the sentence structure articulating the single notice rule reads as follows (sub-clause references are added for convenience of illustration): (1) Main Rule: "A plan administrator may satisfy the requirement to provide notice in accordance with this section to a covered employee and the covered employee's spouse by furnishing a single notice addressed to both the covered employee and the covered employee's spouse, if, on the basis of the most recent information available to the plan, the covered employee's spouse resides at the same location as the covered employee." (2) Exception: "The prior sentence shall not apply if a spouse's coverage under the plan commences after the date on which the covered employee's coverage commences," (3) Exception to Exception: "unless the spouse's coverage commences before the date on which the notice required by this section is required to be provided to the covered employee."

Logically, this appears to state that a single notice is acceptable (clause 1). However, the rule in clause 1 does not apply if coverage for the spouse commences after the employee's coverage (clause 2). On the other hand, that single notice is valid if the spouse's coverage commences after the employee's coverage but during the 90-day period (clause 3). Therefore, if a plan provides a single notice addressed to an employee and spouse at a time when the employee is the only one with coverage, that notice is not valid unless the spouse happens to become covered during the 90-day notice period for the initial COBRA notice. Then, that prior single mailing becomes acceptable even though it was provided to the spouse prior to the time the spouse obtained coverage.

The intent of the rule and exceptions would appear to be that a single notice is acceptable even if a spouse becomes covered after the employee as long as the employee and spouse are both covered at the time the single notice is provided. This is an example of where the technical language of the proposed regulation can create ambiguities unnecessarily. The language should be clarified to more clearly reflect the DOL's intent and examples illustrating the rule and the exceptions to the rule should be provided.

(4) Prop. Reg. §2590.606-1(g)—Model Notice

(A) Summary of Proposed Regulation. The proposed regulations include a model notice that may be modified and used as the initial COBRA notice.

(B) Recommendations and Explanations. Although the model notice is not required to be used and plan administrators are instructed to modify the notice as appropriate, the DOL needs to

be aware that a significant number of plans will base their COBRA notifications on the language already "approved" by the DOL. Therefore, it is essential that the DOL carefully consider how it has described the COBRA requirements and take every effort to make sure the notices are clear, consistent, and accurate.

(i) Recommendation No. 1. Throughout the notice, the language should be clear that only qualified beneficiaries have rights to COBRA coverage, not "you and your family." This will make the model initial notice more consistent with law and with the model qualifying event COBRA election notice.

Explanation. Under COBRA, only qualified beneficiaries have rights to COBRA coverage. Some group health plans may provide coverage for a broader class of individuals who may be part of an employee's family but are not qualified beneficiaries (because they are not employees or their spouses and dependent children). For example, plans could cover other relatives who qualify as tax code dependents but are not spouses or dependent children. Also, some plans provide domestic partner coverage on the theory that domestic partners are part of the employee's family. In these cases, although coverage is provided under the group health plan to an employee's family, these family members may not, contrary to the DOL's model notice, have rights to continue COBRA coverage. Therefore, the model should consistently refer to qualified beneficiaries as having rights to continue coverage, not "you and your family."

Similarly, the model notice defines a qualified beneficiary as "someone" who will lose coverage under the plan because of a qualifying event. For the foregoing reasons, this is not an accurate statement and could mislead non-qualified beneficiaries into believing that they have COBRA rights. Because this model is "approved" by the DOL, it is important that it not purport to create rights that do not exist.

(ii) Recommendation No. 2. The definition of qualified beneficiary should be revised to include a "child born to, or placed for adoption with, the covered employee during the period of continuation coverage."

Explanation. Under COBRA, the class of qualified beneficiaries includes children born to, or placed for adoption with a covered employee during a period of COBRA coverage. ERISA section 607(3)(a), last sentence. To maintain the accuracy of COBRA notifications, the model notice should accurately define qualified beneficiaries in a manner consistent with the terms of ERISA section 607.

(iii) Recommendation No. 3. The model notice should be amended to describe accurately the terms of the bankruptcy qualifying event.

