



**BlueCross BlueShield
Association**

An Association of Independent
Blue Cross and Blue Shield Plans

June 6, 2011

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Director
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Attention: E-Disclosure RFI

Submitted via E-Mail: e-ORI@dol.gov

**Re: Comments on ERISA Electronic Disclosure Request for Information
(RIN 1210-AB50)**

Dear Mr. Doyle:

The Blue Cross Blue Shield Association (“BCBSA”) appreciates the opportunity to provide comments to the Department of Labor’s (“DOL’s”) Request for Information Regarding Electronic Disclosures by Employee Benefit Plans. 76 Fed. Reg. 19,285 (April 7, 2011). BCBSA represents the 39 independent Blue Cross and Blue Shield Plans (“Plans”) that provide health coverage to nearly 98 million – one in three – Americans. Plans offer coverage in every market and every state in America.

Blue Cross Blue and Shield Plans are finding that their employer customers and individual enrollees are increasingly requesting that important health plan information, such as summary plan descriptions and explanations of benefits, be easily and readily accessible in electronic form. While Plans still receive some requests for paper versions of these documents, the numbers are getting fewer and fewer, and there is a clear push among those to whom Plans provide services toward more electronic communications. Indeed, federal regulations have encouraged Plans to communicate electronically among other health plans and health care providers through the HIPAA standard transaction rules, and Plans are seeing the same movement in their communications with individuals.

The ERISA electronic delivery rules, which were adopted in 2002, simply have not kept pace with the current demands of technology and should be updated to allow health plans and employer plan sponsors more flexibility in offering electronic communications to a diverse group of employees in a range of fields, while still protecting those who request to receive communications via paper. As we discuss below, other regulations governing employee benefit plans (including Department of Labor guidance on the pension side) have recognized this need for a more flexible approach, so there is a framework in place that DOL could look to in developing a more practical and workable solution for health plans to respond to employee demands for electronic delivery, while still assuring information is accessible to all.

Accordingly, in response to DOL's request for Information, we offer the following comments and recommendations for ERISA's electronic delivery rules.

A. Permitted delivery methods should not turn on computer access at place of employment.

Issue: ERISA's original delivery rules were drafted in 1977 and contemplated that documents would be provided by an employer "in hand" at the employee's worksite or mailed in hard copy to someone's home. In 2002, DOL adopted an electronic delivery safe harbor that retained this worksite approach and limited electronic delivery to employees who accessed a computer as an "integral" part of their worksite duties or who provided affirmative consent under a complicated set of rules.

This approach is no longer reflective of how predominant electronic media is today and today's mobile workforce. Employers have a very diverse group of employees, many whom do not have traditional 9-5 "desk jobs" but who still want to be able to access plan information electronically. More and more employees are "in the field," whether telecommuting, accessing work from personal electronic devices 24 hours a day, or in industries that have more far-flung workforces, such as retail, transportation, or manufacturing. Non-active participants, such as retirees and COBRA qualified beneficiaries, also are asking for their information to be electronic, and there no longer is a practical reason why these groups should be treated differently. Participants do not want to carry a 100-page book with them outlining their health benefits; they want access to their health plan information wherever they are. In addition, health benefits are more portable than ever – first with HIPAA and now with the Affordable Care Act, with new requirements for plans to be transparent and provide more information, so we anticipate even greater demand for electronic access.

Recommendation: A safe harbor for electronic delivery should not turn on *where* an individual accesses electronic information, but that the individual has demonstrated the *ability to access* the information. We have found that enrollees

log on to home computers, worksite networks, smart phones, iPads, and laptops to access health plan information. The ERISA delivery rule should not limit how health plans respond to innovation, but should instead modernize the former employment site-based standard to an “ability to access” standard. This would be consistent with the electronic disclosure rules under the Internal Revenue Code (discussed in more detail below). The Internal Revenue Code rules do not look at all to place of employment, but instead require that the recipient have the effective ability to access the electronic medium being used and be advised of his or her right to request a paper copy.

B. Replace the affirmative consent requirement with an opt out where participants can demonstrate the ability to access electronic documents (consistent with E-SIGN, IRS regulations, and HIPAA privacy rules, and as already adopted by DOL in Field Assistance Bulletin 2006-03).

Issue: The ERISA electronic delivery rules include a fairly complicated affirmative consent requirement, with multiple notices and a requirement that individuals must affirmatively agree to receive documents electronically, without any real exception (except for a minority of employees who have a traditional desk job). The ERISA model presumes that health plans will deliver communications by paper, with a very narrow exception for electronic delivery in very limited circumstances. This model may have been a cautious approach in 2002 when it was adopted, before technology was so widespread, but it is outdated today. Nothing in ERISA’s original delivery rules requires a presumption of paper over electronic delivery, and other federal laws governing employee benefit plans take the opposite approach.

