



June 3, 2011

*Submitted electronically via the Federal Rulemaking portal @ [www.regulations.gov](http://www.regulations.gov)*

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

Dear Sir or Madam,

Subject: Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (RIN 1210-AB50)

Aon Hewitt appreciates this opportunity to respond to the Department of Labor's (DOL) request for information (RFI) regarding the safe harbor standards for the use of electronic media by ERISA plans to deliver information to participants and beneficiaries. Electronic technology is permeating the business world and individuals' private lives, making it appropriate to revisit the 2002 safe harbor standards. We support the DOL's openness to revising the current standards. As the DOL observes in its RFI, at this time, 88% of the 139.1 million private sector workers currently have Internet access themselves or reside in a household where someone else has access.

Businesses today, like the federal government, interact with a population that is increasingly accustomed to the efficiency of electronic communications and transactions. The forward-looking Government Paperwork Elimination Act (GPEA) reflects this reality. In its summary of GPEA, the Office of Management and Budget points out a valuable incidental benefit that occurs when agencies communicate electronically with the public: "a positive spillover effect into the rest of the agency as awareness of the agency's operations is improved." Likewise, when plans provide electronic information to participants and beneficiaries—such as by sending them a link to the employer's Web site which contains new and archived plan information—participants and beneficiaries deepen their knowledge of the range and details of their employment benefits.

For these and other reasons, Aon Hewitt believes the DOL should expand the safe harbor to allow default electronic delivery of benefit-related disclosures for a greater number of participants and beneficiaries, and to encourage "pull" rather than "push" delivery by posting disclosures on a continuous access Web site. Modernizing the current rules will result in improved convenience to participants and beneficiaries, lower costs to businesses and ERISA plans, a more efficient use of natural resources, and a "greener" workplace environment.

## **Who We Are**

Aon Hewitt is the global leader in human resource consulting and outsourcing solutions. We partner with organizations to solve their most complex benefits, talent, and related financial challenges, and improve business performance. Aon Hewitt designs, implements, communicates, and administers a wide range of human capital, retirement, investment management, health care, compensation, and talent management

strategies. As a market leader in benefits administration, Aon Hewitt delivers health care and retirement programs to more than 22 million participants and retirees, on behalf of more than 300 organizations worldwide.

Within Aon Hewitt, our Compliance Communication Center of Expertise has been helping clients with summary plan descriptions (SPDs) and other ERISA communications since 1974. Our Media Solutions team consults regularly with clients to discuss appropriate technology for resolving clients' business issues, focusing on immediate technology solutions while anticipating the next round of innovations. This team supports over 250 Web sites for mainly Fortune 500 employers. One out of every four client conversations with the Media Solutions team concerns the use of new media in communication. Both groups have contributed to our responses below.

## **Responses to DOL Questions**

Drawing on our relevant administrative and consulting experience, we are responding to 11 of the 30 questions in the DOL's RFI.

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

In our experience, the size, content, and purpose of the disclosure dictate the appropriate method of delivery. Large disclosures such as SPDs cannot be efficiently "bulk emailed" without encountering barriers such as firewalls and recipients' email capacity limits. Additionally, sending disclosures by unsecured email is inappropriate for sensitive or confidential information. Finally, the larger the email, the more likely it contains information that the recipient may want to archive for reference purposes.

For the reasons above, the preferred method of electronically furnishing sizeable documents is to post them on a continuous access Web site and then to notify participants and beneficiaries of the newly posted documents by postcard or by an email that includes a link to the Web site. This approach works well because: 1) it notifies participants and beneficiaries of a new document without concern for firewalls or limits; 2) the actual content of the disclose is kept confidential; and 3) the link in the notice reminds employees of the availability of online benefits resources which they can also use to conduct transactions, review other posted disclosures, or access educational information (the "positive spillover effect"). Posting disclosures on a centralized Web site makes employers, not participants, responsible for ensuring information is up-to-date and lets employers provide context and communication around the disclosures.

