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November 20, 2019

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: Electronic Disclosure by Employee Benefit Plans, RIN 1210-AB90

RE: RIN 1210-AB90, Electronic Disclosure by Employee Benefit Plans

To Whom It May Concern:

We appreciate the opportunity to submit comments on the "**Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA**" proposed rule, published in the Federal Register by the Employee Benefit Security Administration on October 23, 2019. In particular, DirectPath welcomes this opportunity to provide its perspective on the proposed requirements related to electronic distribution of ERISA-required documents in the proposed rule.

For some 20 years, DirectPath has been an industry leader in benefits education and enrollment, compliance and communications, with a particular focus on ERISA materials such as summary plan descriptions (SPDs) for both health and welfare and qualified retirement plans, summaries of material modifications (SMMs), summaries of benefits and coverage (SBCs) and legal notices brochures.

Our comments are generally divided into two parts: (1) support for modernizing the Department of Labor's electronic distribution rule for plan-related documents given the dramatic growth in internet usage over the last 20 years; and (2) responses to many of the additional requests for information included in the proposed regulations.



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Support for Modernizing the Electronic Distribution Rules

As noted in the proposed regulations, adoption and usage of electronic media tools—laptops, smartphones and other mobile devices—has become virtually universal since the electronic distribution rules were last revisited in 2002. In fact, research¹ conducted earlier this year indicates that a whopping 90% of Americans use the internet, and 81% have smartphones. The original guidance was written before the development of alternative means of accessing the Internet, such as smartphones and electronic tablets, and it was written before the advent of social networking sites and applications, such as Facebook, Twitter, and LinkedIn. Because America’s workers have multiple means of accessing information electronically that did not exist in 2002, it is imperative that the standards put in place almost two decades ago be revised to reflect the new face of technology in the American workforce.

Many large employers have committed to revising and redistributing their SPDs on an annual basis, to ensure that their plan participants always have access to the most current and complete information about their plans. Not surprisingly, that commitment comes at a high cost—the cost of printing and mailing those documents to participants—either directly (if produced in house) or indirectly (as part of the fees paid to third-party plan administrators and recordkeepers). In some cases, the cost of production and distribution is far greater than the cost to update the SPD itself.

Those employers who are able to make use of the existing safe harbor² to distribute ERISA-related materials electronically typically use some version of the proposed “notice and access” model—either sending emails with the document attached or distributing emails or print notices including the URL where such documents can be found.

One large employer client has taken it a step further and introduced interactive documents (primarily for its health and welfare SPDs but also for new hire and similar benefits guides). These documents combine the standard format of a PDF file with the added functionality of advanced search features, live links to related documents and other resources, and underlying analytics that help the employer determine what sections of the document are getting the most attention from employees. This data enables the employer

¹ Pew Research Center, Internet/Broadband Fact Sheet: <https://pewresearch-org-preprod.go-vip.co/internet/fact-sheet/internet-broadband/>

² 62 Fed. Reg. 16,985 (April 8, 1997)



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to further refine its communications efforts to target areas where participants appear confused or are clearly seeking additional information. Due to the appeal of these documents, the client was able to save over \$1 million in production costs during the first year alone.

Modernizing the current electronic distribution safe harbor offers employers and plan participants alike a myriad of benefits, including: (1) enhanced access to information for both participant and family members; (2) reduced participant confusion; (3) an opportunity for significant cost-savings; and (4) real greening benefits. In addition, electronic access to documents enables plan sponsors to keep the materials current—even if changes are made during the course of the year, rather than at a regularly scheduled interval. Employers are thus able to refine their materials throughout the year to reflect important changes and participant needs and interests.

Electronic formats are also more cost-efficient for many employers and could increase the speed and efficiency with which employers communicate time-sensitive information to their employees.

Further, by maintaining documents on a website, there is no risk that important revisions or attachments will be misplaced or separated from the documents they are meant to accompany.

Finally, electronic distribution provides for better access for visually impaired participants, other persons with disabilities, and those who prefer access to these documents in languages other than English.

