

Testimony of Cynthia Marcotte Stamer
Before Employee Benefits Security Administration
2017 Advisory Council on Employee Welfare and Pension Benefit Plans
U.S. Department of Labor

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

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Thank you for this opportunity to come before you at this U.S. Department of Labor Employee Benefits Security Administration 2017 Advisory Council on Employee Welfare and Pension Benefit Plans hearing on Reducing the Burdens and Increasing the Effectiveness of Mandated Disclosures with respect to Employment-Based Health Benefit Plans in the Private Sector and to provide input on the proposals that the 2017 Council is considering: (1) to eliminate the Summary Annual Report requirement for health benefit plans not already exempt, (2) to consolidate various annually mandated notices into a single annual notice issued in a standard format, and (3) to modify or supplement the Summary Plan Description requirements to allow a short resource reference tool updated annually.

I am a private practice attorney Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization and an American College of Employee Benefit Counsel Fellow, celebrating my 30th year working with public and private employment-based and other health, disability and other employee benefit plans and programs, their sponsors, fiduciaries, insurers and managed care organizations, administrative services and other vendors, as well as health care and other community organizations to design, innovate, implement, communicate and administer legally compliant, health, disability, savings and retirement and other plans, programs, and policies that effectively help employees and others in our community prepare for and cope with health care, disability, retirement and other life challenges within their families. Counseling, drafting, defending and providing other assistance to plan sponsors, fiduciaries, and administrators about ERISA-mandated health plan disclosures and other plan-related communications and the consequences of those communications is a daily component of this work. Alongside my professional practice experience, I also have and continue to work on the development of education and other tools that inform and help to empower patients and their caregivers to better plan for and deal with health and disability challenges within their families through my work as Executive Director of Project COPE: The Coalition On Patient Empowerment and involvement in various other consulting, professional, community and civic service projects.

As many witnesses before the Council already have testified, the Employee Retirement Income Security Act (ERISA) and other federal disclosure mandates require health plans, their sponsors, fiduciaries and administrators to incur substantial financial and administrative effort to produce and distribute the Summary Plan Descriptions and other mandatory health plan disclosures that most participants and beneficiaries never read. The high cost and administrative effort plans expend to meet these mandates provides a strong case for the elimination or reform of federally mandated health plan disclosures that participant behavior demonstrates to be of limited use or effectiveness in helping plan members understand and appropriately utilize their health plan coverage and benefits.

As a practical matter, regardless of how user-friendly the content, format, or method of delivery, most plan participants and beneficiaries make little or no effort to read, much less understand, their Summary Plan Descriptions or other ERISA-mandated disclosures unless and until the participant or a family member receives medical treatment that the plan refuses to cover or is concerned that the plan might not enroll or cover certain expenses for needed medical care. Moreover, even plan members with health plan questions or concerns at enrollment or when seeking or receiving care tend to seek out and rely upon recommendations or other information from co-workers, treating health care providers or other third parties with little or no real knowledge of actual plan terms unless and until surprise from a plan's denial of an expense or other unexpected outcome compels the plan member or his health care provider to read the Summary Plan Description or other plan materials in search of support to dispute this outcome. While the limited utility, duplicity, and untimeliness of the Summary Annual Report disclosures to health plan members fully warrant its complete elimination, the Summary Plan Descriptions and certain other ERISA-mandated health plan disclosures provide information extremely helpful and important to plan members experiencing eligibility or benefit events impacted by the rules covered by the disclosure. Consequently, the focus for these relevant disclosures should be to work to minimize the cost and administrative expense to plans and their sponsors of preparing and providing these disclosures while reforming these requirements to make this necessary information more readily accessible, comprehensible and useful to plan members when plan members need that information to deal with a medical or other life event.

