

Testimony on Behalf of Aon

By Molly Iacovoni, J.D., Senior Vice President,
Health & Benefits before ERISA Advisory Council

Reducing the Burden and Increasing the Effectiveness of
Mandated Disclosures with Respect to Employment-Based
Health Benefit Plans in the Private Sector

August 22, 2017

Aon Testimony

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement, and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

Aon provides health and benefits consulting services to approximately 1,500 employers who sponsor health and welfare plans. These health and welfare plans include participant counts ranging from 100s of thousands to 100s of participants. We have day-to-day experience with clients in the small, middle, and large markets, all of whom are generally subject to the summary plan description (SPD) and notice requirements discussed in this testimony.

My name is Molly Iacovoni, and I support and consult Aon's clients, many of whom are household name, U.S. based companies, on health and benefits technical issues, including compliance with the Employee Retirement Income Security Act of 1974 (ERISA's) reporting and disclosure rules. I have provided technical consulting to Aon's clients on SPDs and notices required by the U.S. Department of Labor (DOL) for over twenty years. For the majority of my career, I have consulted with larger employers and have seen their challenges as they try to manage electronic options for certain groups of employees versus mailing volumes of paper to retirees and employees who do not maintain a computer as part of his or her work duties. More recently, I have spent time working with mid-size employers and observed that they do not have the staff to maintain current documentation that satisfies all of the DOL technical requirements while making it "user friendly" for employees. In my role, I often receive feedback from clients' internal counsel and HR departments that compliance with the current SPD and DOL notice requirements are onerous and expensive for employers, while not being particularly helpful to the individuals that the information is intended to protect.

Executive Summary

Aon strongly supports the use of an SPD Quick Reference Guide (the "Guide") or similar "availability notice" type document that would **replace** the need to separately **distribute** SPDs and health and welfare notices to eligible employees and retirees. The current ERISA reporting and disclosure rules are outdated and onerous and many of the employers that Aon works with have communicated these concerns to us over the years as well as recently.

Aon supports the Guide concept if it is a short summary of applicable benefits information that would contain links (website references) that attach to the ERISA required documents, such as the SPD and related summaries of coverage and certificates of insurance, the summaries of benefits and coverage (SBCs) and notices that could be accessed online. Two clients indicated to me that they would like flexibility on the actual length of the Guide and content so that it could be structured to meet the needs of their various populations; both clients indicated that the very particular SBC content and length requirements tend to make communicating custom plan designs challenging. Aon assumes that the Guide would be provided to new hires and annually thereafter. However, the need to separately **distribute** via email or paper mail updated SPDs, summaries of material modifications, and notices to participants would no longer be required, as long as these documents, which would be posted on the employer's intranet, are kept up to date within the time frames currently required by ERISA. Of course, Aon understands that individuals without access to the internet could obtain the documents free of charge, upon request, in paper. This is similar to the concept of the availability notice under the SBC distribution rules and makes more practical sense due to current technology capabilities of many Americans. Based on feedback from employers on this topic over the years and very recently, this approach would be a welcomed change.

The ERISA reporting and disclosure requirements, in particular, have become outdated and not useful, resulting in a costly burden for employers who sponsor health and welfare benefits without actually providing a benefit to or protection for plan participants since the volume of material often is not reviewed. Aon clients who sponsor health and welfare plans often comment that employees just “call” when they need something; the amount of information is too difficult and time consuming for employees to review and analyze—the SPD and notice rules have been over-engineered in an effort to protect employees. Further, with the addition of the Affordable Care Act (ACA), employers have been required to add a lot more detail to the SPDs and comply with additional notices, which has only further complicated maintaining compliance with the existing reporting and disclosure rules. Most employers (and they believe their employees) feel that distributing a lot of this information is just a waste of money and paper. The Guide approach would significantly solve this problem while still ensuring that eligible employees and retirees understand and are notified of their rights under the law. The following testimony is provided with these considerations in mind.

Easing the Requirements under the Electronic Distribution Safe Harbor

Aon submitted a letter to Secretary Acosta on May 22, 2017 that outlines why ERISA’s electronic distribution safe harbor should be simplified. Aon requests that this letter be entered into the record as part of this testimony and is included as an attachment at the end of this testimony.

