

Actuarial Work-Products, Inc.

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**RE: Discrimination Appraisal
Medical Reimbursement Plan(s)**

Employer(s) _____

Engager _____

Test Year _____

This Work-Product constitutes an Actuarial Opinion and is to serve as a Discrimination Appraisal of the subject Medical Reimbursement Plan(s) that are tested and summarized in Part 4 herein. Such appraisal is mandated by (a) Section 105(h) of the Internal Revenue Code and relevant Treasury Regulations, (b) civil rights and age discrimination laws, (c) the 2010 Health Reform Act and (d) basic principles of risk management. Discrimination is used in the broader dictionary sense as opposed to the more narrow statutory sense. This Certification is in six parts:

1. Narrative or Explanation
2. Statement of Actuarial Opinion
3. Submitted Data
4. Testing Results
5. Employer Options
6. Comments of the Actuary.

Sincerely,

Principal
Actuarial Work-Products, Inc.

PART 1

NARRATIVE OR EXPLANATION

In General

This Discrimination Appraisal has as its primary goal the determination of whether or not the health care plan(s) of the Employer (and its affiliates, subsidiaries, and similar) discriminate in any of the following ways: (a) favoring the highly compensated, (b) disfavoring the protected class (sex, race, age, disability, e. g.), (c) improper use of or reliance on health status as described by federal mandates (HIPAA, e. g.), (d) violating the principles and practices of our federal trade and commerce laws and in a limited way (e) permitting structural conflicts of interest among its fiduciaries. This Appraisal avoids (a) offering advice or consultation, (b) limiting its scope only to the isolating of infractions and not their consequences, (c) considering only medical reimbursement plans (i.e., not including cafeteria, flexible spending accounts, premium option plans or dependent child assistance arrangements).

Favoring the Highly Compensated

The new Health Care Reform Act amended the federal Public Health and Safety Act so as to require that fully insured medical reimbursement health care plans not discriminate (i.e., violate the Benefits Test) in favor of the highly compensated individuals as defined by IRC Section 105(h). Fully insured plans are not subject to the Eligibility Test. The penalty for such violation is not a W-2 Statement to the Individual but rather a serious infraction of the law.

Self-funded medical reimbursement plans continue to be governed by IRC Section 105(h). This means that such plans must demonstrate that (a) the Benefits Test is met (i.e., no favoritism to the highly compensated as to (i) eligibility, (ii) benefits, (iii) contributions, (iv) tenure or (v) compensation) and (b) the Eligibility Test is also met. The penalty for an act of discrimination is the reversal of the statutory tax advantage that results in (a) a W-2 to the specific highly compensated individual if the Benefits Test fails or (b) a Form 1099 to the highly compensated individuals (as a group) if the Eligibility Test fails.

Disfavoring the Protected Class

Three major federal laws define what are commonly referred to as the protected class: (a) the Civil Rights Laws (race, sex, religion, national origin, e.g.), (b) ADEA (Age Discrimination in Employment Act), and (c) Equal Employment Opportunity Laws (disabled worker, e.g.). The protected class must not be disfavored with respect to (a) eligibility, (b) benefits, (c) contributions, (d) tenure or (e) compensation. Plan-related discrimination infractions against the protected class will be subject to EEOC enforcement action.

Health Status

A family of federal laws that directly impact medical reimbursement plan have the effect of making it an act of discrimination to be in violation thereof. The primary laws in this grouping are: (a) Mental Health Parity Acts, (b) Newborn and Mothers' Health Protection Act, (c) HIPAA, (d) Women's Health and Cancer Rights Act and (e) Americans with Disabilities Act.

Trade and Commerce Laws

The essence of our family of trade and commerce laws is this: (1) there shall be no (a) restraint of trade or stifling of competition, (b) price-fixing, (c) unfair price discrimination or activities that are anti-trust in design or result and (2) trade shall be conducted fairly. These Trade and Commerce Laws were enacted in the early decades of the twentieth century and had as their motivation the Commerce Clause of the U.S. Constitution. The Supreme Court, in 1942, held that insurance was interstate commerce (overturning a long precedence to the contrary); in direct response, Congress enacted the McCarran-Ferguson Act in 1945 which exempted insurance from compliance with the Trade and Commerce Laws. Congress at that time had confidence in the ability of the states to regulate insurance. The new Health Care Reform Act revokes the McCarran-Ferguson *free-pass* to insurers but restricted to health insurance. Self-funders will be unaffected by the revocation of such Law to health insurance since they had to conform thereto all the time. Fully insured health care plan must pay particular heed to any potential discrimination that might violate the federal trade and commerce laws.

