March 27, 2012

The Honorable Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Subject: Electronic Delivery Guidance under Section 404(a) of ERISA

Dear Madam Assistant Secretary:

Thank you for your letter dated December 22, 2011. We appreciate that the Department is engaged in a review of the current electronic disclosure safe harbor. We have survey data to share regarding EBSA's Technical Release 2011-03R and electronic disclosures generally. From survey results and discussions with various companies, we are concerned that this interim guidance does not provide meaningful incentives or make it more feasible for employee benefit plan sponsors and their service providers to use electronic media instead of paper. With the compliance date of the participant fee disclosure rule fast approaching, we are also concerned that the Department's most recently issued regulatory agenda does not include guidance on electronic disclosure.

We encourage the Department to pursue a policy that, in operation, would encourage and facilitate the use of modern electronic forms of communication. Such a policy would have a direct and beneficial impact on plans, plan sponsors, plan participants and beneficiaries. Participants of all ages and incomes increasingly prefer to access information online and believe that doing so makes it easier to act on the information. For this reason and others, a recently issued policy brief by the Progressive Policy Institute recommends allowing default e-delivery of 401(k) statements and retirement plan documents as one of five ideas for a smarter government.[1] The brief explains that the current system of default paper delivery actually works against the goal of helping Americans make the right decisions about their retirement planning because, among other things, "the density of printed disclosure is, for many people, intimidating," and "the static nature of printed materials does not invite the kind of interactive engagement people need to have to manage their retirement portfolios intelligently." The brief also expresses concern about the immediate obsolescence of paper statements noting that "[b]y the time a statement arrives in someone's mailbox, the stock markets may have made a major turn for the better or for the worse."

The impact on retirement savings due to the increased costs of paper notices also is a concern of our membership. Presently, the increased costs attendant to paper disclosure in 401(k) plans could reduce participants' retirement savings, the very savings we are working to increase with enhanced transparency. Ultimately, plan participants will likely bear the additional cost of delivering the required disclosures to non-participating employees in the plan when such costs are not paid by the employer and are instead allocated among participant accounts.

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[1] *See* Kim, "When Paperwork Attacks! Five Ideas for Smarter Government," Progressive Policy Institute Policy Brief (March 2012), available at http://progressivepolicy.org/wp-content/uploads/2012/03/03.2012-Kim_When-Paperwork-Attacks-Five-Ideas-for-Smarter-Government.pdf.

We have reviewed EBSA's Technical Release 2011-03R and discussed it with various companies and have concluded that the guidance provides little relief beyond that already available through the current safe harbor, particularly as it relates to affirmative consent and dependence on paper as the default method of delivery. In fact, a recent survey of companies conducted by the SPARK Institute confirmed that most major service providers/recordkeepers will not attempt compliance with the Technical Release.[2] Some of the concerns raised by responding companies who do not plan to rely on the Technical Release include the inability of existing systems to support the Technical Release approach without costly changes, the required affirmative action on a per participant basis for plans to use electronic communications and the administrative impracticality of the required implementation and monitoring.

As reflected in the same survey, these companies continue to believe that, unlike Technical Release 2011-03R, prior guidance adopted by the Department in December 2006 in the form of Field Assistance Bulletin (FAB) 2006-03, does provide a viable approach to encouraging and fostering electronic disclosure by employee benefit plans, while providing important safeguards for ensuring that participants who still want to receive required disclosures in paper format can do so. In fact, the Department provided a similar approach for non-participating employees in the recently released final regulations implementing the summary of benefits coverage (SBC) requirements of the Affordable Care Act.

As you know, the Department took the position in FAB 2006-03 that the electronic disclosure safe harbor regulation, at 29 CFR § 2520.104b-1(c), is not the exclusive means by which plans could satisfy their obligations to furnish individual benefit statements. In this regard, the Department specifically recognized compliance with Treasury/IRS rules (26 CFR § 1.401(a)-21) relating to the use of electronic media as an acceptable means by which individual benefit statements can be furnished to plan participants and beneficiaries under Title I of ERISA. The Department further recognized the use of continuous access, secure websites as an acceptable means of furnishing required information to participants and beneficiaries.