Aon proposes that the DOL consider an electronic distribution safe harbor for SPDs and other federal notices that align to the safe harbor for SBCs. Specifically, the SPD and all other ERISA required federal notices should be able to use the concept of an “availability” notice so that participants receive just one postcard (generally, in the mail) that explains where the SPDs and notices can be found and then, if they do not have access to the internet, they can obtain the documents free of charge, upon request by calling a specified telephone number, such as the employer’s Human Resources department.

As explained in Aon’s letter to Secretary Acosta on May 22, 2017, employers with employees who do not have computers as part of their ordinary work duties or employers who continue to sponsor retiree welfare plans often just mail these materials which is costly, since the up-front work to meet the affirmative consent requirement at 29 CFR §2520.104b-1(c)(2)(ii) creates another complicated, administrative burden for the employer. For example, employees often don’t respond to requests for information with respect to personal email addresses; it’s difficult to collect and maintain. Both mail and the current electronic distribution safe harbor are expensive and/or difficult to administer for employers and therefore, Aon requests a simplified distribution method for SPDs and federal notices that aligns more closely to the current SBC “posting” approach with an “availability notice.”

Aon was delighted to receive a copy of the draft Guide that the DOL is considering as a way to assist participants with an overview of their benefits and directions on how to find out more. We believe that it will be helpful to both participants and employers. In particular, Aon would envision that the Guide would serve as an “availability” notice and would replace the need to mail an entire SPD and other health and welfare mandated notices. Instead, the Guide could be reworked so that everything can be found on-line or as noted on page 1, by calling the employer’s HR department and receiving a paper copy upon request. This approach would save employers who sponsor health and welfare plans significant money since some SPDs are hundreds of pages in length as noted earlier and are currently being mailed due to challenges with the DOL electronic distribution safe harbor. Further, as one of Aon’s clients (a large employer) mentioned to me, a Guide type approach would allow the employer to keep its’ SPDs “real-time” current so that they become significantly more useful to participants as opposed to SPDs that are two and three years old with summaries of material modifications that supplement the content. Plus, the cost of distribution for individuals who do not have a computer as part of their ordinary work duties would decrease significantly.

SPD Content Simplification

The SPD content requirement at 29 CFR §2520.102-3(j)(3) requires simplification. The current regulations (1) are outdated and impractical for employers who change welfare plan designs frequently (typically on an annual basis), and (2) present another challenge for employers who try to leverage materials prepared by their health plans or other vendors who are experts on their particular segment of the employer's plan administration.

The DOL's consideration of a short resource reference tool could also solve this concern if the Guide replaced the requirement to distribute the SPD in its current form, since the Guide concept could direct participants and beneficiaries to source materials, including those prepared by third parties, such as a health plan administrator. Aon suspects that the DOL's concept is in-line with Aon's and many employers' concerns that health and welfare SPDs become easily outdated, over-loaded with summaries of material modifications that are distributed with annual enrollment materials, and at the end of the day, meet DOL requirements but are not helpful or easy to decipher for plan participants. Multiple employers that we work with have indicated to me that they do not believe that the employees even read the SPD or notices when provided to them. Instead, they just call the employer's HR department when they have a question; the volume of the materials currently provided is just overwhelming so it's overlooked and/or recycled by participants. Employees and retirees realize that they can just call to have their questions answered. The Guide concept might be short enough that employees would retain it and then, at least know where to go online or by calling to obtain the information that they need. We support the concept of a Guide to replace existing SPD requirements.

Easing Rules on Separate Schedules of Benefits

- While the SPD content requirements allow certain information to be provided as a separate schedule of benefits, many welfare plan content requirements are technically required to remain in the SPD. Specifically, 29 CFR §2520.102-3(j)(3) requires that the following items be included in the **actual SPD and not as a separate schedule of benefits**: cost sharing provisions (including premiums, deductibles, coinsurance, and copayment amounts), any annual or lifetime limits, preventive services covered by the plan, whether and to what extent certain drugs are covered by the plan, under what circumstances coverage is provided out-of-network, pre-authorizations, and conditions or limits relating to emergency care.
- In contrast, 29 CFR §2520.102-3(j)(2) allows, in the case of a welfare plan, providing extensive schedules of benefits (a group health plan, for example), only a general description of such benefits if reference is made to detailed schedules of benefits which are available without cost to any participant who so requests.

