



June 6, 2011

**Submitted via [www.regulations.gov](http://www.regulations.gov)**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave. N.W.  
Washington, DC 20210

Re: **RIN 1210-AB50**  
***Request for Information Regarding Electronic Disclosure by Employee Benefit Plans***

Dear Sir or Madam:

UnitedHealth Group appreciates the opportunity to provide the Employee Benefits Security Administration (EBSA) with our comments in response to the Request for Information (RFI) regarding electronic disclosure by employee benefit plans.

UnitedHealth Group is dedicated to making our nation's health care system work better. Our 87,000 employees serve the health care needs of more than 75 million Americans, funding and arranging healthcare on behalf of individuals, employers and government, in partnership with more than 5,300 hospitals and 730,000 physicians, nurses and other health professionals. Our mission to improve health care in America is built on three platforms: technology, information and affordable, quality clinical care. Electronic communication is critical to optimizing all three.

Various sources, including the U.S. Health Care Efficiency Index, identify approximately \$30 billion in savings opportunities through the increased adoption of electronic administrative transactions and the related administrative efficiencies. Our role as a national leader in both private and public health benefits programs and services enables us to continuously foster innovative health solutions aimed at creating a modern health care system that is more accessible, affordable and personalized for all Americans. We offer these comments based on our experience in developing and delivering innovative solutions through our electronic health record and health information exchange technologies, as well as our health plan offerings in the commercial, Medicare, and Medicaid markets across the country.

We commend the EBSA for reviewing its electronic disclosure safe harbor with the goal of expanding the standard to take into account technological "best practices" and the need to protect the rights of plan participants and their beneficiaries. Expanded use of electronic communications has the potential to improve consumer health by providing more timely, accurate and comprehensive information about group health plans, as well as access to

information about the quality and cost of care. Additionally, expanded use of electronic communications will reduce the costs of sponsoring a group health plan and support the greening of America through reduced use of paper.

EBSA framed the RFI, in part, on Executive Order 13563<sup>1</sup>, *Improving Regulation and Regulatory Review* (the Order). The Order noted that some sectors of the economy face “regulatory requirements, some of which may be redundant, inconsistent, or overlapping” and called on the agencies to increase coordination, “thus reducing costs and simplifying and harmonizing rules.”

To address such concerns, the Order noted the need for “integration” between agencies and conflicting rules, overall “flexible approaches,” sensitivity to environmental concerns and adoption of rules that drive “innovation.” The regulation of electronic communications is one area where group health plans face inconsistent and overlapping rules. Reforming these rules and adopting more “flexible approaches” will spur innovation, positively impact the environment and reduce costs for health plans and plan participants.

We have provided detailed comments in response to the RFI, focusing on those questions where we have expertise and experience (see enclosure). Although there are many questions, our answers share common themes concerning welfare benefit plans, which we believe provide the basis for revising existing rules, consistent with the Order’s principles.

- **Establish standards that promote greater use of technology, consistent with other important initiatives to modernize the health care system.** Federal law, such as the Patient Protection and Accountable Care Act (PPACA), the American Recovery and Reinvestment Act and the Health Insurance Portability and Accountability Act (HIPAA), promotes improved and sustainable consumer experience through greater use of technology to expand access to affordable, quality care. Adoption of technology and the use of information is the basis for increased use of electronic health records; the move to the X12 Version 5010 for HIPAA’s Transaction and Code sets; adoption of ICD-10; development of health information exchanges; expanded use of evidence-based medicine, measurement and rewards for its use; and, even detection of fraud, waste and abuse. Group health plan communications should move in sync with these developments by adopting a flexible approach to electronic delivery.
- **Revise current rules to presume electronic communication and allow opt-out for paper delivery, given the prevalence of access to the Internet.** Consumers are deeply engaged with electronic communication as evidenced by the 77 percent of Americans with access to the Internet. Given this, present rules should be modified to create a presumption in favor of electronic communication unless there is an appropriate opt-out. Consumer preference and behavior patterns, environmental concerns, technological advancement and cost savings all justify this approach.
- **Recognize that electronic delivery transmits important information more quickly and effectively than paper notices.** Consumers benefit more from electronic media than paper. Electronic media is faster and more effective at providing consumers with notice that documents are available for review. This is especially true given the prevalence of continuous access websites to deliver information. Notice can be issued electronically,

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<sup>1</sup> Exec. Order No. 13563, 76 Fed. Reg. 3821 (2011)

providing a link or links to directly access documents posted to the website. As with EBSA rules regarding pension plans, such notices could also include information about obtaining paper copies free of charge.

