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Response to Request for Information Regarding Electronic Disclosure by Employee Benefit Plans

June 6, 2011

Employee Benefits Security Administration Department of Labor

The American Society of Pension Professionals and Actuaries (“ASPPA”) appreciates the opportunity to respond to the request by the Department of Labor (“DOL” or “Department”) for comments with respect to the standards for the electronic distribution of plan disclosures required under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).¹ This is an issue that is of great concern to ASPPA and its members and we look forward to working with the Department in this review process.

ASPPA is a national organization of more than 7,600 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the employer-based retirement plan system.

Introduction

ASPPA is very supportive of the DOL in undertaking this initiative. We believe it is consistent with President’s recent Executive Order calling for a retrospective analysis of existing regulations² and the DOL’s efforts in this regard to “promot[e] economic growth, innovation, competitiveness, and job creation while using ‘the best, most innovative, and least burdensome tools to achieve regulatory ends.’”³

In ASPPA’s response to the DOL’s request for comment on the President’s directive, we recommended that the existing regulation pertaining to electronic disclosure be modified to facilitate electronic communication. In particular, we recommended that the consent and access requirements of the existing “safe harbor” be revised to permit electronic disclosure to

¹ Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (Apr. 7, 2011).

² Executive Office of the President, *Executive Order 13563 of January 18, 2011: Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011).

³ Department of Labor, *Reducing Regulatory Burden; Retrospective Review Under E.O. 13563*, 76 Fed. Reg. 15224 (Mar. 21, 2011).

be the default method of communication.⁴ As noted by the Department in its *Preliminary Plan for Retrospective Analysis of Existing Rules*, this suggestion was overwhelmingly supported by those who voted on the interactive website the Department established to seek public input on these matters.⁵ We hope that this current initiative will be the first step in working toward standards that recognize the benefits of electronic communications and facilitate its wider use.

We have provided comments and suggestions on only those questions for which the expertise and experience of our members is relevant and as to which we felt we could provide meaningful assistance to the Department. In addition, ASPPA, the Investment Company Institute and other organizations jointly supported the preparation of a White Paper by Professor Peter P. Swire and Kenesa Ahmad entitled, “Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery.”⁶ Unfortunately, their work was not finished by the deadline for submitting comments but its completion is anticipated within the next 10 days. At that time, we intend to file a copy of this report as a supplemental comment to this letter. In anticipation of this supplemental filing, where appropriate, reference will be made in our comments to the research done in connection with this study.

Access and Usage

- 1. What percentage of people in this country has access to the Internet at work or home? Of this percentage, what percentage has access at work versus at home? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)?**

See White Paper discussion at Part One, Section C.

- 2. What percentage of participants and beneficiaries covered by an ERISA plan has access to the Internet at work or home? Of this percentage, what percentage has access at work, at home, or both? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)? What percentage of participants and beneficiaries uses the Internet to access private information such as personal bank accounts?**

See White Paper discussion at Part One, Section C.

- 3. What percentage of pension benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of plans (e.g., single-employer plans versus multiemployer plans, defined benefit pension**

⁴ See, 29 CFR § 2520.104b-1(c)(2)(iii).

⁵ Department of Labor, *Preliminary Plan for Retrospective Analysis of Existing Rules* 3 (May 27, 2011), available at <http://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentofLaborPreliminaryRegulatoryReformPlan.pdf>.

⁶ Peter P. Swire & Kenesa Ahmad, *Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*, White Paper (June 2011), hereinafter referred to as the White Paper, a copy of which will be filed as a supplemental comment and will also available on the ASPPA website at <http://www.asppa.org>.

plans versus defined contribution pension plans, etc.), types of participants and beneficiaries (e.g., active, retired, deferred vested participants) and types of disclosures (e.g., all required title I disclosures versus select disclosures).

In surveying our members, we found that practices varied greatly. Generally, a majority of plans report furnishing at least some disclosures by electronic communication. The percentages are difficult to determine because of the varying practices. It appears that defined contribution plans have a higher use of electronic disclosures and that active participants receive more electronic communications than retired or deferred vested participants.

4. (Omitted)

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

The most common methods are as described in the question, i.e., delivery of the document either as an attachment to an email or through a hyperlink embedded in the email which links to a continuous access website. There are benefits and detriments to each method and in many cases both methods are in use. In addition, many larger employers have begun sending out CDs with the required disclosures on them.

6. What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns etc.)? What steps can be taken by employers, and others, to overcome these impediments?