Suggestions for Improvement

- In practice, many mid-size to large employers have multiple plan designs and benefit options. Benefit designs, cost sharing, and health plan options often change year to year. So, while 29 CFR §2520.102-3(j)(2) is helpful, it would be more helpful to have 29 CFR §2520.102-3(j)(3) modified to require a very brief description of the options or a reference to the type of option (e.g., PPO, HMO, etc.) and then, refer the participant to a schedule of benefits that includes the cost sharing and all of the other requirements under 29 CFR §2520.102-3(j)(2) **and** (j)(3).
- If a DOL Guide is used, the Guide could provide the "link" between the various pieces of SPD content, including benefit design requirements typically managed by a third-party administrator (TPA), such as a health plan, or an insurer. If the Guide would not directly link to coverage detail but instead, would link to the SPD that would provide the coverage detail, Aon suggests that the SPD not "repeat" the coverage detail in the text of the SPD (again, since it changes frequently) but instead, merely link to these annual enrollment, TPA, or insurer benefit summaries.

- This proposal or the Guide should be available to employers regardless of the number of option(s) that it sponsors, even if it's only one, and apply to all types of ERISA covered health and welfare benefits (e.g., medical, dental, vision, EAP, health FSA, and life).
- Often times, employers like to use the benefit summaries prepared by a vendor (TPA or insurer) and then, have an SPD that wraps around these benefit summaries. Otherwise, it's a lot of duplicative cost and work for employers to basically restate information prepared by the TPAs to ensure that information in 29 CFR §2520.102-3(j)(3) is repeated in the SPD. This makes even more sense when the health plan options are fully insured, where the insurer is the best source for information such as cost sharing, preauthorization, etc. Further, duplicative information in different materials creates risk of error.
- Comments to the final SPD regulations (11/21/2000) had similar comments that were disregarded, but the comments largely predated electronic media and the SBC.

Model Language for the SPD and/or the DOL Guide

- Under the ACA, employers need to use either a monthly measurement method or a look-back measurement method (LBMM) to determine who is a full-time employee for purposes of the employer shared responsibility provisions under Internal Revenue Code section 4980H. The LBMM, in particular, is confusing for employers and employees. Aon would welcome model language to be used in the Guide and/or the SPD that explains eligibility under the LBMM.

Automatic Listing of Providers

- 29 CFR §2520.102-3(j)(3) also requires that group health plans with provider networks provide a listing of providers as a separate document that accompanies the plan's SPD, provided that the SPD contains a general description of the provider network and further that the SPD contains a statement that provider lists are furnished automatically, without charge as a separate document.

Suggestions for Improvement

- Provider listings continually change. Most vendors provide the provider lists via an internet link. This provision on furnishing provider listings is very outdated and should be stricken. It should be modified to allow for access by link on the internet or to request a copy free of charge, upon request.
- Comments to the final SPD regulations (11/21/2000) also had commenters disagreed with this onerous requirement. Again, this was 17 years ago and technology has changed significantly.

Health and Welfare Notices

The health and welfare notices mandated by the DOL and in some instances, other federal agencies, create confusion for employers and participants, since they have varied timing and distribution requirements—for example, some notices are required at the time an individual is hired, others annually, still others in certain benefit descriptions.

To the extent that the DOL has flexibility under the existing statute, Aon fully supports the concept of a link to the DOL health and welfare notices through the distribution of a short Guide. Aon spends a lot of time consulting with employers on the technical requirements of the various notices and the employers more often than not comment that they spend a lot of time and money preparing and distributing the notices which are rarely reviewed by the people that they are intended to protect—it feels like a fruitless activity. The Guide approach gives employees/retirees/participants just enough information that they will know where to find the most current version of the notice when they need to understand a particular right and would not overly burden employers with additional administration and costly distribution. This approach would give employees and participants a one stop shop for locating health and welfare benefit related information. Otherwise, notices are distributed at various times during the year and not particularly helpful when an individual really needs the information—it likely becomes difficult to locate if they haven't retained the information. The Guide also would assist employers in more easily managing these complex timing and distribution requirements.

