



**BlueCross BlueShield  
Association**

An Association of Independent  
Blue Cross and Blue Shield Plans

November 21, 2019

The Honorable Preston Rutledge  
Assistant Secretary of Labor  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Attention: Electronic Disclosure by Employee Benefit Plans RIN 1210-AB90

Submitted via the Federal Regulations Web Portal, <http://www.regulations.gov>

**RE: Request for Information on Effectiveness of ERISA Disclosures (RIN 1210-AB90)**

Dear Assistant Secretary Rutledge:

The Blue Cross Blue Shield Association (BCBSA) appreciates the opportunity to provide comments on the Request for Information on Effectiveness of ERISA Disclosures, 84 Fed. Reg. 56894, 56908 (Oct. 23, 2019; RFI).

BCBSA is a national federation of 36 independent, community-based, and locally operated Blue Cross and Blue Shield companies (Plans) that collectively provide healthcare coverage for one in three Americans. For 90 years, Blue Cross and Blue Shield Plans have offered quality healthcare coverage in all markets across America – serving those who purchase coverage on their own as well as those who obtain coverage through an employer, Medicare, and Medicaid.

The RFI accompanies a notice of proposed rulemaking, Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 84 Fed. Reg. 56894 (Oct. 23, 2019; Proposed Rule). While the Proposed Rule does not include employee welfare benefit plans, the RFI invites commenters to respond as to both pension and welfare benefit plans. Commenters also are encouraged to address any other matters they believe to be relevant to the effectiveness of ERISA disclosures. 84 Fed. Reg. 56894, 56908 (Oct. 23, 2019).

The Department of Labor (Department) gave two reasons for excluding group health plans from the safe harbor provisions of the Proposed Rule:

- Group health plan disclosures “may raise different considerations,” and, specifically, “preservice claims review” notices may impact access to emergency and urgent health care. 84 Fed. Reg. 56894 at 56902, 56916 (Oct. 23, 2019); and
- The Department shares interpretive jurisdiction over certain group health plan disclosures with the Department of the Treasury and the Department of Health and

Human Services and would want to consult those agencies regarding electronic disclosure.

However, the Preamble to the Proposed Rule acknowledges that the Department has the authority to expand the safe harbor to cover group health and other welfare plan disclosures, particularly where the Department's policy goals of reducing plan administrative costs and improving the effectiveness of disclosure may be furthered. 84 Fed. Reg. 56894, 56902 (Oct. 23, 2019).

### **The Department Should Expand the Proposed Rule to Cover Disclosures Required for Group Health Plans and other ERISA-covered Welfare Plans**

The Department should extend the Proposed Rule to all disclosures required by Title I of ERISA for group health and other welfare plans. This would go a long way toward reducing the costs and administrative burdens imposed on group health plans in connection with all employee benefits plans, not just in connection with retirement plans.

The Department acknowledges that it has the authority to extend the new electronic disclosure safe harbor to group health plans particularly where "similar policy goals" apply to group health plan disclosures, including reducing administrative costs. The ability to apply the Proposed Rule to group health and other welfare plans will result in dramatic savings for group health plan sponsors. Note that group health plans and their service providers send out hundreds of millions of explanation of benefit (EOB) documents a year, representing hundreds of millions of sheets of paper, many of which are unread. The ability to rely on electronic disclosure for these routine EOBs alone would save tens of millions of dollars annually for group health plans.

The discussion in the Preamble regarding its decision not to extend the safe harbor to group health and other welfare plans suggests that the Department views required disclosures in connection with group health plans as somehow more critical to a participant's ability to exercise rights under a benefit plan than those disclosures required for retirement plans, and, therefore, further study is necessary.

We respectfully request the Department to reconsider excluding group health plans from the Proposed Rule. First, we note that both welfare plan disclosures and retirement plan disclosures are subject to the same distribution standard under ERISA: disclosures, regardless of type of plan, must be distributed via a method "reasonably calculated to ensure actual receipt." 29 C.F.R. § 2520.104b-1(b)(1). This standard should be interpreted the same for all types of ERISA plans.

Second, retirement notices are no less critical to participants than welfare plan disclosures. For example, benefit statement notices required under section 105 of ERISA (29 U.S.C. § 1025), that may notify a participant of benefits owed to an employee under a retirement plan, are just as critical to a participant's decision-making as certain disclosures required in connection with group health plans. A summary plan description (SPD) describing a participant's rights with respect to taking distributions from a retirement plan is no less critical than such a document in connection with a group health plan. Yet, the Proposed Rule allows these retirement disclosures to be posted on a website under circumstances where an electronic notice of availability is provided to the participant, while similar notifications of benefits and rights under a group health

plan may not be so distributed. There does not appear to be any rational basis on which the Department can make this distinction between retirement and group health plan notices.

There is no limitation on the Department's current electronic disclosure safe harbor for group health or other welfare plans. See 29 C.F.R. § 2520.104b-1(c). This means that in 2002, when the current safe harbor for electronic disclosure was issued in final form, the Department saw no distinction between group health plans and retirement plans on which to base restricting access to the Department's existing safe harbor for electronic disclosure for group health plans.

The Administration should continue its broad commitment to deregulating group health plans. This is clear from the Administration's numerous steps taken to reduce the administrative burdens and costs associated with the Affordable Care Act on employers. Simplifying and reducing costs in connection with group health plans is a key Administration priority.

