

**DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
EMPLOYEE BENEFITS DIVISION VOLUNTARY PRODUCTS RULE**

PUBLIC COMMENTS

Comments Sent by Email -

Name: Derrick Smith, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C. on behalf of American Fidelity Assurance Company

Comment:

We are submitting this letter on behalf of our client, American Fidelity Assurance Company (“American Fidelity”). American Fidelity appreciates the opportunity to provide comments regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products (“Proposed Rule”). American Fidelity is an Oklahoma insurance company that has worked with school districts for over 60 years. In Arkansas, American Fidelity works with school districts to provide life and supplemental benefits products. American Fidelity is concerned that the Proposed Rule could be read to apply to voluntary products provided to employees of public schools in addition to state employees. In that regard, American Fidelity requests that the Proposed Rule be revised to clearly state that it is only applicable to voluntary products offered to state employees. Under Arkansas law, the Director of the Employee Benefits Division (“EBD”) has administrative responsibility for developing, implementing, and maintaining cafeteria plans on behalf of state employees. Historically, the Arkansas State Employees Association has administered the cafeteria plan for voluntary products on behalf of state employees. In 2023, the Arkansas General Assembly memorialized this historical practice by requiring the Arkansas State Employees Association to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees or contract with a designee to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees. Notably, however, Act 533 also made clear that the Director’s historical authority to supervise the implementation and day-to-day management of employee benefits for state and public school employees did not extend to voluntary products or insurance procured by independent school districts for public school employees.

According to the Proposed Rule, its purpose is to implement Ark. Code Ann. § 21-5-905 regarding the administration of voluntary products on behalf of state employees. Although the EBD Director has indicated in public comments that the Proposed Rule is intended to only be applicable to voluntary products provided to state employees and is not intended to impact voluntary products marketed to public school employees, our principal concern is that the language of the Proposed Rule is not as clear. Specifically, section 4.1 of the Proposed Rule states: All state employees who are eligible under Ark. Code Ann. § 21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment. Under § 21-5-901, an “eligible employee” is defined to mean “full time employees of governmental entities.” “Governmental entities” are subsequently defined to include “any agency of the state, any city, any county, *any school district*, or any other political subdivision of the

state.” By referencing § 21-5-901, the Proposed Rule as currently written could be read to include employees of school districts. American Fidelity respectfully requests that the Proposed Rule be revised to clarify its singular applicability to voluntary products sold to state employees. Specifically, American Fidelity proposes that the title of the Proposed Rule, as well as Sections 1.01, 2.0, and 4.0, be revised to clearly state its applicability to voluntary products sold to state employees. American Fidelity also proposes that the statutory reference in Section 4.1 be changed to Ark. Code Ann. § 21-5-904 as that is the statute the Proposed Rule is intended to implement. A redline of the Proposed Rule with the suggested revisions is included for reference. Because these suggested revisions are consistent with the stated purposes of the Proposed Rule, we believe that the Department may make these revisions without a new public comment period. According to the Administrative Procedures Act (“APA”), an agency is to fully consider all written and oral submission respecting a proposed rule before finalizing the language of the proposed rule and filing it with the Arkansas Secretary of State and Arkansas Legislative Council. The APA clearly contemplates that a proposed rule may be revised during the promulgation process without requiring an additional public comment period. An Arkansas Attorney General’s Opinion has expressly adopted the view that “the mere fact that proposed regulations are modified during the public comment period does not automatically require an additional ‘notice and public comment period’ prior to the final adoption of the regulation.” The opinion further states: It has been stated that informed changes and distinctions are the very *raison d’etre* of the notice-and-comment period. This principle is recognized in Act 406 of 1997 which amended § 25-15-204(a)(2) by adding the phrase “the agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule.” Further, it has been recognized that if a final rule could not differ from a proposed rule without a new round of notice and comment, it would result in the absurdity that in rule making under the APA the agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary. *See* Annotation, *What Constitutes Adequate Notice of Federal Agency Rule as against Objection that Rule Adopted Differed in Substance from that Published as Proposed in Notice*, 96 A.L.R.Fed. 411 (1990); *Tenn. Envtl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893 (Tenn. Ct. App. 1992) (unreasonable and inefficient to require an agency to publish the exact text of a proposed rule in order to obtain public reaction thereto and then require a republication and rehearing for every alteration made before final adoption). Although no Arkansas case law has addressed the issue, federal courts have generally cited two tests when considering whether a final rule is so different from a proposed rule that a new notice and comment period is required. A new notice and comment period is not required if: 1. The final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or 2. the notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment. While no Arkansas case law has considered these tests, no fewer than nine Arkansas state agencies have adopted rules of procedure (with Arkansas General Assembly’s review) that adopt these tests. Clearly, Arkansas permits an agency to make some modifications to a proposed rule during the public comment period without requiring an additional notice and public comment period. In this instance, although the satisfaction of one test is sufficient, both tests for concluding that an additional public comment period is not required have been met. First, the proposed modifications do not change the publicly stated character of the rule to regulate the provision of voluntary products to state employees. The proposed modifications merely clarify that the rule only regulates the provision of voluntary products to state employees and does not regulate the provision of

voluntary products to public school employees. Second, the notice described a proposed rule applicable to voluntary products. Any state or public school employee purchasing a voluntary product and any entity marketing such products was sufficiently notified of the items to be considered.

**Footnotes removed in this document for ease of reading.*

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Name: Derrick Smith, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C. on behalf of USAbLe Life

Comment: We are submitting this letter on behalf of our client, USAbLe Life. USAbLe Life appreciates the opportunity to provide comments regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products (“Proposed Rules”). USAbLe Life is an Arkansas domestic life and health insurer based in Little Rock, Arkansas and is the 20th largest life insurer in the United States. USAbLe Life is ranked in the top 10 of the supplemental, life, and disability in the markets that it serves. USAbLe Life does not currently provide group voluntary products to Arkansas state employees. Therefore, USAbLe Life does not have any comments regarding the Proposed Rule’s application to state employees. However, USAbLe Life does provide voluntary group products to independent school districts throughout the State of Arkansas. As such, USAbLe Life is primarily concerned with the potential applicability of the Proposed Rule to voluntary group products provided to employees of public school employees. In that regard, USAbLe Life requests that the Proposed Rule clearly state that it is only applicable to voluntary products offered to state employees. Under Arkansas law, the Director of the Employee Benefits Division (“EBD”) has administrative responsibility for developing, implementing, and maintaining cafeteria plans on behalf of state employees.¹ Historically, the Arkansas State Employees Association has administered the cafeteria plan for voluntary products on behalf of state employees. In 2023, the Arkansas General Assembly memorialized this historical practice by requiring the Arkansas State Employees Association to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees or contract with a designee to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees. Notably, however, Act 533 also made clear that the Director’s historical authority to supervise the implementation and day-to-day management of employee benefits for state and public school employees did not extend to voluntary products or insurance procured by independent school districts for public school employees. According to the Proposed Rule, its purpose is to implement Ark. Code Ann. § 21-5-905 regarding the administration of voluntary products on behalf of state employees. Although the EBD Director has indicated in public comments that the Proposed Rule is intended to only be applicable to voluntary products provided to state employees and is not intended to impact voluntary products marketed to public school employees, our principal concern is that the language of the Proposed Rule is not as clear. Specifically, section 4.1 of the Proposed Rule states: All state employees who are eligible under Ark. Code Ann. § 21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment. Under § 21-5-901, an “eligible employee” is defined to mean “full time employees of governmental

