

U.S. Department of Labor

Office of Inspector General—Office of Audit

**EMPLOYEE BENEFITS SECURITY
ADMINISTRATION**



**FURTHER ACTION BY EBSA COULD HELP
ENSURE PPACA IMPLEMENTATION AND
COMPLIANCE**

Date Issued: September 30, 2011
Report Number: 09-11-003-12-121

**U.S. Department of Labor
Office of Inspector General
Office of Audit**

BRIEFLY...

Highlights of Report Number 09-11-003-12-121, issued to the Assistant Secretary for Employee Benefits Security.

WHY READ THE REPORT

The Patient Protection and Affordable Care Act (PPACA) was enacted on March 23, 2010, and amended by the Health Care and Education Reconciliation Act (HCERA) on March 30, 2010. As amended, PPACA is the most significant health care reform bill in decades. It expands health care coverage to an estimated 31 million uninsured Americans through a combination of cost controls, subsidies, and mandates. PPACA is estimated to cost \$848 billion over a 10-year period.

PPACA will affect nearly every element of our health care system including employers, both large and small. According to employee benefits industry sources, PPACA will have the most significant impact on employer-sponsored health plans since the enactment of the Employee Retirement Income Security Act of 1974 (ERISA) more than 30 years ago. PPACA would impose requirements on the type of health care coverage employers must offer including:

- (a) Covering most adult children up to age 26.
- (b) Elimination of lifetime limits and restrictive annual limits.
- (c) Elimination of pre-existing condition exclusions.
- (d) Required coverage of certain preventative services (e.g., immunizations and infant screenings).

The Employee Benefits Security Administration (EBSA) is responsible for oversight of health coverage provided by employers through the administration and enforcement of the civil and criminal provisions of Title I of ERISA and related criminal statutes. EBSA oversees approximately 2.6 million employer-sponsored health plans covering approximately 150 million participants and beneficiaries. This includes single employer plans, multi-employer plans and Multiple Employer Welfare Arrangements (MEWA).

EBSA, in conjunction with the Departments of Treasury (Treasury) and Health and Human Services (HHS), has been working to implement PPACA.

WHY OIG CONDUCTED THE AUDIT

We conducted the audit to determine if EBSA has taken action to implement PPACA.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to:

<http://www.oig.dol.gov/public/reports/oa/2011/09-11-003-12-121.pdf>

September 2011

FURTHER ACTION BY EBSA COULD HELP ENSURE PPACA IMPLEMENTATION AND COMPLIANCE

WHAT OIG FOUND

EBSA has taken significant actions toward implementing PPACA requirements by issuing regulations, conducting research, and providing compliance assistance and outreach. However, further action by EBSA could help ensure PPACA implementation and compliance. Specifically, EBSA could work with Treasury and HHS to establish a public timeline for addressing the public comments received on interim-final PPACA regulations and issuing final regulations.

In addition, EBSA could better leverage enforcement resources to assist plans in complying with the new regulations. Including compliance with PPACA requirements in its health plan investigations could have resulted in identifying areas where plans, sponsors, and insurers needed technical assistance.

Furthermore, as required by PPACA, EBSA should provide HHS with the results of a survey of benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan. EBSA was unable to state that the report it provided HHS was broad enough to encompass all benefits EBSA considered to be typically covered by employers. Moreover, EBSA did not address all benefits HHS requested. Without this, HHS may not be able to ensure that State Insurance Exchanges offer the appropriate essential health benefits required by PPACA.

Lastly, EBSA should develop a regulation concerning MEWAs under PPACA Section 6604, regarding the applicability of State law as a means to combat fraud and abuse.

WHAT OIG RECOMMENDED

We made four recommendations to the Assistant Secretary for Employee Benefits Security:

1. Work with the Departments of HHS, Treasury, and the Office of Management and Budget to establish specific timetables to respond to public comments and issue final regulations;
2. Incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA;
3. Provide HHS with the results of a survey of benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan; and
4. Proceed with rulemaking relative to PPACA section 6604.

The Assistant Secretary for Employee Benefits Security agreed with recommendations 1 and 4. The Assistant Secretary, however, did not fully agree to incorporate PPACA requirements into the enforcement program to help plans with compliance assistance or take further action to report the results of a survey conducted to determine benefits typically covered by employers.

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U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210



September 30, 2011

Assistant Inspector General's Report

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The Patient Protection and Affordable Care Act (PPACA) was enacted on March 23, 2010, and amended by the Health Care and Education Reconciliation Act (HCERA) on March 30, 2010. As amended, PPACA is the most significant health care reform bill in decades. It expands health care coverage to an estimated 31 million uninsured Americans through a combination of cost controls, subsidies, and mandates. PPACA is estimated to cost \$848 billion over a 10-year period.

The Employee Benefits Security Administration (EBSA) is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and related criminal statutes. ERISA covers pension plans and welfare benefit plans (e.g., employment-based medical and hospitalization benefits, and other plans described in section 3(1) of Title I). To receive favorable tax treatment, plan sponsors must design and administer their plans in accordance with ERISA. EBSA oversees more than 718,000 private retirement plans, 2.6 million employer-sponsored health plans, and similar numbers of other welfare benefit plans covering approximately 150 million participants and beneficiaries.

