

TECHNICAL RELEASE 2011-03R

DATE: DECEMBER 8, 2011

**SUBJECT: REVISED INTERIM POLICY ON ELECTRONIC
DISCLOSURE UNDER 29 CFR 2550.404a-5**

INTRODUCTION

On September 13, 2011, the Department issued Technical Release 2011-03 (TR 2011-03), which sets forth an interim enforcement policy regarding the use of electronic media to satisfy the disclosure requirements under 29 CFR 2550.404a-5. In response, staff at the Department's Employee Benefits Security Administration (EBSA) has received inquiries on whether, and to what extent, TR 2011-03 is intended to apply to continuous access Web sites and whether, and under what circumstances, the release permits investment-related information, specifically comparative chart information required by paragraph (d) of section 2550.404a-5, to be furnished as part of a pension benefit statement described in section 105 of the Employee Retirement Income Security Act (ERISA). In issuing TR 2011-03, it was not EBSA's intent to preclude the use of continuous access Web sites. Nor was it EBSA's intent to preclude furnishing comparative chart information as part of, or along with, pension benefit statement information, either through electronic media under the conditions in section C of the release or in paper form. After reviewing TR 2011-03 in light of these inquiries, EBSA is persuaded that plan administrators and their service providers would benefit from the requested clarifications. In lieu of issuing a separate document, designed to be read in conjunction with TR 2011-03, EBSA has instead decided to revise and restate TR 2011-03 as Technical Release 2011-03R. The revised technical release is identical to TR 2011-03 except as necessary to clarify the aforementioned issues.

BACKGROUND

With regard to the use of electronic media generally, the Department has issued a regulation, at 29 CFR 2520.104b-1(c), setting forth conditions under which a plan administrator will be deemed to satisfy the requirement, in section 2520.104b-1(b)(1), that disclosures under title I of ERISA must be furnished using "measures reasonably calculated to ensure actual receipt of the material." The safe harbor of section 2520.104b-1(c) is limited to individuals who meet the requirements of one of the following classifications:

Integral Part of Duties. The safe harbor applies to participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties. See 29 CFR 2520.104b-1(c)(2)(i).

Affirmative Consent. The safe harbor also applies to other participants (*e.g.*, retirees, former employees, and active employees who do not use a computer as an integral part of their duties), beneficiaries (*e.g.*, surviving spouse, alternate payees), and other persons entitled to disclosures under title I of ERISA who affirmatively consent to receiving disclosures through electronic media in the manner prescribed by the regulation. *See* 29 CFR 2520.104b-1(c)(2)(ii).

On December 20, 2006, the Department issued Field Assistance Bulletin 2006-03 (FAB 2006-03) to provide general guidance regarding good faith compliance with the changes made to the pension benefit statement provisions of section 105 of ERISA by section 508(a) of the Pension Protection Act of 2006.¹ In FAB 2006-03, the Department stated that the furnishing of required pension benefit statement information in accordance with the safe harbor of 29 CFR 2520.104b-1(c) would constitute good faith compliance with section 105. FAB 2006-03 also states that “[f]or purposes of section 105, the Department, pending further guidance and review of the provisions of section 2520.104b-1(c), will view the furnishing of pension benefit statements in accordance with [Treasury regulation] section 1.401(a)-21,² as good faith compliance with the requirement to furnish benefit statements to participants and beneficiaries.” In addition, with respect to secure continuous access Web sites, FAB 2006-03 states:

With regard to pension plans that provide participants continuous access to benefit statement information through one or more secure web sites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a pension benefit statement could be furnished under this Bulletin, and furnished both in advance of the date on which a plan is required to furnish the first pension benefit statement pursuant to section 105(a)(1)(A)(i) and (ii) of ERISA and annually thereafter.

On October 20, 2010, the Department published a final rule in the Federal Register regarding fiduciary requirements for disclosure in participant directed individual account plans, which is codified at 29 CFR 2550.404a-5.³ Paragraphs (e)(1) and (2) of this rule provide that certain fee

¹ Pub. L. No. 109-280, 120 Stat. 780 (2006).

