COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

October 7, 2020

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

Dear Acting Assistant Secretary Wilson:

We write to bring to the attention of the Department of Labor (DOL or Department) recent reports of misuse of hospital indemnity and other fixed indemnity insurance products. This form of coverage, traditionally designed as income replacement during a period of hospitalization or illness, is increasingly being used by employers to serve as a substitute for comprehensive health coverage under traditional group health plans.[1] Evidence strongly suggests that these arrangements may circumvent important requirements of federal law, insulating employers from liability while undermining the health benefits of workers and their families.[2]

As you are aware, the *Employee Retirement Income Security Act* (ERISA)[3] protects the workplace benefits of approximately 150 million participants and beneficiaries covered by employer-sponsored group health plans.[4] Some categories of benefits offered by ERISA-covered plans, known as "excepted benefits," differ from traditional health coverage and accordingly are exempted from many requirements applicable to group health plans.[5] Specifically, excepted benefits are not subject to the provisions of part 7 of ERISA, as amended by important consumer protection laws such as the *Health Insurance Portability and*

[1] *See* Christen Linke Young and Kathleen Hannick, Fixed Indemnity Health Coverage Is a Problematic Form of "Junk Insurance" USC-Brookings Schaeffer on Health Policy, Aug. 4, 2020, https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2020/08/04/fixed-indemnity-health-coverage-is-a-problematic-form-of-junk-insurance/.
[2] *Id*.
[3] Pub. L. No. 93-406 (1974).
[4] Kaiser Family Foundation, *Health Insurance Coverage of the Total Population*, https://www.kff.org/other/state-indicator/total-population/ (last visited Feb. 23, 2020) (Covering the 2018 timeframe.).
[5] 29 U.S.C. 1191a.

Accountability Act of 1996,[6] the *Mental Health Parity and Addiction Equity Act of 2008*,[7] the *Genetic Information Nondiscrimination Act*,[8] and the *Patient Protection and Affordable Care Act*.[9]

Hospital indemnity or other fixed indemnity insurance policies that are offered as independent, noncoordinated benefits are one form of excepted benefit exempted from certain requirements of federal law.[10] In order for fixed indemnity coverage to be treated as an excepted benefit, the following requirements must be met:

- The benefits are provided under a separate policy, certificate, or contract of insurance;
- There is no coordination between the provision of the benefits and an exclusion of benefits under any group health plan maintained by the same plan sponsor; and
- The benefits are paid with respect to an event without regard to whether benefits are provided with respect to the event under any group health plan maintained by the same plan sponsor.[11]

In addition, implementing regulations clarify that such coverage "must pay a fixed dollar amount per day (or per other period) of hospitalization or illness (for example, $100/day) regardless of the amount of expenses incurred."[12] Collectively, these requirements help ensure that fixed indemnity policies serve the purpose of providing income replacement to consumers, and are not offered as a substitute for traditional health coverage or to evade requirements of federal law.

However, despite these guardrails, evidence suggests that certain employers are "misusing fixed indemnity products and offering them to their employees as the primary employee health benefit, in ways inconsistent with the justification for exempting these plans from regulation."[13] A recent analysis by the Brookings Institution found that many employers offer two options to their workers with respect to health benefits: (1) a group health plan that provides coverage for limited items and services (though not necessarily a plan that is affordable or provides minimum actuarial value), and (2) an unregulated fixed indemnity plan that covers other benefits in a

---

[6] Pub. L. No. 104–191 (1996).
[7] Pub. L. No. 110–343 (2008).
[8] Pub. L. No. 110–233 (2008).
[9] Pub. L. No. 111–148 (2010).
[10] 29 U.S.C. 1191b(c)(3).
[11] FAQs About Affordable Care Act Implementation (Part XI), Jan. 24, 2013, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xi.pdf. (hereinafter FAQs Part XI). *See also* 29 U.S.C. 1191a(c)(2).
[12] 29 C.F.R. 2590.732(c)(4). *See also* FAQs Part XI ("[coverage advertised as fixed indemnity insurance for which] payment is made not on a per-period basis, but instead is based on the type of procedure or item, such as the surgery or doctor visit actually performed or the prescribed drug, and the amount of payment varies widely based on the type of surgery or the cost of the drug.… is not hospital indemnity or other fixed indemnity insurance, and is therefore not excepted benefits).
[13] Young and Hannick, *supra* note 1.

