



June 6, 2011

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

Re: Request for Information – E-Disclosure (RIN 1210-AB50)

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to provide information and comment to the Department of Labor (DOL) on the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (RFI). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

First and foremost, we would like to thank DOL for initiating this project, which we hope will be the first phase of a new era in electronic communication for employee benefit plans. The Council believes that appropriate electronic disclosure is a more user-friendly, efficient, and cost-effective means of providing necessary information to plan participants and beneficiaries; a method which is also popular with participants and beneficiaries. Effective electronic communication can enhance the disclosures for

the majority of participants while protecting their rights and ensuring that those who still wish to receive paper notices are entitled to receive them upon request.

In fact, the Council believes that this issue is so important that we held a benefits briefing webinar (attended by more than 217 individual representatives of member companies) and other informational sessions and conference calls with Council membership regarding electronic communication. During the benefits briefing, we conducted an informal poll of attendees regarding the usage and popularity of electronic disclosure. The results of the informal poll clearly demonstrated that electronic disclosure is popular with both employers and employees.

Effective electronic disclosure can provide needed information to plan participants and beneficiaries in a form that is easily accessible, searchable and available around the clock while meeting statutory notice requirements. The Council's plan sponsor members tell us that it is incredibly difficult to motivate employees to review required disclosures, especially lengthy and multiple disclosures. Electronic delivery often allows employees to access the information at any time in a searchable format, thereby providing a means of locating relevant information quickly in an otherwise cumbersome document or documents. We understand that some may be concerned about accessibility for some plan participants and beneficiaries; however, we believe those concerns can be addressed in a manner that ensures protection of the rights of participants and beneficiaries while facilitating use of electronic disclosure for the vast majority who prefer it.

Background

DOL's current rules governing the use of electronic media to provide reports, statements, notices and other documents required under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) severely restrict the circumstances in which email and other paperless means of communication can be utilized. The regulations contemplate the use of electronic media only if a participant either (i) uses an electronic network, *e.g.*, a computer or a smart phone, as an integral part of his or her duties as an employee, or (ii) affirmatively consents to receiving documents electronically in a manner that demonstrates the ability to access electronic disclosures.¹

This standard severely restricts the use of email as a means of communication for many categories of employees and former employees, even in circumstances where the

¹ See DOL Reg. § 2520.104b-1(c).

employer has email addresses and routinely uses email or other electronic disclosure for other forms of communication. As a result, the multitude of notices and statements that plan administrators must provide to plan participants and beneficiaries are typically provided through labor intensive and costly paper media. There are enormous potential cost savings that would benefit participants, beneficiaries, employers and the environment if the rules were revised to more broadly accommodate electronic communication, including use of home computers and personal cell phones or internet connections. The Council appreciates that not every participant or beneficiary has access to a particular system but the Council believes that these participants can be accommodated through rules that allow participants to opt out of electronic delivery and request paper copies of the relevant materials.

One particularly problematic aspect of DOL's current regulation is that it differs from the electronic delivery standards of other regulatory agencies, including the Internal Revenue Service (IRS) and the Securities & Exchange Commission (SEC) which share oversight responsibility for employee benefit plans with DOL. The IRS standard, for example, turns on whether a participant has the effective ability to access the electronic system, not whether a participant uses a computer as an integral part of his or her job.² These different standards can be very frustrating and burdensome for employers who must comply, for example, with one set of standards in furnishing DOL-required notices, another standard in providing IRS-required disclosures, and a third standard in distributing SEC-required disclosures.

Broadening of the DOL electronic communications rules is not unprecedented in certain limited respects and has proven useful to participants, beneficiaries and employers. For example, in Field Assistance Bulletin 2006-3 (FAB), DOL provided a safe harbor method for the delivery of retirement benefit statements. Per the FAB, plan sponsors may use a continuous access secure website for the posting of retirement benefit statements, so long as certain criteria are satisfied. The FAB was issued to provide guidance for plan fiduciaries for the new retirement benefit statement requirements in the Pension Protection Act of 2006 (PPA). Among other things, the PPA required that statements be provided quarterly to participants and beneficiaries of defined contribution plans that permit participants to direct investments. In order to use the website posting option, plans must notify participants and beneficiaries annually on how to access their benefit statements and let them know they have a right to request paper benefit statements free of charge. The notices may be provided by paper or by using the regulatory process of either DOL or Treasury described above.

² Treas. Reg. § 1.401(a)-21(c).

Council members have found the process set forth in the FAB to be both cost-efficient and very effective. Council members who do not yet use the FAB process report that, although the methodology is attractive to employer plan sponsors as well as participants and beneficiaries, the fact that it can only be used as a safe harbor for retirement benefit plan statements is a disincentive. In addition, use of the FAB for other required notices is consistent with Executive Order 13563 that asks agencies to streamline guidance and eliminate unnecessary burdens, and coordinate with other agencies.