² 26 CFR 1.401(a)-21 relates to the use of electronic media to provide certain notices and documents required to be furnished under the Internal Revenue Code.

³ 75 FR 64909.

and expense information may be included in a quarterly pension benefit statement required by section 105(a)(1)(A)(i) of ERISA.⁴

Paragraph (g) of the final rule, relating to the manner of furnishing information under section 2550.404a-5, is reserved. The Department decided to reserve paragraph (g) pending its review of a then yet to be published request for information seeking public comments, views and data relating to the electronic distribution of plan information to participants and beneficiaries. In the preamble to the final rule, the Department anticipated that it would have completed its review of the request for information and provided guidance sufficiently in advance of the compliance date for section 2550.404a-5 of the final rule so as to ensure appropriate notice to plans. The preamble to the final rule also states that pending issuance of any new guidance regarding electronic disclosure, the “general disclosure regulation at 29 CFR 2520.104b–1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures at paragraph (c) of that regulation.”⁵

Section 2550.404a-5 applies to plan years beginning on or after November 1, 2011.⁶ Under the transitional rule of section 2550.404a-5(j)(3)(i), the “initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investments” had to be furnished no later than 60 days after such applicability date. In July of 2011, the Department adopted a final rule which modified the transitional rule of paragraph (j)(3)(i) by extending the time to provide such initial disclosures until the later of 60 days after the applicability date or 60 days after the effective date of 29 CFR 2550.408b-2(c).⁷ As a result of this change, the earliest date that disclosures have to be made under 29 CFR 2550.404a-5 is May 31, 2012.

From public comments made on a number of its regulatory initiatives in the last few years, the Department was aware that in some instances, electronic disclosure might be just as effective as paper-based communications, may lower costs and administrative burdens and increase timeliness and accuracy. At the same time, the Department was aware that some workers and retirees may not be sufficiently computer literate to receive information electronically or have reasonable access to the Internet, and others may simply prefer traditional paper disclosure. In light of the differing views and the significance of the issues surrounding electronic disclosure under title I of ERISA, the Department published the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (E-Disclosure RFI) in the Federal Register on April 7, 2011.⁸ The Department received approximately 80 comments. Some commenters expressed the view that the current safe harbor of 29 CFR 2520.104b-1(c) is outdated and limits the ability of plans to realize the benefits of using electronic media to furnish disclosures

⁴ Paragraph (e)(1) states that “information required to be disclosed in paragraphs (c)(1)(i), (c)(2)(i)(A) and (c)(3)(i)(A) of this section may be provided as part of the plan’s summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section.” Paragraph (e)(2) states that the “information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i).”

⁵ See discussion under B.6 *Manner of Furnishing* of the preamble to the final rule. 75 FR 64909 at 64922, 64923.

⁶ 29 CFR 2550.404a-5(j)(2).

⁷ See 76 FR 42539 (July 19, 2011). This rule delays the effective date of 29 CFR 2550.408b-2(c) to April 1, 2012.

⁸ 76 FR 19285.

required by title I of ERISA (*e.g.*, reduction of costs; environmental impact). A subset of those commenters suggested that the current safe harbor be modified to permit plans to furnish all disclosures required under title I of ERISA in a manner similar to the guidance provided under FAB 2006-03. On the other hand, the Department also received comments that the current safe harbor of 29 CFR 2520.104b-1(c) does not adequately ensure that participants and beneficiaries will receive the required disclosures and suggested strengthening the affirmative consent requirements of the safe harbor (*e.g.*, extend the current affirmative consent requirements for certain disclosures to active employees who use a work computer as an integral part of their duties; annual renewal of affirmative consent to receive electronic disclosures). The Department is reviewing the E-Disclosure RFI comments for purposes of determining whether, and possibly how, it would modify the electronic disclosure rules of 29 CFR 2520.104b-1(c).