Explanation. ERISA section 603, a bankruptcy filing is a qualifying event for certain retirees and surviving spouses if it results in the loss of coverage of a qualified beneficiary. For this purpose, a loss of coverage includes a substantial elimination of coverage with

respect to a qualified beneficiary within one year before or after the bankruptcy filing. The model notice should include this one-year rule as it is an important component of the COBRA qualifying event definition.

(iv) Recommendation No. 4. The model notice should not include the specific time frame applicable to notices provided by employers to plan administrators. This provision should be revised to use more generic language.

Explanation. Covered employees typically participate in more than one group health plan of an employer at one time, particularly in the case of larger employers. If that happens, each plan may provide a different 30 day rule (one measured from the date of the qualifying event and another from the date of the loss of coverage). However, this 30-day notice period does not affect the qualified beneficiary. Instead, the only relevant notice in this context is the notice from the plan administrator to the qualified beneficiary. Therefore, plan-specific information related to the 30-day notice rule should not be required.

(v) Recommendation No. 5. The timing in which the qualified beneficiary must notify the plan administrator of qualifying event should be revised to be consistent with Treas. Reg. §54.4980B-6, Q&A-2. This is discussed further below in the discussion under Prop. Reg. §2590.606-3(c).

(vi) Recommendation No. 6. The model notice should include an express statement to the effect that a qualified beneficiary will permanently lose his or her COBRA rights if the plan administrator is not notified of a qualifying event in a timely manner.

Explanation. The model notice currently states that qualified beneficiaries "must notify" the plan administrator of certain qualifying events. However, the model does not state the consequences of the failure to provide that notification. This is not consistent with the DOL proposed regulations which ordinarily require plans to disclose the consequences of a failure to provide timely notice of qualifying events.

(vii) Recommendation No. 7. The explanation of the disability extension should be clarified as follows: (A) the only individuals who could trigger the disability extension are "qualified beneficiaries" who become disabled, not "anyone in your family"; (B) the reference to the individual being determined to "*be disabled*" at any time during the first 60 days of COBRA continuation coverage should be to being determined to "*having been* disabled" during the first 60 days of COBRA coverage; (C) the reference to a "total maximum of 29 months" should read "total maximum of 29 months measured from the initial qualifying event"; and (D) the consequences of a failure to provide notice within the proper 60-day time period should be explained expressly in the notice.

Explanation. Each of the corrections referred to in this recommendation are intended to clarify the rights as they are stated in the statute. Therefore, the DOL should not, in effect, modify those legal requirements through an effort to simplify the language. In

particular, by referring to anyone in the employee's family covered under the plan becoming disabled, the notice broadens the potential triggering events for the disability extension beyond the class of statutory qualified beneficiaries (as explained above). By explaining that an individual must be determined to "be" disabled, the model implies that the disability has to first occur during the relevant 60-day period. However, the statute provides that the extension applies if a qualified beneficiary is determined "to have been disabled" at any time during the 60-day period. The reference to the maximum period of COBRA coverage being extended should be clear that qualified beneficiaries are only entitled to up to 29 months of COBRA coverage measured from the date of the initial qualifying event. Finally, to be consistent with the DOL's other notification rules, the consequences of a failure to provide the disability notification should be clearly stated in the model notice.

(viii) Recommendation No. 8. In the description of second qualifying events, the model notice states that "if the former employee dies..." This should be revised to say "if the employee or former employee dies...". Also, the reference to "a maximum of 36 months" should read "a maximum of 36 months measured from the date of the first qualifying event."

Explanation. If the first qualifying event is a reduction in hours of employment, the affected employee is a current employee and not a former employee. To be clear, the model should refer to the death of an employee or former employee. In addition, any reference to extending the COBRA time periods (as in the case of the disability extension) should clearly provide that the maximum period is always measured from the date of the initial qualifying event. Otherwise, the notice creates the impression that a second qualifying event results in an additional 36 months of COBRA coverage measured from the date of the second qualifying event.

(ix) Recommendation No. 9. The model should include a brief statement describing reasons that coverage may be terminated early, such as for nonpayment or failure to pay on time or obtaining other group health plan coverage or Medicare coverage. In addition, the model notice should include a general statement concerning the timing of the COBRA election and premium payments.

