June 1, 2011

Attention: E-Disclosure RFI
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N–5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information (RFI) Regarding Electronic Disclosure by Employee Benefit Plans (RIN 1210–AB50), published on April 7, 2011, in the Federal Register

To Whom It May Concern:

Thank you for the opportunity to comment on the RFI.

Based in Coldwater, Michigan, Infinisource, Inc. is a payroll and benefit administrator that provides administrative services related to payroll, flexible benefits (including Health FSAs, Health Reimbursement Arrangements [HRAs], online benefits enrollment and eligibility and Health Savings Accounts [HSAs]), COBRA and HIPAA.

Our client base numbers more than 15,000 employers nationwide. In the first three months of 2011, we sent 139,592 COBRA notices; for all of 2010, we sent 579,901 COBRA notices, and in 2009, a big ARRA year, our COBRA notice total was 714,918.

We want to applaud the EBSA for seeking to update rules relating to electronic disclosures. In our view, the never-ending march of technology is such that all major benefit plan disclosures will someday soon be electronic for four basic reasons:

- the increased speed with which important notices can reach their intended recipients
- the reduced cost of administration (e.g., printing and mailing)
- the increased occurrence of participants throwing away important benefits disclosures along with "junk" mail
- the greater ease of recipients to forward and send the disclosure to others that they believe need access

We would like to address two types of communications in this letter:

- COBRA required notices (e.g., General, Election, Unavailability, Early Termination, Insignificant Premium Shortfall)
- ERISA plan required disclosures (e.g., the Summary Plan Description [SPD] and Summary of Material Modifications [SMM])

In summary, our view is that the two overriding concerns expressed in 29 CFR §2520.104b-1(c)(1) – ensuring actual receipt of the transmitted information and protecting the confidentiality of personal information – can be achieved without the rigorous requirements in that regulation.

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The following is input on various questions in the RFI:

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

Our COBRA and flexible benefit participants have free access to needed account and payment information via an encrypted website with unique user identification. In addition, once consent is obtained over the phone, we sometimes e-mail information to the participant to a directed e-mail address. We also have the ability to send e-mail communications with a link to a secure website that has unique user identification or with an encrypted, password-protected attachment.

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?

A significant impediment is the rigorous safe harbor procedure for obtaining and maintaining participant consent in 29 CFR §2520.104b–1(c)(2). Employers need a simple and effective framework for obtaining such consent on a uniform basis. Developing systems to track the exceptions to the rule is cumbersome. To be fair, the Department of Treasury's electronic disclosure rules (26 CFR §1.401(a)-21), while broader in scope, are also challenging for many plans.

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

Yes, the safe harbor should be revised. Currently, few employers utilize the safe harbor in benefit communications, and the current rubric makes it impracticable to send electronic disclosures in the COBRA context.

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

Section (c)(2)(i) seems to address participants who are current employees. The current rules require computer access at all work locations and are limited to those employees whose access is an integral part of their work duties. This is too limiting. As long as an employee consents to electronic disclosures, electronic access can be assumed – via computer or other electronic device either at home or at work. That should be sufficient. This consent can occur in the form of a model consent notice (which captures the participant's primary e-mail address and a second e-mail address if the first one is through the employer) and the participant deciding not to opt out of electronic disclosures.

Section (c)(2)(ii) seems to address all other participants that do not fall under §(c)(2)(i). The current rules require affirmative consent, demonstration of ability to access electronic

information, a disclosure statement, reservation of the right to obtain a paper copy, a second procedure if hardware or software requirements change, including a second consent. This is too cumbersome. It would seem that if a participant consents to electronic disclosures (again, having received a model consent notice and deciding not to opt out), that should be sufficient. The participant should take responsibility for checking e-mail and ensuring that electronic disclosures are not blocked by any spam filtering.

In other words, we see no need to create two separate classes of individuals. The revised safe harbor could simply follow this procedure:
(1) provide a model consent notice,
(2) once consent is received, disclosures are sent electronically,
(3) the onus is on the participant to keep the plan informed of a change in address, withdrawal of consent or a desire to receive a paper copy.

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?

Yes, the safe harbor should have an additional requirement for disclosures (e.g., COBRA election notice) that require participant action within a certain time frame. Infinisource employs a work process for electronic reports to employers, where the e-mail directs the recipient to a protected Download Center. Our Download Center allows us to monitor whether or not the document has been opened by the recipient. If the document is not accessed within a certain time frame (e.g., five business days), the disclosure is then printed and mailed. In our view, though, because the participant would have already consented to disclosures, the time frame for action should not be altered because of the participant's failure (perhaps, knowing and willing failure) to access the document electronically.