PPACA had significant impact on ERISA covered employer-sponsored group health plans. In accordance with PPACA, EBSA, in conjunction with the Department of the Treasury (Treasury) and its Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS), issued eight interim-final regulations applicable to employer-sponsored health coverage:

- (1) Extension of Coverage for Adult Children
- (2) Grandfathered Health Plans
- (3) Pre-existing Condition Exclusions
- (4) Lifetime and Annual Limits
- (5) Rescissions
- (6) Patient Protections
- (7) Coverage of Preventive Services
- (8) Internal Claims and Appeals and External Review.

We conducted the audit to answer the question: Has EBSA taken action to implement PPACA?

To accomplish our audit, we reviewed applicable EBSA policies, procedures, studies, and surveys from March 23, 2010, (the enactment of PPACA) through August 31, 2011. We obtained information on enforcement actions taken from January 1, 2011, the beginning of the plan year PPACA was effective for most plans, through August 3, 2011. We interviewed officials at EBSA, HHS, the Government Accountability Office, and the Congressional Research Service to gain an understanding of PPACA regulations and rulemaking. We also interviewed officials from the U.S. Chamber of Commerce, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and various trade organizations. We reviewed EBSA's procedures for addressing public comments submitted on EBSA's interim-final PPACA regulations and met with interested parties to discuss their concerns about implementation and compliance.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

RESULTS IN BRIEF

EBSA has taken significant actions toward implementing PPACA requirements by issuing regulations and sub-regulatory guidance, conducting research studies and surveys, and providing compliance assistance and outreach to employers and plan participants. However, further action by EBSA could help ensure PPACA implementation and compliance.

Specifically, for interim-final PPACA regulations, EBSA could improve transparency and better demonstrate its intentions to address the more than 1,900 public comments submitted on these regulations by working with Treasury and HHS to establish a public timeline for addressing the public comments and issuing final regulations. DOL, HHS, and Treasury have the authority to promulgate interim-final rules that they determine are necessary or appropriate to carry out PPACA provisions. Using this authority due to time constraints, EBSA issued PPACA interim-final regulations, and did not engage in a full notice and comment rulemaking normally required by the Administrative Procedure Act (APA). While EBSA requested and obtained public comments on issued interim-final PPACA regulations, and intends to address the comments before finalizing the regulations, EBSA had not worked with HHS and Treasury to establish a timeline to address the more than 1,900 public comments received. EBSA could improve transparency and enlighten the public by providing at least an estimated timeline. EBSA officials stated that they would respond to public comments appropriately when EBSA finalizes the interim-final regulations. However, EBSA

officials stated they could not provide an estimated date to release final regulations because EBSA issues these regulations jointly with HHS and Treasury, and EBSA could not commit for the other agencies.¹ Furthermore, EBSA stated that the Office of Management and Budget. (OMB) would also have to clear the final regulations.

In addition, while EBSA has made significant efforts in providing compliance assistance, EBSA could better leverage its enforcement resources to assist plans in implementing PPACA requirements. EBSA has not included reviews of compliance with PPACA requirements in its health plan investigations. Doing so could have resulted in identifying areas where plans, sponsors, and health insurers needed technical assistance. Since January 1, 2011, EBSA initiated 236 health plan investigations; however, according to EBSA, none of these cases included reviews of PPACA requirements.

EBSA officials stated they wanted to use an initial compliance assistance approach, including enforcement grace periods, for PPACA while developing a coordinated, deliberate approach to PPACA enforcement. EBSA officials also stated that PPACA compliance reviews would be part of its Fiscal Year 2012 Health Benefits Security Project.

Furthermore, as required by PPACA, EBSA should provide HHS with a report on benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan. Specifically, PPACA requires plans offered under the new State Insurance Exchanges (Exchanges) to provide benefits equal to those benefits “typically” provided by employer plans. PPACA requires EBSA to perform a survey to determine the benefits “typically” covered by employers and provide this information to HHS to help it determine the medical benefits the Exchanges must provide. To meet this requirement, EBSA used data from the National Compensation Survey (NCS) conducted annually by the Bureau of Labor Statistics (BLS). The NCS, a comprehensive survey of employer information, provides data on employment-based health care benefits. However, EBSA could not state that the survey was broad enough to cover all benefits EBSA might consider “typically” covered by employers. Moreover, the survey did not address all benefits for which HHS requested information. Without complete survey information from EBSA, HHS may not be able to ensure that the essential health benefits provided by the Exchanges under PPACA are equal to the benefits provided under a typical employer plan as required by PPACA. Furthermore, the lack of information from EBSA regarding benefits employers typically cover may also affect parties’ opportunity for public comment on HHS’ required proposed rule defining essential health benefits.

EBSA officials believed they used the best information available and what they provided to HHS met the PPACA legislative requirements, particularly since HHS

¹ The three Departments are required to coordinate interpretations and enforcement activities under Part 7 of ERISA, pursuant to an Inter-Agency Memorandum of Understanding. See 64 FR 70164 (December 15, 1999).

would use the EBSA report as only one of many sources to determine essential medical benefits the Exchanges would provide.

