Written Statement On Required Health Care Disclosures

Mary Ellen Signorille,
Senior Attorney, AARP Foundation Litigation

On Behalf Of AARP

Before The U.S. Department Of Labor
2017 Advisory Council On Employee Welfare

And

Pension Benefit Plans

June 6, 2017

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment. We appreciate the opportunity to discuss improving health plan disclosures with the ERISA Advisory Council and to present the perspective of our members, who, increasingly, find it challenging to navigate our complex and confusing health care system.

Although the focus of this Council appears to be reducing the requirements on plans and employers, AARP sees this as an opportunity to make ERISA's required disclosures more useful and illuminating to participants and beneficiaries.[1] That means getting the right information to the right person at the right time, with all the information they need in an understandable manner. Before we discuss the specific proposals, AARP believes that some background is instructive to set the stage for our responses.

Uncertainty Surrounding Health Care and Necessary Disclosures

Given the current uncertainty surrounding the American health care system, making changes to health care disclosures are particularly challenging at this time. No one knows which of the current health disclosures will be most important to participants. For example, if the Affordable Care Act pre-existing prohibition is rescinded, then information about COBRA will once again become invaluable for individuals so that they may make informed decisions concerning their health care. Or, if the ACA essential health benefits are eliminated, then information about women's health benefits would become more important for women and their families. Any changes to the current health law will affect the information participants will need to know. Accordingly, the Council should consider this uncertainty when making its recommendations.

Health Literacy: The Necessity of Testing Disclosures

As measured by the National Adult Literacy Survey (NAALS) that assesses literacy across a continuum of skills — prose, document, and quantitative —about 90 million people, or roughly half of the adult U. S. population, lack basic reading skills. M. Kutner, E. Greenberg, Y. Jin, and C. Paulsen, *The Health Literacy of America's Adults: Results From the 2003 National Assessment of Adult Literacy* (2006), U.S. Dep't of Ed., Nat'l Center for Ed. Stat., Washington, DC:

The NAALS also assessed health literacy using items identified by the Institute of Medicine and Health People 2010 and organizing them into three domains of health and

[1] Throughout the remainder of the statement, AARP will use the term participants also to include beneficiaries.

health care information: clinical; prevention, and navigation of the health care system *Id.* The 2003 NAALS found that about two-thirds of the adult population has intermediate (53 percent) or proficient health literacy skills (12 percent). It is sobering that only 12 percent of adults are well equipped to navigate the current health care environment. This small group has the ability to read and synthesize complex prose, integrate and synthesize multiple pieces of information in complex documents, and locate abstract quantitative information to solve multi-step problems. About half have "intermediate" health literacy -- they can perform moderately challenging literacy activities. However, over one-third have just basic (22 percent) or below basic (14 percent) health literacy, which means they either can just perform simple literacy or very simple, concrete activities. In the navigation domain, this means that a substantial proportion of adults may have difficulty understanding how the health care system works (*e.g.*, coverage and eligibility issues) or understand their individual rights and responsibilities.

AARP believes it is critically important for the Department of Labor, plans, insurers, and employers to consider the health literacy skills of their employees, retirees, and dependents in the materials they use to communicate on benefits. Participant engagement depends on information that is accessible and understandable that has been developed, tested, and vetted by a reliable source. The Department can play an important role to assist employers, insurers, and plans to implement innovative and effective communication approaches, including model formats, disclosure statements, and alternative modes for individuals in need of assistance. Materials should be tested especially for those employees, retirees and dependents who are known to have poor or marginal health literacy skills to ensure that they understand the materials. Broadly disseminating tested materials would be a major contribution to employers and health insurers.

The Department should research and expand the evidence base for effective participant disclosures. By so doing, the Department can ensure that health plans and insurers facilitate consumer understanding of various issues that have a direct impact on their welfare. Consistent formats, uniform terminology, and sensitivity to cultural and linguistic preferences are fundamental.

Format, Content and Presentation of Disclosures

AARP agrees that streamlined disclosures can be beneficial to participants because where there is a significant amount of information, such as 100-page SPDs, participants may find it difficult to find the information that they need when they need it. While developing model fee disclosures, AARP learned the complexity of generating disclosures that are understandable to a wide audience. AARP, *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* at 5 (Sept. 2008), https://assets.aarp.org/rgcenter/recon/fee_disclosure.pdf.

However, a few criteria did emerge from the fee disclosure focus groups and testing. To be effective, disclosures should be short and easy to read and understand. Disclosure forms for participants should be clear and concise, not overwhelming. Writing in plain language would make the disclosure far more meaningful.[2] The purpose of the disclosure should be clear. The disclosure should provide meaningful information. Terms that are used in the disclosure form should be clearly defined. The disclosure form should direct plan participants to how they may obtain more detailed information from the plan administrator on the benefits under the plan. *Id.* at 26. Clearly, the format of the form as well as the vocabulary can have a significant impact on the understandability and value of the information. Accordingly, we believe that the Department should move cautiously if it is considering combining disclosures; while merging of disclosures may be feasible, participants' comprehension level may well be compromised. Participant testing can provide necessary feedback to mitigate this issue.