Responses to Other Questions Posed in the Proposed Rules

What is the best way to measure the effectiveness of a disclosure? Should participant engagement or attentiveness to plan affairs be a measure of the effectiveness of mandated disclosures? How do or could plan sponsors and administrators assess the use, effectiveness, and impact of disclosures?



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With respect to measuring the effectiveness of required disclosures—it depends on how one defines “effectiveness.” Some materials are designed to prompt the recipient to take action, some provide specific, timely information and others provide general information for later reference. Because the goal of each disclosure is so variable, we suggest that it is best to measure whether a participant received and read the applicable document—or at minimum, opened the notification that the document is available.

Plan sponsors could assess the effectiveness of their documentation in several ways. If the documents are created and posted using an interactive document system, the underlying analytics of the system can provide valuable data about what documents are being opened and when; what pages are being visited; what terms are being searched on, and so on. This information can help identify potential problem areas and can be used to refine future communications materials. Sponsors can also track activity (e.g., investment charges, increased or decreased contribution rates, new loans or withdrawals) that might plausibly come as a result of a specific communication.

Design, delivery and content are certainly key drivers of participant engagement with required disclosures. Use of white space, color and graphic elements can increase the visual appeal of materials and thus the likelihood that a participant will attempt to read it. Clear, concise and understandable language, along with messaging that emphasizes the impact on the individual participant will go a long way in ensuring engagement and appropriate action. Ensuring easy access to the most current information, as well as to any associated materials the participant may need (forms, worksheets, other resource materials) will also reduce participant frustration and enhance engagement.

That said, we do not feel that measurement of the effectiveness of required disclosures is something that should be required at this time. These materials have been required for years, if not decades, and those employers who are interested in maximizing the return on their communications investment are already taking steps to measure the effectiveness of their communication investment. Mandating such research would likely be perceived as unnecessarily burdensome, particularly for smaller employers.

Are there ways through regulation or appropriate sub-regulatory guidance to require, incentivize, or facilitate plan administrators to organize information within the required disclosures to reflect life events so that information is available as the need arises?



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In our experience, the “life event” approach is far more suited to health and welfare plans than to retirement plans. Retirement plans are by their very nature focused on one life event—retirement; while some plan structures may permit loans and/or withdrawals, such actions are generally to be avoided as they interfere with the true purpose of the plans—to provide a source of income when the participant is no longer actively working.

Some people have indicated that at least some ERISA documents may be too voluminous, complex, or both. These individuals highlight a need to strike a balance between providing too little information for participants to gain an adequate understanding of what the disclosure is trying to convey and providing too much information, which can become overwhelming and confusing. Please identify each ERISA document in these categories....

With respect to each document identified in the previous question, state whether the Department should encourage or require, as an alternative to furnishing the entire document, that the plan administrator furnish a brief, clear, and accurate summary of key information from the document, for example not to exceed one or two pages, coupled with access to more detailed information online, on request, or both. Also identify what should be considered “key” for this purpose.

While we wholeheartedly agree that there is a need to provide a balance between too little and too much information, we do not feel that providing a 1-2-page summary of a document such as an SPD will meet that need. In fact, we feel that will skew more to the “not enough” side of the scale. By providing clear, concise documents, truly written in a manner that can be understood by the average plan participant, sponsors can achieve this goal without generating yet *another* document that merely serves as a summary of a summary.

Further, many plan sponsors already begin their SPDs with a highlights page (touching on key points a participant *must* know and including links to more detailed information) or a “what’s new” section to enable participants to focus on becoming familiar with plan changes. These approaches have worked well in the past.

Providing a “summary” as an alternative to the entire document would merely increase the risk of participants relying on incomplete information.



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What *would* be helpful is a document that describes what materials an employee/participant can expect to receive during the course of the year; what each document means and why it is important, who will be sending it (e.g., the employer or the TPA), and what action, if any, might be required. We realize that some disclosures are only generated in certain circumstances that might not be easy to predict (e.g., blackout notices), but this approach would be applicable to most standard notices. If participants know what to expect they might be more inclined to open and read the materials they receive.