entities.” “Governmental entities” are subsequently defined to include “any agency of the state, any city, any county, *any school district*, or any other political subdivision of the state.” By referencing § 21-5-901, the Proposed Rule as currently written could be read to include employees of school districts. US Able Life respectfully requests that the Proposed Rule be revised to clarify its singular applicability to voluntary products sold to state employees. Specifically, US Able Life proposes that the title of the Proposed Rule, as well as Sections 1.01, 2.0, and 4.0, be revised to clearly state its applicability to voluntary products sold to state employees. US Able Life also proposes that Section 4.1 be amended to explicitly exclude public school employees. A redline of the Proposed Rule with the suggested revisions is included for reference. Because these suggested revisions are consistent with the stated purposes of the Proposed Rule, we believe that the Department may make these revisions without a new public comment period. According to the Administrative Procedures Act (“APA”), an agency is to fully consider all written and oral submission respecting a proposed rule before finalizing the language of the proposed rule and filing it with the Arkansas Secretary of State and Arkansas Legislative Council. The APA clearly contemplates that a proposed rule may be revised during the promulgation process without requiring an additional public comment period. An Arkansas Attorney General’s Opinion has expressly adopted the view that “the mere fact that proposed regulations are modified during the public comment period does not automatically require an additional ‘notice and public comment period’ prior to the final adoption of the regulation.” The opinion further states: It has been stated that informed changes and distinctions are the very *raison d’etre* of the notice-and-comment period. *See Rybachek, supra*. This principle is recognized in Act 406 of 1997 which amended § 25-15-204(a)(2) by adding the phrase “the agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule.” Further, it has been recognized that if a final rule could not differ from a proposed rule without a new round of notice and comment, it would result in the absurdity that in rule making under the APA the agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary. *See* Annotation, *What Constitutes Adequate Notice of Federal Agency Rule as against Objection that Rule Adopted Differed in Substance from that Published as Proposed in Notice*, 96 A.L.R.Fed. 411 (1990); *Tenn. Env’tl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893 (Tenn. Ct. App. 1992) (unreasonable and inefficient to require an agency to publish the exact text of a proposed rule in order to obtain public reaction thereto and then require a republication and rehearing for every alteration made before final adoption) Although no Arkansas case law has addressed the issue, federal courts have generally cited two tests when considering whether a final rule is so different from a proposed rule that a new notice and comment period is required. A new notice and comment period is not required if: 1. the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or 2. the notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment. While no Arkansas case law has considered these tests, no fewer than nine Arkansas state agencies have adopted rules of procedure (with Arkansas General Assembly’s review) that adopt these tests.

Clearly, Arkansas permits an agency to make some modifications to a proposed rule during the public comment period without requiring an additional notice and public comment period. In this instance, although the satisfaction of one test is sufficient, both tests for concluding that an additional public comment period is not required have been met. First, the proposed modifications

do not change the publicly stated character of the rule to regulate the provision of voluntary products to state employees. The proposed modifications merely clarify that the rule only regulates the provision of voluntary products to state employees and does not regulate the provision of voluntary products to public school employees. Second, the notice described a proposed rule applicable to voluntary products. Any state or public school employee purchasing a voluntary product and any entity marketing such products was sufficiently notified of the items to be considered.

**Footnotes removed in this document for ease of reading.*

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Name: John Starline – JTS Commenting on Behalf of Educational Benefits, Inc. (EBi)

Comment: Thank you for the opportunity to provide comments on the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products ("Proposed Rules"). I am commenting on behalf of Educational Benefits, Inc. ("EBi"), an independently owned brokerage service based in Little Rock, Arkansas. The company has more than 40 years' experience providing custom voluntary benefit solutions to educators, and we serve 151 school districts throughout the state. We provide flexible spending account administration, cafeteria plan documentation, enrollment solutions, and state of the art technology platform without any cost to our public-school clients. We can provide these services because we have invested in a team of over 200 employees, most of whom reside in the State of Arkansas.

According to the Proposed Rule, its purpose is to implement Ark . Code Ann. §21-5-905 regarding the administration of voluntary products. The Director of the Employee Benefits Division ("EBD") has publicly stated the Proposed Rule is intended to only apply to voluntary products provided to state employees and is not intended to impact voluntary products for public school employees. However, EBi is concerned that the language of the Proposed Rule does not make this distinction clear. Section 4.01 of the Proposed Rule states:

All state employees who are eligible under Ark. Code Ann. §21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment.

"Eligible employee" is defined in §21-5-901 as "full-time employees of governmental entities. That subchapter goes on to define "governmental entities" as "any agency of the state, any city, any county, any school district, or any other political subdivision of the state." Therefore, as written, the Proposed Rule's reference to §21-5-901 could be read to include employees of school districts.

EBi respectfully requests that the Proposed Rule be revised to make clear that it only applies to voluntary products sold to state employees. Attached are proposed revisions for your consideration. EBi proposes that the title of the Proposed Rule, along with Sections 1.01, 2.0, and 4.02 be revised to clearly state the rule applies only to the voluntary products sold to state

employees. EBi also proposes amending Section 4.01 to explicitly exclude public school employees. These revisions remain consistent with the stated purpose of the Proposed Rule, and therefore, we believe that the changes may be made without requiring a new public comment period. The Administrative Procedures Act ("APA") clearly allows changes within the rulemaking process, since it instructs agencies to "fully consider" comments before finalizing language of a proposed rule. Furthermore, an Arkansas Attorney General's Opinion states, "The mere fact that proposed regulations are modified during the public comment period does not automatically require an additional 'notice and comment period' prior to the final adoption of the regulation." Merely clarifying the language of the proposed rule would not change the character or purpose of the rule, and would not require an additional public comment period. We appreciate your consideration of these comments. We are happy to discuss further, if helpful.

**Footnotes removed in this document for ease of reading.*

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Comments Made During Public Hearing –

Name: Derrick Smith, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C. on behalf of American Fidelity Assurance Company

Comment: I've authorized to speak on their behalf. First, let me thank you for the opportunity to make some public comments. On as proposed rules governing voluntary products and I will supplement the comments with the written suggestions before the deadline is submitted. Those American fidelity is an Oklahoma insurance company that's been working with school districts for over 60 years. In Arkansas, American Fidelity Works with school districts to provide life and supplemental benefits products, and it's in that regard that American fidelity had its initial concerns in reviewing the draft. The concern is primarily assuring that the voluntary products that will be subject to this rule are limited to those voluntary products sold to state employees only and does not implicate a voluntary product sold to school district employees. I think when the statute or when the bill was passed, that is the genesis of this rule, the bill took steps in a couple of instances to to make sure that it's clear that the voluntary products that are subject work that are the reason for this rule are offered to state employees only and not products sold to public school employees procured by school districts. The reason? The primary reason that this bill raised some concern is the reference in section 4.01 to all state employees who are eligible under our code section 21-5-901. That provision of the code doesn't really define state employees. It defines eligible employees who are employees of governmental entities, and the definition of governmental entities in that section speaks to employees of any agency of the state, any city, any county, any school district or any other political subdivision of the state. So with this reference, we think that there could be some confusion in viewing the rule of that it applies to public school employees as well. We think that the rule can be clarified simply by adding references throughout the draft rule, clearly stating its applicability to voluntary products sold to state employees. For instance, couple of words could be added to sections 1.01, 2.0 and 4.0 as well as an amendment to that statutory reference. Because we think these suggestions are consistent with the underlying statutes as well as the publicly stated

purposes of the rule, but we do not believe these revisions are the type that are substantive and would require notice or a review and could be filed with the legislature.

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Name: Julie Marshall, executive vice president for USABLE Life

Comment: I have been for several years. For those of you who don't know, USABLE, we're an Arkansas insurance company. We're domiciled here. Our headquarters is out on Chenal Parkway. And we've provided insurance coverage here in Arkansas to the public school employees for about 40 years.