DISCUSSION

Representatives of plan sponsors, service providers and others in the employee benefits community have expressed concern about the approaching applicability date of 29 CFR 2550.404a-5 and the absence of guidance under paragraph (g) of the final rule regarding the use of electronic media to furnish the required disclosures. A number of such persons have requested that the Department extend the guidance provided under FAB 2006-03 regarding the use of electronic media to furnish pension benefit statements under section 105 of ERISA to the furnishing of all fee and expense information required under section 2550.404a-5. Although the Department is declining to do so at this time, it recognizes that some form of interim relief may be necessary, since the Department may not be able to provide final regulatory guidance regarding the manner of furnishing disclosures under section 2550.404a-5(g) until after the compliance date of section 2550.404a-5.

CONCLUSIONS

A. PLAN-RELATED INFORMATION REFERENCED IN SECTION 2550.404a-5(e).

Disclosures required by section 2550.404a-5(c) that are included in a pension benefit statement in accordance with section 2550.404a-5(e)(1) or (e)(2) may be furnished in the same manner that the other information included in the same pension benefit statement is furnished. For example, if the pension benefit statement information is furnished through a secure continuous access Web site in accordance with the guidance provided under FAB 2006-03, then the information included as part of the pension benefit statement in accordance with section 2550.404a-5(e)(1) or (e)(2) may also be furnished electronically in the same manner. However, disclosures required by section 2550.404a-5 that are not furnished as part of a pension benefit statement in accordance with section 2550.404a-5(e)(1) or (2) may not be furnished electronically under the guidance provided by FAB 2006-03.

B. INVESTMENT-RELATED INFORMATION IN SECTION 2550.404a-5(d).

Consistent with section 2550.404a-5, investment-related information under section 2550.404a-5(d) may be furnished as part of, or along with, pension benefit statement information, either electronically in accordance with section C of this release or in paper form in accordance with section 2520.104b-1(b).

C. ALL SECTION 2550.404a-5 INFORMATION.

General. The plan administrator may use the safe harbor of section 2520.104b-1(c) to furnish section 2550.404a-5 disclosures through electronic media. Alternatively, pending further guidance, a plan administrator may furnish section 2550.404a-5 disclosures through electronic media (including a continuous access Web site) in accordance with the conditions described below:

Conditions. Except as provided under the Special Transition Provision of paragraph 7, below, all of the conditions of paragraphs 1 through 6, below, must be satisfied:

1. Voluntary Provision of E-mail Address. Participants and beneficiaries entitled to receive information under section 2550.404a-5 must voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an e-mail address for the purpose of receiving disclosures required by section 2550.404a-5. The e-mail address must be provided in response to a request accompanied by an Initial Notice, as described in paragraph 2, below. If the provision of an e-mail address is a condition of employment or participation in the plan, such e-mail address shall not be treated as being provided voluntarily.⁹ If a participant, however, is required to provide an e-mail address electronically in order to access a secure continuous access Web site housing the required disclosure, the provision of such e-mail address is considered voluntary where an Initial Notice is provided in accordance with paragraph 2, below.
2. Initial Notice. The Initial Notice must be clear and conspicuous, provided contemporaneously and in the same medium as the request for the e-mail address and contain the following information:
 - a. A statement that providing an e-mail address for the receipt of the required section 2550.404a-5 disclosures is entirely voluntary, and that as the result of providing the e-mail address, the required disclosures will be made electronically;
 - b. Identification or a brief description of the section 2550.404a-5 information that will be furnished electronically and how it can be accessed by participants and beneficiaries;

⁹ The mere establishment or assignment of an e-mail address by an employer or plan sponsor for a participant or beneficiary will not be treated as a voluntary provision of an e-mail address. The participant or beneficiary, however, may subsequently and voluntarily furnish such e-mail address to the employer, plan sponsor or plan administrator (or its designee) for the purpose of receiving the section 2550.404a-5 information if the Initial Notice described in paragraph 2 above is provided contemporaneously.

- c. A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of any of the section 2550.404a-5 information provided electronically and an explanation of how to exercise that right;
 - d. A statement that the participant or beneficiary has the right, at any time, to opt out of receiving the section 2550.404a-5 information electronically and an explanation of how to exercise that right; and
 - e. An explanation of the procedure for updating the participant's or beneficiary's e-mail address.
3. Annual Notice. Commencing with the year beginning after the year that the participant or beneficiary voluntarily provided his or her e-mail address in accordance with paragraph 1, above, and annually thereafter, the plan administrator shall furnish an Annual Notice to each such participant or beneficiary. For purposes of this paragraph 3, "year" means a calendar year, plan year, or any other 12-month period selected by the plan administrator.