An example of the problems created by excluding group health plans from the safe harbor in the Proposed Rule is that some plan sponsors develop a single SPD document that provides SPD content covering all of the employer's employee benefit plans, including the employer's retirement plans, group health plan, and other welfare plans (including life, disability, accident and dismemberment, paid time off, transportation and other benefits). Summaries of material modifications (SMMs) and summary annual reports (SARs) are also commonly developed using one document that is drafted to apply to multiple plans sponsored by the employer (retirement as well as welfare plans). This type of document has been specifically authorized by the Department, at least from a plan expenses perspective, in the Department's plan expenses guidance (see Department FAQs regarding plan expenses, Hypothetical #5 (2002)). If the Proposed Rule is finalized as is, plan sponsors could potentially be required to provide this single SPD or SAR document via two different methods for a single employee for employees who do not meet the existing Department safe harbor (U.S. mail for the welfare plan SPD content and via website posting with a notice of availability to the employee's work-provided email address). This result is costly and seems to defeat the purpose of allowing electronic delivery of the retirement plan documents.

**Alternatively, Expand the Proposed Rule to Cover Disclosures Required by Part 1 of Title I of ERISA (SPDs, SMMS, Notice of Material Reduction in Covered Services, and SARs) and Other ERISA Disclosures Subject to the Exclusive Jurisdiction of the Department**

Part of the Department's rationale for excluding welfare plans from the Proposed Rule was its suggestion that it shares jurisdiction over certain notices in connection with group health plans with the Treasury Department and the Department of Health and Human Services. That may be true for a limited subset of notices, but there are many disclosures required in connection with group health plans over which the Department has exclusive jurisdiction. If the Department is unable to extend the Proposed Rule broadly to cover all disclosures required in connection with group health plans as requested above, the Department should, at a minimum, permit those group health plan disclosures over which the Department has exclusive jurisdiction to be distributed through the Proposed Rule at this time and then do rulemaking for electronic delivery of the remaining disclosures in conjunction with the other agencies.

For example, SPDs, SARs, SMMs, and Summaries of Material Reductions in coverage should, at a minimum, be permitted to be distributed for group health plans through the new e-

disclosure safe harbor. These disclosures are required by Part 1 of ERISA, and the Department has exclusive interpretive and enforcement jurisdiction over these notices. The ability to rely on the safe harbor for these recurring notices in connection with a group health plan would represent a dramatic savings for employers. Moreover, it would allow employers to continue to provide group health and retirement disclosures together in a single document provided through a single delivery method.

COBRA notices, required by Part 6 of ERISA, are, likewise, subject to the exclusive jurisdiction of the Department. Although the Treasury Department has jurisdiction over the substantive requirements of COBRA, the Department has exclusive jurisdiction over the COBRA notice rules. We believe these notices should be permitted to be distributed via the new safe harbor in the Proposed Rule.

The Department has exclusive jurisdiction over claims denial notices under Part 5 of Title I of ERISA. We recognize that certain notices, such as notices of denial of urgent care claims may trigger limited timeframes in which participants are required to act in order to secure appeal rights. However, these limited timeframes weigh in favor of delivering these notices by electronic means, which can result in immediate dissemination of important plan information, instead of paper delivery by U.S. mail, a far slower delivery method.

If the Department is particularly concerned about group health plan disclosures being overlooked, it should require a new notice of availability to be provided each time a group health plan disclosure is posted to a website, rather than close the safe harbor to group health plans entirely.

### **Expand the Proposed Rule to Include E-Mailing the Required Disclosure to the Provided Address. Welfare Plans Do Not Commonly Maintain a Website and Should Not Be Required to Develop One for Purposes of the Proposed Rule**

The Proposed Rule requires a plan to maintain an internet website. This is because the only method of distribution explicitly permitted is through posting documents on an internet website. Sending documents as an attachment to an email, for example, does not fall explicitly within the Proposed Rule.

Group health plans should be able to rely on the Proposed Rule for those disclosures required by Title I of ERISA, as explained above. Nonetheless, group health plans should not be required to incur the expense and ongoing administration required in order to maintain a website solely for the purpose of distributing disclosures required by ERISA. The Department should note that participant-directed individual account retirement plans (such as 401(k) plans) currently are required to maintain a website by reason of the Department's participant disclosure requirements at 29 C.F.R. § 2550.404a-5. Group health plans have no such requirement under ERISA to maintain a website, and most do not.

If the Department extends the Proposed Rule to cover group health plan disclosures, the Department should eliminate the requirement to develop a website in order to rely on the safe harbor. The Proposed Rule should also permit directly e-mailing the required disclosure to the electronic address maintained for the participant (subject to the requirement to protect confidential information). This method of delivery is arguably more effective than website

Request for Information  
on Effectiveness of ERISA  
Disclosures (RIN 1210-AB90)  
November 21, 2019  
Page 5 of 5

posting because the participant is not required to take additional steps to log on or access a website in order to view the document and will not require the development of a website and associated costs. Group health plans relying on the current Department electronic disclosure safe harbor, 29 C.F.R. § 2520.104b-1(c), may provide disclosures by e-mailing the document directly to an email address that the plan maintains for the participant, and this method of delivery should be encompassed by the Proposed Rule.

We appreciate your consideration of our comments and we look forward to working with the Department of Labor on ERISA plan disclosures. If you have any questions or want additional information, please contact Richard White at [Richard.White@bcbsa.com](mailto:Richard.White@bcbsa.com) or 202.626.8613.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Haltmeyer", with a long horizontal flourish extending to the right.

Kris Haltmeyer  
Vice President  
Legislative and Regulatory Policy  
Blue Cross Blue Shield Association