And so we are an in state employer and we've been designated as one of the best places to work in Arkansas since 2016. So we're very proud of our company, our heritage more so is how we have provided benefits to the public school employees for so many years. And although EBD has provided major medical coverage for public school employees, Independent School districts, the public schools have for a long time arranged for their own voluntary products. It's I can remember it for 40 years, so it's probably a lot longer than that. But they have had that right. And that was even further clarified in state law in 2015 that declare that schools could do that could choose their benefits. As the rate stands today, or as the rules stand today. We don't have any concern about the state employees. It's into the clarification of what are public school employees allowed to do? And while we've heard many people say that the proposed rule is intended to apply to voluntary product, so to stay employees. It's not intended to apply to voluntary products sold to public school employees. Still little ambiguous. And so that's, that's where we ask for clarification and we don't believe any clarification would be substantive. We're just asking for that clarification and then 4.01, as Mr. Smith referenced. It talks about all state employees. And so what we would ask and we will put this in writing. Follow up from our I think our CEO will sign our letter, but it's to some language that makes it clear that this doesn't refer to the public school employees, but rather the state employees. So we appreciate the time to make the comments. And we will follow the process and would like clarification.

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Name: John Starline – JTS Commenting on Behalf of Educational Benefits, Inc. (EBI)

Comment: There are two insurance companies present. We're a broker in the school market. We have been in the school market for 40 years. We currently represent the majority of the school districts in the state. And with those school districts, we provide technology platforms to manage eligibility. We do the enrollments with our own enrollers we provide products on a very much competitively bid basis every single year. And we compete against not only insurance carriers but also other brokers in our markets, which bring the pricing to bear very competitively competitive pricing to save our employees and school districts a lot of money. In fact, over the years since, we have been in this business and gone out and bid these products with both carriers in front of us. But other carriers, we've saved millions of dollars for the school district employees and our efforts

to be. At this point, at this juncture, I'm here to talk about. The bill that's been passed to Act 533 was House Bill 1160, I believe, and in that bill, we clarified, or at least my understanding was there was clarification in reference to code section 6-17-1115. That code section clearly sits tablished that public school employees are independent and make an independent. As to who their insurance brokers are, the reason I'm here, the bill itself as written. I believe can be interpreted to to exclude public school employees and only include include state employees. The problem that I aspire see is this is not the first time I've been here. This is about the 4th time that I've been here to try to clarify some of the ambiguities. The broker that was selected 10 years ago to take over the state benefits, and whoever is the followed after that affiliates, whatever it may be, there seems to be a continuous ambiguity as to who is supposed to be doing state employees and who's done public school employees. And that's when 6-17-1115 came and clarified. That and that is referenced in Acts 533 four different times. To clarify that. And so I think at this point what we want to do is to avoid anymore ambiguity make this clear and simple so that the school districts know what they what they have the right to do and the state employees have their rights too. So at this point, the first thing is I want to say, Director Wallace, we want to appreciate you for referencing the fact that this specifically doesn't include school employees in your in your video conference. So recognizing that fact, we just want to make sure that it's clear that that is the intent and that is what we're going to do. And I think that in all things. Trying to make that or effectuate that as best as we can.

If we could put in some some language as as Derek said, and as Julie said, I believe it's in four. I'm a recovering attorney, not a practicing attorney. I don't really know all of those things, but what I do know is just a little clarification. If it's not substantive. To not include it. I don't see where it would be a substantive change to include it to where you specifically included that we exclude public school employees and let them have their own right to make their independent choice to go to their own providers, to procure their benefits at a better price.

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Name: Sharon Chuculate, Arkansas Association of Educational Administrators

Comment: It's gonna sound like we're beating a dead horse, but I'm just here to say that there is some confusion amongst our public school administrators. 21-5-901 does include public schools as the governmental entity, and I think that there is some concern that districts would lose their lot to choose their provider.

And I understand from conversations, again with EBD and Director Wallace, it's absolutely not intended to address public school employees, but we feel like even if you excluded under ACH, 21-5-901 and 4.01, that might make it a little more clear to the public schools. Now say that within the law, and that is our comment.

Department Response: Comment considered; non-substantive change made to remove reference to definition in Ark. Code Ann. § 21-5-901.

Kimberly Duvall

From: Derrick Smith <DSmith@mwlaw.com>
Sent: Thursday, February 29, 2024 9:42 AM
To: TSS Rules Comments
Subject: Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products
Attachments: 2024.02.28 Letter to Leslie Fiskens, Secretary, ADTSS, re Rules Governing Voluntary Products.pdf; 2024.02.29 DRAFT EBD Rules Regarding Voluntary Products (American Fidelity Comments Redl(20410010.4).pdf

You don't often get email from dsmith@mwlaw.com. [Learn why this is important](#)

To Whom It May Concern:

Attached please find comments to the proposed Rules Governing Voluntary Products submitted on behalf of American Fidelity Assurance Company.

MITCHELL | WILLIAMS

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February 28, 2024

Via Email – tss.rulescomments@arkansas.gov

The Honorable Leslie Fiskien
Secretary
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, Arkansas 72201

**Re: Department of Transformation and Shared Services Employee Benefits Division's
Rules Governing Voluntary Products**

Dear Secretary Fiskien:

We are submitting this letter on behalf of our client, American Fidelity Assurance Company (“American Fidelity”). American Fidelity appreciates the opportunity to provide comments regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products (“Proposed Rule”). American Fidelity is an Oklahoma insurance company that has worked with school districts for over 60 years. In Arkansas, American Fidelity works with school districts to provide life and supplemental benefits products. American Fidelity is concerned that the Proposed Rule could be read to apply to voluntary products provided to employees of public schools in addition to state employees. In that regard, American Fidelity requests that the Proposed Rule be revised to clearly state that it is only applicable to voluntary products offered to state employees.

Under Arkansas law, the Director of the Employee Benefits Division (“EBD”) has administrative responsibility for developing, implementing, and maintaining cafeteria plans on behalf of state employees.¹ Historically, the Arkansas State Employees Association has administered the cafeteria plan for voluntary products on behalf of state employees. In 2023, the Arkansas General Assembly memorialized this historical practice by requiring the Arkansas State Employees Association to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees or contract with a designee to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees.² Notably, however, Act 533 also made clear that the Director’s historical authority to supervise the implementation and day-to-day management of employee benefits for state and public school employees did not extend to voluntary products or insurance procured by independent school districts for public school employees.³

¹ Ark. Code Ann. § 21-5-904(a).

² Act 533 of 2023, codified at Ark. Code Ann. § 21-5-904(d)

³ See Act 533 of 2023, section 3, codified at Ark. Code Ann. § 21-5-406(e)(3)

According to the Proposed Rule, its purpose is to implement Ark. Code Ann. § 21-5-905 regarding the administration of voluntary products on behalf of state employees.⁴ Although the EBD Director has indicated in public comments that the Proposed Rule is intended to only be applicable to voluntary products provided to state employees and is not intended to impact voluntary products marketed to public school employees, our principal concern is that the language of the Proposed Rule is not as clear. Specifically, section 4.1 of the Proposed Rule states:

All state employees who are eligible under Ark. Code Ann. § 21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment.

Under § 21-5-901, an “eligible employee” is defined to mean “full time employees of governmental entities.”⁵ “Governmental entities” are subsequently defined to include “any agency of the state, any city, any county, *any school district*, or any other political subdivision of the state.”⁶ By referencing § 21-5-901, the Proposed Rule as currently written could be read to include employees of school districts.

American Fidelity respectfully requests that the Proposed Rule be revised to clarify its singular applicability to voluntary products sold to state employees. Specifically, American Fidelity proposes that the title of the Proposed Rule, as well as Sections 1.01, 2.0, and 4.0, be revised to clearly state its applicability to voluntary products sold to state employees. American Fidelity also proposes that the statutory reference in Section 4.1 be changed to Ark. Code Ann. § 21-5-904 as that is the statute the Proposed Rule is intended to implement. A redline of the Proposed Rule with the suggested revisions is included for reference.