Other regulatory agencies have recognized that electronic disclosure can be an effective, cost-efficient means of disclosure and some have even expanded electronic delivery to providing benefits or benefit-related information. For example, the Social Security Administration recently announced the elimination of paper statements automatically mailed to the homes of taxpayers three months before each birthday (although later this year they may begin mailing statements to taxpayers age 60 and older who have not started receiving benefits). The Social Security Administration is also eliminating paper checks, requiring electronic deposit or monetary cards (similar to gift cards) for those without access. The SEC has revised its proxy and prospectus rules to encourage more electronic disclosure as well. Similar requirements are being implemented with respect to the Federal Employee Health Benefits Plan (FEHBP). The Office of Personnel Management (OPM) Director John Berry recently announced that OPM is dropping the FEHBP brochure mailing requirement. By making brochures accessible online (and mailed upon request), OPM expects to save roughly \$5 million in premiums and a “lot of trees.”³

Request for Transition Rule

The final participant disclosure rules under DOL Regulation section 2550.404a-5 contemplate a significant amount of information that will need to be provided to millions of plan participants. The preamble to the regulations indicates DOL’s intent to promulgate new electronic disclosure rules prior to the applicability date of the participant disclosure regulations but the applicability date of the participant disclosure regulations is for plan years beginning on or after November 1, 2011 (*i.e.*, January 1, 2012 for calendar year plans). Although a recently published transition rule will allow for the disclosure within 120 days after the applicability date, we understand that DOL may be unable to complete a significant rewrite of its electronic delivery guidance during this time period. Therefore, subject to one important caveat noted below, the

³ Remarks of OPM Director John Berry, FEHBP Carrier Conference, March 24, 2011. www.OPM.gov

Council recommends that DOL facilitate these disclosures by permitting, on an interim basis, the use of the rules of FAB 2006-3 for all ERISA disclosures. Although the Council would recommend that this process be allowed for all required disclosures, it is especially important to provide this transition guidance for participant fee disclosure, 408(b)(2) fee disclosure (between service providers and plan fiduciaries), and any PPACA disclosures with effective or applicability dates prior to the anticipated revision of DOL electronic disclosure guidance.

It is important to note that DOL has clearly recognized that simple posting of notices can be an effective method of delivering a range of significant employment notices such as (1) some HIPAA notices, (2) notice under the Employee Polygraph Protection Act, (3) OSHA Job Safety and Health notice, (4) Equal Employment Opportunity notice, (5) Employee Rights under the Fair Labor Standards Act, and (6) rights under USERRA. The Council's proposed transition rule goes one step further by requiring continuous access through a secure website posting with annual notice to participants and beneficiaries with the option of requesting paper copies.

We recognize that the annual notice system described in FAB 2006-3 needs to be modified for time-sensitive notices, such as certain health plan notices or blackout period notices. In such cases, plan administrators should, on an interim basis, be permitted to either (1) deliver the actual time-sensitive notice directly under either the Treasury or DOL rules described above, or (2) provide a timely notice, under either the Treasury or DOL rules of the availability of the time-sensitive information on a secure website. However, in the case of any participant or beneficiary who has in effect a request for paper notices, time-sensitive notices should be sent by paper.

It is also critical that DOL clarify that notices required to be provided to plan sponsors, administrators, or fiduciaries, such as notices required under ERISA section 408(b)(2), may be provided through the use of FAB 2006-3 both on an interim and indefinite basis. The current regulation is limited to notices provided to participants and beneficiaries, as is the RFI, but it would be extremely helpful to confirm that the FAB 2006-3 system is permitted with respect to non-participant disclosures, since there is generally little question regarding employers' access to electronic media.

Need for Transition Rule.

If the transition rule described above is not used, the cost to the benefit system could be enormous. The printing and mailing costs of the participant fee disclosures alone would be massive on a national scale. In the case of service providers that normally

absorb this type of cost, we have heard that they will be likely to pass it on to plans. Employers that generally pay for plan administrative costs are likely to balk at potentially hundreds of thousands of dollars of additional costs, attributable solely to printing and mailing costs. Many such employers will decide that it is necessary to pass these costs on to participants, as many other employers already do.

Also, it is not at all uncommon for administrative expenses to be passed on to participants on a per capita basis. Participants with very small accounts could end up paying perhaps 50 basis points to receive information about much smaller differences. This would be sad and ironic.

Comments on Specific Questions in the RFI

Below are responses to specific questions in the RFI and identified by number.

Q3 The Council's informal poll, conducted during the benefits briefing webinar described above, indicates that the overwhelming majority of the responding members furnish pension benefit statements electronically for some or all of their plans or clients, using the approach outlined in FAB 2006-3 (continuous web access with an annual notice of availability and information on how to request a paper copy).