- *E-SIGN* – The federal E-SIGN legislation (cited in the DOL Request for Information) allows an agency to exempt a specified category or type of record from the general affirmative consent requirement “if necessary to eliminate a substantial burden on electronic commerce that will not increase the material risk of harm to consumers.” 15 U.S.C. § 7004(d).
- *IRS Disclosure Rules* – The Internal Revenue Service (“IRS”) regulations regarding electronic disclosure of notices under the Internal Revenue Code include an affirmative consent requirement, along with an “exemption” from the consent requirement that the regulations say is intended to satisfy the allowed exception under E-SIGN. Affirmative consent is not required if: (1) the recipient has the effective ability to access the electronic medium being used, and (2) at the time the applicable notice is provided, the recipient is advised that he or she may request a paper copy at no charge. 26 C.F.R. § 1.401(a)-21.
- *DOL Field Assistance Bulletin for Pension Benefit Statements* – The Pension Protection Act amended ERISA § 105 to require pension plans to

furnish pension benefit statements to participants. While these statements would be a required disclosure under Title I of ERISA, so subject to the ERISA delivery requirements, DOL issued a Field Assistance Bulletin (2006-03) stating that it would view the furnishing of these statements in accordance with the IRS disclosure rules (above) as good faith compliance with the delivery rule. As noted above, the IRS rule does not require affirmative consent if the recipient has the effective ability to access the electronic medium being used and is advised that he or she may request a paper copy at no charge.

- *HIPAA Privacy Rules* - The HIPAA privacy rules allow health plans to provide the HIPAA privacy notice electronically “if the individual agrees and such agreement has not been withdrawn.” 45 C.F.R. § 164.520(c). In the Preamble to the regulations, the Department of Health and Human Services (“HHS”) clarifies that it does not “require any particular form of agreement.” 65 Fed. Reg. 82,724 (Dec. 28, 2000). HHS gives an example where a plan asks participants on an application for coverage for an e-mail where information may be sent. HHS says the plan can “infer agreement” where the individual supplies an e-mail address. 65 Fed. Reg. 82,724. HHS says this provision “allows covered entities the flexibility to provide the notice in the form that best meets their needs without compromising an individual’s right to adequate notice of covered entities’ information practices.” 65 Fed. Reg. 82,724.

Recommendation: Rather than presuming health plans will issue paper documents and only allowing electronic delivery under limited exceptions, the approach should be changed so that health plans are permitted to deliver documents electronically as their default and allow individuals to request a paper copy. This “opt out” approach should be permitted for all plan participants – active employees, COBRA qualified beneficiaries, and retirees. This approach would be more in line with other laws governing benefit plans and today’s technology, while still protecting employees. The delivery rules could be paired with a requirement that the plan give notice to individuals of what documents are available electronically and how to access them (as the IRS rules do) and alert individuals of their right to request a paper copy at any time. Plans would have more flexibility to offer electronic documents, while individuals who want to continue to receive paper documents would have the same rights they do today.

C. Formalize the approach from DOL Field Assistance Bulletin 2006-03 allowing delivery through a “continuous access” website.

Issue: Plans often provide access to electronic documents on their websites, particularly long documents such as certificates of coverage, summary plan descriptions, or provider directories. Enrollees want quick access to these documents wherever they are, along with the ability to search for the information they need. ERISA’s summary plan description (“SPD”) regulations require that

plans include information about the composition of provider networks and state that this list can be included in a separate document accompanying the SPD. 29 C.F.R. § 2520.102-3(j)(3). Depending on the geographic region, a provider directory can include thousands of listings and be several hundred pages long. A printed document generally will be out of date as soon as it is printed, so it often is more useful to participants to access this type of document online.

In Field Assistance Bulletin 2006-03, DOL recognized that posting documents on a continuous access website would meet the ERISA delivery requirements for certain pension benefits statements as long as participants are provided notification that explains their availability of the information, how to access it, and the right to request a paper version of the information free of charge. It is unclear why DOL would permit this type of delivery method for certain ERISA-required statements and not others.

Recommendation: Formalize the delivery methods adopted in Field Assistance Bulletin 2006-03 in regulations so that the guidance extends to other types of notices and so that plans that provide information through a continuous access website are deemed to meet the safe harbor, where the plan has notified recipients of the information, how to access it, and their right to request a paper copy. In addition, clarify in the SPD regulations that a plan can meet ERISA's delivery requirements by furnishing a network provider directory or similar document by including a link or web address in the SPD to the site where the document is housed, with a printed copy available upon request.