Because these suggested revisions are consistent with the stated purposes of the Proposed Rule, we believe that the Department may make these revisions without a new public comment period. According to the Administrative Procedures Act (“APA”), an agency is to fully consider all written and oral submission respecting a proposed rule before finalizing the language of the proposed rule and filing it with the Arkansas Secretary of State and Arkansas Legislative Council.⁷ The APA clearly contemplates that a proposed rule may be revised during the promulgation process without requiring an additional public comment period.

An Arkansas Attorney General’s Opinion has expressly adopted the view that “the mere fact that proposed regulations are modified during the public comment period does not automatically require an additional ‘notice and public comment period’ prior to the final adoption of the regulation.”⁸ The opinion further states:

⁴ Proposed Rule, § 2.0.

⁵ Ark. Code Ann. § 21-5-901(2).

⁶ Ark. Code Ann. § 21-5-901 (*emphasis added*).

⁷ Ark. Code Ann. § 25-15-204(a)(2)(C).

⁸ See Ark. Op. Atty. Gen. No. 97-358.

It has been stated that informed changes and distinctions are the very *raison d'être* of the notice-and-comment period. *See Rybachek, supra*. This principle is recognized in Act 406 of 1997 which amended § 25-15-204(a)(2) by adding the phrase “the agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule.”⁹ Further, it has been recognized that if a final rule could not differ from a proposed rule without a new round of notice and comment, it would result in the absurdity that in rule making under the APA the agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary. *See* Annotation, *What Constitutes Adequate Notice of Federal Agency Rule as against Objection that Rule Adopted Differed in Substance from that Published as Proposed in Notice*, 96 A.L.R.Fed. 411 (1990); *Tenn. Envtl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893 (Tenn. Ct. App. 1992) (unreasonable and inefficient to require an agency to publish the exact text of a proposed rule in order to obtain public reaction thereto and then require a republication and rehearing for every alteration made before final adoption).⁹

Although no Arkansas case law has addressed the issue, federal courts have generally cited two tests when considering whether a final rule is so different from a proposed rule that a new notice and comment period is required. A new notice and comment period is not required if: 1. the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or 2. the notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment.¹⁰ While no Arkansas case law has considered these tests, no fewer than nine Arkansas state agencies have adopted rules of procedure (with Arkansas General Assembly’s review) that adopt these tests.¹¹

Clearly, Arkansas permits an agency to make some modifications to a proposed rule during the public comment period without requiring an additional notice and public comment period. In this instance, although the satisfaction of one test is sufficient, both tests for concluding that an additional public comment period is not required have been met. First, the proposed modifications do not change the publicly stated character of the rule to regulate the provision of voluntary products to state employees. The proposed modifications merely clarify that the rule only regulates the provision of voluntary products to state employees and does not regulate the provision of voluntary products to public school employees. Second, the notice described a proposed rule applicable to voluntary products. Any state or public school employee purchasing a voluntary product and any entity marketing such products was sufficiently notified of the items to be considered.

⁹ Id.

¹⁰ Id. (citing *Brazos Elec. Power CoOp. v. SWPA*, 819 F.2d 537 (5th Cir. 1987)).

¹¹ {To be added}.

The Honorable Leslie Fisk
Rules Governing Voluntary Products
February 28, 2024
Page 4

Thank you for your consideration of these comments. Please do not hesitate to contact us if you have any questions or want to discuss our requests and recommendations.

Sincerely,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.

By

A handwritten signature in black ink, appearing to read "Derrick W. Smith", written over a faint, circular stamp or watermark.

Derrick W. Smith

DWS/dl

cc: Ms. Kimberly Duvall
Mr. Grant Wallace
Mr. Barry Koonce

DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
EMPLOYEE BENEFITS DIVISIONS RULES GOVERNING
VOLUNTARY PRODUCTS ON BEHALF OF STATE EMPLOYEES

Effective: _____

1.0 AUTHORITY

- 1.01 These rules shall be known as the Department of Transformation and Shared Services Employee Benefits Division Rules Governing Voluntary Products On Behalf of State Employees.
- 1.02 These rules are promulgated pursuant to Ark. Code Ann. § 21-5-905 and Ark. Code Ann. § 25-15-201 et seq.

2.0 PURPOSE

The purpose of these rules is to implement Ark. Code Ann. § 21-5-904 regarding the administration of voluntary products on behalf of state employees.

3.0 DEFINITIONS

- 3.01 EBD means the Department of Transformation and Shared Services, Employee Benefits Division.
- 3.02 Voluntary Products means any individual or group policy and other employee benefits that are wholly paid for by the employee, including without limitation those policies and benefits provided by the Arkansas State Employees Association, Inc., or a designee of the Arkansas State Employees Association, Inc., that develops and administers a cafeteria plan under Ark. Code Ann. § 21-5-405(d).

4.0 VOLUNTARY PRODUCTS OFFERINGS

- 4.01 All full time state employees specifically excluding public school employees shall be offered the opportunity to participate in a cafeteria plan for Voluntary Products established under Ark. Code Ann. § 21-5-904(d) during their new hire eligibility period and during the annual open enrollment.
- 4.02 The Arkansas State Employees Association, Inc., shall offer education and information to each state employee regarding the available Voluntary Products annually during open enrollment and to new hires throughout the year.

5.0 VOLUNTARY PRODUCTS CONTRACTS

- 5.01 The Arkansas State Employees Association, Inc., shall develop and administer a cafeteria plan for Voluntary Products on behalf of eligible state employees.
- 5.02 All Voluntary Products shall be contracted through a competitive sealed bidding

Deleted: who are eligible under Ark. Code Ann. § 21-5-901

Deleted:

process.

- 5.02.1 The Arkansas State Employees Association, Inc., shall ensure the selection of Voluntary Products offer the best combination of benefits and pricing available.
- 5.02.2 The Arkansas State Employees Association, Inc., shall provide EBD a report of all competitive bids including the procedures followed and selection process.
- 5.02.3 No Voluntary Product contract, including amendments and extensions, shall exceed seven (7) years without being competitively rebid.
- 5.03 The Arkansas State Employees Association, Inc. shall present all new contracts and amendments to existing contracts for Voluntary Products to the State Board of Finance and the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council.
- 5.04 Any material changes to Voluntary Products contracts shall be reported to the State Board of Finance and the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council.

6.0 COORDINATION WITH THE EMPLOYEE BENEFITS DIVISION

- 6.01 To ensure continuity of service to state employees, the Arkansas State Employees Association, Inc. shall coordinate with the EBD on issues regarding, but not limited to billing, employee management, record keeping, and information sharing.
- 6.02 The Arkansas State Employees Association, Inc., shall meet with the EBD quarterly.
- 6.03 The State Board of Finance shall resolve any disputes between the Arkansas State Employees Association, Inc. and EBD regarding voluntary products. These disputes shall be exempt from the Administrative Procedures Act, Ark. Code Ann. § 25-15-201 et seq.

7.0 SEMI-ANNUAL REPORTING

- 7.01 The Arkansas State Employees Association, Inc., shall submit to the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council a semi-annual report that includes:
 - 7.01.1 A summary of the Voluntary Products offerings, including the contract, pricing, and number of participants for each offering; and
 - 7.01.2 A financial analysis report for each offering, including premiums paid by state employees and additional fees and expenses, if any.

Kimberly Duvall

From: Derrick Smith <DSmith@mwlaw.com>
Sent: Friday, March 1, 2024 3:54 PM
To: TSS Rules Comments
Subject: Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products
Attachments: 2024.03.01 Letter to Leslie Fiskens, Secretary, ADTSS, re Rules Governing Voluntary Products.pdf

You don't often get email from dsmith@mwlaw.com. [Learn why this is important](#)

To Whom It May Concern:

Attached please find comments to the proposed Rules Governing Voluntary Products submitted on behalf of USABLE Life.