Layout and design elements can be used to enhance understanding of key information in the form. For example, using bold type, underlining, bullets, and borders to highlight important information may enhance comprehension by drawing participants' attention to it. Charts and tables may help to present comprehensive information in a way that allows for the easy presentation of information. Many people find graphic presentations easy to understand. However, while charts, tables and other graphic presentations are a viable way to convey information, testing to ensure participants find them helpful would be beneficial.

Good layout and design elements may lower the amount of cognitive effort required to use information (*e.g.*, reducing the amount of information individuals must process); give consumers a way of relating the implications of a choice to their own experience; and highlight the meaning and significance of information through specific presentation approaches. Such elements combined with written materials that use short sentences, the active voice, and large print will result in better comprehension. Instructions should be provided by grouping segments of information and limiting directions. Moreover, visual aids can help to reduce the amount of reading required and clarify written materials. Peggy Murphy, Terry C. Davis, Robert H. Jackson, Barbara C. Decker and

[2] Plain language is easier to read than technical, legal, or complicated writing. Therefore, readers are more likely to read through the information rather than just skim it. *Plain Language Action and Information Network* at its website, http://www.plainlanguage.gov, provide checklists to assess whether documents or web-based materials comport with plain English standards. Experts have identified processes to help individuals use written information to inform choices. Strategies to help compensate for literacy deficits and build on cognitive strengths are recommended. Jeanne McGee, *Toolkit for Making Written Material Clear and Effective,* a web-based resource prepared for the Centers for Medicare and Medicaid.

Sandra W. Long, *Effects of Literacy on Health Care of the Aged: Implications for Health Professionals,* EDUCATIONAL GERONTOLOGY, 19, 311-6 (1993). The use of narratives and evaluable formatting helps those with moderate skill, but not those in the lowest quartile of skills. Significantly, consumers are highly influenced by how information is presented and framed. This may be as important as the content itself and failure to focus attention on the manner in which materials are presented could undermine a participant's ability to consider her own self-interest in the context of making a decision J. Hibbard, J. Dubow, E. Peters, *Decision Making In Consumer-Directed Health Plans,* Washington, DC. (2003).

Web-based materials can also be designed to facilitate decision making by: offering step-by-step guidance to navigate a web site; including functionalities that enable the user to search on key words; defining key terms; allowing the user to easily print a web page; protecting personal information and securing such information. Web-based materials are often very complex and require a unique set of navigation and graphic-reading skills. For Internet-based materials, specific techniques such as graphics, multimedia, and interactive elements may make content more accessible, but they ultimately cannot remove the barriers for individuals with poor health literacy skills. Ahmad Risk and Carolyn Peterson (2002), *Health Information on the Internet: Quality Issues and International Initiatives*, *JAMA*, 287 (20), 2713-5. As a rule, individuals with poor literacy skills rely on their listening skills to learn. Murphy, *supra.* However, it is not always feasible to provide one-on-one teaching or counseling. For those with low literacy skills, other interventions include offering audio or video instructions and providing visual rather than written cues, J. Gazmararian, D. Baker, M. V. Williams, R. Parker, T. Scott, D. Green, S. N. Fehrenback, J. Ren and J. Kaplan, *Health Literacy Among Medicare Enrollees in a Managed Care Organization, JAMA*, 281 (No. 6) (1999), and suggesting behaviors and actions that the patient/consumer should take.

A disclosure form can lead to action, but action is not guaranteed. A form that is perceived as easy to understand and helpful is more likely to be used to weigh the advantages and disadvantages of available options and actions and to make informed decisions than one that is more confusing.

AARP strongly recommends that the Department test the Council's recommendations concerning the changes in disclosures to ensure that the disclosures present the information to participants in a manner that is understandable to the average participant and is useful.

The Council's Proposals

The Elimination Of The Summary Annual Report Requirement For Health Benefit Plans, Not Already Exempt

SARs, according to ERISA §103(b), shall include a statement providing a snapshot of the plan's financial status. Congress enacted the SAR requirement for two reasons. The first was that Congress believed that the SAR provided some basic transparency concerning a plan's finances. The second reason was that this basic information would provide participants with enough information to determine whether additional review or inquiries were necessary. Congress realized that the Department of Labor would not be able to police every plan and thus hoped that participants with adequate information would police their own plans.

AARP agrees that the SAR has not been particularly helpful in giving an accurate picture of the plan's financial health. However, AARP believes that the appropriate question before the Council is not whether to eliminate the SAR but to turn it into the document it was supposed to be — a snapshot of a plan's financial health that is helpful to participants. AARP suggests that the Council make recommendations to make the SAR more useful to participants and the Department. The focus should be on a snapshot of financial information that is important for participants to know about their plan so they can police it. For example, among other things that a participant wants to know is whether the employer has remitted salary deductions to the insurer, if the plan is insured, and whether there is enough money to pay the claims and/or services if the plan is self-insured.

The SAR or the other alternative notices provide transparency to a health plan's financial condition. Without such transparency, AARP is concerned that a health plan could end up with insufficient assets to pay health care bills, leaving participants holding the bag, and participants would have had no warning.