The requirements of the existing safe harbor are a significant impediment to more widespread use of electronic disclosure.⁷ In particular, limiting the safe harbor only to individuals who have previously consented to receive electronic disclosures or who access the employer's or plan sponsor's electronic information system as an integral part of that person's job duties makes the safe harbor extremely cumbersome and not workable. As the technology has changed at a rapid pace, using electronic communication has become a safer, more accepted, secure and reliable form of communication than traditional mailing through the U.S. Postal Service.⁸

In addition, the lack of a consistent regulatory standard for employee benefit communications is frustrating to plan sponsors and their service providers. Given the gravity of the communications and the complexity and inconsistency of the rules, many find it easier to play it safe and simply rely on paper disclosures. This makes it far less likely that participants will get the benefits associated with electronic forms of communication.⁹

⁷ See, 29 CFR § 2520.104b-1(c).

⁸ See, White Paper discussion at Part One, Section G.

⁹ *Id.*, at Part One, Sections D-G.

- 7. Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?**

See White Paper at Part One, Section C.4.

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

Absolutely! Electronic social media such as Facebook, LinkedIn, Twitter, etc. are online communities that could be a cost effective way for companies to distribute participant communications and disclosures, if there is not already an internal intranet or other means. Online distribution of disclosure material will be increasingly cost effective as workforces become more dispersed and more employees are able to work from home or in non-traditional work environments.

Interactive technologies can be programmed into recordkeeper websites or handheld devices to create linked tools that can facilitate participants receiving disclosures and then taking action in their accounts. This can be particularly useful for mobile workforces, or workforces that may have limited time at a desk with a computer.

“Cloud-based” computing technologies can provide secure web-based but remotely stored data and archives. This can also facilitate online or remote access, so that Smartphones, mobile tablets, or other devices can access disclosure documentation or web-based plan information in a secure way, but it does not require a company to purchase their own servers or computers for each employee. Using these tools, an employer can provide a kiosk or secure but public computer that employees can use on their breaks, to provide secure access to participants’ account information and disclosure materials.

General Questions

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

The current safe harbor’s consent and access requirements should be revised to permit electronic disclosure to be the default method of communication. The safe harbor should be crafted so that it is consistent with the Internal Revenue Service (“IRS”) requirements for the use of electronic media.¹⁰ The “good faith” standard of Field Assistance Bulletin (“FAB”) 2006-03 pertaining to employee benefit statements is an example of how this might be done.¹¹

This change to allow electronic communication as the default method is needed because many workers do not access documents electronically as an “integral part” of their job duties. Nevertheless, many of these same employees regularly use email and the Internet

¹⁰ See, 26 CFR § 1.401(a)-21.

¹¹ See, DOL Field Assistance Bulletin 2006-03, Issue 2.

in their personal lives and would prefer to receive information about their retirement plans electronically. In order for these workers to get documents by email or the Internet, they must give their affirmative consent.¹² It is this requirement that often creates difficulty for plan sponsors. Despite the ease of indicating consent by simply clicking a link in a confirming e-mail from the plan sponsor, many participants simply will not take the time to do so or otherwise provide the needed consent.

Providing information that is clear, understandable and there when needed will enable participants to better understand their plans and make informed decisions. Electronic disclosures have the added benefit of the ability to be more timely, searchable, environmentally friendly, and more likely to gain the attention of the participant. Electronic disclosure can communicate more effectively than paper documents by directing the reader's attention to key information and providing the ability to click-through for additional details. Allowing retirement plans to provide information electronically to participants who have not opted for paper, would reduce plan and environmental costs. As many plans generally pass through their communication costs to participants, these savings could be expected to result in increased retirement benefits for participants.

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

The participant access and consent requirements should be modified to eliminate the need for affirmative consent to electronic delivery. Plan sponsors should be permitted to use electronic delivery as the default method for participant and beneficiary communication. The good faith standard in FAB 2006-03 could serve as the basis for this approach since it is already in use by many plan sponsors.

Of course, participants should receive notice of the manner in which the electronic disclosures will be made and be permitted to elect paper copies if they wish. Copying costs would only be applied as otherwise permitted under ERISA.¹³

11. Should a revised safe harbor have different rules or conditions for different types of employee benefit plans (e.g., pension versus welfare plans)? If so, why and what differences?

No, different rules will result in confusion and compliance challenges.

12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statements, COBRA election notices, etc.)? If so, why and what differences?

No, different rules will result in confusion and compliance challenges.

¹² If the information is to be provided through the Internet or by similar means, they must consent in a way that demonstrates their ability to access information in the way it will be provided. *See*, 29 CFR § 2520.104b-1(c)(ii)(B).

¹³ *See, e.g.*, ERISA §104(b)(4); 29 CFR § 2520.104b-30.

- 13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, *etc.*)? If yes, why and how should the rules of conditions differ?**

No, different rules will result in confusion and compliance challenges.

- 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.*, by paper, email, *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).**

The Department should not require pension and welfare benefit plans to furnish disclosures through a continuous website. Although many plans may choose this option, it should not be a mandate. Instead, the DOL should permit plan sponsors to use a website as one of several permissible approaches to furnishing electronic communication.