Explanation. COBRA qualified beneficiaries do not always understand why their COBRA coverage is being terminated. Indeed, the DOL has acknowledged that this is a common area of misunderstanding by adding a new notice of termination of COBRA coverage. In light of this recognized misunderstanding, it is important that all COBRA notices explain the fact that COBRA coverage may be terminated before the maximum period due to such events as nonpayment or late payment or some of the other events that cause COBRA coverage to end early. It should also be noted that the early termination provisions were included in the original DOL model notice included in ERISA Technical Release 86-2 and are typically included in currently used initial notices.

IV. QUALIFIED BENEFICIARIES'/EMPLOYEES' NOTICE TO PLAN ADMINISTRATOR

The proposed regulations include specific rules governing the notices that must be provided by covered employees and/or qualified beneficiaries to plan administrators upon the occurrence of qualifying events, multiple qualifying events, and disability determinations. There are several issues raised by this section of the proposed regulations.

(1) Prop. Reg. §2590.606-3(a)(3) and (c)(1)—Multiple Qualifying Event Notice

(A) Summary of Proposed Regulation. The DOL proposal establishes a new 60-day time frame within which qualified beneficiaries must notify plan administrators of a second qualifying event.

(B) Recommendation and Explanation. The DOL regulation should include a specific example and explanation of the consequences of a failure to provide a second qualifying event notice in a timely manner. In particular, the regulations should specify that if a qualified beneficiary fails to give timely notice of a second qualifying event, then the beneficiary loses the right to extended coverage. Qualified beneficiaries do not ordinarily understand that their COBRA coverage rights lapse if they fail to comply with COBRA's strict time frames. Therefore, it is important for the DOL to state clearly the consequences of a failure to provide this notice of a second qualifying event.

(2) Prop. Reg. §2590.606-3(b)(4), §2590.606-3(d)—Required Procedures and Notice Rule if No Procedures in Place

(A) Summary of Proposed Regulation. The proposed regulations indicate that plans are allowed to establish reasonable procedures through which qualified beneficiaries could notify plan administrators of events such as divorce, legal separation, or cessation of dependent child status. These procedures must be included in the plan's SPD and could require the use of particular forms that require specific information. According to the proposed regulations, however, if a plan has no such procedures in place, then any written or oral communication that identifies a qualifying event, given to anyone who normally handles the employer's employee benefit matters or to any officer of the employer, will constitute notice. Similarly, if a plan is insured, notice to any person or organizational unit or any officer of the insurer will suffice as a COBRA qualifying event notice, and if a plan is a multiple employer plan or union plan, notice to any person or organizational unit will suffice.

(B) Recommendations and Explanations. There are several aspects of the proposed regulation governing procedures for notification that should be clarified.

(i) Recommendation No. 1. Final regulations should clarify that any reasonable procedures could be included in a timely summary of material modifications and not just the SPD.

Explanation. Many group health plans just completed numerous amendments and modifications to incorporate HIPAA requirements as well as other recent legislative and other changes. In connection with such amendments, the underlying SPDs have been restated as well. At this point, a plan administrator may not wish to restate its SPD just for the purpose of communicating new COBRA notice procedures. Pending a restatement of an SPD, the DOL COBRA regulations should clarify that notice of procedures that is included in a timely SMM is as acceptable as including such procedures in an SPD.

(ii) Recommendation No. 2. The proposed regulations should include more information concerning the consequences of the failure to include complete information in a required form. This should explain whether there are any timing rules on how long a qualified beneficiary can delay providing required information before the plan is allowed to deem the notice of qualifying event to be inadequate.

Explanation. According to §2590.606-3(d)(2), a plan administrator may require that a qualified beneficiary supplement any deficient notification with the required information. However, the regulation does not explain how much time must be allowed for this information to be provided. Moreover, the proposed regulation does not state that the qualified beneficiary's attempted notice could be deemed to be inadequate notice if the required information is not provided after some period of time. This ambiguity will lead to a great deal of confusion for plan administrators as well as qualified beneficiaries. In some cases, qualified beneficiaries might be able to obtain a delay of any required notification simply by providing incomplete information. Therefore, there should be finality in terms of how long a qualified beneficiary must be given to provide all information required by a plan's reasonable notification procedures.