- **Recognize the enhanced confidentiality protections afforded by electronic delivery of health information.** Consumer privacy rights are vulnerable when surface mail is used. While federal privacy laws (HIPAA) may place restrictions on communications to prevent, for example, a spouse or parent from accessing sensitive personal health information (PHI), those efforts to protect privacy are not as effective when paper notices are mailed to a household. Using electronic media, PHI can instead be posted to continuous access websites, along with notice and a link to the posting. Access to the information can be password-protected.
- **Pursue consistency across regulatory bodies to create an enhanced consumer experience.** In order to create the synchronized approach contemplated by the Order – and to create a standard consumer experience – we urge the EBSA to establish rules that can be adopted for those group health plans regulated by the EBSA and other state and federal agencies. Also, we urge the same kind of regulation across all forms of health plans, such as insured group health plans. While we do not believe that the EBSA should be deterred in adopting more flexible rules immediately, even if other constituencies can not be persuaded, we do believe that long-term modernization would be supported by collaboration with other federal agencies and the National Association of Insurance Commissioners.

By harmonizing the present rules with the more flexible ones already in use under the Employee Retirement Income Security Act (ERISA) and other laws, EBSA would adopt the important concepts of integration and innovation required by the Order. These revisions would contribute to the health system modernization envisioned by recent federal laws, positively impact the environment by reducing paper usage and move us toward the triple aims of affordability, access and quality. We are convinced that plan participants and beneficiaries are interested in adopting electronic delivery methods and greener alternatives to paper communications. As further explained in our response to the RFI's specific questions, electronic plan materials are more convenient, secure and useful for individuals than traditional paper communications.

Thank you for the opportunity to submit comments on behalf of the 75 million consumers we serve. Given the complex issues under consideration, we request that the EBSA work with affected parties to explore solutions. Please do not hesitate to contact me if you have any questions about the information in this letter or its enclosure.

Sincerely,



Thad C. Johnson  
General Counsel  
UnitedHealthcare Employer & Individual

Enclosure

## **Request for Information Regarding Electronic Disclosure by Employee Benefit Plans**

### **Access & Usage: Questions 5 through 8**

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

The need to protect the privacy and security of health plan communications shapes the method of delivery of electronic communications. Rather than transmitting notices and other documents containing personal health information (PHI) via email with attachments, group health plans that employ electronic delivery commonly post the information on secure, continuous access websites and provide notice at the time of the posting. This approach to document delivery protects the privacy of the information because access to the website is password-protected.

Password-protected websites offer more privacy protection than written notices mailed to a household. While federal privacy law (e.g., HIPAA) may allow individuals to place restrictions on the issuance of Explanations of Benefits (EOBs) and other communications to prevent, for example, a spouse or parent from accessing sensitive PHI, those efforts to protect privacy are not as effective when paper notices are mailed to a household. This is because any person in the household can open the mail and read the contents of the notice.

In its group health plan business, UnitedHealth Group currently introduces electronic information via registration on our web portal, as an opt-in option to online delivery of personal health documents. The website is promoted through open enrollment activities and the provision of new materials to covered persons. Information and required disclosures will also be sent when an appropriate request is received via the call center listed on our health plan ID cards. After election of online delivery, we send notice via an email when a health statement, EOB or claim letter has been posted, with a link to the website. At the website, login is required based upon the password chosen at registration. Beyond privacy and access compatibility, this approach organizes the data in a user-friendly format that allows for EOBs and other required notices to be instantly retrieved when needed and stored for future reference. Access to the websites also connects the participant to a host of benefits and healthy living information of the type discussed below.

