May 12, 2023

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW, Suite N-5677
Washington, D.C. 20210

Dear Assistant Secretary Gomez:

On September 15, 2022, we wrote to Acting Assistant Secretary, Ali Khawar, urging the Department of Labor (the "Department") to allow health and welfare plans to provide e-delivery for plan notices and disclosures, in a manner similar to the 2020 Pension Plan E-Delivery Safe Harbor (RIN 1210-AB90).[1] Doing so would streamline the delivery of required plan disclosures under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), while maintaining consumers' ability to opt-out of e-delivery and receive paper disclosures at no cost.

Subsequently, we met with the Departments of Labor, Health and Human Services, and the Treasury to discuss this important issue on January 5, 2023. During the meeting, your staff questioned how enabling default e-delivery for plan sponsors would improve upon the disclosure requirements under Title I of ERISA. Specifically, your staff requested additional information about the following:

1. How e-delivery ensures consumer protections around information access and security;
2. How e-delivery benefits consumers' health and their overall experience with health plan disclosures; and
3. How to prioritize transitioning to e-delivery based on the impact to beneficiaries, employers, health and welfare plans, and the environment.

Since that meeting, we have reflected on these important questions and appreciate the opportunity to provide you with feedback and data sourced from a diverse array of stakeholders.

Required paper disclosures[2] amount to as many as 7 billion pages per year to satisfy health plan carriers' obligations under ERISA. These paper mailings are susceptible to fraud/theft and are often difficult to navigate for plan participants and their beneficiaries. Defaulting to e-delivery would support safeguards for consumers by transitioning them towards streamlined, convenient, and secure electronic portals with a proven track record of improving consumers' engagement with their health.[3] We agree with the Department's stance — articulated in the 2020 pension rule — that e-delivery would *"enhance the effectiveness of ERISA disclosures,"*[4] by harnessing tested 21st century technologies.

Given these tremendous benefits to consumers, we urge the Department to issue a regulation permitting default e-delivery of all ERISA-required disclosures — especially those with the greatest impact on consumers. We recognize that this may involve collaborating with other agencies who have joint rulemaking authority — including the Departments of Health and Human Services and Treasury — and look forward to our ongoing collaboration.

1. Consumer Protection

Your staff inquired about how e-delivery would protect consumers' privacy, while simultaneously ensuring that consumers maintain seamless access to their plan information. As with the 2020 pension rule, any consumer who prefers or needs to receive paper disclosures should be able to opt-out of e-delivery at no cost. For most consumers, however, e-delivery would leverage existing, ubiquitous technologies to guarantee secure, streamlined, and reliable access to their health plan information when and where they need it.

Secure Delivery

In the 2020 pension rule, the Department required that plan administrators "*take measures reasonably calculated to protect the security and privacy of covered individuals' information.*" In developing this standard, the Department recognized that many pension portals "*already have secure systems in place to protect covered individuals' personal information*." Existing health plan portals incorporate equivalent security measures, including encryption technology, multi-factor authentication, and password protection to ensure that patients' sensitive health information is safeguarded from unauthorized access in alignment with the Health Insurance Portability and Accountability Act (HIPAA) and the Genetic Information Nondiscrimination Act (GINA).

The Department's *"principles-based"* standard in the pension rule also recognized that plans should have the flexibility to harness innovative new technologies that improve functionality for consumers, while still safeguarding consumer information.[5] As technologies continue to evolve –– driven by new market incentives created by e-delivery — this standard strikes the right balance in protecting the security of consumers' sensitive health information while anticipating future improvements.

In a nationally-representative poll of Americans receiving health coverage through ERISA plans that we conducted this fall, 37% reported experiencing their bills, statements, notifications, and other important mailings being lost, stolen, or delayed.[6] This concern has only grown in recent years, on the heels of a nearly 400% increase in postal robberies between 2019 and 2022.[7] Mail theft can have devastating effects on consumers, with more than 700 victims of identity theft and forgery linked to just one recent case in Little Rock, Arkansas.[8] Our polling also found that 4 in 5 adults are concerned that paper disclosures containing their sensitive health information could be accidentally delivered to the wrong person.