Under the current Technical Release guidance, plan-related information that is not included in a pension benefit statement and investment-related information that must be provided under the participant disclosure regulations are inexplicably subject to more burdensome and complex electronic disclosure standards than individual benefit statements that contain specific and personal information about an individual's account balance and selected investments. Additionally, the electronic disclosure rules that apply to the participant disclosure regulations are more burdensome and complex than the standards found to be protective by the Department of the Treasury and the IRS for most of its participant communications under the Internal Revenue Code.

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[2] Twenty-five record keepers, who are among the largest service providers in the retirement plan industry, responded to the survey. Only 4 (or 16%) of those surveyed indicated that they intended to support or rely on the Technical Release, including one that was still researching system capabilities. A copy of the survey is included for your consideration.

The stricter requirements are even harder to justify given the absence of any information or data that suggests significant compliance problems with personalized individual benefit statement disclosures during the five year period since the Department's issuance of the FAB.

We believe the efficiencies and cost savings, as well as benefits to participants, attendant to electronic disclosure are well established. Electronic communication today is no longer the exception, it is the norm. We, therefore, encourage the Department to move forward with interim guidance that facilitates and encourages the use of electronic disclosure as the primary means by which plan information is furnished to plan participants and beneficiaries. In this regard, we specifically request that the Department issue interim guidance (*i.e.,* guidance pending the adoption of a revised final electronic disclosure safe harbor regulation) as soon as possible that extends the now well-established and workable standards of FAB 2006-03 to all participant disclosures under title I of ERISA or, at a minimum, those currently required under the new 404a-5 regulations.

Sincerely,

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Society of Pension Professionals & Actuaries
ERISA Industry Committee
Financial Executives International Committee on Benefits Finance
Financial Services Institute
Financial Services Roundtable
Insured Retirement Institute
Investment Company Institute
Plan Sponsor Council of America
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce

cc:
The Honorable J. Mark Iwry
Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, Department of the Treasury

The Honorable Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs

Michael L. Davis
Deputy Assistant Secretary, Employee Benefits Security Administration

Enclosure

Memorandum

To: Distribution

From: Larry H. Goldbrum

Date: January 20, 2012

Re: **Record Keeper Survey Re: DOL Technical Release 2011-03 – Final Survey Results**

Set forth below are the results from the survey regarding Department of Labor ("DOL") Technical Release 2011-03 (the "technical release"). Preliminary results were reported on November 15, 2011 and The SPARK Institute indicated that it was conducting further research regarding the cost estimates (questions 9, 10 and 11) in order to improve the accuracy of the information. Except for the updated results reported for questions 9 through 11, the report is unchanged.

Twenty five companies responded to the survey, which was fielded between October 20 and November 10, 2011. The follow-up research for questions 9 through 11 was conducted between November 22 and December 30, 2011. The results are shown in the same order as the questions appeared. The "Responder(s)' Comments" included under certain questions are from the record keepers that responded to the survey, are reported verbatim and do not reflect the views or opinions of The SPARK Institute.

1. **Do you intend to support or rely on the guidance in Section B of the technical release (relating to disclosures that are not included on statements) so that plan sponsors will be able to provide required investment related disclosures to participants electronically under the 404a-5 regulations (e.g., consolidated investment option comparative chart)?** (25 Responders)

a. Yes (Go to Question 5.)	**12% (3)**
b. No (Go to Question 2.)	**72% (18)**
c. Undecided (Go to Question 3.)	**8% (2)**
d. Other (Please explain)	**8% (2) (See comments)**
e. Not applicable (Please explain.)	**0% (0)**

<u>Responders' Comments</u>:

1. Intend to, but still researching capabilities from a systems' perspective.
2. We will rely on the existing safe harbors in accordance with section 2520.104b-1(c). However, we will not rely on the new alternative Conditions as set forth in the Technical Release as they are impractical, costly, and come too late to systematically administer.