Q5 Council members indicate that the most common methods of furnishing information electronically are emails with attachments or links to posted materials and continuous access websites. Generally, it appears that most Council members provide quarterly retirement benefit plan statements to participants and beneficiaries through continuous access to a secure website in accordance with FAB 2006-3. In many cases, participants may affirmatively elect electronic delivery of other notices, often by logging on to a participant website using an identification number and password. Duplicate copies of many documents delivered in paper form are also posted on the website and can be downloaded and searched electronically by keyword. Many participants and beneficiaries also have access to a toll-free interactive voice response system where they can obtain account updates and have access to retirement planning tools and resources. They also generally may request documents be sent to them in paper form by calling the toll-free number.

Q6 The current regulatory requirements are the most significant impediments to increasing the use of electronic media. The current rules require different delivery mechanisms for different employee groups. This is much harder to administer than a system that allows electronic disclosure unless the participant or beneficiary opts out (elects to receive paper). Service providers – who generally provide delivery of notices

for large employers – cannot identify which participants have computer access as an integral part of their job. Participant consent is often necessary (and difficult to obtain universally as described in more detail below) for many plan participants. For these participants, the service providers must track and keep records of affirmative consent.

Q7 Anecdotal evidence suggests that increases in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general indicates an increased desire or willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically. Council members report that participants and beneficiaries generally do not want paper notices. Participants and beneficiaries are asking to be told where notices are and they will find them when they need them. The mentality is “put it where I can find it and I can use it later when I need it.” Council members are frustrated when they mail 200+ page Summary Plan Descriptions (SPDs) to participants’ homes (covering all of the participant’s multiple benefit plans) knowing that they are no more likely to read them than if they post them to an easily accessible website on the Internet. In fact, Council members find that participants and beneficiaries generally do not read the written notices – they prefer searchable electronic notices so they can find what they need.

Q8 Technology is constantly evolving with computer tablets and smart phones. Retail companies are starting to use these and other advanced technologies for a wide variety of services (*e.g.*, placing orders, checking in for plane flights at the airport, etc.) Retail sales forces required to use this technology for orders will often prefer to receive notices via electronic technology. Downloaded applications on smart phones could be used to notify employees of updated notices that they can download at their convenience. Blogs and social media are evolving, and it is possible that such online tools could be utilized to share information with employees and participants.

Q9 The Council urges DOL to revise the current electronic disclosure safe harbor because the current requirements are overly stringent. For example, very often employees who do not use a computer as “an integral part” of their duties are expected to use a computer to perform other functions, such as entering time worked, placing orders, or receiving other information from their employer. In addition, compliance with multiple standards has discouraged, inhibited, and in some cases, prevented the use of electronic delivery for many plan sponsors and service providers. Use of electronic delivery clearly provides a more timely delivery of time-sensitive materials than notices that are now delivered by mail. Electronic documents are often searchable documents that enable readers to quickly identify and focus upon relevant information.

Finally, electronic delivery would reduce plan administration costs, resulting in savings that can be passed through to plan participants and beneficiaries.

Q10 The Council supports expanding the current safe harbor for electronic disclosure permitted under FAB 2006-3 to all plan disclosure requirements. The Council believes that FAB 2006-3, which permits disclosure via a continuous access secure website, should be the default delivery method, along with the option for individuals to request paper notices at their election. In conjunction with an expanded safe harbor, an annual notice of the availability of the information and how to access it could be distributed to all participants using current disclosure requirements (DOL or Treasury) and participants could request paper copies by calling a telephone number provided in the notice and identified on the website or through the website itself. This would greatly enhance plan sponsors' ability to use electronic delivery for benefits disclosure. In addition, we urge DOL to expand the safe harbor by allowing electronic delivery to employees who have kiosk access and/or who are using computers for some part of their job function (even if it is administrative) to receive notices electronically unless they opt out of such electronic delivery.

Q12 Properly structured, electronic disclosure works very well for all required notices, even time-sensitive notices such as COBRA (*e.g.*, a website posting that is pushed out to the participant via email) as discussed above.

Q14 The Council urges DOL to permit, but not require, pension and welfare benefit plans to furnish all disclosures required under Title I of ERISA through a continuous access website(s). Continuous access to a secure website is the most effective and efficient method of furnishing participants with access to all forms, notices, and important plan-related information. As noted, pursuant to DOL or Treasury rules, notification could be sent when a material new document is posted to the website or an existing document is materially changed, particularly if the new or changed notice is time sensitive. In all events, annual notification, pursuant to the DOL or Treasury rules, regarding the existence of the website should be required.

