



June 6, 2011

The Honorable Phyllis C. Borzi  
Assistant Secretary  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
Room N-5655  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Attention: E-Disclosure RFI  
RIN 1210-AB50**

Dear Assistant Secretary Borzi:

The National Business Group on Health (Business Group) appreciates the opportunity to respond to the Request for Information (RFI) regarding Electronic Disclosure by Employee Benefit Plans.

The Business Group represents approximately 330 primarily large employers, including 66 of the Fortune 100, who voluntarily provide health benefits and other health programs to over 50 million American employees, retirees, and their families.

As use of electronic media among plan participants and beneficiaries increases, employer-sponsored plans and their participants will have opportunities to realize greater administrative efficiencies and higher cost savings through use of electronic disclosures. While the current safe harbor allows for electronic disclosures, providing greater flexibility in the safe harbor will allow plans to adapt their disclosure processes to evolving technology and take greater advantage of these efficiencies and cost savings. These efficiencies and cost savings, in turn, will allow more funds for employees' plan benefits. **Specifically, the Business Group supports a safe harbor that:**

- I. **Allows plan sponsors flexibility to determine the most effective and efficient methods for providing disclosures to their plan participants and beneficiaries;**

- II. **Maintains the current standard of using measures reasonably calculated to ensure actual receipt rather than detailed requirements for specific notice methods (such as employer Web sites);**
- III. **Provides uniform rules and conditions for electronic disclosures with respect to all types of plans, required notices, and recipients; and**
- IV. **Allows plan sponsors to require participants and beneficiaries to “opt out” of electronic disclosures.**

The Business Group is pleased to provide the following responses to the RFI’s specific questions on whether and how to expand or modify the DOL’s current electronic disclosure safe harbor.

- 4. **What percentage of employee welfare benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of welfare plans (e.g., health, disability, etc.), types of participants and beneficiaries (e.g., active employees, retirees, COBRA Qualified Beneficiaries, etc.) and types of disclosures (e.g., all required title I disclosures versus select disclosures).**

Business Group members provide a wide variety of welfare plan disclosures electronically. Plans that provide electronic disclosures include health, disability, and other welfare plans, and recipients of electronic disclosures include active employees, retirees, and COBRA qualified beneficiaries. The disclosures include a variety of documents such as summary plan descriptions and COBRA notices, although Business Group members do not necessarily provide all disclosures required by ERISA electronically.

- 5. **What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?**

National Business Group on Health members furnish information electronically through a variety of methods, including e-mail attachments, intranet portals, and continuous access Web sites.

- 6. **What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?**

While an increasing number of employees has access to electronic media at work and/or at home, lack of access for some employee populations who do not have computer access at work and technological illiteracy are impediments to

increasing the use of electronic media in providing plan disclosures. However, we anticipate that as electronic media become more widely used, these impediments will diminish. These impediments are less significant for new plan participants and younger workforces.

- 7. Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?**

Many Business Group members find that employees are increasingly and routinely expecting to receive benefit information electronically.

- 8. Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?**

Increased use of smart phone technology and texting may be newer ways that employees will access electronic disclosures in the future.

- 9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?**

The current electronic disclosure safe harbor should be revised. As use of electronic media among plan participants increases, employer-sponsored plans and their participants have opportunities to realize more administrative efficiencies and cost savings through use of electronic disclosures. The current safe harbor allows for electronic disclosures, but providing more flexibility in the safe harbor would allow plans and participants take greater advantage of these efficiencies and cost savings. These efficiencies and cost savings, in turn, would allow more funds for employees' plan benefits.

- 10. If the safe harbor should be revised, how should it be revised? Please be specific.**

The safe harbor should be expanded to encourage and allow plans greater flexibility in providing electronic disclosures. Specifically, the safe harbor should:

- Provide uniform rules and conditions for electronic disclosures with respect to all types of plans, required notices, and recipients;
- Allow plan sponsors flexibility to determine the most effective methods for providing disclosures to participants and beneficiaries, whether with paper documents, by e-mail, through continuous access Web sites, or by other methods; and

- Allow plan sponsors to implement a system whereby participants and beneficiaries must “opt out” of receiving electronic disclosures.

**11. Should a revised safe harbor have different rules or conditions for different types of employee benefit plans (e.g., pension versus welfare plans)? If so, why and what differences?**

Although different types of employee benefit plans are subject to different notice requirements, the safe harbor should have the same rules and conditions for all employee benefit plans. Individual Business Group members often sponsor a wide variety of benefit plans. Imposing different rules or conditions for different types of plans would increase costs for plan sponsors (and by extension, for participants) and would discourage use of electronic disclosures. Furthermore, imposing different rules or conditions for different types of plans may result in a single plan sponsor providing notices for different plans by different methods, which may result in confusion for plan participants. Having the same rules and conditions would allow maximum efficiency and cost savings when preparing and processing plan disclosures and would minimize potential confusion for plan participants. These efficiencies and cost savings also would allow more funds for employees’ plan benefits.