Consumer concerns are especially amplified in the case of health plan documents, given that they contain sensitive health and financial information. In addition to being stolen, paper mailings can be easily misplaced, damaged, or improperly delivered during a move or in an emergency — times when it is essential for consumers to have convenient access to their plan information. Disclosures delivered online, in contrast, are portable and grant participants secure access to their information no matter where they may be. **E-delivery would help alleviate a top concern of consumers, ensuring that plan disclosures are available within a centralized, secured location and accessible only to the intended recipient.**

Streamlined Access

In addition to protecting the integrity of plan disclosures, e-delivery would ensure that consumers are afforded streamlined access to important benefits information at all times and without delay — especially during significant health moments and important life transitions.

Following the implementation of default e-delivery for pension plans, Fidelity Investments –– an undersigned organization — found that retirement plan participants over the age of 50 log in to their online retirement portal an average of 14.4 times per year, compared with younger participants, who log in an average of 9.8 times per year.[9] This data indicates that participants choose to engage with their plan's e-delivery platform more frequently when they are faced with important life decisions. **Like e-delivery for retirement plans, e-delivery for health and welfare plans would ensure that consumers are able to have streamlined, meaningful access to their plan disclosures when it matters most.**

For consumers who are already accustomed to e-delivery in other aspects of their life (e.g., credit card statements, utility bills, etc.), the movement to e-delivery for health and welfare plans would be a natural — and indeed welcomed — transition. In the 2020 pension rule, the Department concluded that there was "*nearly universal access to the internet among individuals who participate in an ERISA covered plan.*" The Department further stipulated that advances in mobile technology sufficiently guaranteed that vulnerable consumers in "*handheld-device-only*" households could access their pension plan information.[10] **E-delivery, combined with the option to opt-out and receive paper disclosures at no cost, would ensure that all consumers –– including the most vulnerable among them — are able to access their disclosures in the manner that is most useful to them.**

Reliable Communications

Unlike with physical mailings, e-delivery allows consumers to stay on top of their plan documents, ensuring they never miss important updates about their health. Consistent with the "*notice-and-access model*" contained in the 2020 pension rule,[11] e-delivery would afford employers and health plans the flexibility to send push notifications or other alerts when new documents are available. Much like electronic notifications already sent to patients by health care providers, these notifications would safeguard patients' protected health information by directing patients to access their disclosures through a secure portal or encrypted email. This would immediately improve the reliability of existing plan communications, while adding another layer of protection for consumers' personal information.

General Protections

We recognize that many of these plan disclosures contain required information in accordance with other relevant federal legislation and regulations. For example, Explanation of Benefits (EOBs) are required to contain nondiscrimination notices under Section 1557 of the Patient Protection and Affordable Care Act.[12] The final 2020 pension rule addressed the importance of required content in plan disclosures by stating that "*the rule is not intended to alter the substance or timing of any of ERISA's required disclosures. The rule merely expands the possible delivery methods for disclosures*." Moreover, a recent EBSA assessment of the 2020 pension rule found that it was unlikely to have any negative impact on vulnerable populations. According to this report, 99% of ERISA-covered retirement plan participants report having internet access at home or work, with 88% of participants accessing the internet daily.[13] **Expanding the delivery modalities available to health plans would allow them to communicate the same, vital information to their consumers, while accommodating plan participants' existing communication preferences.**

As with DOL's 2020 e-delivery safe harbor for pension plans, the Department should, through rulemaking, "*preserve the rights of those who prefer paper disclosures,*" by allowing beneficiaries the option to easily opt-in to paper delivery at no cost to them. The pension rule requires participants to have an existing, valid email address to be eligible for e-delivery. Email addresses are required to undergo "*system checks for invalid electronic addresses*" –– a current standard practice among some of the nation's largest health plans. Additionally, online disclosures are subject to "*accessibility and readability standards*," which ensure that employers and plans provide the documents in a useful format to participants and beneficiaries.[14] We believe that these protections are essential and foundational to any rulemaking designed to improve communication between health plans and plan participants.