While most plan members only occasionally need the information contained in this later group of disclosures during a particular plan year, the plan members needing this information are precisely those members in circumstances that the plan is designed to address as well as tend to have the greatest impact on health plan benefit and administrative costs. Appropriately strengthening the comprehensibility, accessibility and utility of the Summary Plan Description and other participant relevant health plan disclosures can promote the ability of plan members confronting a health care circumstance that requires the plan information to better understand and cost-effectively utilize their employment-based and other health, disability and other coverages and benefits as well as develop the health care literacy they need to better cope with the various health care needs that they and their families confront across their lifetimes. Improved participant comprehension could help participants and their families better realize the benefits

of their coverages when confronting challenging health care events while concurrently benefitting plans, their fiduciaries and sponsors by promoting better member satisfaction, helping to manage plan costs and liabilities and alleviating a plethora of administrative headaches. For this reason, I applaud and encourage the 2017 Council to encourage the Department to use lean management principles to guide the refocus and reform of ERISA's health plan disclosure mandates to improve the accessibility, utility and effectiveness of their delivery of critical plan information when most needed and relevant to plan members while minimizing the expense and other burdens placed upon plans, their sponsors and fiduciaries from wasteful, ineffective, unproductive or unnecessary disclosure mandates. In furtherance of these efforts, I also encourage the Council, where appropriate, to encourage and assist the Department to publish as a pamphlet or in other suitable for a consolidated set of model disclosures covering all mandatory disclosures generic to all health plans for optional use by covered health plans on a safe-harbor or other Department-endorsed basis to fulfill disclosure mandates for these generically applicable rules, as well as to develop and share other model language, drafting flow charts, outlines and other guidance and other resources to assist plans and their administrators to fulfill mandatory disclosure requirements more cost effectively.

The Council already has received extensive input from prior witnesses in the course of this and prior hearings. Therefore, my opening comments seek to highlight a few key points that I hope will help the Council to continue these efforts with a minimum of duplication of input already received from other witnesses.

First, the core purpose of mandated and other plan disclosures to participants should be to effectively communicate material information that participants need to make informed coverage choices or to access and use plan coverages and benefits in a time and manner that facilitates the ability of participants to understand and use that information when they need it, rather than on arbitrary timelines.

Second, financial and administrative costs significantly influence plan sponsor decisions about whether and what benefit plans to offer, the design of those plans and the funds available to provide benefits and other services to plan participants. Accordingly, mandated disclosures that are ineffective, unnecessarily duplicative or provide information of little practical use to participants like the Summary Annual Report should be eliminated whenever possible. Likewise, where the disclosure or other mandate is of sufficient generic applicability to make such resource beneficial, the Department also should be encouraged to continue to help minimize the cost and administrative burdens of mandated disclosures by 1) offering Department-approved, model disclosures, brochures and other generic resources for safe harbor or other optional use by plans and their administrators to fulfill mandated disclosure requirements; 2) permit the consolidation of the content and timing of delivery of mandated notices; and 3) provide flexibility for plans to use evolving technology to deliver or make available disclosures in whole or part electronically via e-mail, intranets, webpages, mobile applications or other means that provide reasonable access to participants more cost-effectively.

Third, the Department also should be encouraged to pursue opportunities to enhance the usefulness and effectiveness of disclosures to participants in the Summary Plan Description and other plan disclosures about information material to participants' understanding and use of their coverage, benefits and other plan rights by designing disclosures be more participant-centric using a "lean management" principles to provide the right information at the right time.

Because the relevance and comprehensibility of plan information to participants and beneficiaries is event driven, plans should be encouraged to organize and draft Summary Plan Descriptions to provide a road map to guide participants in their understanding and use of the plan to better make available information in a manner that empowers participants and beneficiaries to understand and make informed health plan enrollment decisions and once enrolled, to access and use the plan benefits effectively when dealing with the various health care needs and transactions that may arise while enrolled in the plan.