2. **What are the main reasons that you do not intend to support or rely on the technical release? (Select all that apply.)** (18 Responders)

   a. Requires affirmative action by participants. **72% (13)**
   b. Administratively impractical to implement and monitor on an ongoing basis. **94% (17)**
   c. Too costly to modify systems and procedures. **78% (14)**
   d. Does not facilitate/support electronic delivery of initial disclosures to newly eligible plan participants. **72% (13)**
   e. Record keepers and plan sponsors are not likely to have systems and procedures sufficient to retroactively determine and document whether a participant's e-mail account has been used within the past 12 months. **83% (15)**
   f. Other (Please explain.) **22% (4) (See comments)**

   <u>Responders' Comments</u>:
   1. The guidance is an interim policy, meaning what service providers develop could quickly become obsolete. Efficiencies would be gained by waiting for comprehensive E-delivery guidance covering all required notices, then developing a global e-delivery solution.
   2. In the absence of additional guidance, we are of the opinion that the TR presents more challenges than what is currently in place for compliance with the safe harbor.
   3. It seems that to make that amount of effort just for participant fee disclosure, we would be better off using that time/resources toward obtaining affirmative consent for all disclosures, not just participant fee disclosure.
   4. Because we have the ability to use the existing safe harbor rules for fee disclosure, the additional burden of separately tracking email addresses collected for fee disclosure would require us to build new capabilities and pose an administrative burden that is not cost effective.

   Skip to Question 4.

3. **What are the main reasons that you have not yet decided to support or rely on the technical release? (Select all that apply.)** (4 Responders)

   a. Requires affirmative action by participants. **25% (1)**
   b. Administratively impractical to implement and monitor on an ongoing basis. **75% (3)**
   c. Too costly to modify systems and procedures. **25% (1)**
   d. Other (Please explain.) **0% (0)**

4. **Please indicate if you agree or disagree with the following statements:**

   4.1 The approach and requirements in the technical release are more complicated to implement and follow than the existing DOL regulatory safe harbor regarding electronic communications, and we do not currently support or rely on the safe harbor on a broad basis. (20 Responders)

   a. Agree **100% (20)**
   b. Disagree **0% (0)**

4.2 It will be more cost effective to comply with the 404a-5 disclosure requirements using paper than to build the systems and operate under the approach that is contemplated in the technical release. (20 Responders)

a. Agree **80% (16)**
b. Disagree **20% (4) (See comment)**

Responder's Comment:

1. No, in the long run, paper based distribution costs far outweigh the cost to build the systems to operate under the approach that is contemplated in the technical release; however, given the timeframe within which initial compliance with the regulation must occur, paper-based compliance is a more cost effective option for us because we will assess a fee to plan sponsors to cover our costs.

5. Do you currently support or rely on the existing DOL regulatory safe harbor regarding electronic communications on a broad basis? (25 Responders)

a. Yes (Go to Question 7.) **28% (7)**
b. No (Go to Question 6.) **72% (18)**

6. What are the main reasons that you do not support or rely on the existing safe harbor on a broad basis? (Select all that apply.) (16 Responders)

a. Requires affirmative action by participants. **75% (12)**
b. Administratively impractical to implement and monitor on an ongoing basis. **50% (8)**
c. Too costly to modify systems and procedures. **50% (8)**
d. Other (Please explain.) **38% (6)**

Responders' Comments:

1. The current safe harbor is limited in scope in that it is limited to workplace e-mails where access is an "integral part" of work duties. Plan sponsors have not been willing to certify if participants with workplace e-mail addresses meet this standard.
2. Due to the affirmative action requirement, process must be built to distribute information via hardcopy for the majority of participants instead of exceptions.
3. Waiting for final guidance before implementing systems support to help plan sponsors.
4. While we do utilize the current regulatory safe harbor as broadly as possible, we support greater flexibility so that we could achieve even broader usage. The framework provided by FAB 2006-3 for participant statements has been a successful example of such flexibility.
5. We do not maintain email addresses for all participants. Very few of our clients have 100% of their employee base with work place computers, requiring distribution for at least a portion of their ee base.
6. We support/rely on the "integral part of duties" safe harbor upon direction from clients. We have not built an affirmative consent safe harbor process.