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

Five years ago, our clients were asking us to create interactive PDFs of their SPDs so employees could better navigate the copious content. Then came requests for SPDs in an HTML format, with its greater search, recordkeeping, analytical, and navigation capabilities. Today's demand is for mobile companions (i.e., delivery of communication to both a Web browser and handheld devices). We are planning for a steady increase in demand for delivery to handheld devices within the next three to five years.

The rising popularity of tablets, mobile phones, and personal digital assistants, etc., indicates a future where handheld devices may be the preferred means of accessing electronic information. Handheld devices allow near *continuous* access to electronic information, diminishing the need for desktop and laptop

computers, especially among individuals who can't afford both. This trend toward mobile technology suggests relaxing the safe harbor consent rules to permit e-disclosure to a larger population may result in greater convenience to participants and beneficiaries who are accustomed to getting all their information from their handheld devices.

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

We strongly believe the DOL's current safe harbor should be revised to accommodate evolving technology that enables participants and beneficiaries to access ERISA and benefits information more efficiently. Specifically, we recommend that a revised safe harbor:

- Expand the category of employees to whom plan sponsors can automatically provide electronic disclosures;
- Allow delivery of electronic disclosures to individuals who provide a personal email address, unless and until such individuals "opt out"; and
- Encourage continuous posting of certain documents, such as SPDs, as the preferred form of delivery to the two categories of individuals described in the above bullets (i.e., encourage "pull" rather than "push" disclosure in some instances).

Such revisions are desirable because:

- **Centralized location of benefits information is convenient for participants and beneficiaries.** Participants and beneficiaries are becoming accustomed to reviewing and managing their benefits via an electronic Web site (just as many Americans are also trending toward online banking).<sup>1</sup> Accordingly, it is more convenient for them to receive all, or most, benefits-related documents via a company Web site or in forms that can be saved in an electronic folder, rather than receiving some benefits information electronically and other benefits information via paper mailings. As many other commentators have noted, paper mailings are likely to be shelved and forgotten—or simply discarded outright. Providing benefits information via a single media that allows computer-using individuals collect, organize, archive, and review information as needed is a practical, streamlined approach to communication.

Aon Hewitt data demonstrates the popularity of managing benefits online. For example, the vast majority of defined contribution plan transactions in 2010 were conducted on a Web site rather than by calls to a customer service representative. The percentages suggest individuals who actively manage their retirement accounts generally prefer using the computer to do so.

**Defined Contribution Plan Transaction Data**

<b>2010 Defined Contribution Plan Transaction</b>	<b>Percent of Transactions Conducted on Web Site Rather Than by Telephone</b>
Change contribution rate	96.02%
Change investment elections	98.58%
Transfer/reallocate funds	96.76%

Source: Aon Hewitt 2010 data

<sup>1</sup> See "Online Banking 2006: Surfing to the Bank," Pew Internet and American Life Project. The survey shows that 43% of internet users (an even mix of men and women) were banking online in 2006.

In health plan enrollments, Aon Hewitt has seen a steady increase in the percentage of participants (including retirees) who prefer to do self-serve enrollments via a Web site, rather than calling a customer service representative for assistance. We believe the fact that the Web site contains detailed, searchable information about the plans contributes to this trend.

**Self-Service Enrollment Trends**

	<b>2003</b>	<b>2005</b>	<b>2007</b>	<b>2009</b>
Actives	81%	87%	87%	89%
Retirees	36%	35%	40%	45%

Source: Aon Hewitt 2003-2009 data

A specific example is the experience of a major U.S. retailer, who is an Aon Hewitt client. Approximately 80% of the retailer’s employee population does not use, and cannot access, worksite computers during their day-to-day jobs. Even so, in 2010, 93% of the retailer’s employee population chose to enroll online during annual enrollment. This suggests that many individuals without a worksite computer nevertheless are comfortable using computers to complete benefits-related transactions.