Lastly, PPACA enables DOL to promulgate regulations addressing fraudulent multiple employer welfare arrangements (MEWA). Historically, MEWAs have been a difficult enforcement issue for EBSA, and issuing regulations under these provisions may alleviate the difficulties. To implement these provisions, EBSA has drafted and cleared proposed regulations (1) allowing it to issue cease and desist, and summary seizure orders with respect to abusive MEWAs, and (2) requiring registration of MEWAs. However, it has not yet drafted a proposed rule under section 6604 of PPACA, which authorizes the Department to determine standards, or issue orders, regarding when persons providing insurance through MEWAs are subject to State law as a means to prevent fraud and abuse. EBSA states that it took up the other two rulemaking first because EBSA viewed them as having a higher priority.

We made four recommendations to the Assistant Secretary for Employee Benefits Security as follows: (1) Work with the Departments of HHS, Treasury, and OMB to establish specific timetables to respond to public comments and issue final regulations; (2) Incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA; (3) Provide HHS with the results of a survey of benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan; and 4) Proceed with rulemaking relative to PPACA section 6604.

EBSA RESPONSE

In response, the Assistant Secretary for Employee Benefits Security agreed to engage in discussions with the other two Departments and OMB regarding timetables to respond to public comments and issuing final regulations. EBSA did not fully agree to incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA. EBSA believed its approach to enforcing operative provisions of the PPACA was appropriate, and stated it would phase in PPACA enforcement as a component part of its FY 2012 Health Benefits Security Project. EBSA did not agree that EBSA should provide more survey results showing benefits typically covered by employer plans to HHS. EBSA stated that the April 2011 report to HHS together with its associated supporting material fully satisfies the requirements of PPACA. Finally, EBSA agreed to set a reasonable timeline for PPACA section 6604 regulations, taking into account all PPACA priorities. The Assistant Secretary's entire response is contained in Appendix D.

OIG CONCLUSION

We accept EBSA's response to recommendations 1 and 4. However, we continue to disagree with EBSA's positions on recommendations 2 and 3. We believe EBSA misunderstood the OIG's position regarding its enforcement resources. The OIG did not question EBSA's approach to enforcing operative provisions of the PPACA. Instead, it was the OIG's position that EBSA could have used enforcement resources already

directed at investigating health plans to identify compliance assistance needs rather than not reviewing compliance with PPACA requirements at all. We are not advocating additional enforcement actions. EBSA's response does not state specifically when in FY 2012 all health plan investigations will include reviews of PPACA requirements. We continue to believe that generally all reviews of health plans should include compliance with PPACA requirements as a means to assist plans, sponsors, and insurers with compliance regardless of whether EBSA intends to take enforcement action or not.

We also continue to believe EBSA should provide HHS with a report on benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan.

The fact that the ultimate determination is to be made by HHS, potentially using other sources of information in addition to the DOL survey, perhaps gained from different perspectives and/or different agencies, has no bearing on the scope of the survey that EBSA is required to perform under the statute. Since PPACA specifically requires EBSA to submit to HHS to "inform" its decision on what benefits are typically covered by employers. If the EBSA survey is not broad enough to cover what EBSA is prepared to say is the full scope of benefits "typically" provided by employers, then we believe EBSA has not fulfilled its statutory obligation to assist and inform HHS.

To ensure the understanding of our position, we clarified our discussion of EBSA's report and modified recommendation 3 from the draft version of this report.

RESULTS AND FINDINGS

Objective — Has EBSA taken action to implement PPACA?

Further Action By EBSA Could Help Ensure Implementation and Compliance

Finding 1 — EBSA could take additional action to help ensure PPACA implementation and compliance

EBSA has taken significant actions toward implementing PPACA requirements through issuing eight regulations and sub-regulatory guidance, conducting research studies and surveys, and providing compliance assistance and outreach to employers and plan participants. Additionally, EBSA has issued sub-regulatory guidance issued, including four technical releases, seven model notices, and six sets of Frequently Asked Questions.

While EBSA has taken significant actions to implement PPACA, further action could mitigate potential challenges that may affect implementing and complying with PPACA requirements.

EBSA Could Improve Transparency in Response to Public Comments Received on Interim-Final PPACA Regulations

EBSA could improve transparency and better demonstrate its intentions to address the more than 1,900 public comments submitted on PPACA regulations by working with HHS, Treasury, and OMB in an effort to establish a public timeline for reviewing the public comments and issuing final regulations.

PPACA contained major new requirements for group health plans. To implement these requirements, EBSA had to develop new regulations dealing with complex issues in a short amount of time. EBSA also had to develop these regulations jointly with the Treasury and HHS. Normally, under the APA (5 U.S.C. Subchapter II), issuing new regulations involves publishing proposed regulations in the Federal Register, obtaining and reviewing public comments, making changes where necessary, and ultimately issuing final regulations. This process frequently takes more than a year to complete. Due to time constraints in implementing PPACA, EBSA took advantage of existing provisions in Part 7 of ERISA, which grants the authority to issue interim-final regulations for group health plan coverage where necessary or appropriate. These interim-final regulations became effective without the consideration of public comment and compliance is generally required shortly after their issuance. However, EBSA and the other Departments may make changes in final regulations, as the result of public comments submitted in response to the interim-final regulations.