manner that mimics traditional health coverage.[14] By providing such an arrangement, employers can mitigate their liability (including exposure to potential shared responsibility payments), while providing an indemnity policy resembling traditional health coverage but that is not subject to basic consumer protections such as the prohibition on annual and lifetime limits.[15]

These arrangements raise serious concerns for workers and their families. The Brookings Institution analysis found that numerous such fixed indemnity policies vary benefits based on the type of service, often claiming that reimbursement is made on a "per day" or other fixed basis while nonetheless varying payment amounts based on the service provided.[16] In so doing, these policies mimic traditional medical coverage, yet only provide for limited payments that fall far short of the cost of the care. In addition, these policies appear to run afoul of ERISA's requirement that there be no coordination between the provision of the fixed indemnity coverage and "any exclusion of benefits under any group health plan maintained by the same plan sponsor."[17] Indeed, many service providers promote such arrangements to employers with the explicit purpose of coordinating between the group health plan and the fixed indemnity product.[18]

As you know, the development of effective regulations and vigorous enforcement of federal law is central to Employee Benefits Security Administration's (EBSA) mission of assuring the security of health and other workplace benefits.[19] The Committee on Education and Labor shares this mission and believes that strong action must be taken to ensure that consumers are protected from substandard, noncompliant health coverage. Accordingly, it is our hope that the Department and EBSA will engage with the Committee in a constructive process to ensure that plan participants have meaningful access to quality coverage, consistent with all requirements of federal law.

To that end, we request the Department provide the Committee with the following information:

1. The text of any documents associated with complaints the Department has received from plan participants regarding hospital indemnity or other fixed indemnity insurance products. Please include specific information regarding the following:
    a. The number of complaints received;

---

[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] 29 U.S.C. 1191b(c)(3)(B).
[18] *See e.g.*, Alden J. Bianchi, The Affordable Care Act's Reporting Requirements for Carriers and Employers (Part 21 of 24): Reporting for "MEC" Plans, Dec. 14, 2015, https://www.mintz.com/insights-center/viewpoints/2226/2015-12-affordable-care-acts-reporting-requirements-carriers-and-1 ("MEC plans are often bundled and sold together with hospital or fixed indemnity coverage"); Sherman Edwards, The Skinny of It: Benefits of MEC Plans, Employee Benefits Advisor, Aug. 25, 2017, https://www.bbdetroit.com/the-skinny-of-it-benefits-of-mec-plans/ ("[MEC] plans… are usually bundled along with a limited benefit [fixed indemnity] plan.").
[19] Employee Benefits Security Administration, Our Mission, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement ("The mission of the Employee Benefits Security Administration is to assure the security of the retirement, health and other workplace related benefits of America's workers and their families. We will accomplish this mission by developing effective regulations; assisting and educating workers, plan sponsors, fiduciaries and service providers; and vigorously enforcing the law.").

   b. The general nature and scope of such complaints; and
   c. Any enforcement actions taken in response to such complaints, including the number of participants impacted.
2. Any documentation of steps the Department has taken or plans to take through guidance, compliance assistance, or other available tools to inform plan sponsors and service providers of the requirements of federal law.
3. An explanation of efforts the Department has taken, or is considering taking, to collaborate with state insurance commissioners, the Department of the Treasury, and the Department of Health and Human Services to protect plan participants from noncompliant fixed indemnity insurance policies.
4. Any assessments or analyses the Department has done related to the use of hospital indemnity or other fixed indemnity insurance products by employers, including whether the pairing of fixed indemnity and other products violates the standards for a "noncoordinated" excepted benefit.

Please provide the requested documents and information by October 21, 2020. For any questions, please reach out to Daniel Foster at Daniel.Foster@mail.house.gov with the House Committee on Education and Labor. Please direct all official correspondence to the Committee's Clerk, Mariah Mowbray, at Mariah.Mowbray@mail.house.gov.

We thank you in advance for your prompt response. We look forward to working with you to address this important issue on behalf of workers and their families.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chair
Committee on Education and Labor

FREDERICA S. WILSON
Chair
Subcommittee on Health, Employment, Labor, and Pensions