The Consolidation Of Each Of The Various Annual Notices Into A Single Annual Notice Issued In A Standard Format

The idea of one envelope (or link) with all of the annual notices has some appeal inasmuch as the individual would know that there is one place for all of the information. Ideally, it could be sent out with a table of contents, a short description of each of the notices in the table, and a bolded statement saying **THIS IS IMPORTANT PLEASE SAVE WITH IMPORTANT PAPERS.**

However, disclosures have different levels of relevance depending on, among other things, current laws and industry environment. While notices may not be new (and thus would not appear in the "What's New" section in the reference tool), they may be

particularly relevant to an industry or a demographic group. If the ACA is repealed, then COBRA and women's health notices may become particularly relevant. If there were reductions in force, COBRA notices would be particularly relevant. If an employer's workforce has a significant number of women, then notices concerning women's health issues such as notices required by the Newborns' and Mothers' Health Protection Act (NMHPA) and Women's Health and Cancer Rights Notice (WHCRA) would be particularly important. These notices might need to stand out, and, if consolidated, would not do so.

If a disclosure is required due to an event occurring (e.g., COBRA notices are required when an employee is terminated) or upon request of a participant, the Council should not entertain any changes to the timing of the disclosure.

The Modification Of The Summary Plan Description Requirements
To Allow A Short Resource Reference Tool Updated Annually.

The summary of benefits and coverage (SBC) — an ACA requirement — describes the benefits and coverage options under the applicable plan. The SBC is limited in length to 4-pages and is required to use language that is understandable to the average plan participant. The uniform format for SBCs provides participants with a valuable resource to making informed health care decisions. We appreciate the Council's attempt to build upon the success of the SBC to streamline the SPD. In addition, we know that clear and concise information is the best way to inform individuals about their benefits. However, AARP has some concerns that participants will misread the "tool" and lose some of their rights.

The SPD should provide the method for a plan or insurer effectively communicate with participants. The SPD contains plan rules, financial information, and documents on the operation and administration of the plan whereas the SBC provides the benefits and coverage — the information that participants need to know when they are trying to figure out what coverage they need to take care of a medical issue. Instead, the SPD has become a document to mitigate litigation risk and protect the plan, the insurer, and/or the employer. [3]

By endorsing another document (resource reference tool along with the SPD, SBC, and plan document), the Council exacerbates the continuing problem of numerous documents with inconsistent provisions or incomplete explanations. This is particularly important if a participant challenges a benefit denial in court. *See* BNA/Bloomberg, EMPLOYEE BENEFITS LAW at 208-212 (3d ed.) (2015 Cum. Supp.) (discussing deviation between documents due to inconsistent provisions or silence in one document but not

[3] AARP also notes that only large employers and/or insurers will have the resources to produce such a "tool."

the other). AARP suggests that the best method for dealing with inconsistent (or silent) plan provisions is an interpretation that permits the participant to choose which plan provision applies to her situation. The rationale for this outcome is that the plan or employer has control over the documents, not the participant. If the Council does recommend such a reference tool, then the Council should also recommend this construction concerning conflicting documents.

AARP Suggestions for Additional Information in the SPD

Given questions we frequently receive from our members, we suggest that the following information be added to the SPD:

Relationship between COBRA and Medicare. Early retirees and those on disability who rely on COBRA need more information and assistance on what it means to them when they become eligible for Medicare. The reason that this information is vital is if participants do not realize that they should enroll in Medicare during their initial enrollment period, they can find themselves with no coverage when their COBRA runs out. They will then have to wait for the general enrollment for Part B, which occurs each winter, and their coverage cannot start until July 1; on top of the late coverage, they have to pay the late enrollment premium penalty for Part B. Clearly, if they are caught in this gap between COBRA and Medicare coverage and a serious illness occurs, they either have to forego care because they cannot afford it, or they must turn to savings, family, or debt to pay for care. Others have found themselves owing their retiree plans large sums of money for claims paid by the plan, which should have been paid by Medicare. (This has happened when the plan mistakenly pays when Medicare should have). Frequently, they cannot obtain the money from Medicare because they find out about the situation beyond the timeframe when Medicare is liable for the services. Thus, they are responsible for payment when they thought the cost was insured at the time they received care.

Relationship between employer coverage and Medicare. Workers who stay in the workforce beyond age 65 can get caught without coverage. This also happens when a spouse is older than the employee participant is. Participants are able to sign up for Part B while they have employer coverage (Medicare pays second). However, enrolling in Part B initiates their Medigap open enrollment period. If participants do not also sign up for a Medigap plan during the six months following their Part B enrollment, they will not receive the same guaranteed-issue protections if they try to purchase a plan later on. Additionally, many who use Medicare as secondary to employer coverage do not understand which plan pays first and how the benefit payments are coordinated.

Conclusion

In conclusion, AARP would be pleased to further discuss the best system for delivering needed information in a useful manner to over 100 million workers, retirees, and their families. We support providing needed information in an understandable manner in order to best inform the consumer. We appreciate the opportunity to be part of the discussion.

For further information or assistance, please contact Michele Varnhagen, Senior Legislative Representative or Mary Ellen Signorille, Senior Attorney.