EBSA, in conjunction with Treasury and HHS, issued eight interim-final regulations applicable to employer-sponsored health coverage:

- (1) Extension of Coverage for Adult Children
- (2) Grandfathered Health Plans
- (3) Pre-existing Condition Exclusions
- (4) Lifetime and Annual Limits
- (5) Rescissions
- (6) Patient Protections
- (7) Coverage of Preventive Services, and
- (8) Internal Claims and Appeals and External Review.

While EBSA, in conjunction with Treasury and HHS, requested and obtained public comments on all of these regulations, EBSA has not yet worked with the other Departments to establish a timeline to address and respond to the more than 1,900 public comments received. EBSA officials stated that they have reviewed the public comments and have addressed many public comments through the issuance of amendments to the interim-final rules for Grandfathered Health Plans, Internal Claims and Appeals and External Review, and Preventive Services. In addition, EBSA has issued sub-regulatory guidance addressing many questions.

However, EBSA officials could not provide a firm date for when they would respond to other comments through tri-Department final regulations. They stated they must jointly

issue the final regulations with HHS and Treasury and clear the regulations with OMB and this makes estimating a date difficult.

The APA generally requires agencies to publish proposed regulations in the Federal Register, allow the public and affected organizations an opportunity to comment on the proposed rule, and then consider those comments in developing and publishing final regulations. However, section 734 of ERISA authorizes the promulgation of any interim-final rules the Secretary determines are appropriate to carry out the provisions of Part 7 of ERISA. Additionally, section 553(b) of the APA states that a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. EBSA and the other Departments determined that the provisions of the APA that ordinarily require a notice of proposed rulemaking did not apply because of the specific authority granted by section 734 of ERISA. The agencies also found that, even if the APA were applicable, it would be impracticable and contrary to the public interest to delay putting these regulatory provisions in place until the agencies completed a full public notice and comment process.

Following the issuance of PPACA regulations, EBSA received more than 1,900 comments from the public. EBSA organized the comments into seven categories. The following table illustrates the amount of public comments EBSA received after promulgating interim-final regulations on PPACA.

Table 1: Summary of Public Comments Received on PPACA Interim-Final Regulations

PPACA Interim-Final Regulations	Date Issued	No. of Comments
Extension of Coverage For Adult Children	5/13/2010	82
Grandfathered Health Plans	6/17/2010	1,199
Amendment to Interim-final Rule- Grandfathered Health Plans	11/17/2010	16
Internal Claims and Appeals and External Review Processes	7/23/2010	89
Amendment to Interim-final Rule- Internal Claims and Appeals and External Review Processes	6/24/2011	123
Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections	6/28/2010	145
Coverage of Preventive Services	7/19/2010	261
Total		1,915

Commenters on these regulations include organizations such as The National Association of Health Underwriters, American Benefits Council, U.S. Chamber of Commerce, ERISA Industry Committee, AFL-CIO, New York State Insurance Department, New York City Department of Health and Mental Hygiene, and national health insurance companies.

EBSA indicated it plans to respond to these comments, in conjunction with Treasury and HHS, and fully consider them in the final regulations; however, it has not established a timeline for this or informed the public of when to expect the agencies to complete the process.

Though not required, establishing a timeline and informing the public of expected final regulations would help improve transparency in PPACA rulemaking. The Administrative Conference of the United States (ACUS), an independent Federal agency designed to improve Federal administrative procedures, issued some guidance on this matter. The ACUS stated² that when using post-promulgation comment procedures, agencies should consider whether to include in the Federal Register notice a commitment to act on any significant adverse comments within a fixed period of time or to provide for a sunset date for the rule.

While we acknowledge EBSA's cited time constraints in promulgating PPACA interim-final regulations and efforts to address specific public comments, EBSA could better demonstrate its progress to address the more than 1,900 public and industry comments submitted on these regulations. EBSA could provide a specific timetable to address all public comments. This would increase transparency in the agency's response to public comments and mitigate potential challenges for implementation.

EBSA Could Better Leverage Its Office of Enforcement to Assist Plans in Implementing and Complying with PPACA Requirements

EBSA could better leverage its enforcement resources to assist plans in implementing PPACA requirements. EBSA's Office of Enforcement has not actively monitored plans' compliance with PPACA requirements. Such monitoring could have resulted in identifying areas where plans, employers and health insurers needed technical assistance. Changes by health insurers could potentially impact numerous employer-sponsored health plans. PPACA requirements were effective for most plans on January 1, 2011. EBSA, however, did not immediately incorporate PPACA requirements into all enforcement investigations. This was because EBSA was developing an approach to PPACA enforcement that initially focused on compliance assistance. As a result, EBSA did not immediately issue PPACA enforcement checklists or train investigators on PPACA requirements.

EBSA's enforcement program detects and corrects ERISA violations and restores losses to employee benefit plans, including health plans. Since January 1, 2011,

² 1 CFR s 305.95-4

EBSA initiated 236 health plan investigations; however, according to EBSA, none of these cases included reviews of PPACA requirements.

EBSA officials stated they implemented an initial compliance assistance approach, including enforcement grace periods, for PPACA requirements. EBSA officials stated enforcement checklists were not necessary immediately since EBSA was concentrating on compliance assistance, not enforcement. They also stated the enforcement checklists were completed and circulated to investigators at an August 10, 2011 training program.