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?

No. A uniform rule will enable more plans to adopt an electronic disclosure process. As long as the participant has consented and not withdrawn the consent, that should be sufficient. In addition, electronic disclosures should be able to take advantage of the Single Notice Rule that currently applies to COBRA notices. Thus, a separate electronic disclosure should not be required for spouses and dependent children.

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.

As mentioned above, the administrative burdens are reduced if consent is assumed by the participant deciding not to opt out.

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?

No. Certainly, individuals with disabilities deserve a reasonable accommodation. Also, a January 2011 Pew Research Center study found that only 54 percent of disabled adults access the Internet, compared with 81 percent of non-disabled adults. However, the simple fact is that a disabled person without Internet access can simply opt out to electronic disclosures. Often, a disabled person has another individual (e.g., a spouse or other family member) to assist with Internet transactions. The study is located at: http://www.pewinternet.org/~/media//Files/Reports/2011/PIP_Disability.pdf.

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?

Yes, as described above, time-sensitive disclosures should have the requirement of a Download Center. If a document is not accessed within a certain time frame (e.g., five business days), the revised safe harbor rules should require the employer to send the disclosure via alternative means (e.g., regular mail) or contact the participant via phone to send the document as directed (perhaps to another e-mail address).

Disclosures that are not time-sensitive (e.g., SPDs and SMMs) should be satisfied by simple posting to an accessible website without the need for e-mail.

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

Spam filters do pose problems, but should be the responsibility of the participant who has consented to electronic disclosures. The model consent notice could make this point clear.

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

Please see our response above relating to a Download Center.

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?

Whatever system is used to generate a disclosure will typically have a field for e-mail addresses. The electronic disclosure should simply have a link so that the participant can notify the plan when the e-mail address is changing.

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?

In our view, very few participants would opt out of electronic disclosure.

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?

In this increasingly electronic world, our experience has been that participants overwhelmingly prefer electronic documents over paper ones. The SPD is actually a good example. It can be a bulky document (often exceeding 50 pages), making it a challenge to find needed information. An electronic version of the same document can utilize a search function and other features that make the information more readily available.

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?

Small plans are mindful of administrative costs. In addition, small employers often have very effective information communication channels for ensuring participants obtain necessary information. That is why a simple, straightforward safe harbor procedure with a model consent notice would be optimal for all plans, particularly small plans. Currently, few if any small plans have the time, resources or funds to invest in the technology required to comply with the current safe harbor rules.

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?

Sending an attachment can create issues with server space for a plan administrator (or third party administrator like Infinisource). However, plans should have the flexibility for deciding which method works best as long as they can meet the actual receipt and confidentiality standards in the current safe harbor rules.

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?

A single electronic disclosure standard is critical. We recommend a combined effort between the Departments of Labor, Treasury, and Health & Human Services (HHS) to ensure all disclosures follow the same rules. These collaborative efforts have proven very successful in providing guidance for laws like HIPAA and the Affordable Care Act. For example, HHS has oversight over governmental employers as well as Medicare Part D Notices of Creditable and Non-Creditable Coverage.

Here are some additional issues the Departments should clarify:

- Who needs to maintain the consent form and document, the employer/plan administrator or the third party administrator?
- What constitutes delivery?
- What procedures should be followed if an e-mail "bounces back?"
- Does a COBRA election period need to be extended if a qualified beneficiary does not open the election notice from a Download Center (again, Infinisource's position is that it should not because qualified beneficiaries could simply use this tactic to automatically extend the election period)?

We are encouraged by the prospect of increasing the number of electronic disclosures. While the savings may not be immediate, a simpler process has of the prospect of reducing significant plan costs, especially related to mailing. Over time, everyone will benefit if the revised safe harbor rules are flexible enough to make compliance a relatively easy endeavor.

We want to thank EBSA for this opportunity to comment on the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans. If you have any questions or concerns, please feel free to contact me or Connie Gilchrest, our Research and Compliance Specialist, who assisted with these comments, at 800-300-3838 or via e-mail at rglass@infinisource.net or cgilchrest@infinisource.net.

Thank you for your consideration.

Respectfully Submitted,

Rich Glass, JD
Chief Compliance Officer
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Via e-mail (sent to e-ORI@dol.gov)