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**BlueCross BlueShield  
Association**

An Association of Independent  
Blue Cross and Blue Shield Plans

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July 25, 2003

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Attention: COBRA Notice Regulations

Dear Sir:

The Blue Cross and Blue Shield Association ("BCBSA"), which represents the 42 independent Blue Cross and Blue Shield Plans ("Plans") that provide health coverage to approximately 89 million Americans, is pleased to submit comments in response to the Department of Labor's ("Department") proposed regulations concerning the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) notice requirements. 68 Fed. Reg. 31832 (May 28, 2003).

The COBRA notice requirements under Part 6 of title I of the Employee Retirement Security Act of 1974, as amended ("ERISA") apply only to group health plans, and not to insurers. Accordingly, Plans are not directly subject to these provisions. However, since many Blue Cross and Blue Shield Plans carry out COBRA administrative responsibilities on behalf of group health plans, BCBSA has an interest in ensuring that these proposed rules do not adversely affect efficient COBRA administration. To the extent that the proposed regulations clarify issues, such as timing requirements and the contents of required notices, they are helpful. However, BCBSA is concerned that certain provisions are not only unnecessary, but also have the potential to create confusion and needless liability for group health plans and COBRA administrators. These provisions, and our recommendations for, are described below.

### **1. New Notice Requirements**

The proposed regulations impose two new notice requirements. 29 C.F.R. § 2590.606-4(c) and (d). The first requires a plan administrator to provide notice when an individual who has notified the plan of the occurrence of a qualifying event is not eligible for COBRA. The second new notice requirement requires notice when COBRA coverage terminates before the maximum COBRA period. Neither of these notice requirements are required under the statute. BCBSA believes these two new notices should not be adopted in any final rules as they appear to be unnecessary.

The proposed regulations make it clear that the general notice and election notice required under ERISA § 606 must contain information about the circumstances under

which COBRA is available, the duration of coverage, and the circumstances that can lead to early termination of COBRA. 29 C.F.R. §§ 2590.606-1(c); 2590.606-4(b)(4). Requiring a plan administrator to send additional notices upon the actual occurrence of these events imposes an additional and duplicate notice requirement that Congress did not consider necessary. In addition, these new notice requirements, if not satisfied, raise the threat of litigation under ERISA §§ 502(a)(1)(B) and 502(a)(3), as well as statutory penalties under ERISA § 502(c)(1). Finally, employers, administrators and insurers face the prospect of excise taxes under the Internal Revenue Code, I.R.C. § 4980B for failure to send these notices. I.R.C. § 4980B(e)(1).

**Recommendation:** BCBSA recommends that these the new notice requirements be eliminated.

## **2. Reasonable Notification Procedures**

The "reasonable notification procedures" section of the proposed regulations, 29 C.F.R. § 2590.606-3(b), contains several provisions that could create administrative uncertainty as well as potential liability for administrators and insurers. First, if a plan does not establish reasonable notification procedures, either written or oral notice from the qualified beneficiary about a qualifying event is deemed sufficient. 29 C.F.R. § 2590.606-3(b)(4). Oral notice is likely to lead to disputes about when notice was given, or if it was given at all. These disputes could largely be avoided by imposing a written notice requirement. Second, the proposed regulations designate an insurance company, or an insurance service, among others, as proper parties to receive a qualified beneficiary's notice in the absence of reasonable procedures. 29 C.F.R. § 2590.606-3(b)(4)(iii). Since ERISA § 606(3) provides that a qualified beneficiary's notice should be given to the plan administrator, placing the burden for receiving these notices on the insurance company or insurance service is inappropriate and departs from COBRA's statutory structure. Finally, even if a plan does establish reasonable notification procedures, the proposed regulations prohibit the plan administrator from rejecting a qualified beneficiary's notice as untimely, even if the qualified beneficiary does not follow such procedures within the statutory time frame. 29 C.F.R. § 2590.606-3(d). In the interest of efficient administration, which lowers plan costs as a whole, participants should be required to follow reasonable procedures that specify the required contents of a notice.

**Recommendation:** BCBSA recommends that there be revisions to the reasonable procedure section of the proposed regulations to require written notice from qualified beneficiaries, to permit plans to exclude insurers from the list of persons who may receive a qualified beneficiary's notice, and to allow the plan administrator to reject a notice from a qualified beneficiary if it is not sent in accordance with a plan's reasonable notification procedures.

## **3. Effective Date**

The proposed effective date for the regulations is the first day of the first plan year that occurs on or after January 1, 2004. This effective date does not provide enough time for

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plans to become familiar with and implement the new procedures, including making amendments to summary plan descriptions as necessary.

**Recommendation:** BCBSA recommends changing the effective date to a date no earlier than the first plan year beginning on or after January 1, 2005.

BCBSA appreciates the Department's efforts to clarify uncertainties in the COBRA statute and to create workable standards for administration. However, BCBSA urges the Department to modify those provisions of the proposed regulations described in our comments to avoid imposing additional and unnecessary burdens on plan administrators.

Thank you for the opportunity to provide these comments. If you have any questions, you may direct them to Jane Galvin, Director, Regulatory Affairs at BSBCA at 202.626.8651 or by e-mail at [Jane.Galvin@wro.bcbsa.com](mailto:Jane.Galvin@wro.bcbsa.com).

Sincerely yours,

Alissa Fox  
Executive Director