Method of Distribution/Consolidation of Notices

- Similar to the SPD, the most significant advancement for plan sponsors of health and welfare plans would be the ability to send an “availability” notice or a Guide for **all** federally required health and welfare notices and then, refer the eligible employees/participants to a website for the complete notice and offer to provide the notice free of charge upon request to the extent that the individual does not have internet access. This would significantly reduce the amount of paper that is necessary and ensure that employers are able to keep notices more current (e.g., the CHIP notice). The DOL already permits this approach with respect to SBCs. The availability notice could be a “single annual notice” (SAN) that contains short form summary of each of the requirement notices or alternatively the use of a Guide; both would be marked improvements over the current requirements.
- Today, employers struggle with when to distribute the notices. While annual enrollment is an opportune time to include the annual notices, employers are often concerned that the volume of the notices and related information detracts from the critical messages that they are trying to send as part of annual enrollment, which also often includes a summary of material modification that explains changes to the health and welfare plan designs for the upcoming year. So, they may include some of the notices with annual enrollment and others with the summary annual report mailing. The Guide “links” concept would solve this problem since it's a reasonable amount of information that would be distributed.

Suggestions for Improvement

- Aon requests that the DOL give employers/plan sponsors the option to use a SAN or a Guide in lieu of being required to distribute DOL mandated notices in accordance with ERISA's current reporting and disclosure rules. This should reduce the amount of administrative burden on employers and the amount of confusion that is created for employees/plan participants. Aon often consults with employers/plan sponsors on the various notice requirements. While employers want to comply, they are often confused by the different timing requirements. The amount of content in the notices arguably results in employees not reviewing and instead, being lost in the volume of information. A short version of the notices consolidated into a SAN or Guide would be extremely helpful to employers and likely employees/retirees as well. The approach in the draft Guide would be extremely helpful to employers and participants based on Aon's experience with these documents.
 - **Women's Health Cancer Rights Act (WHCRA) notices.** WHCRA currently requires slightly different notices to be provided at different times, upon hire and annually. The WHCRA notice should be part of the SAN/Guide. Since WHCRA requires by statute both a notice at hire and annually, if the Guide was provided to new hires and annually, it would arguably meet this requirement. Then, the actual WHCRA notice could just live on an employer's intranet and new guidance under WHCRA could be easily updated in an on-line notice.

