

# GROOM LAW GROUP

November 22, 2019

Hon. Preston Rutledge  
Assistant Secretary  
U.S. Department of Labor  
Employee Benefits Security Administration  
200 Constitution Ave., NW  
Room N-5655  
Washington, DC 20210

Re: **Proposed Regulation on Electronic Disclosure**  
**RIN 1210-AB90**

Dear Assistant Secretary Rutledge:

Groom Law Group, Chartered (“Groom”) is providing the comments described in this letter on behalf of our health and welfare clients. We write to provide comments on the U.S. Department of Labor’s (“DOL”) proposed safe harbor for the electronic delivery of participant and beneficiary disclosures, *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 84 Fed. Reg. 56894 (Oct. 23, 2019) (the “Proposed Rule”).

On the whole, we applaud the DOL for developing the Proposed Rule and further advancing the use of electronic delivery. Nonetheless, we believe DOL’s decision to exclude employee welfare benefit plans, and particularly group health plans, is an important missed opportunity. DOL should extend the Proposed Rule to all disclosures required by Title I of ERISA for group health and other welfare plans.<sup>1</sup> This would go a long way toward reducing the cost of operating health and welfare benefit plans, in a way that does not impact participant’s access to the benefits of those plans, while expanding participant choice regarding how they elect to receive information about their plans.

Our clients send out literally millions of explanations of benefits (“EOB”) statements a year, representing millions of sheets of paper, many of which are unread or, more realistically, reviewed online during calls or electronic chats with TPA and insurance provider call center representatives when participants believe an error has been made. The ability to rely on electronic disclosure for these routine EOBs alone would save millions of dollars annually for sponsors of group health plans and health insurance issuers. Further, applying the Proposed Rule to the furnishing of health and welfare benefit plan summary plan descriptions (“SPD”) would

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<sup>1</sup> For example, SPDs, SARs, SMMs, and Summaries of Material Reductions in coverage are required by part 1 of ERISA and the DOL has exclusive interpretive and enforcement jurisdiction over these notices. COBRA notices, required by part 6 of ERISA, and claims denial notices, under part 5 of Title I of ERISA, are likewise subject to the exclusive jurisdiction of the DOL.

also likely permit millions of additional dollars in annual savings, while providing participants with easy to read and searchable versions of their SPDs.

Both health and welfare plan disclosures and retirement plan disclosures are subject to the same distribution standard under ERISA (i.e., they must be distributed via a method “reasonably calculated to ensure actual receipt”). This standard should be interpreted the same for all types of ERISA plans which is what DOL did with the current DOL electronic disclosure safe harbor for group health or other welfare plans.<sup>2</sup> We see no reason for any distinction in this day and age of ubiquitous access to smart phones, tablets and other technology.

We acknowledge the DOL’s point that certain group health plan disclosures “may raise different considerations,” but we think it is not true that retirement notices are any less critical to plan participants than health and welfare plan disclosures. For example, a SPD for a 401(k) plan is intended to serve the exact same purpose as a group health plan SPD (i.e., informing participants and beneficiaries about their plans and how they operate). It makes sense that Section 1 of DOL’s own “Reporting and Disclosure Guide for Employee Benefit Plans” lists “Basic Disclosure Requirements for Pension and Welfare Benefit Plans” (emphasis added) since these disclosures are required for both types of ERISA-covered plans and have the same general content requirements. If DOL 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.

Additionally, many of our employer clients have developed a single SPD document that provides SPD content that applies to more than one of an employee’s benefit plans, including their retirement plans, group health plan, or other welfare plans (including life, disability, accident and dismemberment, paid time off, transportation and other benefits). Summary of material modifications (“SMM”) and summary annual reports (“SAR”) are also commonly developed using a single document that is drafted to apply to multiple plans sponsored by a single employer (retirement as well as welfare plans). These types of documents have been specifically authorized by the DOL, at least from a plan expenses perspective, in DOL’s plan expenses guidance.<sup>3</sup> If the Proposed Rule is finalized as is, we could potentially be required to provide this single SPD or SAR document via two different methods for employees who do not meet the existing DOL safe harbor (e.g., US mail for the welfare plan SPD content and via website posting with a notice of availability to the employee’s work-provided email address for the retirement plan). This would result in a costly and unnecessary change to their existing practice, and significantly limits the intended benefits of the new disclosure rule for sponsors of retirement plans.

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<sup>2</sup> See 29 C.F.R. 2520.104b-1(c).

<sup>3</sup> See DOL FAQs regarding plan expenses, Hypothetical #5 (2002).

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As acknowledged in the Proposed Rule's preamble, DOL has the authority to expand the safe harbor to cover group health and other welfare plan disclosures, particularly where the DOL's policy goals of reducing plan administrative costs and improving the effectiveness of disclosure may be furthered. We believe that both of those goals would be furthered by such an expansion and we respectfully ask DOL to so expand the proposed safe harbor.

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We thank the DOL for all of its work in developing and finalizing the Proposed Rule and for the opportunity to submit these comments. We hope our comments are helpful. We would be happy to discuss these comments with members of the DOL in person or by telephone. Please let us know if that would be helpful.

Respectfully submitted,



Elizabeth T. Dold