MITCHELL | WILLIAMS

Derrick Smith
T 501.688.8845 | M 501.416.3230 | F 501.918.7845
DSmith@mwlaw.com | [Profile](#) | MitchellWilliamsLaw.com
425 W. Capitol Ave. | Ste. 1800 | Little Rock, AR 72201
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

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MITCHELL | WILLIAMS

Derrick W. Smith
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Fax: 501-918-7845
E-mail: dsmith@mwlaw.com

425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
Telephone: 501-688-8800
Fax: 501-688-8807

March 1, 2024

Via Email – tss.rulescomments@arkansas.gov

The Honorable Leslie Fiskien
Secretary
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, Arkansas 72201

**Re: Department of Transformation and Shared Services Employee Benefits Divisions
Rules Governing Voluntary Products**

Dear Secretary Fiskien:

We are submitting this letter on behalf of our client, USABLE Life. USABLE Life appreciates the opportunity to provide comments regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products (“Proposed Rules”). USABLE Life is an Arkansas domestic life and health insurer based in Little Rock, Arkansas and is the 20th largest life insurer in the United States. USABLE Life is ranked in the top 10 of the supplemental, life, and disability in the markets that it serves.

USABLE Life does not currently provide group voluntary products to Arkansas state employees. Therefore, USABLE Life does not have any comments regarding the Proposed Rule’s application to state employees. However, USABLE Life does provide voluntary group products to independent school districts throughout the State of Arkansas. As such, USABLE Life is primarily concerned with the potential applicability of the Proposed Rule to voluntary group products provided to employees of public school employees. In that regard, USABLE Life requests that the Proposed Rule clearly state that it is only applicable to voluntary products offered to state employees.

Under Arkansas law, the Director of the Employee Benefits Division (“EBD”) has administrative responsibility for developing, implementing, and maintaining cafeteria plans on behalf of state employees.¹ Historically, the Arkansas State Employees Association has administered the cafeteria plan for voluntary products on behalf of state employees. In 2023, the Arkansas General Assembly memorialized this historical practice by requiring the Arkansas State Employees Association to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees or contract with a designee to develop and administer a cafeteria plan for voluntary products on behalf of eligible state employees.² Notably, however, Act 533 also made clear that the Director’s historical authority to supervise the implementation and day-to-day management of employee benefits for state and public school employees did not extend to

¹ Ark. Code Ann. § 21-5-904(a).

² Act 533 of 2023, codified at Ark. Code Ann. § 21-5-904(d)

voluntary products or insurance procured by independent school districts for public school employees.³

According to the Proposed Rule, its purpose is to implement Ark. Code Ann. § 21-5-905 regarding the administration of voluntary products on behalf of state employees.⁴ Although the EBD Director has indicated in public comments that the Proposed Rule is intended to only be applicable to voluntary products provided to state employees and is not intended to impact voluntary products marketed to public school employees, our principal concern is that the language of the Proposed Rule is not as clear. Specifically, section 4.1 of the Proposed Rule states:

All state employees who are eligible under Ark. Code Ann. § 21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment.

Under § 21-5-901, an “eligible employee” is defined to mean “full time employees of governmental entities.”⁵ “Governmental entities” are subsequently defined to include “any agency of the state, any city, any county, *any school district*, or any other political subdivision of the state.”⁶ By referencing § 21-5-901, the Proposed Rule as currently written could be read to include employees of school districts.

USABLE Life respectfully requests that the Proposed Rule be revised to clarify its singular applicability to voluntary products sold to state employees. Specifically, USABLE Life proposes that the title of the Proposed Rule, as well as Sections 1.01, 2.0, and 4.0, be revised to clearly state its applicability to voluntary products sold to state employees. USABLE Life also proposes that Section 4.1 be amended to explicitly exclude public school employees. A redline of the Proposed Rule with the suggested revisions is included for reference.

Because these suggested revisions are consistent with the stated purposes of the Proposed Rule, we believe that the Department may make these revisions without a new public comment period. According to the Administrative Procedures Act (“APA”), an agency is to fully consider all written and oral submission respecting a proposed rule before finalizing the language of the proposed rule and filing it with the Arkansas Secretary of State and Arkansas Legislative Council.⁷ The APA clearly contemplates that a proposed rule may be revised during the promulgation process without requiring an additional public comment period.

An Arkansas Attorney General’s Opinion has expressly adopted the view that “the mere fact that proposed regulations are modified during the public comment period does not automatically require an additional ‘notice and public comment period’ prior to the final adoption of the regulation.”⁸ The opinion further states:

³ See Act 533 of 2023, section 3, codified at Ark. Code Ann. § 21-5-406(e)(3)

⁴ Proposed Rule, § 2.0.

⁵ Ark. Code Ann. § 21-5-901(2).

⁶ Ark. Code Ann. § 21-5-901 (*emphasis added*).

⁷ Ark. Code Ann. § 25-15-204(a)(2)(C).

⁸ See Ark. Op. Atty. Gen. No. 97-358.

It has been stated that informed changes and distinctions are the very *raison d'être* of the notice-and-comment period. *See Rybachek, supra*. This principle is recognized in Act 406 of 1997 which amended § 25-15-204(a)(2) by adding the phrase “the agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule.”⁹ Further, it has been recognized that if a final rule could not differ from a proposed rule without a new round of notice and comment, it would result in the absurdity that in rule making under the APA the agency could learn from comments on its proposals only at the peril of starting a new procedural round of commentary. *See* Annotation, *What Constitutes Adequate Notice of Federal Agency Rule as against Objection that Rule Adopted Differed in Substance from that Published as Proposed in Notice*, 96 A.L.R.Fed. 411 (1990); *Tenn. Env'tl. Council v. Solid Waste Disposal Control Bd.*, 852 S.W.2d 893 (Tenn. Ct. App. 1992) (unreasonable and inefficient to require an agency to publish the exact text of a proposed rule in order to obtain public reaction thereto and then require a republication and rehearing for every alteration made before final adoption).⁹

Although no Arkansas case law has addressed the issue, federal courts have generally cited two tests when considering whether a final rule is so different from a proposed rule that a new notice and comment period is required. A new notice and comment period is not required if: 1. the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or 2. the notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment.¹⁰ While no Arkansas case law has considered these tests, no fewer than nine Arkansas state agencies have adopted rules of procedure (with Arkansas General Assembly’s review) that adopt these tests.¹¹

Clearly, Arkansas permits an agency to make some modifications to a proposed rule during the public comment period without requiring an additional notice and public comment period. In this instance, although the satisfaction of one test is sufficient, both tests for concluding that an additional public comment period is not required have been met. First, the proposed modifications do not change the publicly stated character of the rule to regulate the provision of voluntary products to state employees. The proposed modifications merely clarify that the rule only regulates the provision of voluntary products to state employees and does not regulate the provision of voluntary products to public school employees. Second, the notice described a proposed rule applicable to voluntary products. Any state or public school employee purchasing a voluntary product and any entity marketing such products was sufficiently notified of the items to be considered.

⁹ Id.

¹⁰ Id. (citing *Brazos Elec. Power CoOp. v. SWPA*, 819 F.2d 537 (5th Cir. 1987)).

¹¹ {To be added}.

The Honorable Leslie Fiskin
Rules Governing Voluntary Products
March 1, 2024
Page 4

Thank you for your consideration of these comments. Please do not hesitate to contact us if you have any questions or want to discuss our requests and recommendations.

Sincerely,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.

By

A handwritten signature in black ink, appearing to read "Derrick W. Smith", written over a faint, circular stamp or watermark.