- **Summary Annual Report (SAR).** The SAR has specific timing requirements. While this particular item likely is not of interest to most welfare plan participants and should be eliminated, if the DOL continues to make this communication a requirement then, it should be part of SAN/Guide and timing should **not** be dependent on whether or not the IRS Form 5500 was extended. As a legal consultant, I never receive questions regarding the SAR; more likely than not, participants are deleting or filing.
- **HIPAA Special Enrollment notice.** This notice currently must be provided at or before initial enrollment and is not required to be distributed annually. While sometimes included in the SPD, some employers (likely as a result of confusion with the DOL requirements) also include as an annual notice. The HIPAA Special Enrollment notice requirement at or before initial enrollment should no longer be required and instead, the content from this notice should be included in the Guide. An updated model notice, incorporating the CHIP special enrollment provisions, also would be helpful, again to post on the employer's intranet.
- **Medicare Part D Notice of Creditable/Non-Creditable Coverage.** While this notice is not within the jurisdiction of the DOL and instead, is the focus of the Centers of Medicare and Medicaid Services (CMS), this particular notice must be provided prior to October 15, as well as upon other events outlined under 42 CFR §423.56. Employers should be given the option to provide this Part D notice annually as part of SAN or Guide and it should merely state that it should be maintained and reviewed prior to the Medicare Part D enrollment period that occurs from October 15 to December 7 each year. As long as the notice requirements allow an employee to request the notice free of charge when needed, the remaining Part D notice timing requirements should no longer apply. Again, while not the focus of the DOL's collection of information on August 22, 2017, this notice typically is distributed with DOL notices in conjunction with the annual enrollment for health and welfare plans when an employer sponsors a calendar year plan year. Aon would strongly recommend making the Medicare Part D notice part of the SAN/Guide in lieu of the current distribution requirements.
- **Children's Health Insurance Program (CHIP) notice.** This is a very lengthy notice and the state contact information changes frequently, which makes it well suited as a notice posting instead of an annual distribution. In my experience, employers from time to time mail an outdated CHIP notice instead of the updated CHIP notice that generally is issued two times per year. If the CHIP is incorporated as a link in a SAN or Guide, the link could even be the government's base notice ensuring that the CHIP notice is the most current for plan participants.
- **Wellness notice.** 29 CFR §2590.702(f)(4)(v) requires a notice of availability of reasonable alternative standard when an employer sponsors an outcomes-based wellness program. While Aon understands the reasoning for including this notice in all plan materials describing the terms of an outcomes-based wellness program, wellness program rules have already become so complicated that employers are often reluctant to implement them. If including this notice in the Guide would relieve this more complicated notice requirement, it would reduce at least one more requirement that employers need to track if they implement a wellness program. The Equal Employment Opportunity Commission (EEOC) separately requires a notice for certain types of wellness programs that also should be incorporated into the Guide, even though Aon understands that the EEOC wellness notice is not within the DOL's jurisdiction.

Other Notice Considerations

- The following notice provisions remain confusing to plan participants and/or are more burdensome to employers/plan sponsors than helpful to employees/participants:
 - **Consolidated Omnibus Budget Reconciliation Act (COBRA) general notice.** If COBRA is described in the SPD and a COBRA qualifying event notice is triggered at the time of a qualifying event, Aon recommends that the COBRA general notice be discontinued (today, the COBRA general “rights” notice is required within 90 days of enrollment). Aon clients have indicated that the COBRA general notice often creates confusion and concern for newly hired employees who do not understand why they are being given information about what happens when coverage terminates. Adding it the Guide in lieu of a separate notice for new enrollees makes perfect sense and should be implemented.
 - **Michelle’s Law.** While Michelle’s law technically still applies if an employer offers coverage beyond age 26 and if that coverage is dependent on student status, it arguably is outdated due to the extension of coverage to age 26 under the ACA. Since the notice requirement remains in Section 714 of ERISA and arguably cannot be discontinued by regulation, Aon agrees that adding it to the Guide makes practical sense.
 - **Section 1557 of the Affordable Care Act notice.** Aon acknowledges that this notice is not within the jurisdiction of the DOL. However, if a SAN or Guide is developed, Aon respectfully requests that this notice which is in the jurisdiction of U.S. Department of Health and Human Services (HHS), be part of such SAN or Guide. Currently, the requirement that this notice be included in all significant publications creates a lot of additional cost to employers who are already trying to manage a number of notice requirements. In addition, if it’s added to all significant notices, it creates confusion/detracts from the message for those other notices, including those that may be consolidated into a SAN or Guide. Instead, this notice should be required one time annually as part of a SAN or Guide that accompanies notices within the jurisdiction of the DOL.
 - **Patient Protection Model Disclosure.** Today, this notice must be included whenever the plan or issuer provides a participant with an SPD or other similar description of benefits under the plan or health insurance coverage. Since most employers and TPAs are well aware of this requirement and as a result, have dropped the requirement to maintain or designate a primary care physician, this notice should only be required to be included in the SPD and not in any other “descriptions of benefits.” This notice would fit nicely into a SAN or through a link in a Guide and that should suffice as meeting this notice requirement. Aon understands that this notice is monitored by more than just the DOL, but wanted to include it since it’s a notice that could be easily worked into the Guide.