**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?**

The most significant barrier to increasing the use of electronic media by group health plans is the narrow scope of the existing safe harbor. The safe harbor provides group health plans with a limited ability to issue communications in electronic form, generally only after obtaining affirmative consent from each participant and beneficiary and issuing a notice for each document. This standard does not allow for broad adoption of electronic media by group health plans. For example, even if the plan sponsor elects to have its participants receive electronic communications, or if participants consent to receive electronic plan

communications, each beneficiary must also still consent for the plan to be compliant. The consent requirement, in particular, does not leverage the latitude given federal agencies under E-SIGN.<sup>2</sup>

Additionally, the safe harbor conflicts with other laws that apply to group health plans. Compliance with the ERISA safe harbor does little to provide plan sponsors with meaningful assurance that they will not be found in violation of state laws that impose different, and sometimes conflicting, requirements. State laws that affect disclosures by group health plans are contained in insurance codes, the published opinions of state insurance commissioners and other laws that regulate insurance, privacy and are otherwise designed to protect consumers. In addition, there is inconsistency with other federal laws as recognized by the EBSA in the RFI.

Our experience has found that electronic delivery of plan information plays a critical role in encouraging participants and beneficiaries to be actively engaged in their overall health and wellness. Through increased visits to the web portal, often prompted by emails notifying members about the availability of a new plan document, there is increased likelihood of engagement and interaction with tools to manage benefits and wellness resources and information. Such tools include those that provide the latest on network provider participation; physician quality designation; treatment cost estimators; health and welfare advice; and preventive care information.

**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?**

Yes. UnitedHealth Group's experience with its web portal has found that once participants and beneficiaries log onto the website and familiarize themselves with its content, they are much more likely to educate themselves about ways to avoid disease and improve health. We have found that participants and beneficiaries who access the web portal are more likely to learn about and participate in wellness programs, health coaching and disease management programs than those participants who do not log onto the portal. Participation in these types of wellness programs improves health and lowers health care costs.

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

Yes. Laptop and desktop computers connected to the Internet are the most common technology used to disseminate electronic plan communications today. As 2010 census data indicates, more than 77 percent of American workers have access to this technology either on the job or at home. In addition to this technology, members are increasingly accessing information, including plan information, through mobile phones or tablet computers. Smart phone technology is already in place to access financial information from banks and other financial institutions and is being developed increasingly as a tool to manage health care information and delivery.

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<sup>2</sup> Electronic Signatures in Global and National Commerce Act, P.L. 106-229, 114 Stat. 464 (2000)

Covered persons will benefit from the use of evolving technologies because it allows for health plan information to be available at the point of service, including at the physician's office or pharmacy. For example, participants in UnitedHealth Group's standard medical options can now access our web portal at any time. Compatible with most smart phone browsers, our mobile web portal application allows participants to view claims, check spending account balances, search for doctors and map their locations, and find deductible and out-of-pocket amounts. Participants can also pull up an electronic image of their health plan ID card and fax or email a copy to their provider directly from their phone.

We urge the EBSA to consider smart phone technology, as well as more traditional forms of electronic communication, as it considers the ways in which to increase the use of electronic plan communications.

### **General Questions: (Questions 9 through 15)**

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

Yes. The electronic disclosure safe harbor should be revised to allow group health plans to deliver plan information through continuous access websites without having to obtain consent from each participant and beneficiary. This approach to plan communication (combined with appropriate notice) will encourage participants and beneficiaries to visit the websites hosted by group health plans, providing them with health benefits education. Participants and beneficiaries who have received education about their plan features will be more likely to learn about and participate in wellness, health coaching and disease management programs, thereby improving their health and reducing the cost of health care.

Password-protected electronic delivery systems: (1) are more effective in protecting member privacy; (2) provide users with electronic storage of notices and other plan documents, which enhances the document's utility, and (3) eliminate the time lag, cost and environmental impact associated with the need to print and mail paper documents.