- **Electronic delivery allows participants and beneficiaries to locate information quickly.** Reviewing a document by specified search terms allows individuals to locate the information they are seeking quickly, just as they do in their personal lives using search engines such as Google.
- **Defraying administrative costs helps businesses and participants/beneficiaries.** In our experience, an average SPD costs \$8–\$15 to print and deliver. Employers spend tens of thousands of dollars in printing, fulfillment, and postage costs each year in order to satisfy current distribution rules. Very often, plan sponsors charge reasonable administrative costs to the plan, as allowed by ERISA § 404. With less expensive, electronic disclosure, more retirement plan assets will be used to pay out benefits.
- **Electronic delivery is environmentally responsible.** The amount of paper wasted in printing and distributing unread plan disclosures and notices is avoidable. For our clients, a full set of health and welfare and retirement SPDs is often between 500 and 1,000 pages in printed format. Generally, participants and beneficiaries are interested in reviewing specific sections of documents *at the time they need to make a decision*—which in many cases won’t be the time at which plan sponsors provide the documents. Thus, continually posting documents on a Web site where participants and beneficiaries can read and search them at their own convenience is a sensible alternative that also has an environmentally friendly impact.

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

We recommend the following revisions in order to expand the use of electronic delivery:

- a) **Adopt “reasonable access” standard for all active employees.** We strongly agree with the ERISA Advisory Council Working Groups’ recommendations that for the category of participants who are active employees, the electronic delivery standard should be relaxed from the “integral part of the employee’s duties” standard to a “reasonable access” standard. Such a standard is consistent with the “effective ability to access” standard the Internal Revenue Service recognizes as an exemption from the consumer consent requirements for electronic disclosures. (See Treas. Reg. § 1.401[a]-21[c]). In other words, we believe employers should be able to furnish ERISA disclosures to all employees who have reasonable access to the employer’s electronic information system in common areas of the workplace or establishment, just as they provide them to employees who access the employer’s

Web site as an integral part of their daily responsibilities. We suggest the safe harbor rules state that employees have “reasonable access” at a workplace or establishment<sup>2</sup> if three conditions are met:

- The employer issues the employee a work email address;
- The employee has reasonable access to a computer at the employee’s usual worksite or at the establishment to which physically dispersed employees report each day *or*, as part of the employee’s job function, the employee has reasonable access to a computer or has a handheld device which can connect to the employer’s Web site (e.g., through an electronic pad or telephone); and
- The employer makes it a clear condition of employment that employees with reasonable access are expected to receive and review benefits-related information via electronic disclosure.

**b) Allow electronic disclosures for individuals who provide a personal email address.** A revised safe harbor should also allow plans to request email addresses from individuals (e.g., former employees, retirees, beneficiaries, employees who lack reasonable access to a computer at the worksite or establishment) and, at that time, explain that the plan will provide some or all benefits-related information via electronic means. Under this approach, the plan must also state that individuals who do not wish to receive information electronically may contact an administrator (e.g., via a provided telephone number or email address) to be defaulted to paper at no charge. Additionally, individuals should be told they have an obligation to keep the employer informed of changes to their email address.

In other words, we recommend a revised safe harbor that allows plan sponsors to treat individuals who provide personal email addresses as having demonstrated their ability to access electronic information and as having consented to electronic disclosures. Even if the employer never or rarely uses the email address (e.g., the employer prefers to notify individuals of newly posted documents by first-class mail), the email address still effectively identifies the individual as a computer-user who is able to access plan information electronically. Individuals who provide an email address must affirmatively opt out if they wish to receive paper disclosures instead. This liberalized rule would replace the onerous consent requirements in DOL Reg. § 2520.104b-1(c)(2)(ii).

**RFI Question 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).**

We believe the DOL should encourage, but not require, plans to deliver documents by notifying participants and beneficiaries of posted documents available on secure, continuous access Web sites. The continuous access site centralizes the location of benefit information and allows individuals to consult documents at the time they are personally interested in getting information (e.g., at the time a beneficiary wants to know if a certain medical service is covered or at the time a 401(k) participant wants to see how market events are impacting his or her account).

<sup>2</sup> We recommend utilizing the definition of “establishment” as it currently appears in DOL Reg. § 2520.104b-1(b)(3)(i).