Structural Conflicted Interest

The Supreme Court held in *MetLife v. Glenn* that the presence of a conflicted interest with a plan fiduciary (even if only potential) should result in the court, in its adjudication, to hold a litigant, with such conflicted interest, to a higher standing than a litigant without such conflicted interest. The issue from a risk standpoint is this: Is it significant from a risk management point of view to acknowledge the fact that Employer will be disadvantaged should a plan-related legal issue arise solely because of a conflicted interest (even if potential or structural)? For purposes of this Work-Product, the response to this question is affirmative,

PART 2

STATEMENT OF ACTUARIAL OPINION DISCRIMINATION APPRAISAL MEDICAL REIMBURSEMENT PLAN(S)

I am a principal of both Self-funding Actuarial Services, Inc. and Actuarial Work-Products, Inc. (affiliated Corporations); am a member of the Society of Actuaries and am a member of the American Academy of Actuaries. My firm has been retained by the Engager to provide calculations of certain actuarial items for the above-cited Health Care Plan. I relied upon the Engager shown herein as to the accuracy and completeness of the underlying information that was used in this Certification. In other aspects, my examination included (a) reviews of the actuarial assumptions, methods, submitted data and (b) tests of actuarial computations as I considered necessary under the circumstances.

Summary and Actuarial Appraisal

Favoring the Highly Compensated

Benefits Test (All Plans)

1. The Tests summarized on Part 4 show that all of the Plans meet the Benefits Test.
2. The Tests summarized on Part 4 show that certain of the Plans fail to meet the Benefits Test. Where such Plans are self-funded, the penalty is for the affected highly compensated individual to be given a W-2 (Block 1 only) for the plan-provided benefits that are attributable to the discriminatory Plans' provision(s). Where such Plans are fully insured, the penalty constitutes an infraction of the .

Benefit and Risk Management Test (All Plans)

It is my opinion that the Testing Results set forth in Part 4 herein fairly provide the Discrimination Appraisal that is the purpose of this Work-Product. That is, the Plans under review all meet the following four tests: (a) do not unfairly discriminate in favor of the highly compensated, (b) do not unfairly discriminate against the protected class (race, gender, disabled, older worker, e.g.), (c) meet all federal plan-related mandates, (d) do not discriminate so as to violate any trade or commerce laws and (e) avoid any structural conflicted interests (if selffunded with the exception of the following:

<u>Designation</u>		
<u>Employer</u>	<u>Plan</u>	<u>Basis for Discrimination</u>

Work-Product
Discrimination Appraisal
Medical Reimbursement Plan(s)

Eligibility Test (Self-Funded Plans Only)

All of the self-funded medical reimbursement plans meet the Eligibility Test with the exception of the following:

<u>Designation</u>		
<u>Employer</u>	<u>Plan</u>	<u>Basis for Discrimination</u>

The Treasury Regulations permit the modification of Plan participation terms so as to make such Plans meet the Eligibility Test. This process (referred to restructuring) essential permits Plan A to either (a) absorb Plan B or (b) merge with Plan B. If Plan A has 100 participants and Plan B has 150 participants, the absorbing of B by A will yield an amended Plan of 150. The merging of Plan B and Plan B will yield an amended Plan of 250. Such restructuring is permissible only with a Plan amendment. Such Amendment, if used, is described in Part 5.

Conditions and Terms of Opinion

1. That this Work-Product is an Actuarial Opinion as contemplated by the American Academy of Actuaries.
2. That I am qualified to offer such opinion by reason of my meeting the requisite examination, experience and continuing education requirements of the American Academy of Actuaries
3. That this Actuarial Work-Product is the result of a mathematical computer program processing inputted data and documentation by Actuarial Work-Products, Inc. as summarized herein.
4. That I am independent of and have no conflicted interest with any party with respects to this Work-Product.
5. That the Work-Product was prepared at the request of the Eligible User, who is identified herein, and who may or may not be the ultimate user of such Work-Product.

6. That I have been engaged, as contemplated by the relevant American Academy of Actuaries, by the Engager identified herein.
7. That I intend to be a fiduciary with respect to this Work-Product and will act accordingly, striving to meet any and all standards of conduct necessary to meet this end.
8. That the professional liability for this Work-Product is assumed by Self-Funding Actuarial Services, Inc. which has in place an appropriate professional liability insurance policy. A PDF of the summary page of this policy is available at: www.awpse.com/eando.pdf.

09/25/2008

Date

Principal
Actuarial Work-Products, Inc.

PART 3

SUBMITTED DATA

PART 4
TESTING RESULTS

PART 5

RESTRUCTURING PLAN AMENDMENT

PART 6

COMMENTS OF THE ACTUARY