Q15, 17 and 26 Electronic disclosure should be the default since it is effective, cost-efficient, often searchable and, generally, more popular than paper disclosure. Participants who want paper copies can elect to receive them. Participants who want paper copies for some but not all notices, should be able to elect that as well (*e.g.*, paper copies of quarterly statements, electronic copies of SPDs). The Council believes that a very small percentage of participants and beneficiaries would opt out of the electronic delivery. Council members who use the FAB approach for retirement benefit

statements indicate that a very small percentage of former employees/beneficiaries and an even smaller percentage of current employees “opt out” or elect to receive paper statements (one member indicated only 2 percent of current employees and 8 percent of former employees and beneficiaries opted out of electronic delivery).

Q16 A revised safe harbor could contain conditions that would make electronic notices even more effective for disabled individuals than paper notices. For example, continuous access websites could include icons to click to enlarge print size for the visually impaired.

Q19 The affirmative consent requirement in the DOL’s current electronic disclosure safe harbor has been an impediment to plans that otherwise would elect to use electronic media. Requiring affirmative consent from employees, former employees, and beneficiaries can be difficult, especially once the formal employment relationship ends. A very large number of individuals simply do not respond to any such requests. In addition, human resources departments and recordkeeping systems may not be set up to take and house an election for e-delivery. Under the approach the Council suggests, plans would provide an initial notice of the availability of disclosure information through an Internet website. The initial notice could be provided through any media that participants can effectively access (computers available in the worksite, home email addresses provided by the employee). The initial notice would provide directions for opting for a paper version of the disclosure but, absent such an affirmative opt-out election, the materials would be made available through continuous access to a website. A participant should be permitted to later decide to receive a paper copy through the website.

Q25 Based on input from Council member companies, the benefits of expanding electronic distribution of required plan disclosures are enormous. In response to a request, the Council received information from a few companies on their current costs of providing benefits. Our informal poll (performed during our benefits briefing webinar as described above) indicates that most members estimated their cost savings from using the FAB approach versus mailed paper notices is between 50 and 75 percent of the cost and a significant number estimated the saving to be between 75 and 90 percent of the cost of paper delivery. One large company indicated it spends \$250,000 to produce and deliver a new SPD book every year (the company combines its retirement and health plan SPDs into one book and finds that essentially every year there are material changes). Smaller workforces have similar expenses on a smaller scale. For example, one employer with approximately 21,000 participants in a particular 401(k) plan indicated the cost of providing an SPD for the plan exceeded \$80,000. For

another plan sponsor, the cost of providing health and retirement handbooks (with SPDs) to approximately 31,000 employees and retirees exceeded \$400,000. One service provider member estimated that the cost of producing and mailing the participant fee disclosure alone to each eligible employee of its clients will be \$1.3 million. Another service provider estimated their savings from delivering their SPDS in electronic versus paper form would exceed \$500,000. In response to a question in the Council's informal poll, a significant percentage of respondents indicated that the costs associated with paper delivery are passed along to retirement plan participants through asset-based fees. The Council believes this pass-through of expenses may increase as disclosure requirements for retirement and health plans both increase. Others indicated that more benefits or other educational efforts could be made using the savings.

Q27 Our members report that employees generally prefer delivery in electronic versus paper form and that they often receive complaints from employees about receiving lengthy paper documents such as SPDs. Some employers who automatically provide retirement plan statements in paper form (the default) but also offer the option to elect to receive electronic statements, report that large percentages of employees opt for electronic statements only. Council members report that their employees prefer to receive the information via technology – in fact, they want more mobility applications.

Q30 Employee benefit plans would benefit greatly from an electronic disclosure standard based on FAB 2006-3 that would apply to all plan-related disclosures, whether required under ERISA, the Internal Revenue Code, or other statutory rules or agency regulations. The current multi-standard approach has led to increased costs of plan administration and has inhibited the use of electronic delivery.

In conclusion, the Council strongly urges DOL to make electronic delivery the default method of disclosure with the option for participants to elect to receive paper disclosures. To protect the rights of those participants who prefer paper, the election should be very easy to make (such as calling a toll-free number, returning a postage-paid post card, or clicking on a box on the website housing these disclosures) and should allow participants to differentiate between different types of notices (*e.g.*, to choose to receive certain disclosures or notices in electronic form and others in paper form). Many participants prefer electronic disclosure for ease of access and the substantial environmental benefits of using less paper. More flexible electronic disclosure will save money for both plan sponsors and plan participants – money that

can be better used to provide more benefits or educational communications to participants and beneficiaries.

* * *

Again, we appreciate the opportunity to comment on electronic disclosure by employee benefit plans, and we look forward to working with you on these important issues. If you have any questions or would like to discuss these comments further, please contact the undersigned at 202-289-6700.

Sincerely,



Jan Jacobson

Senior Counsel, Retirement Policy



Kathryn Wilber

Senior Counsel, Health Policy