However, EBSA could have leveraged this compliance assistance if it had incorporated PPACA requirements into its enforcement investigations. If the investigations found non-compliance with PPACA requirements, EBSA could have provided technical assistance to plans and health insurers to achieve compliance. Enforcement investigations also may have been able to provide feedback on areas plans were having difficulties in complying with PPACA requirements. EBSA could have added resources and leveraged its compliance assistance efforts by actively reviewing employer-sponsored health plans compliance with PPACA.

EBSA Should Provide HHS With a Report on Benefits Typically Covered by Employers as Required by PPACA

EBSA's report to HHS regarding employer-sponsored coverage was not sufficiently broad for HHS to determine benefits provided under a typical employer plan. The report primarily presented health benefit data from the National Compensation Survey (NCS), conducted annually by BLS. EBSA officials could not confirm that the data in the report represented benefits typically covered by employers. Moreover, the report did not include information on all the types of benefits HHS asked EBSA address.

PPACA requires each State to establish an American Health Benefit Exchange (Exchange) to offer non-group health insurance beginning in calendar year (CY) 2014. PPACA requires the benefits the Exchanges offer to meet minimum coverage requirements, including being equal to the scope of benefits provided under a typical employer plan. While HHS must make the actual determination of benefits each Exchange must offer, PPACA requires EBSA to conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers and provide a report on the survey to HHS.

To meet this requirement, EBSA used data from the annual NCS. The NCS, a voluntary survey of employers, provides comprehensive measures of occupational wages, employment cost trends, and benefit incidence and detailed plan provisions. Annually, BLS releases data from this survey on the percent of employees offered employment-based health care benefits and the percent of employees who are actually covered by such benefits. The NCS also provides details on the provisions of those health care plans, including what services are covered and what cost-sharing is required by plan

participants. Benefits presented include such services as hospital room and board, surgical procedures, physician office visits, and skilled nursing facility care. While the NCS currently captures data from about 36,000 employers, including those in private industry and State and local government across all industries and all establishment sizes, information on the detailed provisions of employment-based health care benefits is from a representative sample of about 3,900 private sector employers annually. From each of these employers, BLS identifies available health plans and requests copies of written documents describing plan benefits. BLS extracted the detailed plan provisions presented in the NCS report from approximately 3,200 plan documents.

To expand on the NCS published benefits, HHS requested coverage and cost sharing data on 24 additional benefits.

In April 2011, EBSA issued a report to HHS. The report contained detailed data on selected health benefits coverage by employer-sponsored health plans in the private sector. The report also presented new data from an analysis of additional health benefits requested by HHS.

However, EBSA could not state that the survey information it provided to HHS was sufficiently broad to cover what it considered to be benefits typically covered by employers as required by PPACA Section 1302(b)(2)(A), which states:

The Secretary of Labor shall conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers, including multiemployer plans, and provide a report on such survey to . . . [HHS]

Furthermore, the report did not provide all the information HHS had requested. HHS specifically requested data on 24 benefits. EBSA requested the data from BLS but, while BLS did do additional survey work, data on only 12 of the 24 benefits could be developed under BLS's survey methodology.

EBSA officials stated that the NCS was very comprehensive and using the data satisfied the legislative requirement in the PPACA and met HHS's needs. EBSA further stated that the report would be only one of many sources HHS would use to determine benefits under a typical employer plan. Despite these claims, we concluded that to completely fulfill its statutory obligation under PPACA, EBSA must provide HHS with survey information that it believes encompasses those benefits typically covered by employers.

Without this information from EBSA, HHS may not be able to ensure that the scope of the essential health benefits provided by state exchanges is equal to the scope of benefits provided under a typical employer plan as required by PPACA. This could potentially impact millions of Americans and the cost of their insurance. Any benefits not included as typically offered in an employer-sponsored plan may not be included in

essential medical benefits offered through the Exchanges. Any benefit actually included, although perhaps not typically provided in an employer-sponsored plan will nevertheless be required in essential benefits and could drive the cost of insurance up. The Congressional Budget Office (CBO) estimates 8.9 million people will buy insurance on the Exchanges in 2014, with the number growing to 24 million people in 2021.

In addition, public commenters on the proposed regulation may lack sufficient information on what benefits are typically covered by employer plans or may incorrectly assume that EBSA provided HHS with information from a survey that was broad enough for HHS to determine benefits provided under a typical employer plan.

Even sophisticated employee benefit specialists may misinterpret or imprecisely describe what EBSA provided to HHS. For example, the May 2, 2011, issue of *Deloitte's Washington Bulletin*, a periodic update of legal and regulatory developments relating to employee benefits stated:

The Labor Department released a report on the health benefits provided under a typical employer plan. The typical benefits will provide a baseline for the Department of Health and Human Services in defining "essential health benefits" under the Patient Protection and Affordable Care Act (PPACA). The PPACA requires that the scope of "essential health benefits" be equal to the scope of benefits provided under a typical employer plan.