(iii) Recommendation No. 3. The final regulation should clarify that, in the absence of reasonable procedures, any oral notification is not a notice of a COBRA qualifying event unless it is: (1) provided to an officer who is responsible for employee benefit plan administration; and (2) provided for the purpose of seeking benefits under a group health plan.

Explanation. If it is not modified in final regulations, this DOL proposed rule could have significant and adverse consequences for plans without adequate procedures. For example, in the absence of procedures, if an assistant informs a senior officer of the employer that the assistant's child graduated from college, this information arguably is enough to constitute notice of a qualifying event even if the purpose of the notification had nothing at all to do with coverage under the employee benefit plan and the officer did not know anything about the legal requirements for COBRA coverage. This is simply a trap for the unwary employer. In effect, the plan administrator could be exposed for penalties due to a failure to provide a COBRA notice on time even though the notice was not originally offered for COBRA purposes and the officer had no way of knowing that the statement had any significance for an employee benefit plan. This is particularly unfair if the employer is not even the plan administrator for this purpose. If it is assumed that a plan administrator had provided an initial COBRA notice, then it ought to be assumed that qualified beneficiaries will be put on notice of their COBRA rights and that they need to apprise the plan administrator or its representative of a qualifying event. Therefore, if the DOL regulation must

include a default notice rule in the absence of a plan's procedures, the qualified beneficiaries should, at a minimum, be required to demonstrate that they provided some type of deliberate notice of a qualifying event to someone who was in a position to assist them with their COBRA rights.

(3) Prop. Reg. §2590.606-3(c)—Time Periods for Providing Notice

(A) Summary of Proposed Regulation. The proposed regulation indicates that, generally, notice must be provided within 60 days of the qualifying event (unless a plan measures all time periods from the date coverage is lost due to the qualifying event).

(B) Recommendations and Explanations

(i) Recommendation No. 1. Notice of an initial qualifying event from a qualified beneficiary should be required to be provided within 60 days of the later of the qualifying event or the loss of coverage due to the qualifying event.

Explanation. The DOL's proposed regulatory structure is technically inconsistent with IRS final regulations on point. See Treas. Reg. §54.4980B-6, Q&A-2. According to the IRS final regulations, in all cases, qualified beneficiaries have a period of 60 days after the later of the qualifying event or loss of coverage due to the qualifying event within which to notify a plan administrator of the qualifying event. By contrast, the DOL proposed regulations generally require notice within 60 days of the qualifying event, unless a plan specifically applies the rule in ERISA section 607(5) to measure time periods from the loss of coverage date. This inconsistency is significant for plans that provide for a certain period of extended coverage after a qualifying event but *do not* apply the rule in ERISA section 607(5) to measure time periods from the loss of coverage date. In these plans, if a qualified beneficiary is late in providing notice according to the DOL rule (because it is more than 60 days after a qualifying event), but timely under the IRS rule (because it is within 60 days of the later loss of coverage), then a dispute could likely arise concerning whether notice was timely and a court would have difficulty deciding which regulatory provision to follow. There is no purpose served by maintaining this inconsistency in final regulations.

(ii) Recommendation No. 2. Final regulations should clarify the consequences for qualified beneficiaries if they fail to provide notice of a qualifying event in a timely fashion.

Explanation. As indicated above, the regulation should be more clear concerning the consequences for failure to provide any of the required notifications. Without this clear statement, qualified beneficiaries may take the position that a failure to comply with the notice requirements does not necessarily bar their continued right to elect COBRA coverage. Consistent with the DOL's stated purpose underlying the regulations, therefore, the DOL should clarify the status of a qualified beneficiary who fails to notify the plan administrator of a qualifying event in a timely manner.