**12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?**

For the reasons stated in the response to #11 above, the safe harbor should have the same rules and conditions for all types of disclosures. Having the same rules and conditions would allow maximum efficiency and cost savings when preparing and processing plan disclosures and would minimize potential confusion for plan participants. These efficiencies and cost savings would allow more funds for employees’ plan benefits.

**13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?**

For the reasons stated in the response to #11 above, the safe harbor should have the same rules and conditions for all recipients entitled to disclosures. Having the same rules and conditions would allow maximum efficiency and cost savings when preparing and processing plan disclosures and would minimize potential confusion for plan participants. As the Department noted in the Preamble to the Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, the safe harbor does not alter requirements otherwise applicable to specific disclosures (e.g., rules related to notices to COBRA qualified beneficiaries). We believe that these other

requirements ensure adequate and timely notice to recipients who are not actively employed with plan sponsors, such as retirees and eligible dependents.

- 14. To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of the disclosures provided on the Web site(s).**

For many plan sponsors, continuous access Web sites are a viable and useful method of providing electronic disclosures. However, the Department should not require disclosure by this method. Depending on the nature of a plan sponsor's business and employee population, the plan sponsor may determine that e-mail, intranet, or another method is more efficient or effective for providing disclosures to plan participants. The safe harbor should continue to allow plan sponsors the flexibility to make this determination, provided the chosen method is "reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals," as required by current ERISA regulations.

In addition, the Business Group believes that the current rules for notifying participants of the ability to access benefit information through Web sites are adequate and do not need to be modified. Currently, plans provide notice of electronic disclosures at the time a document is furnished electronically. If the disclosures are available through a Web site, these notices likely include a direct link to the Web site. Furthermore, plans availing themselves of the safe harbor must take "appropriate and necessary measures" to ensure actual receipt of electronic disclosures. These "appropriate and necessary measures" can include additional notices regarding access to disclosures through Web sites. Additional requirements specific to Web sites would create unnecessary burdens for the electronic disclosure process and would limit plan sponsors' ability to tailor disclosure processes to the specific needs of their businesses and employees.

- 15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt into or out of electronic disclosures? See Question 26.**

Plan sponsors should decide whether disclosures are furnished electronically and should have flexibility to decide whether participants opt in or opt out of electronic disclosures. As noted in the response to #14 above, plans availing themselves of the safe harbor must take “appropriate and necessary measures” to ensure actual receipt of electronic disclosures. This standard adequately ensures that plan sponsors will make actual receipt the foremost priority when determining how to distribute required disclosures. Allowing plan sponsors flexibility to implement an “opt out” system would further the goal of actual receipt because as use of electronic media increases, plan sponsors may find that an “opt out” system results in more participants and beneficiaries receiving their notices. Allowing an “opt out” system may also increase use of electronic disclosures, which, in turn, may increase efficiency and cost savings for plan sponsors and participants. Generally, using electronic means to communicate with plan participants and beneficiaries will reduce plan administrative expenses, thereby allowing more funds for employees’ plan benefits.

- 16. Should a revised safe harbor contain conditions to ensure that individuals with disabilities are able to access disclosures made through electronic media, such as via continuous access Web sites? If so, please describe the conditions that would be needed. Also, please identify whether such conditions would impose any undue burdens on employee benefit plans, including the costs associated with meeting any such conditions. What burden and difficulty would be placed on employees with disabilities if the Web sites and/or other electronic communication were not accessible?**

As noted in the response to #14 above, plans availing themselves of the safe harbor must take “appropriate and necessary measures” to ensure actual receipt of electronic disclosures. The Business Group believes that this standard adequately ensures that plans sponsors will take the needs of individuals with disabilities into account when deciding how to distribute required disclosures. Specific requirements with respect to individuals with disabilities would limit plan sponsors’ ability to tailor disclosure processes to the specific needs of their businesses and employees.

- 17. If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?**

The National Business Group on Health believes that the current safe harbor rules allowing participants and beneficiaries to request paper versions of electronic disclosures and, in the case of affirmative consent, opt out of electronic disclosures do not need to be modified.

- 19. Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is**

**this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.**

As described in the response to #15 above, the Business Group supports allowing plan sponsors to require “opting out” of receiving electronic disclosures. An “opt out” system, provided the plan sponsor takes “appropriate and necessary measures” to ensure actual receipt of electronic disclosures, would obviate the need for affirmative consent.

- 20. In general, the E-SIGN Act permits electronic disclosure of health plan materials but does not apply to cancellation or termination of health insurance or benefits electronically. Are there special considerations the Department should take into account for group health plan disclosures (including termination of coverage and privacy issues)?**

As described in the response to #12 above, the safe harbor should have the same rules and conditions for all types of disclosures, including those related to cancellation or termination of health insurance or benefits. Having the same rules and conditions would allow maximum efficiency and cost savings when preparing and processing plan disclosures and would minimize potential confusion for plan participants. These efficiencies and cost savings would allow more funds for employees’ plan benefits.