Attachment—Aon Letter to Secretary Acosta Regarding the Electronic Distribution Safe Harbor



May 22, 2017

The Honorable Alexander Acosta
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Acosta:

On behalf of Aon, the leading global professional services firm providing a broad range of risk, retirement and health solutions, we appreciate the President's commitment to reduce burdens imposed by federal rules and regulations on employers and believe that the Executive Order, "Reducing Regulation and Controlling Regulatory Costs," issued on January 30, 2017, serves as an important first step to help alleviate onerous requirements for employers. We appreciate this opportunity to discuss burdens that many employers who sponsor employee benefit programs (including group health plans) face under Department of Labor (DOL) regulations related to the Electronic Disclosure Safe Harbor¹ for disclosures required under the Employee Retirement Income Security Act of 1974 (ERISA).

The present Electronic Distribution Safe Harbor regulations are so outdated and onerous that many employers continue to distribute required plan documents by mail rather than electronically—which results in significant unnecessary additional expense for employers in today's electronic world.

Deregulatory action is needed to (1) significantly reduce the length of the safe harbor for electronic distribution of documents required by ERISA outlined at 29 CFR §2520.104b-1(c) and (2) align it with a simplified version of 29 CFR §2590.715-2715(a)(4)(ii)(B). Accordingly, both original regulations should be identified for elimination and then, a single simplified rule that aligns with 29 CFR §2590.715-2715(a)(4)(ii)(B) should become the safe harbor for all ERISA-required documents for all participants and beneficiaries, including (but not limited to) summary plan descriptions (SPDs), summaries of material modification (SMMs), and summaries of benefits and coverage (SBCs).

¹ 29 CFR §2520.104b-1(c).

Present Safe Harbor Requirements Do Not Align with Today's Electronic World

Under 29 CFR §2520.104b-1(c), the posting of a document on a company Intranet, without additional action, does not satisfy ERISA distribution requirements. Instead, to ensure compliance with ERISA, the Electronic Distribution Safe Harbors require:

- **Participants Using a Computer as Part of His/Her Ordinary Work Duties.** The current regulations provide that email distribution of plan documents may be used, but additional requirements to ensure actual receipt are required (including, for example, use of the return-receipt email feature).
- **Participants Not Using a Computer as Part of His/Her Work Duties, includes Retired Participants.** The current regulations impose a very complex, affirmative consent requirement in order to use electronic distribution. As a result, employers typically mail the ERISA required documents in paper form to these participants.

Streamlining Electronic Disclosure Requirements Will Reduce Employers' Costs

The distribution rule currently available with respect to the SBC² should be applied to all ERISA-required documents, and in particular, the SPD. Under present regulations³ the DOL provides that the mere posting of the SBC on the Internet satisfies delivery requirements as long as the plan notifies the plan participant with a paper notice (such as a postcard) or email that the SBC is available on the Internet, provides the Internet address, and notifies the plan participant that the documents are available upon request in paper form.

Accordingly, the distribution rule for SBCs should replace the present Electronic Distribution Safe Harbor regulations. Such a change is warranted because:

- Almost all Americans—a robust 87%—use the Internet. The vital guarantee that plan participants have access to their ERISA plan documents would be protected by providing plan participants with a postcard/email notice that their ERISA plan documents are available on the Internet, or alternatively, available in print, free of charge, by request.
- Employers presently spend significant amounts of money in printing and mailing fees to deliver plan documents which can run hundreds of pages long and require distribution to tens of thousands of plan participants.
- Plan participants would benefit from receiving electronic distribution of plan documents as their plan sponsors would be able to update their SPDs with current information more quickly and frequently.

² A document that summarizes a plan's design that is required to be provided to plan participants by the Affordable Care Act.

³ 29 CFR §2590.715-2715(a)(4)(ii)(B).

Cost Savings/Change in the Number of Regulations

We believe that these proposals are consistent with the goals of the President's Executive Order and help promote the Administration's key priorities: reducing and streamlining unnecessary regulations and helping employers reduce costs so it can better serve their employees. We look forward to working with the Administration to help find common sense, practical solutions to reduce burdens on the American economy.

If you have any questions, please feel free to contact me at molly.iacovoni@aonhewitt.com or (847) 442-3247.

Sincerely,

Aon



Molly B. Iacovoni
Senior Vice President

MBI:lms