In addition to improved consumer experience, use of electronic documents reduces the cost of plan sponsorship. We estimate that the average cost of mailing a one page document, including the paper, postage and envelope, is about \$0.53 per mailing. The cost of electronic document delivery, including posting the file and issuing an email notifying the individual of the posting of a one page document, is less than \$0.01. The cost savings associated with the use of electronic delivery of plan documents reduces plan administrative costs and thus the expenses of plan sponsors and consumers.

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

The existing safe harbor assumes that paper delivery of plan notices and other communications is the norm and that use of electronic delivery is the exception. Given that more than 77 percent of Americans now have access to the Internet either on the job and/or at their homes, we believe EBSA should modify the safe harbor to further encourage use of electronic disclosure. Following are specific suggestions that could promote electronic disclosure:

- *Electronic communication as the default.* The present rules should be modified to create a presumption in favor of electronic communication unless there is an affirmative opt-out because there is no “effective ability,” using the concepts employed by the Internal Revenue Service (IRS), to access electronic commerce. The benefit for covered persons includes a reduction in the administrative costs that drive premium expenses. As the Office of Personnel Management (OPM) recently noted, the use of electronic communications in place of mailing health insurance brochures saved, just with that singular action, \$5 million in premium expenses.

Under the IRS’ rules,<sup>3</sup> plans must confirm the “effective ability” to access the electronic medium, and the opt-out approach would provide evidence of the inability to meet that standard. Adoption of such an approach would also harmonize with EBSA’s own rules impacting pension plans.<sup>4</sup> EBSA guidance allows pension plans to meet their benefit statement and annual funding notice requirements electronically without obtaining affirmative consent from participants when participants have continuous access to plan information from secure websites.

- *Notice.* Electronic media is faster, and thus more effective, for participants and beneficiaries at providing notice of the availability of documents, especially given the prevalence of continuous access websites to deliver information. Appropriate notice should be in electronic form and, if feasible, the notice would provide a link to access the posted document available to facilitate delivery.

As with EBSA rules regarding pension plans, such notices could also include information about obtaining paper copies free of charge if desired by the consumer. This type of approach would be consistent with the electronic disclosure rules used by the Securities and Exchange Commission concerning the notice and delivery of mutual fund prospectus.

- *Participant Status.* If the participant in a plan receives electronic communications, then such status should control for all family members (spouse, children) receiving benefits under the coverage, subject to appropriate exceptions as discussed below. This approach would reduce the administrative costs associated with determining which family members receive documents in electronic form, as opposed to paper form. Password technology can be utilized to protect the privacy of family members and other dependents with each family member choosing his or her private password.
- *Inbox Overload.* The safe harbor requires issuance of a notice to participants and beneficiaries each time an electronic document is delivered. In the case of a participant who covers multiple beneficiaries receiving care over a given period of time, this means that the participant receives a large number of email notices. Many times these multiple notices are unnecessary and unwanted. In the case of disclosures where a notice is necessary, EBSA should revise the safe harbor to: (1) allow plans to issue a monthly reminder to the member to review plan notices or other communications and (2) allow participants to opt out of the future receipt of email notices.

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<sup>3</sup> Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, 26 CFR 1.401(a)-21

<sup>4</sup> Field Assistance Bulletin No. 2006-03

- *Restrict Opt-Out.* While it is appropriate to allow for the election to receive individual documents in hard copy, the safe harbor should limit requests to receive documents in paper form when there is access to technology and the Internet. In such situations, the ability to opt out of electronic communication should be limited to the specific document requested, consistent with the IRS electronic media regulation issued under section 104(b) of the E-SIGN Act<sup>5</sup>. A revised safe harbor should clarify that once the specific document has been printed and mailed, all future group health plan communications will be disseminated electronically.

For those without access to technology and the Internet the safe harbor should allow an opt-out of electronic delivery methods for all or a class of documents. Such decisions can be initially communicated during enrollment and at any time thereafter, consistent with reasonable plan procedures. Additionally, it may be appropriate to employ opt-out rights in limited situations such as an employee leaving employment if the employee has no other means of accessing electronic communications, a divorce or separation, or when a Qualified Medical Child Support Order (QMCSO) may be in place.