Derrick W. Smith

DWS/dl
Enclosure

cc: Ms. Kimberly Duvall
Mr. Grant Wallace

DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
EMPLOYEE BENEFITS DIVISIONS RULES GOVERNING
VOLUNTARY PRODUCTS ON BEHALF OF STATE EMPLOYEES

Effective:

1.0 AUTHORITY

1.01 These rules shall be known as the Department of Transformation and Shared Services Employee Benefits Division Rules Governing Voluntary Products On Behalf of State Employees.

1.02 These rules are promulgated pursuant to Ark. Code Ann. § 21-5-905 and Ark. Code Ann. § 25-15-201 et seq.

2.0 PURPOSE

The purpose of these rules is to implement Ark. Code Ann. § 21-5-904 regarding the administration of voluntary products on behalf of state employees.

3.0 DEFINITIONS

3.01 EBD means the Department of Transformation and Shared Services, Employee Benefits Division.

3.02 Voluntary Products means any individual or group policy and other employee benefits that are wholly paid for by the employee, including without limitation those policies and benefits provided by the Arkansas State Employees Association, Inc., or a designee of the Arkansas State Employees Association, Inc., that develops and administers a cafeteria plan under Ark. Code Ann. § 21-5-405(d).

4.0 VOLUNTARY PRODUCTS OFFERINGS

4.01 All state employees, specifically excluding public school employees, who are eligible under Ark. Code Ann. § 21-5-901 shall be offered the opportunity to participate in a cafeteria plan for Voluntary Products during their new hire eligibility period and during the annual open enrollment.

4.02 The Arkansas State Employees Association, Inc., shall offer education and information to each state employee regarding the available Voluntary Products annually during open enrollment and to new hires throughout the year.

5.0 VOLUNTARY PRODUCTS CONTRACTS

5.01 The Arkansas State Employees Association, Inc., shall develop and administer a cafeteria plan for Voluntary Products on behalf of eligible state employees.

5.02 All Voluntary Products shall be contracted through a competitive sealed bidding process.

- 5.02.1 The Arkansas State Employees Association, Inc., shall ensure the selection of Voluntary Products offer the best combination of benefits and pricing available.
- 5.02.2 The Arkansas State Employees Association, Inc., shall provide EBD a report of all competitive bids including the procedures followed and selection process.
- 5.02.3 No Voluntary Product contract, including amendments and extensions, shall exceed seven (7) years without being competitively rebid.
- 5.03 The Arkansas State Employees Association, Inc., shall present all new contracts and amendments to existing contracts for Voluntary Products to the State Board of Finance and the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council.
- 5.04 Any material changes to Voluntary Products contracts shall be reported to the State Board of Finance and the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council.

6.0 COORDINATION WITH THE EMPLOYEE BENEFITS DIVISION

- 6.01 To ensure continuity of service to state employees, the Arkansas State Employees Association, Inc., shall coordinate with the EBD on issues regarding, but not limited to billing, employee management, record keeping, and information sharing.
- 6.02 The Arkansas State Employees Association, Inc., shall meet with the EBD quarterly.
- 6.03 The State Board of Finance shall resolve any disputes between the Arkansas State Employees Association, Inc. and EBD regarding voluntary products. These disputes shall be exempt from the Administrative Procedures Act, Ark. Code Ann. § 25-15-201 *et seq.*

7.0 SEMI-ANNUAL REPORTING

- 7.01 The Arkansas State Employees Association, Inc., shall submit to the Employee Benefits Oversight Subcommittee of the Arkansas Legislative Council a semi-annual report that includes:
 - 7.01.1 A summary of the Voluntary Products offerings, including the contract, pricing, and number of participants for each offering; and
 - 7.01.2 A financial analysis report for each offering, including premiums paid by state employees and additional fees and expenses, if any.

Kimberly Duvall

From: Derrick Smith <DSmith@mwlaw.com>
Sent: Friday, March 1, 2024 3:57 PM
To: TSS Rules Comments; Kimberly Duvall
Cc: Grant Wallace (EBD); Amanda Land; Jennifer Davis (DIS)
Subject: RE: Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products
Attachments: 2024.03.01 Letter to Leslie Fiskens, Secretary, ADTSS, re Rules Governing Voluntary Products.pdf

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Thank you for the confirmation of receipt.

We have also submitted a comment letter on behalf of USABLE Life. A copy of that comment letter is attached.

MITCHELL | WILLIAMS

Derrick Smith

T 501.688.8845 | M 501.416.3230 | F 501.918.7845
DSmith@mwlaw.com | [Profile](#) | MitchellWilliamsLaw.com
425 W. Capitol Ave. | Ste. 1800 | Little Rock, AR 72201
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

From: TSS Rules Comments <TSS.RulesComments@arkansas.gov>
Sent: Friday, March 1, 2024 1:11 PM
To: Derrick Smith <DSmith@mwlaw.com>
Cc: Grant Wallace (EBD) <Grant.Wallace@arkansas.gov>; Amanda Land <Amanda.Land@arkansas.gov>; Jennifer Davis (DIS) <Jennifer.Davis@arkansas.gov>
Subject: RE: Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products

Received. Thank you.



Kimberly DuVall | Legal Counsel
Transformation and Shared Services
o. 501.682.1567 | kimberly.duvall@arkansas.gov
[Website](#) | [Facebook](#) | [Twitter](#) | [LinkedIn](#) | [Instagram](#)

From: Derrick Smith <DSmith@mwlaw.com>
Sent: Thursday, February 29, 2024 9:42 AM
To: TSS Rules Comments <tss.rulescomments@arkansas.gov>
Subject: Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products

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To Whom It May Concern:

Attached please find comments to the proposed Rules Governing Voluntary Products submitted on behalf of American Fidelity Assurance Company.

MITCHELL || **WILLIAMS**

Derrick Smith

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Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

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Kimberly Duvall

From: John Starling <john@jtsfs.com>
Sent: Sunday, March 3, 2024 6:29 PM
To: TSS Rules Comments
Cc: John Starling; David Chance; Grant Wallace (EBD); Kimberly Duvall
Subject: EBI Public Comment - Rules Governing Voluntary Products
Attachments: EBI_Public_Comment.pdf

Some people who received this message don't often get email from john@jtsfs.com. Learn why this is important

Good evening,

I have attached to this email my written public comment regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products. Please let me know if there is anything else I need to do to make certain that we comply with the public comment rules/process.

Thank you,

John Starling

e: john@jtsfs.com
p: 501-400-1800
m: 870-692-1693
f: 888.965.4050
w: jtsfs.com



The greatest compliment we ever receive is referrals from ecstatic clients and valued friends. They're the most powerful introductions that help us help others quickly, ethically and dramatically grow their businesses. Thank you for not keeping us a secret!

March 1st, 2024

Via Email – tss.rulescomments@arkansas.gov

The Honorable Leslie Fiskin
Secretary
Arkansas Department of Transformation and Shared Services
501 Woodlane, Suite 201
Little Rock, Arkansas 72201

In re: Department of Transformation and Shared Services Employee Benefits Divisions
Rules Governing Voluntary Products

Dear Secretary, Fiskin:

Thank you for the opportunity to provide comments on the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products (“Proposed Rules”). I am commenting on behalf of Educational Benefits, Inc. (EBi), an independently owned brokerage service based in Little Rock, Arkansas. The company has more than 40 years’ experience providing custom voluntary benefit solutions to educators, and we serve 151 school districts throughout the state. We provide flexible spending account administration, cafeteria plan documentation, enrollment solutions, and state of the art technology platform without any cost to our public-school clients. We can provide these services because we have invested in a team of over 200 employees, most of whom reside in the State of Arkansas.