Under PPACA, essential health benefits are to be used as the minimum coverage of the qualified health care plans in the Exchanges established by each State by CY 2014. These Exchanges provide the opportunities for health coverage for millions of people who currently have no health insurance. Without sufficiently broad survey information from EBSA concerning the benefits typically covered by employers, HHS may not be able to ensure that the scope of the essential health benefits provided by state exchanges is equal to the scope of benefits provided under a typical employer plan as required by PPACA. Furthermore, this could impact affected parties' opportunity for public comment on HHS's required proposed regulation defining essential benefits.

EBSA Should Determine if MEWA regulations are Necessary

PPACA added the following three provisions to ERISA relating to the prevention of fraud and abuse by multiple employer welfare arrangements: (1) Section 6604 authorizes the Secretary of Labor to issue regulations to determine when persons engaged in offering insurance through MEWAs are subject to State law, (2) Section 6605 authorizes the Secretary to issue cease and desist orders and summary seizure orders with respect to abusive or financially hazardous MEWAs, and (3) Section 6606 provides for the registration of MEWAs with the Department of Labor. Although EBSA has submitted to draft proposed regulations to OMB for implementation of sections 6605 and 6606, as of the end of the audit, 18 months after enactment of PPACA, it has not begun drafting a proposal under section 6604. EBSA has stated that it considered the 6605 and 6606 regulations to be a higher priority.

MEWAs historically have been a difficult enforcement issue for EBSA. In fact, EBSA has, for many years, had a National Enforcement Project directed at MEWAs. According to EBSA, although legitimate organizations can provide MEWAs, they are sometimes marketed using attractive but actuarially unsound premium structures, which generate large administrative fees for the MEWAs. In addition, certain promoters will set up arrangements, which they claim are established pursuant to a collective bargaining agreement; and therefore, are not MEWAs but legitimate benefit plans free from state insurance regulations. Often, however, these collective bargaining agreements are nothing more than shams designed to avoid state insurance regulation.

The impact of MEWAs can be significant. The General Accounting Office has estimated there were more than 2.5 million participants and beneficiaries in 46 states enrolled in MEWAs.

EBSA could help alleviate the MEWA issue by proceeding with a rulemaking action under PPACA section 6604.

Conclusion

Overall, EBSA could take further action in its rulemaking, enforcement, reporting on benefits typically covered by employers, and MEWA regulations to mitigate potential challenges that may affect implementation and compliance with PPACA requirements. Taking the recommended actions could help improve transparency to the public; provide additional compliance assistance to employer, plans and insurers; help enable HHS to determine essential medical benefits; and help strengthen enforcement over MEWAs.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Employee Benefits Security:

- (1) Work with the Departments of HHS, Treasury, and OMB to establish specific timetables to respond to public comments and issue final regulations.
- (2) Incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA.
- (3) Provide HHS with the results of a survey of benefits typically covered by employers that is sufficiently broad to enable HHS to determine benefits provided under a typical employer plan; and
- (4) Proceed with a rulemaking to implement PPACA section 6604.

We appreciate the cooperation and courtesies that EBSA personnel extended to the Office of Inspector General during this audit. OIG personnel who made major contributions to this report are listed in Appendix E.



Elliot P. Lewis
Assistant Inspector General for Audit

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Appendices

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Appendix A**Background**

The Patient Protection and Affordable Care Act (PPACA) was enacted on March 23, 2010, and amended by the Health Care and Education Reconciliation Act (HCERA) on March 30, 2010. As amended, PPACA is the most significant health care reform bill in decades. It expands health care coverage to an estimated 31 million uninsured Americans through a combination of cost controls, subsidies, and mandates. PPACA is estimated to cost \$848 billion over a 10-year period.

PPACA will affect nearly every element of our health care system including employers, both large and small. According to employee benefits industry sources, PPACA will have the most significant impact on employer-sponsored health plans since the enactment of ERISA over 30 years ago. PPACA would impose requirements on the type of health care coverage that employers must offer including:

- (a) Covering most adult children up to age 26;
- (b) Elimination of lifetime limits and restrictive annual limits;
- (c) Elimination of preexisting condition exclusions; and
- (d) Required coverage of certain preventative services (e.g., immunizations and infant screenings).

PPACA reorganizes, amends, and adds to the provisions of the Public Health Service Act (PHS Act) and ERISA relating to group health plans and health insurance issuers in the group and individual markets. The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (the Departments) are issuing regulations in several phases to implement the revisions.

EBSA is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and related criminal statutes. ERISA covers pension plans and welfare benefit plans (e.g., employment based medical and hospitalization benefits, and other plans described in section 3(1) of Title I). Plan sponsors must design and administer their plans in accordance with ERISA. EBSA oversees more than 718,000 private retirement plans, 2.6 million employer-sponsored health plans, and similar numbers of other welfare benefit plans covering approximately 150 million participants and beneficiaries.

In accordance with PPACA, the Employee Benefits Security Administration (EBSA), in conjunction with the Department of the Treasury (Treasury), the Internal Revenue Service (IRS) and the Department of Health and Human Services (HHS), has issued eight interim-final regulations applicable to employer-sponsored health coverage for (1) Extension of Coverage for Adult Children, (2) Grandfathered Health Plans, (3) Pre-existing Condition Exclusions, (4) Lifetime and Annual Limits, (5) Rescissions, (6) Patient Protections, (7) Coverage of Preventive Services, and (8) Internal Claims and Appeals and External Review.

