



EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION

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June 6, 2011

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

RIN: 1210-AB50

Dear EBSA:

The Employers Council on Flexible Compensation (“ECFC”) is writing to express its thoughts with respect to the current electronic disclosure regulations, DOL Regulation Section 2520.104b-1 (the “Regulations”). Our comments are in response to the Department of Labor’s Request for Information, dated April 7, 2011, 76 Fed. Reg. 19285, (the “RFI”).

ECFC is a membership association dedicated to maintaining and expanding employee benefit programs offered on a pre-tax basis including health care, transportation, dependent/child care assistance and retirement plans. ECFC’s more than 100 members include employers who provide these important benefits, as well as insurance, accounting, consulting, and actuarial companies that design or administer employee benefit plans throughout the nation. Together, ECFC member companies design, offer, or administer flexible benefits for tens of millions of working Americans.

Our comments relate to the use of employee benefit websites. Many plan sponsors use either a private intranet site, a public internet site, or both, to store and display summary plan descriptions, annual enrollment materials and other important benefit disclosures (collectively referred to as a “Benefit Website”). Some Benefit Websites are only available to employees who are accessing the Benefit Website through an employer’s computer system. However, the majority of Benefit Websites are available on the internet. Some are open to the general public without logging in with a username and password, while others require a username and password.

Many plans have employees, beneficiaries and other individuals (collectively, “Participants”) that do not satisfy the provisions of subsection (c)(2) of the Regulation, either because an employee does not use a computer at work or because the consent procedure set forth in subsection (c)(2)(ii) is overly complicated. Some plan administrators have devised alternate distribution methods for Participants. Each plan administrator’s specific method may differ in some respects, but typically contain the following elements (referred to herein as the “Postcard Method” or the “Enrollment Acknowledgement Method” below).



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Under the “Postcard Method”:

- The Participant is sent a postcard, letter or other written communication (collectively, a “Postcard”) via first class mail to the Participant’s home address or other address on file with the plan;
- The Postcard provides that a new document has been posted to the plan’s Benefit Website and lists the specific internet address of the Benefit Website;
- The Postcard satisfies the requirements in subsection (c)(1)(iii), e.g., the Postcard includes a short description of the new posted document;
- The Postcard also provides that Participants may receive a written copy via first class mail, if the Participant calls a toll-free phone number; and
- The requirements of subsection (c)(1)(iv) are satisfied, e.g., if a Participant calls the number and requests a copy, a copy is mailed to his or her home address.

Under the Enrollment Acknowledgement Method, Participants voluntarily elect to use an electronic copy of the summary plan description (or other relevant communications). Participants that choose to continue to receive communications in paper can “opt-out” of electronic communications at the time of enrollment and continue to receive paper. This opt-in is typically accomplished during open enrollment procedures (either electronic, telephonic, or on paper) and, as with the Postcard Method, provides the following:

- The Enrollment Acknowledgement provides that access to relevant plan documents is posted to the plan’s Benefit Website and lists the specific internet address of the Benefit Website;
- The Enrollment Acknowledgement satisfies the requirements in subsection (c)(1)(iii), e.g., it includes a short description of the posted documents;
- The Enrollment Acknowledgement also provides that Participants may receive a written copy via first class mail, if the Participant calls a toll-free phone number or elects for a paper copy in accordance with the instructions designated with the enrollment materials; and
- The requirements of subsection (c)(1)(iv) are satisfied, e.g., if a Participant calls the number and requests a copy, a copy is mailed to his or her home address.

In our view, the Postcard and Enrollment Acknowledgement Methods (collectively the “Alternate Methods”) satisfy the general rule in subsection (b)(1) and they should be adopted as new specific safe harbors under the Regulations for all Participants for the following reasons.

First, the Alternate Methods are the functional equivalent of the safe harbor requirements in subsection (c)(1). The Postcard is mailed to the Participant’s home or other address, which is a specific distribution method in subsection (b)(1) and informs Participants where and how to find the document. Similarly, the Participant affirmatively elects to “opt-in” to receive electronic communications through the Enrollment Acknowledgement Method. Therefore, the Alternate Methods satisfy the requirements in subsection (c)(1)(i)(A). (The requirements of subsection (c)(1)(i)(B) are typically not applicable, because the document is of a general nature that includes



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no personal information.) Because the document is posted on the Benefit Website in PDF form (or other similar form), it meets the requirements of subsection (c)(1)(ii). Further, as noted above, the provisions of subsection (c)(1)(iii) and (iv) are satisfied (e.g., by including a description of the document, a toll free number and mailing of a printed copy upon request). In essence, the Alternate Methods function the same as an email with a link to the Benefits Website for those that satisfy the requirements of subsection (c)(2) of the Regulation.

Under the Alternate Methods the actual document is not provided to the Participant (just the Postcard and/or open enrollment materials). However, the same is true with respect to the current safe harbor in subsection (c)(1). The subsection (c)(1) safe harbor does not require that the actual document be provided via electronic media. In the situation where a Participant (who satisfies the requirements of subsection (c)(2) of the Regulation) is sent an email with a link to the Benefits Website, the person still must click on the link (and likely log into the Benefit Website) to access the document. This is similar to accessing the same document on a Participant's home computer, public computer, smartphone or other electronic device, after receiving the Postcard or enrollment materials with the Benefit Website address.

Second, the Alternate Methods reduce the regulatory burden on plan administrators and saves money. Participants have actually questioned employers and plan administrators regarding why the company continues to incur the cost of printing and distributing paper copies given the prevalence of electronic media. Due to the numerous mailings required by ERISA, some Participants have even said that they prefer an Alternate Method because it allows them to obtain copies of only the items they prefer to read. Thus, similar to the electronic media safe harbor, the Alternate Methods ensure that only those Participants who desire a printed copy actually receive a printed copy.

We strongly urge the Department to not burden plan administrators with a complicated consent procedure for the Alternate Methods. The Alternate Methods, as set forth above, already contain an "opt out" provision, because they allow Participants to obtain a paper copy should the Participant desire a paper copy.

Requiring the "opt out" to apply automatically to any future correspondence would not be desirable to Participants because many Participants want to receive a specific document, such as an SPD, in writing, while not burdening the Participant with all other kinds of paper documents that may be required under ERISA. Offering Participants the ability to pick and choose which document they receive in writing fosters efficient plan administration while at the same time ensuring Participants receive required ERISA documentation.

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

Sincerely,

A handwritten signature in black ink that reads "Dennis Triplett". The signature is written in a cursive, flowing style.

Dennis Triplett
Board Chair