If any required disclosure is going to be made available through a continuous website, participants should first be notified that the website has information about their benefit plan, how to access that information and of their right to request and receive paper copies. This notification should be given at the time a participant is to receive their first ERISA disclosure and on an annual basis thereafter. There could also be a “reminder” to participants of their ability to access this information on the participant’s benefit statement.

In addition, at the time an ERISA-required disclosure is posted to the website, participants should be notified by email of the most recent posting. This email could also remind participants of their right to paper copies and what steps to follow to receive paper.

- 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?**

The plan sponsor should have the right to decide if the default method for disclosure will be electronic. However, participants should have the right to opt out of electronic disclosure and receive paper instead.

- 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 electronic communication were not accessible?

The revised safe harbor should not have any specific conditions associated with the use of electronic media by individuals with disabilities. Of course, individuals with disabilities should, like any other participant, have the right to opt out of electronic communication if they wish to do so. This election would ensure disabled individuals would have the same access to the disclosure information as they do today without placing any undue burdens on the plan. However, it is likely that many disabled individuals would find electronic communication more beneficial.

As noted in the White Paper, electronic communication allows the use of various technologies to improve access for the disabled.¹⁴ These technologies are readily available but will vary based on the type of disability. Given the unique needs of any particular individual, the Department's regulation should not force plans to bear the cost of having to accommodate electronically all potential disabilities. Rather, the ability of any participant, disabled or otherwise, to request that disclosure be furnished through paper delivery will ensure access to plan information.

Technical Questions

17. If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?

Participants and beneficiaries should have the right to elect to receive only paper disclosures at any time. Of course, after being informed of such an election, a plan should be given a reasonable period of time to process and implement the request.

18. The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work email accounts?

The provisions of the current regulation and the protections it affords participants and beneficiaries are more than adequate to ensure compatible software and hardware.

19. Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would

¹⁴ See, White Paper, Part One, Section B.2.

eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d) of E-SIGN.

As noted in our response to question 6 above, the process of obtaining affirmative consent is cumbersome at best. It requires plan sponsors to send out consent forms and then hope the form gets read and returned. Response rates can be low, even from participants who otherwise access electronic plan records through a website.¹⁵ Plan sponsors end up feeling frustrated for their efforts. In addition, the inconsistency between the standards applied by the IRS and the DOL add further unnecessary complexity to an already complicated regulatory regime. As a result, less focus is made on electronic forms of communication by plan sponsors and service providers. Consequently, the “bells and whistles” and beneficial technologies that go with electronic forms of communication are not available to any participants.¹⁶

The affirmative consent requirement should be removed. It is a burden on electronic commerce in several different ways. As explained above, the difficulties encountered in obtaining consent results in fewer communications being made electronically, not only to those who don’t consent but also to the other participants. This is because many plan sponsors forgo electronic communication entirely due to their frustration with both the unnecessary requirements of the current safe harbor and the lack of a consistent standard for all employee communications. This results in unnecessary printing and use of natural resources which could be avoided through electronic commerce and communication. The consumer consent approach of E-SIGN places a significant burden on this commerce which could be mitigated through alternative approaches without increasing the risk of harm to participants.

As discussed in the White Paper, many electronic commerce transactions and notices of the Federal government have been shifted to electronic delivery, including disclosures made by the Federal Thrift Savings Plan and the Social Security Administration.¹⁷ This shift recognizes that electronic disclosure is an accepted standard of communication and electronic commerce. Requiring affirmative consent is an unnecessary and substantial burden in this regard. The Department of Treasury and IRS made a specific finding under section 104(d)(1) of E-SIGN that requiring affirmative consent to electronic communication “...would impose a substantial burden on electronic commerce with respect to retirement plans, employee benefit plans and individual retirement plans...”¹⁸ As consumer acceptance of electronic technologies and commerce have evolved, that finding is truer today than when it was made in 2006.¹⁹

The Department of Treasury and IRS also found that an alternative, less burdensome method was available which would not increase the likely harm to participants. The

¹⁵ *Id.* at Part One, Section A.1.

¹⁶ *Id.* at Part One, Section D-G.

¹⁷ *Id.* at Part One, Section F.3.

¹⁸ *See*, Preamble to 26 CFR § 1.401(a)-21 at Section II, C; Department of the Treasury, *Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents*, 71 Fed. Reg. 61877, 61881 (Oct. 20, 2006).

¹⁹ *See*, White Paper discussion of Internet acceptance at Part One, Section C.

essential elements of the IRS alternative approach are that the recipient of the notice must be able to “effectively” access the electronic medium used to provide the notice; and must also be advised that a paper copy of the notice can be requested and received at no charge.