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Appendix B

Objective, Scope, Methodology, and Criteria

Objective

The objective of this audit was to determine if EBSA has taken action to implement the Patient Protection and Affordable Care Act (PPACA).

Scope

Our scope included all EBSA policies and procedures pertaining to PPACA activities for March 23, 2010 through August 31, 2011. Additionally, we reviewed prior GAO and CRS reports on federal rulemaking, and EBSA required research studies and surveys. We conducted fieldwork at EBSA headquarters in Washington, D.C.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Methodology

To accomplish our audit, we reviewed applicable EBSA policies and procedures, research studies and surveys, and enforcement actions. We interviewed officials at EBSA, HHS, the Government Accountability Office, and the Congressional Research Service to gain an understanding of PPACA regulations and rulemaking. We reviewed public comments submitted on EBSA regulations and met with interested parties to discuss their concerns about implementation and compliance.

In planning and performing our audit, we considered EBSA's internal controls that were relevant to our audit objective. We confirmed our understanding of these controls through interviews, obtaining, and reviewing PPACA studies, policies, procedures, and enforcement actions. Our consideration of internal controls relevant to our audit objective would not necessarily disclose all matters that might be significant deficiencies. Because of inherent limitations in internal controls, misstatements or noncompliance may nevertheless occur and not be detected.

In conducting our audit, we did not rely on computer-processed data; therefore, the sufficiency and reliability of data was not applicable in meeting the audit's objective.

Criteria

We used the following criteria to accomplish our audit:

- Title I of the Employee Retirement Income Security Act of 1974
- The Patient Protection and Affordable Care Act of 2010
- The Health Care and Education Reconciliation Act of 2010
- The Administrative Procedure Act of 1946

Appendix C**Acronyms and Abbreviations**

APA	Administrative Procedure Act
ACUS	Administrative Conference of the United States
BLS	Bureau of Labor Statistics
CBO	Congressional Budget Office
CRS	Congressional Research Service
CY	Calendar Year
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
ERISA	Employee Retirement Income Security Act of 1974
GAO	Government Accountability Office
HCERA	Health Care and Education Reconciliation Act
HHS	Department of Health and Human Services
IRS	Internal Revenue Service
MEWA	Multiple Employer Welfare Arrangement
NCS	National Compensation Survey
NPRM	Notice of Proposed Rulemaking
OIG	Office of Inspector General
OMB	Office of Management and Budget
PHS	Public Health Service
PPACA	Patient Protection and Affordable Care Act

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EBSA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210



DATE: **SEP 29 2011**

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: PHYLLIS C. BORZI *Phyllis C. Borzi*
Assistant Secretary for Employee Benefits Security

SUBJECT: EBSA Response to OIG Performance Audit
Draft Audit Report Number 09-11-003-12-121

Thank you for the opportunity to comment on the recommendations in your above referenced Performance Audit Report on our implementation of the Patient Protection and Affordable Care Act of 2010 (PPACA).

The Employee Benefits Security Administration (EBSA) is responsible for the administration and enforcement of the civil and criminal provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and related criminal statutes. EBSA oversees approximately 718,000 private retirement plans, 2.6 million health plans, and similar numbers of other welfare benefit plans, such as those providing life or disability insurance. The employee benefit plans under our jurisdiction hold approximately \$6.5 trillion in assets and cover approximately 150 million participants and beneficiaries.

When President Barack Obama signed the PPACA, P.L. 111-148 on March 23, 2010, this historic health care reform legislation gave more than 32 million Americans access to medical coverage. The PPACA assigned significant new regulatory, enforcement, and outreach responsibilities to the Department and more specifically, EBSA. To implement the PPACA, the Department is required to develop and implement over 25 regulations in conjunction with the Departments of Health and Human Services (HHS) and Treasury; implement Multiple Employer Welfare Arrangements (MEWA) reporting and oversight requirements; and design and conduct several health benefit studies, as well as develop and implement education, outreach, and assistance programs and new enforcement strategies. Your audit focused on the Department's responsibilities under the PPACA and your objective was to determine whether EBSA has taken action toward the implementation of the PPACA.

As you know, parallel statutory provisions implementing the PPACA market reform provisions were added to ERISA, the Public Health Service Act, and the Internal Revenue Code. Accordingly, EBSA shares interpretive jurisdiction over the PPACA market reforms with the Department of Health and Human Services and the Department of the Treasury (including its Internal Revenue Service).¹ Regulations are developed and issued jointly by the three Departments.

OIG's RECOMMENDATIONS

Recommendation 1: Work with the Departments of HHS, Treasury, and the Office of Management and Budget (OMB) to establish specific timetables to respond to public comments and issue final regulations.

EBSA will engage in discussions with the other two Departments and OMB regarding timetables. These discussions typically take place through the semi-annual regulatory agenda decision-making process.

Recommendation 2. Incorporate PPACA requirements immediately into the enforcement program to assist plans in complying with PPACA.