D. Claims determinations should not be limited to the electronic safe harbor delivery requirement.

Issue: The DOL claims procedure regulations specify that an employee benefit plan may issue an adverse benefit determination in electronic form only if the communication satisfies the electronic delivery safe harbor. 29 C.F.R. § 2560.503-1(g)(1); (j)(1). It is not clear why adverse benefit determinations should have a different standard than other electronic communications and not also be subject to ERISA's general rule for delivery (that the delivery be made in a manner reasonably calculated to ensure actual receipt). There are many ways that employee benefit plans are able to provide claims determination notices (such as online and in real-time), so health plans should not be limited to the safe harbor.

Recommendation: Revise the claims procedure regulations to remove the express reference to the ERISA electronic delivery safe harbor subsections so that claims determinations are subject to the same delivery rules as other ERISA-required documents.

E. Reconcile ERISA’s electronic delivery rules with the delivery rules for other required notices.

Issue: Health plans are required to provide numerous notices under several different laws, including ERISA, the Internal Revenue Code, the Public Health Service Act, the Children’s Health Insurance Program Reauthorization Act, the Women’s Health and Cancer Rights Act, the HIPAA privacy rules, Medicare Part D, and now, the Affordable Care Act. Different rules govern these notices so health plans are forced to send notices piecemeal using a number of delivery requirements, or combine in one notice with uncertainty about which delivery rule should apply. Health plans generally do not object to making sure enrollees are informed, but would like to send communications in the most efficient process for both plans and enrollees.

Recommendation: Whatever rule is issued should apply uniformly to all notices, so health plans do not have to look to more than one rule when providing electronic notices that are required by law. Particularly where a notice must be provided under several laws (for example, Affordable Care Act notices may be required under ERISA, the Code, and Public Health Service Act), plans should be considered to have met the delivery requirement for all if they meet the requirements for one of these laws. If DOL were to adopt the IRS delivery rule, as discussed above, at least some of these disparate rules would be reconciled. We would encourage DOL to work with other agencies that impose notice requirements on health plans also to reconcile their delivery requirements.

F. Replace the “actual receipt” standard under ERISA’s general delivery rule with a “reasonable access” standard.

Issue: A health plan may not strictly satisfy all of the requirements of the electronic delivery safe harbor with respect to every notice, so it is helpful to have the general delivery rule as an overarching requirement. However, the language of the general rule needs to be updated. The current general delivery rule requires that the plan use a method “reasonably calculated to ensure actual receipt.” This language was adopted in 1977, well before the time when the regulators envisioned the use of online or electronic notice. This type of standard does not fit with today’s technology, when a plan only may be able to verify that a participant has “reasonable access” to an electronic notice (it is not clear how a plan would know whether an individual “received” a notice that is posted online, for example).

Recommendation: Regardless of the electronic delivery rules DOL adopts, it should retain the general rule that plans use a delivery method “reasonably designed” to ensure receipt. A prescriptive safe harbor may not be practical for all situations, so plans still should be able to fall back on the general ERISA delivery rules. However, the standard in the general rule should be updated to

reflect the use of technology and electronic delivery and, instead be, “calculated to ensure reasonable access” to required documents.

G. The requirement to translate SPDs and other ERISA-required notices into non-English languages only should apply upon request.

Issue: DOL regulations require that a health plan must disclose SPDs in a foreign language if a certain number of participants are literate only in that language. 29 C.F.R. § 2520.102-2(c). However, health plans have no way of identifying how many participants are literate in a particular language and are prevented by labor and employment laws from inquiring about race and ethnicity. DOL also adopted this requirement as part of the new claims and appeals rules under the Affordable Care Act, and it is unclear how broadly this requirement extends. Plans do not have any clear direction as to how to identify which languages documents must be translated into and to whom they must be delivered.

Recommendation: Plans should have the flexibility to use whatever reasonable method is most appropriate for their population to identify whether the thresholds requirements for providing SPD information in a foreign language are met. Some plans may rely on an overall survey of their populations, some may use requests to trigger the thresholds, and others may want to use the methodology required for the individual market, looking to census data by geographic area.

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We appreciate your consideration of our comments on the Department’s Request for Information Regarding Electronic Disclosures by Employee Benefit Plans and for considering our suggested recommendations. If you have any questions, please contact Patrick Watts at 202.626.8653 or Patrick.Watts@bcbsa.com.

Sincerely,



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