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Established 1983



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September 7, 2010

Mr. Jay Fritz
Program Analysis Officer
Program Planning and Evaluation
Retirement and Benefits/Insurance Operations
U.S. Office of Personnel Management
1900 E Street, NW, Room 2H22
Washington, DC 20415-3661

RE: Health Benefits Election Form (OMB Control No. 3206-0160; SF 2809)

Dear Mr. Fritz:

The Association of Federal Health Organizations ("AFHO") appreciates this opportunity to provide comments on the SF 2809 form in response to the notice published at 75 Fed. Reg. 39,587 (July 9, 2010). AFHO is a national association of Federal Employees Health Benefits ("FEHB") fee-for-service plan carriers. AFHO's member organizations sponsor FEHB plans that care for over three million federal and postal employees and annuitants.¹

Our comments fall under two headings: (1) Updating the SF 2809 for changes necessitated by the Affordable Care Act and (2) Updating the SF 2809 for changes required by Medicare's mandatory reporting requirements. AFHO's comments are equally applicable to the OPM 2809 form.

- 1) Updating the SF 2809 for Changes created by the Affordable Care Act
 - a) Affordable Care Act changes to dependent child eligibility.

The SF 2809 form is used by federal and postal employees and certain annuitants to enroll for FEHB plan coverage. The SF 2809 form describes a general age limitation for dependent child coverage of 22 and various financial dependency tests for certain types of dependent child coverage which conform with the FEHB Act and implementing OPM regulations. The form also explains that only unmarried dependent children are eligible for FEHB coverage. We understand that the Affordable Care Act, enacted in March 2010, effectively modifies these longstanding rules.²

¹ AFHO's members include American Foreign Service Protective Association, American Postal Workers Union, Compass Rose Benefits Group, Government Employees Health Association, Mail Handlers Benefit Plan, National Association of Letter Carriers Health Benefit Plan, National Rural Letter Carriers' Association, Panama Canal Area Benefit Plan, Special Agents Mutual Benefit Association, and Associate Member Blue Cross Blue Shield Association. AFHO members reserve the right to comment individually on this form.

² Source: <http://www.opm.gov/insure/health/reform/index.asp>

2. OPM has explained on its web page that "Under the Affordable Care Act, adult children up to age 26 will be eligible for health insurance coverage at the start of the [2011] benefit year." PPACA also mandates coverage of married young adult dependents. The interim final regulation implementing this law generally prohibits group health plans, including FEHB plans, from restricting dependent child coverage on the basis of any status other than the existence of a legal relationship. Accordingly, OPM should modify the SF 2809 form to reflect these statutory changes. Collection of enrollee and family member telephone number and email addresses
- b) Changes necessitated by the Internal Appeals Regulation applicable to non-grandfathered plans
 - i) Collection of home/cellular phone numbers and personal email addresses

We ask that OPM revise the OPM 2809 and SF 2809 forms to collect, at the enrollee's option, home or cellular telephone numbers and personal email addresses from FEHB plan enrollees and family members with addresses different from the enrollee. The forms currently collect the home addresses of the enrollee and family members (when different from the enrollee's). While FEHB plans routinely communicate with their members by mail, it often is necessary to contact members by telephone or email, e.g., to promptly resolve claim issues or engage members in disease management or wellness programs. Moreover, the new internal claims appeals regulation for non-grandfathered plans under the Affordable Care Act, 45 C.F.R. § 147.136(b)(ii)(B), published at 75 Fed. Reg. 43,359) requires plans to notify enrollees of decisions on urgent claims within 24 hours beginning next year. The preamble explains that

This is a change from the requirements of the DOL claims procedure regulation, which generally requires a determination not later than 72 hours after receipt of the claim by a group health plan for urgent care claims. The Departments expect that electronic communication will enable faster decision-making today than in the year 2000, when the final DOL claims procedure regulation was issued.

75 Fed. Reg. at 43, 333. Of course, we understand that OPM cannot require enrollees to submit this information, but making an optional request for the information on the form would be helpful to the plans which utilize email and beneficial to members in those plans. It should be noted, however, that not all plans use e-mail as a means of communicating with enrollees, for privacy and other reasons, and nothing in this request or in a revised Form 2809 should be construed as a requirement for plans to communicate with enrollees via e-mail. If OPM adopts this recommendation, we ask that OPM include a statement on the Form 2809 after the request for the e-mail address such as "Please note that not all plans communicate with enrollees via e-mail.

- ii) Inquiring about dependent literacy only in a non-English language.

The internal claims appeal regulation, mandates that non-grandfathered plans provide certain claim decision notices in a culturally and linguistically appropriate manner as follows:

1. For a health plan that covers 100 or more participants at the beginning of a plan year, if the health plan provides notices upon request in a non-English language in which the lesser of 500 or more participants, or 10 percent or more of all plan participants, are literate only in the same non-English language.
2. If this threshold is met, the health plan must also—
 - (A) Include a statement in the English versions of all notices, prominently displayed in the non-English language, offering the provision of such notices in the non-English language;

(B) Once a request has been made by a member, provide all subsequent notices to the member in the non-English language; and

(C) To the extent the plan or issuer maintains a customer assistance process (such as a telephone hotline) that answers questions or provides assistance with filing claims and appeals, the plan or issuer must provide such assistance in the non-English language

To facilitate compliance with this regulation, it would be helpful if the SF 2809 inquired whether an enrollee, e.g., a divorced spouse or a TCC enrollee, or eligible dependent is literate only in a non-English language and, if so, identify the particular non-English language. Enrollees are the only possible source for this information, and modifying the SF 2809 would materially assist carriers in collecting the information in a cost-effective manner.