It is clear that the affirmative consent provisions of the current safe harbor are a substantial burden on electronic commerce which could and should be removed in a way that will not materially increase the risk of harm to participants or beneficiaries.

20. (Omitted)

21. (Omitted)

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

Spam filters are of some concern, but technologies exist to overcome these concerns.²⁰ Additionally, the increasing functionality of electronic communication has led to greater understanding and acceptance of it in the mass market.

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

Practices vary greatly with no apparent “standard” in place. However, a common element is that the administrative procedure by which distribution is effected is what serves as confirmation. In other words, it is rare that there is an actual return receipt, particularly when notice is given by hand delivery or by the U.S. Postal Service. However, electronic communication is much more easily monitored. Consequently, there is increasing and growing use of “return receipt” and “bounceback” technologies when electronic communication is used.²¹

24. What are current practices for ensuring that the email address on file for the participant is the most current address? For example, what are the current practices for obtaining and updating email addresses for participants who lost their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?

As discussed in the White Paper, technologies have become quite sophisticated for monitoring the use of an email account.²² “Bounceback” and similar technologies can be used to determine whether emails are being received and/or opened. If there is a question, accounts can be flagged for follow-up through other means, such as the U.S. Postal Service

²⁰ *Id.* at Part One, Section G.1.

²¹ *Id.*

²² *Id.* at Part One, Section G.

Comments Regarding Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act

- 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 participants and beneficiaries when information is furnished electronically?**

The White Paper has significant data to the effect that the benefits and savings associated with expanding electronic disclosure far outweigh any perceived costs in doing so.²³ The accessibility and quality of electronic delivery make it the medium of choice for effective communication and evolving technologies will only make it better. Additionally, the costs of printing communication materials will be saved. Such costs savings should inure to the benefit of plan participants since, in most cases, this is an expense paid from plan assets.

- 26. If electronic disclosure were the default method for distributing required plan disclosures, and assuming “opting out” were an option, what percentage of participants would likely “opt-out” of electronic disclosure in order to receive paper disclosures? Should participants be informed of increased plan costs, if any, attendant to furnishing paper disclosures at the time they are afforded the option to opt out or into an electronic disclosure regime?**

Unfortunately, electronic delivery as the default option for disclosure has not been the rule so it is difficult to estimate what percentage of participants would “opt-out” if that were the choice. Input from our members suggests, as an estimate, that approximately 10% of participants and beneficiaries would “opt-out” of electronic delivery if it were the default method. Plan sponsors should have the option to apprise participants of the costs to the plan associated with non-electronic communication.

- 27. Do participants prefer receiving certain plan documents on paper rather than electronically (e.g., summary plan descriptions versus quarterly benefit statements), and what reasons are given for such preference? Would this preference change if participants were aware of the additional cost associated with paper disclosure?**

Participants prefer electronic copies of plan documentation and disclosures that are lengthy (e.g., the plan document) or contain general explanations and rules (e.g., a summary plan description). The reasons for the preference are the ease with which electronic documents can be stored and searched for information.

- 28. What impact would expanding electronic disclosure have on small plans? Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?**

Expanding electronic disclosure would result in better, more cost effective disclosures for small plans just as it would for larger plans.

²³ *Id.* at Part One.

29. Is it more efficient to send and 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, and retain and act upon the disclosure?

There are benefits and detriments to either approach. A PDF file or other attachment does not require any “log-on” capabilities and down loading of files. The attachment can be saved on the recipient’s computer. However PDF files can be rejected by the recipient’s email system either because of the size of the file or for fear of an attached computer “virus.”

A website may be easier to access and easier for participants and beneficiaries to return to at a later date. In many cases, documents and records would not need to be saved externally because they could be accessed on the website. However, participants would need to endure “log-in”, password and other security precautions.

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?

We absolutely believe that there should be a single uniform standard governing electronic disclosure to participants and beneficiaries in employee benefit plans. The present lack of consistency discourages plan sponsors and service providers from attempting to make electronic communication more pervasive because of the complexities associated with trying to satisfy different regulatory regimes within the same plan.

If more plan sponsors used electronic communication, then the beneficial effects of electronic communication would be available to more participants and beneficiaries. The use of interactive technologies makes participants better savers and investors and most importantly, better prepared for retirement. Anything that can be done to encourage plan sponsors to make these electronic technologies available will inure to the benefit of participants. Having a single regulatory will encourage their development by service providers and adoption by plan sponsors.



These comments were primarily authored Craig P. Hoffman, APM, General Counsel and Director of Regulatory Affairs at ASPPA, with input from members of ASPPA’s Government Affairs Committee’s Department of Labor Subcommittee. We welcome the opportunity to discuss this further with you. Please contact Craig Hoffman, at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

/s/

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cc: Joe Canary, Acting Director, Office of Regulations and Interpretations