- *Enhanced Regulatory Consistency.* EBSA should work across jurisdictional lines and collaborate with state agencies and departments of insurance, the Departments of Health and Human Services (HHS) and Defense, the IRS and OPM to issue an electronic delivery regulation that will apply to all group health plans affected by PPACA. Any group health plan, including ERISA plans, non-federal governmental plans, federal government plans, church plans, student services plans and plans for members of the military and their families should be able to utilize a revised electronic delivery standard. This uniform approach to group health plan regulation would eliminate regulatory “silos” and reduce the costs of plan administration by allowing the industry to formulate universal approaches to health benefits communication.

**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?**

EBSA has issued guidance that facilitates electronic communications by pension and other retirement programs. The approach taken by EBSA for pension benefit statements and funding notices eliminates the consent requirement provided the information is available to participants and beneficiaries via a continuous access website, consistent with the Section 104 exemption found in E-SIGN. By relieving pension plan sponsors of the requirement to obtain consent, the government has reduced the costs of pension plan sponsorship, which benefits employers and working Americans alike. Based on this experience, UnitedHealth Group believes that the regulatory relief provided to pension plans should be extended to all group health and other welfare benefit programs.

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<sup>5</sup> (d) Authority To Exempt From Consent Provision. (1) In general.--A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.



**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?**

While a uniform rule allowing for the electronic delivery of plan communications will be effective, it is appropriate to tailor the disclosure rule to the type of communication. For example, participants may only need an annual notice that their Summary Plan Description (SPD) or provider directory is posted on the plan's secure website. If there is a material change in the document, a notice should be issued.

In the case of other documents that are time-sensitive, such as adverse benefit determinations (commonly known as an EOB) or continuation of coverage notices under the Consolidated Omnibus Budget Reconciliation Act (COBRA), where a participant may have to take action (e.g., file an appeal, elect to continue coverage), procedures should be in place to remind the participant via email to check the website for the time-sensitive information. Opt-outs of notice requirements should be permitted. .

**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?**

We recognize there are classes of recipients where special considerations should be taken into account under a revised electronic delivery safe harbor. We urge the EBSA to be flexible and avoid a one-size-fits-all approach. As noted above, we believe individuals should be free to continue to receive their documents through password-protected electronic document delivery, as it is: (1) more secure from a privacy perspective because paper mailings can be opened by any individual in the household: (2) more timely, eliminating the lag time associated with the delivery of documents via the postal service: and (3) more convenient because electronic documents are automatically filed in an organized manner, facilitating document retrieval by the participant or beneficiary.

Given these considerations, we urge EBSA to continue allowing the electronic delivery of documents, even in the case of COBRA notices, HIPAA Certificates of Credible Coverage, coverage termination notices, and other similar documents issued to continuing or former employees. It is true that COBRA beneficiaries have a short period of time within which to make their benefit election, but the speed of electronic communications actually supports the use of electronic COBRA notices, when the former employee provides a new email address and requests electronic delivery.

In the case of time-sensitive documents, there are systems used today which provide group health plans with confidence that email notice of a time sensitive document has been successfully delivered. This would include email systems with "bounce back" technology that instantly informs the plan administrator of failures to transmit the information.

**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, email, 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).**

Secure, continuous access websites offer real advantages for those involved in employee welfare benefit plans. Documents may be posted in a secure format, ready to be accessed and used by participants or beneficiaries at their convenience. We agree that group health plans should issue a notice about the information available on the website, as well as how to access the information.

In the case of the SPD, Certificate of Coverage (COC) or provider directory, for example, we believe that an annual notice to the member regarding the posting of the document on the plan's secure website should be sufficient. If there is a material change in the document, a notice should be issued. This method of delivery would also be appropriate for required notices, such as HIPAA, Women's Health & Cancer Rights Act or the Newborns' and Mothers' Health Protection Act notices.

Time-sensitive documents, such as health plan EOBs and COBRA election notices, may require more frequent notice. Again, opt-outs should be permitted.