Is the problem that there are too many disclosures, or that there is too much information that is disclosed, or both? Would it be feasible, and advisable, to condense and streamline information into fewer disclosures or less voluminous disclosures, rather than eliminating disclosure of certain information?

In general, plan participants are bombarded with too many disclosures, often coming from multiple sources—which results, more often than not, in the documents being discarded and unopened. Further, some disclosures, such as the summary annual report, are meaningless to the vast majority of plan participants.

We believe it would be helpful to consolidate as many disclosures as possible into one distribution, possibly a booklet or packet marked “Important Information About Your Plan.” Of course, some disclosures are triggered by plan events (e.g., blackout period notices), but most are required on a regular basis. Having them distributed together might emphasize their importance and reduce the likelihood of them being ignored, discarded or deleted.

To what degree does the design of disclosures (as opposed to their content) impact the likelihood that participants will read and understand the information disclosed? Are there design elements or tools that are particularly effective? For example, should certain information be presented in a question-and-answer (Q&A) format? Are larger font sizes, greater use of white spaces, colors, or visuals, or the use of audio or video potentially helpful? Would it be appropriate for the Department to require particular design elements for all plans (e.g., including small plans, retirement and welfare plans, defined contribution and defined benefit plan, etc.)?

We strongly recommend *against* the question and answer format, as not every participant would frame a question the same way. Arranging information in a logical flow, adding search capability and a robust table of contents should permit participants to find the information they need easily.



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Particularly for content related to benefits—which can by its very nature be intimidating—judicious use of visual elements (such as white space, color and other visuals) will break up large blocks of text and enhance participant engagement. Material that is visually engaging is more likely to be picked up and read—which is, of course, key to the effectiveness of plan disclosures.

That said, we do not feel it is appropriate for the Department to require specific design elements. Each employer—and each employer’s workforce—is different, and what appeals to/is appropriate for one employer, industry or workforce may not be appropriate (or within budget) for another. Further, certain elements might not lend themselves to distribution channels necessary to reach all plan participants.

Are there additional or better standards for improving the readability of the content in disclosures than the Department’s general standard - i.e., that documents must be written in a manner calculated to be understood by the average plan participant?

While we are encouraged that, as we recommended several years ago, the Department is adopting a minimum readability standard—as measured by the Flesch-Kincaid reading ease score—we caution that a score of 60 may not be initially achievable by many employers. Certain industry terminology does not easily lend itself to simplification; it may be more achievable to set a score of 60 as a goal to be achieved within a certain time frame rather than an immediate requirement. In addition, the Flesch “grade level” score provides an equivalent measure and might be more understandable to the average plan sponsor (e.g., it’s easier to grasp that text is understandable by an 8th grader grade than that the text has a reading ease score of 61-70).

As you are no doubt aware, as far back as 2006, a study by the Employee Benefit Research Institute found that important information contained in many SPDs is written at a reading level that may be too high for the average plan participant.³ In fact, the average level of readability for SPDs is higher than the recommended reading level for *technical* material. This has become increasingly problematic as the Department of Education reports that 43% of adults read on or below the basic level of literacy and 34% are either at or below the basic level of literacy needed to understand information about medicines or health care. A joint report by the DOE and the National Institute of Literacy found that 21% of adults in the U.S. read below the fifth-grade level.

³ “How Readable Are Summary Plan Descriptions For Health Care Plans?” EBRI, 2006. Available at https://www.ebri.org/publications/notes/index.cfm?fa=notesDisp&content_id=3756.



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While a complete rewrite of each SPD to meet the recommended statutory standard would be ideal, it is often impractical due to resource, timing and financial constraints. However, there are incremental steps that can be taken to enhance readability, from small word changes (“before” instead of “prior to,” “if” instead of “in the event of,” “when” instead of “at the time,” etc.), writing in the first person and eliminating extra words, to use of more white space, call-out boxes and headings to provide visual interest.