<u>2. Consumer Benefits</u>

Allowing employers and plan sponsors to default to e-delivery would reallocate funds that could be better utilized in providing added benefits to beneficiaries. Consumer polling found that three out of four ERISA-covered Americans are concerned that the immense costs of printing paper disclosures divert money away from their actual health care.[15] This consumer concern is backed by the significant costs to health plans of printing and sending physical mailings –– estimated to be over $400 million per year.[16] Similarly, while designing the 2020 pension rule, DOL estimated that plan sponsors and employers would save approximately $317 million per year, and $3.2 billion over 10 years. The Department further acknowledged that "*there could be significant cost savings if the safe harbor were extended to cover welfare plan disclosures*."[17] **We agree with the Department's findings and believe that extending the e-delivery safe harbor to cover health and welfare plan disclosures would improve employees' engagement in their health and spur investment in employee benefits.**

<u>Current Standard Under ERISA</u>

Title I of ERISA currently requires that health plan disclosures are sent on paper as a default, via US mail. These disclosures are easy to misplace, easily lost, stolen, or delayed in the mail, and are inaccessible to participants and beneficiaries with certain disabilities and those with Limited English Proficiency (LEP). Recent polling found that seven out of 10 ERISA-covered Americans report that their paper health plan disclosures can make it difficult to keep track of important information about their health over time.[18] This causes plan participants' health literacy — defined by Healthy People 2030 as the ability of individuals to "*find, understand and use information*" relevant to their health[19] — to suffer as they struggle to organize their disclosures.

Improving health literacy would particularly benefit vulnerable workers — improving health equity among marginalized racial/ethnic groups, low-income workers, and people with pre-existing conditions.[20] Current patient-provider portals present patients' essential health information in a similar way to health plan portals, and have been proven to improve chronically ill patients' ability to track their health data over time — simultaneously increasing patient engagement and improving health outcomes (i.e., by lowering hospital admission rates).[21] In addition, these portals have improved communication mechanisms for patients experiencing current, acute health events.[22] **Recognizing that improving health equity is a priority of the current administration,[23] e-delivery for ERISA-covered health and welfare plans is a commonsense step towards achieving this goal within the largest insured group in the nation.[24]**

Current Benefits of E-Delivery

In designing the 2020 pension rule, the Department rightly recognized that e-delivery for health and welfare plans would make the required disclosures "*more understandable and useful for participants and beneficiaries*."[25] In the context of retirement plans, the Department acknowledged that delivering existing disclosures as an attachment in an email would sufficiently meet the legal standard of ERISA, while still accomplishing this same goal. For health plans, we recognize that there are unique considerations surrounding patient's sensitive health information — including the requirements of HIPAA, GINA, and other related statutes –– which necessitate heightened privacy safeguards. **Current health and welfare e-delivery portals meet these more stringent requirements and exceed the standard contained in the pension rule.**

Current disclosures furnished through e-delivery not only meet the legal standard articulated in Title I of ERISA, but are also already increasing patients' engagement with their health and improving health literacy. Data from a large health plan representing more than 25 million covered lives show that the average e-delivery participant logs in more than once a month, suggesting that they are engaging with their plan information frequently and productively.[26] In addition to improving health outcomes, existing patient-provider portals have been recognized to improve patients' engagement with their care and communication with their provider.[27] **E-delivery leverages this same, streamlined channel of communication, empowering health and welfare plan participants to make informed decisions about their health care.**

Investment In Future, Innovative E-Delivery Portals

An e-delivery safe harbor would provide health plans and employers with a market-based incentive to invest in innovations which would improve the functionality of e-delivery portals. Recognizing that e-delivery would save employers and health plans over $400 million in printing and mailing costs[28] — while providing e-delivery portals with a more substantial userbase — we anticipate increased investment and development to further enhance e-delivery portals. The Department acknowledged this potential in the 2020 pension plan safe harbor, noting that e-delivery would allow plans to "*better leverage ongoing improvements in online and mobile-based technology and communications and to provide a structure that will be appealing to, and workable for, today's workers*."[29]

Cutting-edge technology features have the potential to vastly increase the accessibility and functionality of current disclosures, further improving health literacy. For example, text-to-speech tools, adjustable font sizes, and a "high-contrast" mode could allow visually impaired consumers to read their health plan documents more easily. Similarly, a translation function could make plan disclosures more accessible for those with LEP, increasing health equity. Disclosures with embedded links to the claims and appeals processes would be more readily actionable by plan participants. Moreover, suggesting links to specific action items — such as on disclosures sent during major life events (births, deaths, a new job, etc.) — would help to distill participants' complex plan disclosures into manageable follow-up steps.