EBSA believes its approach to enforcing operative provisions of the PPACA is appropriate. EBSA officials explained to the Inspector General (OIG) auditors that the three Departments' initial approach to ACA implementation, as stated in Question 1 of the September 20, 2010 "Affordable Care Act Implementation FAQs Part 1," is to assist plans, issuers, and others in understanding the new rules and achieving compliance rather than to immediately begin imposing penalties for violations of the ACA.² EBSA officials explained that the agency's initial focus was on developing regulations and related sub-regulatory guidance. The agency had also engaged in substantial compliance

¹ The three Departments are required to coordinate interpretations and enforcement activities under Part 7 of ERISA, title XXVII of the Public Health Service Act, and chapter 100 of the Internal Revenue Code (including the PPACA health reform provisions, which were added to those sections) pursuant to an Inter-Agency Memorandum of Understanding. See 64 FR 70164 (December 15, 1999).

² Specifically, this FAQ states:

Q1: Under the Affordable Care Act, there are various provisions that apply to group health plans and health insurance issuers and various protections and benefits for consumers that are beginning to take effect or that will become effective very soon. What is the Departments' basic approach to implementation?

The Departments are working together with employers, issuers, States, providers and other stakeholders to help them come into compliance with the new law and are working with families and individuals to help them understand the new law and benefit from it, as intended. Compliance assistance is a high priority for the Departments. Our approach to implementation is and will continue to be marked by an emphasis on assisting (rather than imposing penalties on) plans, issuers and others that are working diligently and in good faith to understand and come into compliance with the new law. This approach includes, where appropriate, transition provisions, grace periods, safe harbors, and other policies to ensure that the new provisions take effect smoothly, minimizing any disruption to existing plans and practices.

assistance and outreach efforts to the public, separate from investigations.³ At the same time, investigative support tools were being developed and investigative staff were undergoing training to enforce the new provisions in a consistent, informed manner. As requested by the OIG, EBSA provided the dates PPACA field training was conducted. EBSA also developed a comprehensive PPACA enforcement checklist to promote consistent investigations. The checklists drew in part from the Departments' expertise in the growing body of regulations and public guidance. After multiple rounds of training, refinement of a PPACA enforcement checklist, and internal guidance, EBSA elected to phase in PPACA enforcement as a component part of its FY 2012 Health Benefits Security Project. Through this national enforcement project EBSA expects to investigate a large number of health plans. These investigations will provide meaningful feedback on PPACA compliance after plans and insurers have had the opportunity to process the implementing regulations and related guidance and benefit from EBSA's extensive outreach.

Recommendation 3. Determine benefits typically covered by employer-sponsored plans and provide this to HHS.

The DOL's April 2011 report to HHS ("the report"), together with its associated supporting material, fully satisfies the requirements of PPACA Section 1302(b)(2)(A). This section provides as follows:

The Secretary [of HHS] shall ensure that the scope of the essential health benefits under paragraph (1) is equal to the scope of benefits offered under a typical employer plan, *as determined by the Secretary [of HHS]*. To inform this determination, the Secretary of Labor shall conduct a survey of employer-sponsored coverage to determine the benefits typically covered by employers, including multiemployer plans, and provide a report on such survey to the Secretary [of HHS].

The italicized language clearly requires the Secretary of HHS, rather than the Secretary of Labor, to determine the scope of benefits offered by a typical employer plan. The stated purpose of the Secretary of Labor's survey is to inform this determination. Congress' plain intent was for the Secretary of HHS to use the survey in deciding whether a given benefit is offered under a "typical employer plan."

The survey is based on the National Compensation Survey, conducted regularly by the Department's Bureau of Labor Statistics. Using a large, nationally representative sample of employers, the NCS collects detailed information on whether particular benefits are included in employer health plans. By measuring the incidence of a broad range of different benefits, the Department's survey will allow the Secretary of HHS to determine which are offered by a typical employer plan.

³ Materials provided to OIG indicated that outreach events by EBSA National Office staff (not including Regional-Office-led outreach by customer service staff) exceeded two (2) events per week.

The OIG faults the report for not expressly stating which benefits are "typical." However, the statute does not require the DOL to determine a specified threshold of incidence above which (and only above which) the benefit should be considered "typical" by HHS. DOL's report, by providing detailed data on the incidence of different benefits, fulfills the statutory purpose and requirements without taking on the function of the Secretary of HHS. DOL also disagrees with the OIG's assertion that DOL's approach to the report could impair the public comment process. The report and associated supporting materials are easily available to the public. Commenters are free to provide their views on the survey and on what benefits are offered by a typical employer plan. In addition, in her press release thanking the DOL following the transmittal of our report, Secretary Sebelius stated that HHS will be collecting public comments as they consider how to determine the scope of essential benefits.⁴

Recommendation 4. Proceed with rulemaking relative to PPACA section 6604.

EBSA will reevaluate its initial determination that regulations under PPACA section 6604 were not immediately necessary to implement the requirements of PPACA section 6604 in light of other priorities. EBSA will set a reasonable timeline for such regulations, taking into account all PPACA priorities.

We appreciate the opportunity to provide our comments to the draft report and hope that they will be helpful to you in developing a final document.

⁴ See <http://www.hhs.gov/news/press/2011pres/04/20110415b.html>.

Appendix E

Acknowledgements

Key contributors to this report were Ralph McClane (Audit Director), Jason Jelen (Audit Manager), Chih “Steve” Chiang (Auditor-in-Charge), Richard Donna, Tim Kerschen, Angela Stewart, and Mary Lou Casazza.

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