7. **Do you currently track, or have the ability to efficiently and cost effectively track on an ongoing and broad basis, whether all participants send or open e-mail messages to or from the plan, or log onto the participant website using their e-mail address as the username?** (11 Responders)

   a. Yes **9% (1)**
   b. No **82% (9) (See comment #1)**
   c. Other (Please explain.) **9% (1) (See comment #2)**

   <u>Responders' Comments</u>:
   1. Answer given was "No" with this comment: Under certain conditions, we have the ability to monitor returned email, and we have tracked the percentage of participants who access our participant website. However, we don't believe there is a workable solution for tracking when/whether a participant opens an email addressed to him or her. Also, the tracking requirements in the DOL's interim guidance to be able to reply to it for e-delivery are not workable for us.
   2. We have the ability to track if participants open emails that we send to them, but it is not currently part of our standard practice to do so, because we have to set the capability at the individual email "template" level which is additional technology. We do not currently have a way to mass track all emails for open rates or record that information. For the web logon, we use a user name and not the email address for logon. However, as part of the web registration process, we require participant to provide their email address.

8. **Would using an "opt out" method whereby participants received an initial annual paper notice explaining how to access information, the right to receive paper, etc., with web access to information as the default solution, significantly lower your costs as compared to relying on the current DOL regulatory safe harbor or the technical release?** (25 Responders)

   a. Yes **96% (24)**
   b. No **4% (1)**

   (If you answered yes to Question 1 then go to Question 13.)

9. **Please provide an estimate of your anticipated total annual costs to comply with the 404a-5 requirements using paper instead of electronic delivery.** (22 Responders)

   a. Estimate provided. (Go to Question 10.) **41 % (9)**
   b. Unable/unwilling to provide estimate. (Go to Question 12.) **59% (13)**

   The SPARK Institute conducted follow-up research regarding questions 9 through 11 with the respondents who provided estimates in order to improve the accuracy of the results. The original results varied widely and did not appear reliable. We were able to determine that the disparity in the original results was due to differing methodologies and assumptions used by the respondents in developing their estimates. The SPARK Institute worked with respondents to develop a common methodology for developing estimates based on record keepers' generally agreed upon anticipated compliance practices. Respondents were then asked to develop an estimated cost per participant per year under question 10 following the common methodology. The methodology and assumptions are explained under question 10.

10. **Please provide an estimate of the cost per covered individual based on the estimate you provided in Question 9.** (8 applicable responses)

    As noted above, in follow-up research respondents were asked to develop estimates based on the following assumptions and methodology.

    Assumptions: Generic black and white printing on regular paper. 404a-5 materials will be mailed separately, instead of being included with statements or other materials.

    Respondents were asked to provide three estimates:

    (i) Base cost – The incremental or increased cost to print and deliver a single paper communication. This included, for example, paper, printing, postage, sorting, and other costs.

    (ii) Number of mailings per year per plan – An estimate of the average number of mailings per year, per plan including the annual notice and change notices.

    (iii) Non-participating individual costs multiplier – An estimate of the average non-participating individuals who must receive the required notices but do not have an account balance. The cost for materials provided to non-participating individuals would have to be allocated to participants with account balances unless absorbed by the service provider or paid by the plan sponsor. The results are reported as a multiplier.

    The estimated average Base Cost is $1.56, the estimated average number of mailings per year per plan is 2.11, and the estimated average non-participating individual costs multiplier is 30%. **Based on this information, the estimated average additional or incremental cost per year, per participant to comply with 404a-5 using paper instead of electronic delivery is $4.28** (1.56 x 2.11 x 1.30).

11. **What percentage of the costs estimated in Question 9 would you be able to save on an annual basis if you were able to provide the 404a-5 materials in accordance with DOL FAB 2006-03?** (7 applicable responses)

    In our follow-up research we asked respondents to estimate the percentage of their estimated costs they would save if they were able to provide the 404a-5 materials in accordance with DOL FAB 2006-03. **The estimated average savings is approximately 95% of the estimated costs.**

12. **Do you intend to pass some or all of costs to comply with the 404a-5 requirements using paper on to the affected plans?** (22 Responders)

    a. Yes **50% (11)**
    b. No **0% (0)**
    c. Undecided **50% (11)**

13. In your opinion, how useful will the approach in the technical release be in facilitating electronic delivery of 404a-5 materials to participants? (25 Responders)

a. Very useful. **4% (1)**
b. Somewhat useful. **0% (0)**
c. Neutral. **8% (2)**
d. Not very useful. **52% (13)**
e. Not useful at all. **36% (9)**

If you have any questions regarding this information, please feel free to contact me.