According to the Proposed Rule, its purpose is to implement Ark. Code Ann. §21-5-905 regarding the administration of voluntary products.¹ The Director of the Employee Benefits Division (“EBD”) has publicly stated the Proposed Rule is intended to only apply to voluntary products provided to *state* employees and is not intended to impact voluntary products for public school employees. However, EBi is concerned that the language of the Proposed Rule does not make this distinction clear. Section 4.01 of the Proposed Rule states:

All state employees who are eligible under Ark. Code Ann. §21-5-901 shall be offered the opportunity to participate in a cafeteria plan for voluntary products during their new hire eligibility period and during open enrollment.

“Eligible employee” is defined in §21-5-901 as “full-time employees of governmental entities.”² That subchapter goes on to define “governmental entities” as “any agency of the state, any city,

¹ See Proposed Rule, § 2.0.

² Ark. Code Ann. §21-5-901(2).

any county, **any school district**, or any other political subdivision of the state.”³ Therefore, as written, the Proposed Rule’s reference to §21-5-901 could be read to include employees of school districts.

Ebi respectfully requests that the Proposed Rule be revised to make clear that it only applies to voluntary products sold to state employees. Attached are proposed revisions for your consideration. Ebi proposes that the title of the Proposed Rule, along with Sections 1.01, 2.0, and 4.02 be revised to clearly state the rule applies only to the voluntary products sold to state employees. Ebi also proposes amending Section 4.01 to explicitly exclude public school employees.

These revisions remain consistent with the stated purpose of the Proposed Rule, and therefore, we believe that the changes may be made without requiring a new public comment period. The Administrative Procedures Act (“APA”) clearly allows changes within the rulemaking process, since it instructs agencies to “fully consider” comments before finalizing language of a proposed rule.⁴ Furthermore, an Arkansas Attorney General’s Opinion states, “The mere fact that proposed regulations are modified during the public comment period does not automatically require an additional ‘notice and comment period’ prior to the final adoption of the regulation.”⁵ Merely *clarifying* the language of the proposed rule would not change the character or purpose of the rule, and would not require an additional public comment period.

We appreciate your consideration of these comments. We are happy to discuss further, if helpful.

Sincerely,



John Starling

President, Educational Benefits, Inc.

Enclosure

cc: Ms. Kimberly Duvall
Mr. Grant Wallace

³ Ark. Code Ann. §21-5-901(3) (*emphasis added*).

⁴ Ark. Code ann. §25-15-204(a)(2)(C).

⁵ See Ark. Op. Atty. Gen. No. 97-358.

Kimberly Duvall

From: TSS Rules Comments
Sent: Monday, March 4, 2024 9:29 AM
To: John Starling; TSS Rules Comments
Cc: David Chance; Grant Wallace (EBD); Amanda Land; Jennifer Davis (DIS)
Subject: RE: EBI Public Comment - Rules Governing Voluntary Products

Received. Thank you.

KGD



Kimberly DuVall | Legal Counsel
Transformation and Shared Services
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[Website](#) | [Facebook](#) | [Twitter](#) | [LinkedIn](#) | [Instagram](#)

From: John Starling <john@jtsfs.com>
Sent: Sunday, March 3, 2024 6:29 PM
To: TSS Rules Comments <tss.rulescomments@arkansas.gov>
Cc: John Starling <john@jtsfs.com>; David Chance <david@jtsfs.com>; Grant Wallace (EBD) <grant.wallace@arkansas.gov>; Kimberly Duvall <kimberly.duvall@arkansas.gov>
Subject: EBI Public Comment - Rules Governing Voluntary Products

Some people who received this message don't often get email from john@jtsfs.com. [Learn why this is important](#)

Good evening,

I have attached to this email my written public comment regarding the Department of Transformation and Shared Services Employee Benefits Divisions Rules Governing Voluntary Products. Please let me know if there is anything else I need to do to make certain that we comply with the public comment rules/process.

Thank you,

John Starling

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DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
EMPLOYEE BENEFITS DIVISION
VOLUNTARY PRODUCTS RULE

PUBLIC HEARING TRANSCRIPT – FEBRUARY 13, 2024, 1:30 P.M.

Audio file

[Public Comment Hearing for VP Recording \(2\).m4a](#)

Transcript

00:00:00 Speaker 1

OK.

00:00:02 Speaker 1

Before we get started, I want to give you an idea of how the meeting will be conducted. The the public comment hearing will be conducted. I will read from a script to make sure that I get all of the information that needs on the record on the record and then I'll open the floor up for public comment. Please just raise your hand if you want to make a comment and then.

00:00:22 Speaker 1

We'll make sure that the recorder picks up your voice so that we have a recording of it and that you're.

00:00:30 Speaker 1

Adequately represented with your comment on the recording.

00:00:36 Speaker 1

With that, are there any questions about any of that about the process? OK, we'll get started.

00:00:49 Speaker 1

Thank you for attending the public comment hearing today. If you have not already, please sign in with your name and entity you are representing.

00:00:57 Speaker 1

Today, the Department of Transportation Transformation and Shared Services will take public comments on.

00:01:02 Speaker 1

The following rule.

00:01:04 Speaker 1

Employment, Employee Benefits, division rules governing voluntary products.

00:01:09 Speaker 1

These rules were approved for public comment by the governor on November 30th, 2023.

00:01:16 Speaker 1

The public comment period will close on Monday, March 4th, 2024.

00:01:23 Speaker 1

Today's hearing will go as follows.

00:01:26 Speaker 1

Individuals wishing to make comments will come to the microphone, state their name and entity they represent, if applicable, and make their comments. We ask that you speak slowly and clearly as the comments will be compiled and evaluated.

00:01:44 Speaker 1

Today's hearing is being recorded for those purposes.

00:01:48 Speaker 1

Only comments will be accepted, no discussion responses will be compiled upon closure of the comment period.

00:01:56 Speaker 1

At this time, you may begin making comments.

00:02:03 Speaker 1

Derrick Smith, do you want to come up and just I think it might be better if you just come up and speak. Is that OK?

00:02:32 Speaker 2

Thank you. My name is Derek Smith. I'm an attorney with the Mitchell Williams, Selig Gates and Woodyard law firm here in Little Rock. Today I am representing American Fidelity Assurance Company, and I've authorized to speak on their behalf. First, let me thank you for the opportunity to make some public comments.

00:02:51 Speaker 2

On as proposed rules governing voluntary products and I will supplement the comments with the written suggestions before the deadline is submitted.

00:03:02 Speaker 2

Those American fidelity is an Oklahoma insurance company that's been working with school districts for over 60 years. In Arkansas, American Fidelity Works with school districts to provide life and supplemental benefits products, and it's in that regard that American fidelity had its initial concerns.

00:03:23 Speaker 2

In reviewing the drash.

00:03:25 Speaker 2

The concern is primarily assuring that the voluntary products that will be subject to this rule are limited to those voluntary products sold to state employees only and does not implicate A voluntary product sold to school district.

00:03:45 Speaker 2

Employees, I think when the statute or when the bill was passed, that is the genesis of this rule, the bill took steps in a couple of instances to to make sure that it's clear that the voluntary products.

00:04:04 Speaker 2

That are subject work that are the reason for this rule are offered to state employees only and not.

00:04:12 Speaker 2

Products sold to public school employees procured by school districts. The reason? The primary reason that this bill raised some concern is the reference in section 4.01 to Allstate employees who are eligible under our code section 21-5-9. Oh.

00:04:34 Speaker 2

That provision of the code doesn't really define state employees. It defines eligible employees who are employees of governmental entities, and the definition of governmental entities in that section speaks to employees of any agency of the state, any city, any county, any school district.

00:04:54 Speaker 2

Or any other political subdivision of the state. So with this reference, we think that there could be some confusion in viewing the rule of that it applies to.

00:05:04 Speaker 2

Public school employees as well. We think that the rule can be clarified simply by adding references throughout the draft rule, clearly stating its applicability to voluntary products sold to state employees. For instance, couple of words could be added to sections 1.012.0.

00:05:24 Speaker 2

And 4.0 as well as an amendment to that statutory reference.