Do the timing requirements for various ERISA disclosures increase or decrease the likelihood that participants will pay attention to them? Should the Department consider changing when information is disclosed to participants and, if so, how? Explain how such changes would enhance the likelihood that participants would pay attention to the disclosure or disclosures or otherwise improve the disclosure experience.

Differing deadlines result in multiple distributions throughout the year, increasing costs for plan sponsors and increasingly the likelihood that the disclosures will be ignored, deleted or thrown out unread—particularly if the disclosures are not material or personalized to the participant. We recommend that, to the extent possible, distribution deadlines be aligned (for example, once per year or once per quarter, or in conjunction with the annual enrollment period—when employees are already focused on benefits).

Well-designed plan websites or internet-connected apps may benefit plan participants by effectively communicating plan information, including by adopting features not possible with paper, such as interactive videos, calculators, and layered design. What common features have plan administrators adopted in their websites or apps that are effective in communicating plan information to participants and attracting participants to engage in activity with their plan accounts online? What are the benefits of these features, and how do they achieve them? Should any such features be required by regulation?

As noted earlier, several of our clients have adopted an interactive document solution, where documents are hosted online in a highly navigable PDF format. This solution enables the sponsor to embed links to other documents, to external URLs leading to additional information, to calculators, and even short audio and video clips. These documents are highly searchable and enable participants to add notes (visible only to themselves), clip and send content to family members, and more. Further, the underlying analytics enable the sponsor to determine which topics are of particular interest to



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participants, which documents are being opened, how much time is being spent on each document, etc.—helping the sponsor refine future communications. Further, the documents can be kept current 24/7/365 simply by loading an updated copy of the material, so participants can be assured of always having the correct information.

Having all the information they need in one place—without having to dig out other materials or wait for another mailing—is tremendously helpful in enhancing engagement, and for one client in particular dramatically increased the number of employees electing to receive materials electronically versus on paper.

We do not feel, however, that such features should be required by regulation. As previously noted, employers and plan sponsors are the best judge of what communication channels will work best for their audience groups, and not every organization has the budget for robust websites or apps.

As discussed in the regulatory impact analysis (RIA), well-designed plan websites and apps may also be used to provide effective communication of plan information to certain vulnerable populations, such as the visually impaired and non-native English speakers, by adding voice-reader and translation features. How do plan websites and apps currently use these features and how effective are they in enhancing the presentation and use of covered documents by participants with special needs?

Currently, many accessibility guidelines (for example, Web Content Accessibility Guidelines, part of a series of [web accessibility](#) guidelines published by the [Web Accessibility Initiative](#) of the [World Wide Web Consortium](#), the main international standards organization for the internet) are just that—guidelines—and compliance with them is entirely voluntary. Of course, HHS Section 508⁴ guidelines apply to all organizations who contract with the federal government, which may exclude many small businesses. Those of our clients who comply with these standards use Adobe Acrobat Professional XI Accessibility Checker to verify compliance.

⁴ Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998 (P.L. 105-220), August 7, 1998.



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Some literature suggests that participants find that different documents are presented more effectively in different mediums. For example, some participants prefer to receive certain covered documents on paper while other types of covered documents are preferred to be received electronically. What, if any, types of covered disclosures do plans and participants perceive to be more effectively communicated in print (e.g. highly individualized and complex notices), and what explains this preference? How might modern technology and effective website or app design make electronic presentation of these covered disclosures more effective and increase participant engagement?

In our experience, whether a given disclosure or document works better on paper or online is purely a matter of personal preference. That said, lengthy documents (such as SPDs) tend to work better online as they are easier to search when in an electronic format. Shorter documents, such as personalized statements, often work better on paper so they can be filed, stored in binders, or shared with tax and other financial professionals.

Thank you for considering our recommendation feedback and recommendations on the proposed regulation. If you have any questions or would like additional information, please feel free to contact me at 781.996.5594 or kbuckey@directpathhealth.com.

Sincerely,

Kim A. Buckey
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DirectPath, LLC