- **Frequency of notice.** We recommend employers remind participants and beneficiaries of the continual posting of certain documents when the document is first posted, at the time of hire, and at Annual Enrollment.
- **Medium of notifications.** We believe electronic or paper notifications are appropriate for employees with reasonable computer access and individuals who provide email addresses (and do not opt out). Non-computer-using participants and beneficiaries do not need to be notified of the continuous Web site as they are outside the safe harbor for electronic furnishing of documents.
- **Steps for ensuring individuals understand how to request/receive paper copies on Web sites.** A statement similar to the following should appear in the header of the document or another conspicuous place: *“If you are unable to print this document, you may request a paper version by [clicking on this button] [and/or] [calling this telephone number] [and/or] [sending an email to xxx@xxx.com stating that you need a paper version of the document. Please include the name of the document, your name, and mailing address].”* The employer would provide the appropriate instructions, based on its specific technology.

**RFI Question 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 under a revised safe harbor, employers should be able to require their employees who have “reasonable access,” as determined by the three requirements listed in part (a) of our response to Question 10, to receive benefits information online. In contrast, we believe plan sponsors should permit individuals who don’t meet the three requirements mentioned above to choose whether to receive documents electronically (i.e., by providing an email address, demonstrating their access to a computer) or via paper. Allowing plan sponsors discretion to deliver notices electronically or via paper to employees with reasonable access is acceptable because:

- Practically speaking, employers know that unsuccessful delivery of notices results in frustrated employees who will complain internally and possibly publicly, including to the DOL.
- Employers know that employees have a right under ERISA to receive certain disclosures. Employers also know they have a fiduciary duty to disclose information that is relevant and important. Finally, current DOL regulations already require employers to furnish disclosures in a way that is reasonably calculated to ensure actual delivery. These existing obligations—and the penalties and litigation risks employers face for failure to meet them—make it acceptable for a revised safe harbor to give employers discretion to decide whether electronic delivery is suitable for all or part of its employee population.

**RFI Question 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?**

We do not recommend revising the safe harbor to include conditions to ensure individuals with disabilities are able to access disclosure made through electronic media. We believe a more practical solution is for the DOL to point out in its preamble that employers should make reasonable accommodations for employees who, for disability-related reasons, request paper ERISA disclosures. As mentioned in our response to Question 15, the DOL's existing safe harbor already requires employers to furnish disclosures in a way that is reasonably calculated to ensure actual delivery. Thus, if an employee informs the Human Resources (HR) department he or she cannot receive electronic disclosures, the employer is already obligated to find a different delivery approach. Because of HR departments' familiarity with the Americans with Disabilities Act, we anticipate employers will make suitable accommodations regarding the delivery of benefits disclosures.

Having said that, we believe individuals with disabilities will generally prefer electronic delivery. In our experience, employees with mobility problems are often versed in the Internet already—at work and/or at home—because it puts information at their fingertips. People with visual impairments often prefer electronic documents because the text can easily be magnified and searched.

**RFI Question 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?**

Electronic delivery has the universal benefit of reduced environmental impact. Other specific costs and benefits include:

Costs to Participants/ Beneficiaries	Benefits for Participants/ Beneficiaries	Costs to Employers	Benefits for Employers
<ul style="list-style-type: none"> <li>▪ Need to keep employer informed of changes to email address (for employers who will use the email address to provide notices of newly available information or to email actual documents)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Faster delivery of information</li> <li>▪ Centralized archives of benefits information on a Web site or in employee's own computer files (depending on type of delivery)</li> <li>▪ Ability to search benefit information by term</li> <li>▪ Access to more benefits-related information (if employer creates benefits Web site)<sup>3</sup></li> <li>▪ More secure than mail, assuming email line is secured or Web site is password-protected</li> <li>▪ Access to and better familiarity with available tools and transactions (if employer creates benefits Web site)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Expectation to post disclosures more quickly (e.g., SMMs)</li> <li>▪ Costs of any necessary software or hardware upgrades</li> <li>▪ Time and materials to design and build an interactive Web site (optional)</li> <li>▪ Continued need to protect confidential information via secure delivery or secured Web site</li> <li>▪ Continued need to ensure the delivery system is working, by tracking return receipts or conducting periodic reviews or audits</li> </ul>	<ul style="list-style-type: none"> <li>▪ More efficient content management that enables creation of versions of content (e.g., a mix of participant-specific and standardized language for different populations)</li> <li>▪ Lower printing and postage costs</li> </ul>