V. PLAN ADMINISTRATORS' NOTICE

(1) Prop. Reg. §2590.606-4(b)(2)—Timing if Employer is Plan Administrator

(A) Summary of Proposed Regulation. The proposed regulations provide that, except as provided in §2590.606-4(b)(2) or (b)(3), upon receipt of a notice of a qualifying event furnished in accordance with §2590.606-2 or §2590.606-3, the administrator must provide a COBRA election notice within 14 days after receipt of the notice of qualifying event. The proposed regulation in §2590.606-4(b)(2) then provides that if an employer and administrator are the same, a COBRA election notice must be provided, *for any qualifying event*, no later than 44 days after the qualifying event or, if the plan measures time periods from the loss of coverage date (under ERISA section 607(5)), within 44 days after the loss of coverage date. A longer time period could apply for multiemployer plans. The proposed regulations make no exception to this 44-day time limit for (in fact, they specifically include) cases in which the notice of a qualifying event comes from a qualified beneficiary (*e.g.*, in cases of divorce, legal separation, or cessation of dependent child status).

(B) Recommendation. A correction should be made by modifying §2590.606-4(b)(2) to limit the 44-day rule to cases involving only ERISA section 606(a)(2) notices (*i.e.*, notices from an employer concerning a qualifying event), not ERISA section 606(a)(3) notices (*i.e.*, qualifying event notices from qualified beneficiaries or covered employees).

(C) Explanation. If the employer is the plan administrator and an event such as a divorce, legal separation, or cessation of dependent child status occurs, then, under ERISA section 606(a)(3), qualified beneficiaries generally have 60 days from the date of the qualifying event within which to provide the plan administrator with notice of a qualifying event. Through an apparent drafting oversight, however, the DOL's proposed regulations would apply the 44-day rule to *all* qualifying event notices, including those required under ERISA section 606(a)(3). Because of the 60-day notice rule under ERISA section 606(a)(3), the 44-day rule does not apply to these notices and the proposed timing rule should be corrected.

(2) Prop. Reg. §2590.606-4(b)(4)—Content of Election Notice

(A) Summary of Proposed Regulation. The proposed regulation states that COBRA election notices must be "written in a manner calculated to be understood by the average plan participant" and must contain a discussion of fifteen different substantive items.

(B) Recommendations and Explanations

(i) Recommendation No. 1. Plan administrators should be allowed to prepare simple and direct COBRA election notices and refer qualified beneficiaries to the plan's SPD for more plan specific information rather than explain in depth all 15 different required items.

Explanation. By requiring that a COBRA election notice include detailed information concerning so many different aspects of COBRA administration, the DOL is creating a multiplicity of detailed documents that could lead to a great deal of confusion. For example, the DOL SPD regulations already require plans to disclose a significant amount of COBRA information in the plan's SPD. If this information must be repeated in a COBRA election notice, inevitably there is a risk that one of the documents could be updated without corresponding changes in the other document. This would lead to unnecessary confusion for qualified beneficiaries. Instead, COBRA election notices should merely be required to include the most relevant information for qualified beneficiaries, such as the type of coverage available, the cost of coverage, the timing of COBRA elections and premium payments, and other options that are available under the plan. Then, the notice could refer the qualified beneficiaries to the SPD or the plan administrator for more information if they believe it is necessary.

Generally speaking, qualified beneficiaries want to know answers to the basic questions such as whether they are allowed to continue coverage, how much the coverage will cost, and how and when to elect and pay for coverage. Beyond that, there is no reason why the SPD could not provide all of the other details surrounding COBRA compliance.

The risk in this instance is that if some qualified beneficiaries have too much information, it is almost as bad as having not enough information. The DOL should try to strike more of a balance with allowing plan administrators to provide very basic information in formal COBRA election notices and then make it clear where a qualified beneficiary can go to obtain more detailed information (such as a plan's SPD). By requiring detailed information, the DOL seems to be contradicting its own standard that the notice must be understandable to an average plan participant.

(ii) Recommendation No. 2. COBRA election notices should not be required to list each beneficiary by name if the qualified beneficiaries can otherwise determine from the information provided who is a qualified beneficiary.

Explanation. Often, those responsible for administering COBRA (as well as the plan administrator) may not know for sure the names of all of an employee's dependents that are eligible for coverage under a group health plan. Perhaps the clearest examples of such plans include flexible spending arrangements and employee assistance plans, each of which could be subject to COBRA. In these types of plans, the employee is provided coverage and told that his or her family dependents are also eligible for coverage. It is then up to the family to use the benefits collectively or not. However, the plan administrator may not know whether any of the employee's dependents are eligible for COBRA coverage. If the COBRA regulations (even through model notices) require that plan administrators list all qualified beneficiaries eligible for COBRA coverage, plans would have to go to significant expense to obtain the appropriate information from the covered employees. This should not be necessary if the administrator can clarify who could be a qualified beneficiary by category and mail the COBRA notice to all qualified beneficiaries living at the address(es) on file with the plan administrator.