In addition to enhancing the actionability and functionality of ERISA-required disclosures, e-delivery portals provide plan participants with a centralized, streamlined access point for important supplementary resources. This includes cost transparency tools and provider directories, which help patients access high-quality, affordable care more easily. One large health plan found that their consumers who used these tools saved up to $56 per prescription and chose the most cost-effective treatment option 94% of the time — saving an average of 20% per member per month.[30] **Tools like these help workers, families, employers, and plans alike to be better and more quickly able to use and manage their health benefits and be more confident consumers of health care, saving them money in the process.**

Importantly, given that current e-delivery portals already exceed the legal standard contained within ERISA, inclusion of these features should be driven by the market, rather than set by regulatory requirements. As in the 2020 pension rule, this flexibility would allow employers and plan administrators to keep pace with new innovations, while choosing how best to pass their savings on to consumers.

3. Transitioning to E-Delivery

Benefits & Protections of E-Delivery

Recognizing significant benefits of e-delivery outlined above — particularly during consequential health events — 94% of ERISA plan participants favor the proposal to allow e-delivery for health plan disclosures.[31] This indicates a clear consumer preference: **when employees need to receive vital information about their health plan, they prefer to do so electronically.**

E-delivery would significantly lower the considerable, aforementioned administrative costs of printing and sending nearly 60 million paper mailings,[32] instead allowing employers and health plans to funnel resources back into providing quality benefits to employees. Every sheet of paper saved by health plans frees up valuable financial resources that can be used to better benefit the health care experience for millions of American workers and families. **Given the many advantages of e-delivery to consumers, any expansion of the e-delivery safe harbor for health and welfare plans should include all ERISA-required disclosures**.

In designing the 2020 pension rule, the Department considered an *"a la carte"* approach to e-delivery of pension plan disclosures, but later abandoned that idea. We agree with the Department's analysis that this would create confusion for consumers and impose unnecessary administrative complexity on employers and plan administrators.[33] Receiving some disclosures by paper and others via e-delivery — even as "backups" for the most important health plan notices — would only increase health plan communication complexity, diminishing the health literacy benefits of e-delivery. Furthermore, the Department has previously acknowledged that such an approach to e-delivery would require employers and plan administrators — already saddled with immense administrative costs — to undertake costly technology retrofits to track varied disclosure modalities. This would significantly limit the reach of the benefits and protections of e-delivery for consumers, employers, and health plans.

Climate Impact

E-delivery for all required disclosures would also provide more efficient paper use and help reduce major contributions to climate change and associated impacts on public health. *Each year*, the climate impact of required paper disclosures equates to as many as:[34]

- **Forest impact** = 754,000 trees;
- **Greenhouse gas emissions** = 593 million pounds CO2 | emissions of 53,800 cars;
- **Energy use** = 857,000 million BTUs | 1 million refrigerators operated;
- **Water use** = 742 million gallons | 535,000 washing machines operated; and
- **Solid waste** = 40.9 million pounds | 9.3 million people generating waste every day.

Existing paper disclosures are an unnecessary drain on natural resources and harmful to our planet. **E-delivery is a straightforward step in the right direction for our environment. Including all ERISA-required disclosure mailings in this rulemaking would maximally reduce the U.S. carbon footprint — advancing progress towards net-zero in one of the largest sectors of the US economy.[35]**

Conclusion

Expanding the ERISA e-delivery safe harbor to include health and welfare plans would protect consumers by guaranteeing them secure, reliable, and streamlined access to their plan disclosures. E-delivery would improve the functionality of existing disclosures by leveraging existing technology that consumers overwhelmingly prefer. While we support the unequivocal right for consumers to opt-out of e-delivery at no charge, we also recognize that defaulting *all* ERISA-required disclosures to e-delivery would help guarantee the maximum benefits to patients, employers, health plans, and the environment.

We believe that this is a straightforward step that will help to keep the administration on its current trajectory of cutting emissions, improving health literacy and health equity, and ensuring appropriate consumer protections.[36] **We look forward to ongoing collaboration with you. Accordingly, we request a meeting with you to further discuss this issue with you and your team in the coming weeks.**

Thank you for your consideration.

Sincerely,

The ERISA Industry Committee

America's Health Insurance Plans

Black Women's Health Imperative

Blue Cross Blue Shield Association

Boilermakers National Health and Welfare Fund

Business Group on Health

Culinary Health Fund

Environmental Paper Network

Fidelity Investments

Health Services Coalition

HR Policy Association

Mercer

National Alliance of Healthcare Purchaser Coalitions

National Association of Benefits and Insurance Professionals

National Association of Professional Employer Organizations

Partnership for Employer-Sponsored Coverage

Self-Insurance Institute of America, Inc.

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