00:05:31 Speaker 2

Because we think these suggestions are consistent with the underlying statutes as well as the publicly stated purposes of the rule, but we do not believe these revisions are the type that are substantive and would require Republic notice or a re review and could be filed with the legislature.

00:05:52 Speaker 2

On adoption. Thank you.

00:05:58 Speaker 1

Are there any other comments?

00:06:01

OK.

00:06:18

Start talking. Just start.

00:06:20

Just introduce yourself and sign up.

00:06:23 Speaker 3

OK, so my name is Jeri Marshall and I'm an executive vice president for USA.

00:06:30 Speaker 3

And I have been for several years. For those of you who don't know, USA bowl, we're an Arkansas, Arkansas insurance company. We're domiciled here. Our headquarters is out on Chenal Parkway.

00:06:47 Speaker 3

And we've provided insurance coverage here in Arkansas to the public school employees for about 40 years.

00:06:58 Speaker 3

And so we are an in state employer and we've been designated as one of the best places to work in Arkansas since 2016. So we're very proud of our company, our heritage more so is how we have provided benefits to the public school employees.

00:07:18 Speaker 3

For so many years.

00:07:20 Speaker 3

And although EBD has provided major medical coverage for public school employees for public employees, Independent School districts, the public schools have for a long time arranged for their own voluntary products. It's.

00:07:38 Speaker 3

I can remember it for 40 years, so it's probably a lot longer than that.

00:07:44 Speaker 3

But they have had that right. And that was even further clarified in state law in 2015 that.

00:07:54 Speaker 3

Declare that schools could do that could choose their benefits.

00:08:00 Speaker 3

As the rate stands today, or as the rules stand today.

00:08:04 Speaker 3

We we don't have any concern about.

00:08:08 Speaker 3

The state employees.

00:08:10 Speaker 3

It's into the clarification of.

00:08:15 Speaker 3

What are public school employees allowed to do?

00:08:19 Speaker 3

And while we've heard many people say that.

00:08:25 Speaker 3

The proposed rule is intended to apply to voluntary product, so to stay employees. It's not intended to apply to voluntary products sold to public school employees. Still little ambiguous.

00:08:41 Speaker 3

And so that's, that's where we ask for clarification and we don't believe any clarification would be substantive.

00:08:50 Speaker 3

We're just asking for that clarification and then?

00:08:54 Speaker 3

4.01, as Mr. Smith referenced.

00:09:00 Speaker 3

It talks about all state employees.

00:09:04 Speaker 3

And So what we would ask and we will put this in writing.

00:09:09 Speaker 3

Follow up from our I think our CEO will sign our letter, but it's to some language that makes it clear.

00:09:18 Speaker 3

That this doesn't refer to the public school employees, but rather the state employees.

00:09:25 Speaker 3

So we appreciate the time to make the comments.

00:09:31 Speaker 3

And we will follow the process and would like clarification.

00:09:41 Speaker 1

Thank you for your comment.

00:09:45 Speaker 1

Are there any others?

00:09:55 Speaker 4

Hello, my name is John Sterling. I'm the owner of educational benefits. We are a K through 12 exclusive employee benefits broker. There are two insurance companies present. We're a broker in the school market. We have been in the school market for 40 years. We currently represent the majority of the school districts in the state.

00:10:13 Speaker 4

And with those school districts, we provide technology platforms to manage eligibility. We do the enrollments with our own enrollers we provide products on a very much competitively bid basis every single year.

00:10:26 Speaker 4

And we compete against not only insurance carriers but also other brokers in our markets, which bring the pricing to bear very competitively competitive pricing to save our employees and school districts a lot of money.

00:10:40 Speaker 4

In fact, over the years since, we have been in this business and gone out and bid these products with both carriers in front of us. But other carriers, we've saved millions of dollars for the school district employees and our efforts to be.

00:10:53 Speaker 4

At this point, at this juncture, I'm here to talk about.

00:10:58 Speaker 4

The bill that's been passed to Act 533 was House Bill 1160, I believe, and in that bill we clarified, or at least my understanding was there was clarification in reference to code section 617-1115. That code section clearly sits tablished that public school employees are independent and make an independent.

00:11:19 Speaker 4

As to who their insurance brokers are, the reason I'm here, the bill itself as written.

00:11:25 Speaker 4

I believe can be interpreted to to exclude public school employees and only include include state employees.

00:11:34 Speaker 4

The problem that I aspire see is this is not the first time I've been here. This is about the 4th time that I've been here to try to clarify some of the ambiguities. The broker that was selected 10 years ago to take over the state benefits, and whoever is the followed after that affiliates, whatever it may be, there seems to be a continuous ambiguity as to.

00:11:55 Speaker 4

Who is supposed to be doing state employees and who's done public school employees. And that's when 617-1115 came and clarified.

00:12:02 Speaker 4

That and that is referenced in Acts 533 four different times. To clarify that. And so I think at this point.

00:12:11 Speaker 4

What what we want to do is to avoid.

00:12:14 Speaker 4

Anymore ambiguity make this clear and simple so that the school districts know what they what they have the right to do and the state employees have their rights too.

00:12:24 Speaker 4

So at this point, the first thing is I want to say, Director Wallace, we want to appreciate you for referencing the fact that this specifically doesn't include school employees in your in your video conference. So recognizing that fact, we just want to make sure that it's clear that that is the intent and that is what we're going to do. And I think that.

00:12:45 Speaker 4

In all things.

00:12:47 Speaker 4

Trying to make that or effectuate that as best as we can.

00:12:51 Speaker 4

If we could put in some some language as as Derek said, and as Julie said, I believe it's in four.

00:12:58 Speaker 4

.01.

00:13:00 Speaker 4

I'm a recovering attorney, not a practicing attorney. I don't really know all of those things, but what I do know is just a little clarification. If it's not substantive.

00:13:10 Speaker 4

To not include it. I don't see where it would be a substantive change to include it to where you specifically included that we exclude public school employees and let them have their own right to make their independent choice to go to their own providers, to procure their benefits at a better price.

00:13:31 Speaker 4

Thank you very much.

00:13:36 Speaker 1

Thank you for your comment.

00:13:38 Speaker 1

Are there any other comments?

00:13:49 Speaker 5

I'm fine, OK.

00:13:51 Speaker 5

I'm Sharon chief Wright. I'm with the Arkansas Association of Educational Administrator.

00:13:56 Speaker 5

It's gonna sound like we're beating a dead horse, but I'm just here to say that there is some confusion amongst our public school administrators. 215901 does include public schools as the governmental entity, and I think that there is some concern that districts would lose their.

00:14:15 Speaker 5

Lot to choose their provider.

00:14:19 Speaker 5

And I understand from conversations, again with EVD and director Wallace, it's absolutely not intended to address public school employees, but we feel like even if you excluded under ACH, 215901 and 4.01, that might make it a little more clear. So the public schools.

00:14:39 Speaker 5

Now say that within the law, and that is our comment.

00:14:48 Speaker 1

Thank you for your comment.

00:14:50 Speaker 1

Are there any other comments?

00:14:58

OK.

00:15:12 Speaker 1

Thank you for all your comments. As stated before, all comments will be reviewed and evaluated and all responses will be available as part of the final rule package. Comments will be accepted through 4:30 PM on March 4th, 2020.

00:15:30 Speaker 1

Comments may also be submitted to tss.rulescomments@arkansas.gov.

00:15:40 Speaker 1

Or maybe mailed to TSS at PO Box 3522, Little Rock AR 72223.

00:15:55 Speaker 1

Let me repeat that last bit. Comments may also be submitted to tss.rulescomments@arkansas.gov.

00:16:04 Speaker 1

Or maybe mailed to TSS at PO Box 3522, Little Rock AR 72223.

00:16:16 Speaker 1

And with that, we're off the record.