**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.**

We believe that there should be an assumption in favor of electronic communication. If participants covered by a plan do not wish to receive certain electronic communications, it is reasonable to require that they opt out if they do not have the effective ability to access electronic communications. Delivery of a notice to a participant (subject to limited exceptions) should be presumed to serve as notice and delivery for the spouse, other family members or dependents (each of whom would have their own password-protected access to the document, subject to all privacy and electronic access laws.). Such an approach would allow each participant the ability to opt out.

**Technical Questions: (Questions 17 through 21; 23 through 30)**

**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?**

A presumption should exist that electronic communication will be used, subject to opt-outs based upon no effective ability to access to appropriate technology and the Internet. Additionally, when the presumption applies, the ability to opt out of electronic communications should be limited to the specific document in question. Where there is no access to technology or the Internet, entire opt-outs of electronic delivery should be allowed.

Additionally, opt-outs should also be permitted in limited circumstances such as: (1) an employee separates from employment if the employee has no other means of accessing electronic communications; (2) a divorce or legal separation where a spouse or other beneficiary no longer resides in the same household as the participant; and, (3) when QMSCOs are in place.

**18. The Department’s current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work email accounts?**

The current regulations do not allow for electronic delivery of plan materials when there has been a change in hardware or software that creates a material risk that the individual will not be able to access or retain electronically furnished materials. Advances in technology have not changed the effectiveness of this protective standard.<sup>6</sup> Retirees and participants with no “effective ability” to access email accounts may present special challenges for an electronic delivery rule. A revised safe harbor could allow these individuals to opt out of electronic document delivery entirely.

**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.**

The requirement that plans obtain affirmative consent prior to the use of electronic delivery methods impedes electronic advances in two ways. First, it creates the presumption that all documents must be delivered in paper form and requires the plan to obtain affirmative consent prior to moving the participant or beneficiary to electronic methods. It is costly and time consuming for plans to obtain individual consent from large numbers of participants and beneficiaries. Many participants are unable to benefit from electronic delivery methods and the enhanced engagement with plan technology due to their failure to opt in.

EBSA and the Congress recognized this phenomenon when they created automatic enrollment provisions for 401(k) and health plans. Automatic enrollment changes the enrollment assumptions for these plans so that participants are assumed to participate in the plan unless they actively elect not to do so. We believe this is a very similar situation from a benefits perspective. Participation in electronic delivery systems will be greatly enhanced by changing the presumption.

Second, unlike the E-SIGN Act, the EBSA’s affirmative consent requirement appears to allow for indefinite opt-out of electronic delivery methods. While we agree there should be some mechanism for opting out of electronic delivery for a specific document, we do not

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<sup>6</sup> 29 CFR 2520.104b-1(c)(2)(D)

believe the opt-out should be open ended or of unlimited duration when the participant has access to technology and the Internet. We continue to believe that a limited opt-out is a better approach in a revised safe harbor.

**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)?**

For cancellation notices or other time-sensitive documents, electronic communications are preferred because they are faster than paper mail and “bounce back” technology instantly informs the plan administrator of failures to transmit the information. Traditional mail is slower and, except for return receipt mail, does not inform the sender of a delivery failure.

In addition, password-protected electronic communications are more private than paper communications. To the extent EBSA is concerned with protecting the privacy of family members of the employee-participant, it is worth noting that secure websites in use today protect the privacy of other family members covered under the plan through the use of passwords.

**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?**

The existing safe harbor protects individuals who need to receive time-sensitive information. The safe harbor requires that the plan administrator take “appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents” results in actual receipt of transmitted information.<sup>7</sup> To comply with that strict standard, the safe harbor requires that plans use systems that provide a notice of undelivered email that alerts the plan administrator of a faulty transmission. It is appropriate to issue time-sensitive disclosures electronically because they are delivered faster and more securely than surface mail due to advances in email technology.

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

Group health plans have email systems that ensure that the appropriate individual receives time-sensitive notices consistent with the requirements of the safe harbor. It is common for plan administrators to use systems equipped with “bounce back” technology that provide an instant alert if there has been a failure to transmit the notice. After a defined number of failed attempts at electronic delivery, the practice is to revert to surface mail.