To enhance the effectiveness of the Summary Plan Description and other disclosures, it is important to keep in mind that health plans and their benefits are not simple. The sheer diversity of the benefits provided under any particular health plan inherently frustrates efforts to improve the understandability and utility of health plan disclosures by providing generic, one-size fits all disclosures or paring back the information disclosed. Not only are health benefits not standardized from plan to plan, each plan offers a diverse range of coverages and benefits for care of an extraordinary range of medical conditions pursuant to a unique set of complicated, medical condition and evidence specific rules which must be applied on a claim-by-claim basis to each item of care rendered with respect to an extraordinarily diverse range of health care conditions to determine the benefit payable with respect to a particular charge or treatment. As a result, each health plan in actuality includes thousands of potential benefits, the applicability of which is determined by applying the applicable rules within the plan to the particular items of care provided to treat the condition impacting the plan member incurs the expense. Pared down or generic disclosures

about non-generic matters in a manner that omits or obscures key information a plan member needs to know in light of his particular circumstances undermines, rather than promotes the ability of the plan member with or without the assistance of his treating provider to understand, predict or enforce his benefit rights under the plan terms.

Furthermore, while advocates of simplicity often nostalgically wish for the days when Summary Plan Descriptions were relatively short summaries of the plan terms, free from most of the hyper-technical jargon and legalism contained in the plan document, as a practical matter the legalistic motivations that prompt plan members and providers to read otherwise largely disregarded disclosures coupled with the existing and ever-growing judicial precedent punishing plans for providing overly simplistic explanations of plan terms make it unlikely that plan sponsors or fiduciaries will feel comfortable in reversing the trend of detailed incorporation of language from the plan into their Summary Plan Descriptions. Consequently, rather focusing on shortening the length of the disclosures by paring down the relevant information included, the goal should be to refocus the disclosure mandates to make available plan information specifically targeted to the event driving the plan member's need for the information in accordance with the timing of the need by organizing, writing and delivering the relevant information in the Summary Plan Description and other necessary mandated disclosures in a manner that provides or guides the participant to where to access at a readily accessible location the detailed, specific information the plan member or his caregiver needs to address his current need, as well as to encourage plans to organize and present the relevant information in an event-driven flow chart or other suitable format that guides the participant to understand the relevant plan information and steps necessary to respond to that particular need.

To promote the utility of the Summary Plan Description or the supplemental plan guide under consideration by the 2017 Council as an effective, comprehensible summary guide to the plan and to minimize plan and plan sponsor financial and administrative costs to produce and make available these materials, the Department should act to encourage plan administrators to forgo placement of lengthy restatements of plan language in the Summary Plan Description in favor of directing plan members to a readily accessible website or other specific location where the plan participant can obtain a detailed explanation of all of plan terms and requirements applicable to the circumstances confronting the plan member by amending its Summary Plan Description regulation to clarify information incorporated by reference into the Summary Plan Description is considered included in the Summary Plan Description for purposes of satisfying the requirement its requirement that the Summary Plan Description include all "material" information. This clarification, particularly if coupled with Department regulatory action supporting expanded use of electronic disclosure and other technologies for providing access to the referenced information, could significantly enhance the real time accessibility and comprehensibility of vital information for plan members as well as help restore the Summary Plan Description to its originally contemplated and much needed role as a summary guide to the plan rather than an overwhelming regurgitation of the majority of the plan terms.

Finally, beyond improving on the utility of mandated and other disclosures, the Department also can significantly support and enhance the efficiency and utility of plan disclosures and promote greater effectiveness by plan members in the use of their health plan coverages and benefits through the continued development of health benefit and health care tools and other expanded health literacy outreach. The Council and the Department both have excellent records of effective workforce education and outreach on savings, retirement, health plan eligibility and many other concerns. The Department of Labor by position, experience and resources is in an excellent position efficiently to help American workers and their families develop the broader health literacy skills they need to use their health benefits and health benefit disclosures to plan for and deal with health care events within their family in the evolving health care system.

Thank you again for this opportunity to share my input. Please let me know if you have any questions or I can provide any additional information.

Respectfully submitted,



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