(3) Prop. Reg. §2590.606-4(c) and (d)—Two New Notices

(A) Summary of Proposed Regulation. The proposed regulations create two new notices for plan administrators. These notices are not required by the statute.

(B) Recommendation. Final regulations should clarify, as indicated above, that the ERISA section 502(c) $110 per day penalty for late COBRA notices does not apply to these types of notices even though the notices must be provided by a plan administrator. The statute specifies which notices are subject to late penalties, and because these two new notices are not listed in the statute, the regulation should clarify that there is no applicable notice penalty for late delivery of these new notices.

(4) Prop. Reg. §2590.606-4(c)—Notice of Unavailability of Coverage

(A) Summary of Proposed Regulation. The proposed regulations create a new notice requirement to notify an individual that COBRA coverage is unavailable. This notice applies where a qualified beneficiary or covered employee notifies the plan administrator of a divorce, legal separation, or cessation of dependent child status. The preamble to the proposed regulation suggests that the purpose of this notice is to help alleviate misunderstandings in this area.

(B) Recommendation. The circumstances under which a notice of unavailability of COBRA coverage would be required should be clarified.

(C) Explanation. This notice of unavailability of coverage only applies in the context of a notice provided by qualified beneficiaries or employees of events such as a divorce, legal separation or cessation of dependent child status. However, there are no explanations or illustrations of the reasons why COBRA coverage would be unavailable in this context.

In addition, as written, this notice is not required if an employee was denied COBRA coverage because of a termination due to gross misconduct or is denied COBRA coverage simply because the individual was not otherwise eligible for coverage under the plan and, somehow became covered by the group health plan. These scenarios are common occurrences, yet notice of unavailability of COBRA coverage is not necessarily required in such instances.

Without clear examples illustrating the common circumstances in which this type of notice would be helpful, however, plan administrators will not really understand when such a notice is required. It would be helpful to provide the specific instances in which this notice is to be provided.

(5) Appendix to Prop. Reg. §2590.606-4—Model COBRA Coverage Election Notice

(A) Summary of Proposed Regulation. The proposed regulations create a new model COBRA election notice in addition to an "important information" fact sheet about COBRA.

(B) Recommendation. The COBRA fact sheet includes a number of misstatements that should be clarified, including:

(i) In the section entitled "How long will continuation coverage last", the proposed notice should clarify that coverage is lost if a premium is not paid "in full" and on time. In addition the circumstances under which COBRA coverage could be terminated early due to coverage under another group health plan or Medicare entitlement should be clarified so that coverage is not lost unless the qualified beneficiary in question "first becomes" covered by that other coverage after the date of the COBRA election. This was the topic of much litigation and the U.S. Supreme Court finally determined that the "first becomes" language in the statute was significant language in applying COBRA. See *Geissal v. Moore Medical Corp.* 524 U.S. 74 (1998).

(ii) In the discussion of second qualifying events, the model notice should be revised to state more than that failure to notify of the second event "may affect" a qualified beneficiary's rights to the extension. Instead, the notice should state that the extension of coverage is not available if notice of a second qualifying event is not provided on time.

(iii) We note that in the model election notice information sheet, the description of the disability extension is accurately limited in application to qualified beneficiaries in contrast to the proposed model initial COBRA notice. The two notices should be as consistent and accurate as possible on common provisions.

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In summary, the DOL has, through the proposed regulations, taken a meaningful step toward providing definitive guidance for employers, plan administrators, COBRA service providers, and qualified beneficiaries with definitive notice and disclosure guidance. Final regulations should be issued as quickly as possible so all involved in the COBRA process can have final and clear guidance on these issues.

We appreciate the opportunity to provide comments on the proposed COBRA regulations and if any additional information would be helpful, please contact the undersigned.

Respectfully submitted,

McDERMOTT, WILL & EMERY

By: _____
Paul M. Hamburger, P.C.