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<sup>7</sup> 29 CFR 2520.104b-1(c) (1)(i)(A)

Receipt confirmation for non-member specific documents that are posted on a continuous access website should not be subject to this requirement. An annual reminder to check the group health plan's website for information should be sufficient.

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

We obtain email addresses upon registration for the plan web portal. We also send e-prompts to confirm current email address every three months. Should an email bounce back indicating non-delivery, a postcard is sent to the street address indicating that an important document is available on-line and reminding of the need to update the email address to ensure successful delivery in the future.

In the case of employees who have separated from employment or transferred, but have access to the Internet from home or another location, email addresses can be updated by the individual through the web portal. The web portal would also obtain updated information through routine requests every three months seeking confirmation of their email address.

**Comments Regarding Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act (Questions 25-26, 28-30)**

**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 participant and beneficiaries when information is furnished electronically?**

The costs of posting documents and issuing email notices are modest compared to the costs of printing and mailing plan communications. Employers that purchase computers, laptops and smart phones for their workers have already made the investment in technology. Given this, it is difficult to argue that these costs are being transferred from plans to participants and beneficiaries. Moreover, there is no need to print documents since continuous access websites store all documents for users.

We estimate that the average cost of mailing a one page document, including paper, envelope and postage, is about \$0.53 per mailing. The cost of electronic document delivery, including the posting of a file and issuance of an email notifying an individual of the posting of a one page document, is less than \$0.01 per document. The cost savings associated with the use of electronic delivery of plan documents reduces administrative costs and thus the expenses of plan sponsors and consumers.

**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?**

Given the widespread use of the Internet and the benefits associated with electronic communication, we would expect the number of “opt-outs” to be small. It may be appropriate to provide individuals with information about how electronic distribution can reduce plan administrative costs and have a positive environmental impact. In 2010, UnitedHealth Group’s Go Green initiatives saved 11,922 tons of paper, through increased electronic communications to our employer customers, members, brokers and network physicians.

**28. What impact would expanding electronic disclosure have on small plans? Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?**

Employers of all sizes should be able to benefit from their investments in technology and Internet access. Costs associated with printing and mailing plan communications are reduced when economies of scale are present. Because of this, smaller group health plans pay more than larger plans for paper delivery methods on a per unit basis. The need to reduce costs on the part of small employers and their service providers is another policy reason to expand the use of electronic delivery methods.

**29. Is it more efficient to send an email 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?**

The need to protect the privacy and security of health plan communications shapes the method of delivery of electronic communications. Rather than transmitting notices and other documents containing PHI via email with attachments, group health plans most commonly post the information on secure websites and provide notice to the covered person at the time of the posting.

This approach to document delivery protects the privacy of the information, but also organizes the data in a user-friendly format that allows for EOBs and other required notices to be instantly retrieved, read and retained as necessary. The ability of individuals to retain electronic documents via a secure website means that they are more likely to refer to the communication and act upon it. In addition, storing documents on a secure website minimizes the impact that electronic file transmission may have on employers’ electronic storage and email systems.

**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?**

Group health plans would benefit greatly from a single electronic disclosure rule. Use of a single rule would streamline plan administration, reducing the cost of plan sponsorship and benefiting employers and their workers. As group health plans become familiar with a revised electronic disclosure rule, we expect they will include additional information on their websites that further the goals of health benefit education. These materials will raise

awareness of the need to engage in healthy lifestyles and would encourage participation in wellness programs, improving health and reducing illness and disease. Continuous access websites also allow group health plans to provide significantly greater health benefits education materials than what would be possible with paper methods.

For example, UnitedHealthcare's web portal contains information to assist individuals in the following: exploring treatment options; estimating the costs of plan options using the *Plan Cost Estimator*; communicating one-on-one with a nurse using *Live Nurse Chat*; using the *Personalized Health Record* to organize health data; obtaining a personalized *Health Assessment* and participating in online health coach programs that help set goals and achieve health objectives.