2) Updating the SF 2809 for changes required by Medicare's mandatory reporting requirements

The SF 2809 form directs the annuitant or employee to provide his or her Social Security Number ("SSN") and requests SSNs for dependents. The instructions found on both forms read in pertinent part as follows:

Part A Item 13. Please provide Social Security numbers for your dependents, if available. If not available, leave blank; benefits will not be withheld. (See Privacy Act Statement on page 5.)

The Privacy Act statement on page 5 of the SF 2809 form (and page 4 of the OPM 2809 form) reads in pertinent part as follows:

We request that you provide your Social Security Number so that it may be used as your individual identifier in the FEHB Program. Executive Order 9397 (November 22, 1943) allows Federal agencies to use the Social Security Number as an individual identifier to distinguish between people with the same or similar names. Failure to furnish the requested information may result in the U.S. Office of Personnel Management's (OPM) inability to ensure the prompt payment of your and/or your family's claims for health benefits services or supplies.

OPM should update this Privacy Act statement to reflect Executive Order 13,478 (73 Fed. Reg. 70,239 (Nov. 20, 2008)), which amends the referenced 1943 Executive Order and continues to permit federal agencies to collect SSNs from employees and annuitants for identification purposes.

OPM has required disclosure of the enrollee's SSN because, among other reasons, FEHBP carriers must use SSNs to coordinate benefits with Medicare in compliance with federal law and the OPM contract. Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) (P.L. 110-173), added mandatory reporting requirements for group health plan (GHP) arrangements, among others. See 42 U.S.C. 1395y(b)(7) & (8). Pursuant to this statutory authority, CMS has directed FEHB plan carriers and other group health plans ("GHP") to report the Medicare Health Insurance Claim Numbers (HICN) or SSNs of Active Covered Individuals, including spouses and dependents, over age 45. See CMS's GHP User Guide, Ver. 3.1, issued June 25, 2010, § 7.1.2.³

³ The reporting requirement has been phased in over a two year period began in the first quarter of 2009 and ends in the first quarter of 2011. CMS's GHP User Guide, Ver. 3.1, issued June 25, 2010, § 7.2.8

The "Active Covered Individual" category principally encompasses employees who use the SF 2809 form. The category also extends to OPM Form 2809 users because it includes "[a]ll individuals covered in a GHP who have been receiving kidney dialysis or who have received a kidney transplant, regardless of their own or a family member's current employment status." CMS GHP User Guide, Ver. 3.1, issued June 25, 2010, § 7.1.2.⁴ Non-compliance can result in the imposition of heavy penalties on the GHP.⁵

Under these CMS requirements, FEHB plans must report the HICNs or SSNs of certain spouses and other dependents of Active Covered Individuals. For this reason, we are requesting a change to the SF 2809 and OPM 2809 forms that would require the enrollee to provide the HCINs or SSNs for himself and his dependents.

In this regard, however, we recognize that Section 7(a)(1) of the Privacy Act, 5 U.S.C. § 552a note, states that

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) [The] provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

In my opinion, as AFHO's general counsel, AFHO's requested SSN disclosure falls within Section 7(a)(2)(A)'s exception for a disclosure required by federal statute, specifically the above referenced Section 111. However, AFHO recognizes that OPM must make its own conclusion as to whether this statute impedes OPM from mandatorily collecting spouse SSNs in the SF 2809.

If OPM concludes that Section 7 impedes the agency from mandatorily collecting dependent SSNs, then we ask that OPM strengthen the language in the OPM 2809 and SF 2809 instructions as follows:

Please provide Social Security numbers for your dependents, if available. If not available, leave blank; (See Privacy Act Statement on page 4.)

A Mandatory Insurer Reporting Law (Section 111 of Public Law No. 110-173) requires your health plan to report, as directed by the Secretary of the Department of Health and Human Services, information that the Secretary requires for purposes of coordination of benefits between your health plan and Medicare. In order for Medicare to properly coordinate

⁴ The User Guide is available on CMS's mandatory insurer reporting web site at the following link: <https://www.cms.gov/MandatoryInsRep/Downloads/GHPUserGuideV3.1.pdf>

⁵ CMS may impose a penalty of \$1,000 per day for each "Active Covered Individual" the group health plan fails to report, 42 U.S.C. § 1395y(b)(7)(B)(i).

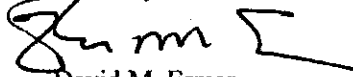
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Medicare payments with other insurance and/or workers' compensation benefits, Medicare relies on your health plan to collect Medicare Health Insurance Claim Numbers (HCIN) or Social Security Numbers (SSN) from you and your dependents and provide them to Medicare. As an FEHB plan enrollee (or spouse or family member of an enrollee), your HCIN or SSN likely will be requested in order to meet the requirements of P.L. 110-173 if this information is not already on file with your insurer. Please cooperate with these routine requests.

(This second paragraph is based on the CMS Alert dated April 6, 2010).⁶ OPM may wish to attach a copy of the Alert to the form. Furthermore, particularly in that event, we ask that OPM request that CMS waive the imposition of the statutory non-compliance penalty on FEHB plans because of this statutory impediment to collection of the dependent SSNs.

Should you wish to discuss these comments, please contact me. If you plan to respond to these comments by mail, please use the following postal address as we are in the process of moving our Post Office Box: P.O. Box 33253, Washington DC 20033-0253

Sincerely,



David M. Ermer
General Counsel

cc: AFHO Board of Directors
Daniel Green, OPM
Anne Easton, OPM
Sylvia Pulley, OPM
Shirley Patterson, OPM
William Stuart, OPM

⁶ Source: <https://www.cms.gov/MandatoryInsRep/Downloads/RevisedCollectionSSNEINs.pdf>