- 21. Many group health plan disclosures are time-sensitive (e.g., COBRA election notice, HIPAA certificate of creditable coverage, special enrollment notice for dependents previously denied coverage under the ACA, denials in the case of urgent care claims and appeals). Are there special considerations the Department should take into account to ensure actual receipt of time-sensitive group health plan disclosures?**

Generally, electronic disclosure processes (such as e-mail) are capable of tracking whether recipients receive notices, and as noted above, the safe harbor already requires plan sponsors to take appropriate and necessary measures to ensure actual receipt of electronic disclosures. Therefore, the Business Group does not believe that additional rules for time-sensitive group health plan disclosures are necessary.

- 22. Do spam filters and similar measures used by non-workplace (personal) e-mail accounts, pose particular problems that should be taken into consideration?**

The Business Group does not think that spam filters and similar measures for personal e-mail accounts pose any greater problems than those for workplace e-

mail accounts. In some cases, workplace spam filters are more restrictive than those for personal e-mail accounts. As noted in the response to #21, e-mail systems generally are capable of tracking whether recipients receive notices, and a plan sponsor that received notification that a spam filter or other measure blocked a plan disclosure would be able to take additional measures to ensure receipt.

**23. What is the current practice for confirming that a participant received a time-sensitive notice that requires a participant response?**

Business Group members use a variety of methods to confirm receipt of time-sensitive notices. However, the Business Group believes that any confirmation requirements for electronic notices should be no more stringent than those for paper versions.

**24. What are current practices for ensuring that the e-mail address on file for the participant is the most current e-mail address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?**

Business Group members use a variety of methods to confirm that e-mail addresses are current. The Business Group believes that any requirements related to updating e-mail addresses should be no more stringent than those for updating home addresses once participants cease employment with a plan sponsor. As noted in the response to #22 above, e-mail systems generally are capable of tracking whether recipients receive notices, and a plan sponsor that received notice that an e-mail was undeliverable (due to an incorrect e-mail address or otherwise) would be able to take additional measures to update the address or ensure receipt.

**25. What costs and benefits are associated with expanding electronic distribution of required plan disclosures? Do costs and benefits vary across different types of participants, sponsors, plans, or disclosures? Are the printing costs being transferred from plans to plan participants and beneficiaries when information is furnished electronically?**

The Business Group believes that expanding electronic distribution of required plan disclosures would allow employer-sponsored plans and participants opportunities to realize more administrative efficiencies and cost savings. These cost savings would allow employers to more easily maintain benefit programs and potentially add benefits for employees. As participants increase use of electronic media, electronic disclosure will likely also become a more effective method for providing required plan disclosures. The costs and benefits will likely vary across different types of participants, sponsors, plans, and disclosures.



- 26. If electronic disclosure were the default method for distributing required plan disclosures, and assuming “opting out” were an option, what percentage of participants would likely “opt-out” of electronic disclosure in order to receive paper disclosures? Should participants be informed of increased plan costs, if any, attendant to furnishing paper disclosures at the time they are afforded the option to opt out or into an electronic disclosure regime?**

Group health plans should have the option of informing plan participants of increased plan costs associated with furnishing paper disclosures and charging a nominal fee for paper disclosures. Providing this information would be consistent with requirements in the Patient Protection and Affordable Care Act aimed toward informing participants of the cost of their benefits (such as reporting cost of health coverage on Forms W-2).

- 27. Do participants prefer receiving certain plan documents on paper rather than electronically (e.g., summary plan descriptions versus quarterly benefit statements), and what reasons are given for such preference? Would this preference change if participants were aware of the additional cost associated with paper disclosure?**

Some participants prefer receiving plan documents such as summary plan descriptions on paper rather than electronically. We believe that this preference is largely the result of habit. As more participants become familiar with using electronic media, we believe any preference for paper documents will diminish.

- 29. Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure?**

Generally, there does not appear to be a substantial difference in efficiency between sending an e-mail with a disclosure attached and sending a link to a Web site. Likewise, neither method appears to substantially increase the likelihood that a worker would receive, read, retain, and act upon a disclosure. However, sending an e-mail with a link to a secure Web site is likely more secure than sending an attachment.

- 30. Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?**

Employee benefit plans would benefit significantly from a single electronic disclosure standard. For the reasons described in the response to #11 above, such a uniform standard would allow maximum efficiency and cost savings when preparing and processing plan disclosures and would minimize potential

confusion for plan participants. These efficiencies and cost savings would allow more funds for employees' plan benefits.

Again, thank you for the opportunity to express the concerns of the business community and employer-sponsored health plans regarding electronic disclosure. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012, if you would like to discuss our comments in more detail.

Sincerely,

A handwritten signature in black ink that reads "Helen Darling". The signature is written in a cursive, flowing style.

Helen Darling  
President

cc: Thomas M. Hindmarch, Employee Benefits Security Administration, U.S.  
Department of Labor  
Amy Turner, Employee Benefits Security Administration, U.S. Department of  
Labor  
Beth Baum, Employee Benefits Security Administration, U.S. Department of  
Labor