- **Variations in costs and benefits.** Cost savings with electronic distribution are greatest with high page-count disclosures, such as SPDs. Employers that already have technology for electronic distribution will have fewer start-up costs than employers that have relied exclusively on paper.
- **Transference of disclosure costs to participants.** In our experience, employers often charge the costs of developing and printing disclosures, such as SPDs, to plan trusts. If production changed from print to electronic, the (reduced) costs would still be transferred to participants.

<sup>3</sup> E.g., education information or tools, or other versions of disclosures, such as non-English versions in situations where: 1) the employee population has fewer than 10% non-English speakers; or 2) an English-speaking employee still prefers disclosures in another language.

**RFI Question 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 costs associated with paper disclosure?**

In our experience, participants typically prefer receiving high page-count, non-personalized communications, such as SPDs, electronically. These types of documents tend to be bulky and difficult to search, archive, and retrieve. Having SPDs available in an easy-to-find electronic format has proved to be more satisfactory to participants. Additionally, documents that do not contain personal information, such as the HIPAA Privacy Notice, are also preferred electronically. Documents such as quarterly or individual benefit statements are sometimes preferred on paper since participants want to share the personalized information with a spouse or financial representative.

Regarding factors in preferences, we believe some participants and beneficiaries are interested in the costs of paper delivery and may prefer electronic delivery as a result of what they learn. However, we believe a more important factor is the recipient's confidence that any personal or sensitive disclosures are delivered securely. (This is analogous to what the Pew Internet & American Life project identifies as the "trust gap" that makes some bank customers unwilling to do online banking.) Participants and beneficiaries want assurances that their personal information is secure. Once they have that assurance, they are likely to be comfortable with electronic delivery. Access to a password-protected Web site is in fact a secure form of delivery—in some ways more secure than first-class mail, which family members may be able to open.

**RFI Question 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?**

As indicated in our response to Question 5, our experience indicates it is generally more efficient to email (or send a postcard) to participants and beneficiaries, that contains a link to a continuous access Web site. This method avoids the risk of "bounce-backs" of email sent to a full inbox and prevents large files from triggering any spam filter or firewall. For employers with interactive Web sites, the link brings participants and beneficiaries to a site that, in addition to housing interactive PDFs or Web content, may also be a location where they can perform plan-related transactions (e.g., check balances in flexible spending accounts, submit claims for reimbursements, request plan loans). Other advantages to providing a link to a continuous access Web site include:

- **Security.** Providing individuals with a Web site reference or link is typically very secure because in our experience employers require participants and beneficiaries to login to the Web site with a personal password.
- **Likelihood of use by participants.** Based on our interviews with participants, sending a postcard with a Web address or emailing a link to a Web site is preferable because it allows them to access archived information at a future time (i.e., at the time they have a reason to read it).

**RFI Question 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 standard for electronic delivery of ERISA plan disclosures, approved by all regulatory agencies, would be enormously beneficial. Small employers, with limited use of benefits legal counsel, are likely to find the existing multiple standard confusing. Large employers must spend time and money building an electronic delivery framework that satisfies legal requirements; when there a second or third set of requirements, the employer must build several frameworks. A uniform standard for electronic delivery of plan-related disclosures (whether based on the Internal Revenue, ERISA, PBGC rules, or HIPAA<sup>4</sup>) is also more convenient for computer-using participants and beneficiaries, who will be able to manage more, if not all, of their benefits information in a electronic format that is easy to archive and search at their own convenience.

### **Closing**

Again, we thank the DOL for this opportunity to comment on electronic disclosure practices. If you have any questions or comments, please contact the undersigned at the telephone number or email address provided below.

Sincerely,

Aon Hewitt

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<sup>4</sup> E.g., 45 CFR 164.520(c)(3) states special rules for electronic delivery of the HIPAA Notice of Privacy Practices.