The Annual Notice must contain the information set out in subparagraphs b. through e. of paragraph 2, above. The Annual Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Annual Notice electronically by sending it to the e-mail address on file for the participant or beneficiary if there is evidence that such participant or beneficiary interacted electronically with the plan after the date the Annual Notice for the preceding year was furnished (or in the case of the first Annual Notice, after the date the Initial Notice was furnished). Examples of electronic interaction include, but are not limited to: the participant or beneficiary updating, resubmitting, or confirming his or her e-mail address to the plan; the participant or beneficiary sending an electronic message to the plan; logging onto a secure continuous access Web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant or beneficiary.¹⁰

4. Delivery. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information (*e.g.*, using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, *etc.*).
5. Confidentiality. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.

¹⁰ The electronic interaction described in this paragraph is relevant only for whether the Annual Notice may be furnished electronically rather than in paper. Such interaction, for purposes of paragraph 3, is not a substitute for the condition in paragraph 1, above, relating to the voluntary provision of an email address. Thus, for example, if a plan sent an e-mail to a participant at an address on file that had not been voluntarily provided by the participant for the purpose of receiving the disclosures under 29 CFR 2550.404a-5, although the participant's opening of that email may be evidence that the participant has access to the Internet, it is not a substitute for the requirement that an e-mail address must be voluntarily provided to the employer, plan sponsor, or plan administrator (or its designee).

6. Calculated To Be Understood. Notices furnished to participants and beneficiaries shall be written in a manner calculated to be understood by the average plan participant.
7. Special Transition Provision. With respect to e-mail addresses of participants and beneficiaries that are on file with the employer, plan sponsor or plan administrator (or its designee) on the date specified in subparagraph b. of this paragraph 7 (the “Transition Group”), the conditions in paragraphs 1 and 2 shall be deemed to be satisfied if a Transition Group Initial Notice, described below, is furnished to the Transition Group as follows:
 - a. The Transition Group Initial Notice must contain the information set out in subparagraphs b. through e. of paragraph 2, above;
 - b. The Transition Group Initial Notice must be furnished no earlier than 90 nor later than 30 days prior to the date the initial disclosures required under 29 CFR 2550.404a-5(j)(3)(i)(A) are provided to the Transition Group;
 - c. The Transition Group Initial Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Transition Group Initial Notice electronically by sending it to an e-mail address on file for a participant or beneficiary if there is evidence of electronic interaction with the plan, within the meaning paragraph 3, above, during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7.

This Special Transition Provision is not available for an e-mail address established or assigned by the employer, plan sponsor or its or their designee unless there is evidence that such e-mail address was used by the participant or beneficiary for plan purposes during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7. For this purpose, examples of using e-mail address for plan purposes include, but are not limited to, the participant or beneficiary: sending an electronic message to the plan from such e-mail address; receiving and opening an electronic message sent by the plan to such e-mail address; or logging onto a secure continuous access Web site housing plan information, using such e-mail address as the username.

D. Scope of Technical Release.

This Technical Release establishes a temporary enforcement policy until the Department issues further guidance in this area. Under this policy, the Department will not take any enforcement actions against a plan administrator who complies with the conditions in this Technical Release. The relief in this Technical Release is specifically limited to the furnishing requirement under 29 CFR 2520.104b-1(b)(1) as it applies to the disclosures under 29 CFR 2550.404a-5. This is an expression of the Department’s enforcement policy but it does not address the rights or obligations of other parties. No inferences should be drawn that the guidance provided under either this Technical Release or FAB 2006-03 will be reflected in changes, if any, to the current electronic disclosure safe harbor of 29 CFR 2520.104b-1(c).

FOR FURTHER INFORMATION CONTACT: Thomas M. Hindmarch or Janet Song,
Employee Benefits Security Administration, Department of Labor, at 202-693-8500.