



Invested in America

June 6, 2011

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

Re: Request for Information on Electronic Disclosure

Ladies and Gentlemen:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is pleased to provide comments regarding the Department of Labor’s (“Department”) Request for Information Regarding Electronic Disclosure by Employee Benefit Plans under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We appreciate the opportunity to provide comments to the Department as it assesses the impact of the proposal on plans, plan sponsors and their participants.

We applaud the Department’s initiative in issuing an RFI in this area. As the Notice points out, various agencies have different rules on electronic disclosure and even within a single agency, there are often different rules for different plans and different communications. Our members find that simply reconciling these rules for even a single plan is an enormous effort. We urge the Department to take the lead in harmonizing these different rules with the Department of Health and Human Services, the Department of the Treasury, the Securities and Exchange Commission, the Financial Industry Regulatory Authority and any other relevant agency. We recently submitted comments to the SEC asking that they take into account the disclosure regimes proposed by other agencies, including the Department on Labor, as well.² We believe the consumer will be best served by harmonization of disclosures.

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

² Letter dated May 31, 2011 to the Securities and Exchange Commission re: “SR-FINRA-2011-018” available at: <http://www.sec.gov/comments/sr-finra-2011-018/finra2011018-5.pdf>.

We are also pleased that the Department intends to issue a rule that will apply to communications both to plan sponsors and to participants and beneficiaries. We strongly believe that the Internet presents the most accessible method of accessing information, whether section 408(b)(2) disclosures, participant disclosure for the 401(k) plan options, pension benefit statements, or other required notices for pension and welfare plans.

SIFMA believes the Department's current regulation is outdated and its safe harbor should be revised. We agree with the ERISA Advisory Council that electronic communication is now the norm, and not an exception, and that in most cases, reasonable access to electronic communication should be presumed. We do not see a difference in standards based on plan type and we urge the Department not to differentiate. Plans and participants should be free to differentiate and select, for example, electronic communication for retirement benefits and written disclosure for health benefits. We think that any plan differentiation that the Department might believe appropriate will not capture the unique desires of all participants and beneficiaries. In our view, the Department should not presume one type of plan disclosure is "more critical" than any other or that it can determine for participants and beneficiaries, which ones are more accessible in written format.³

SIFMA urges the Department to adopt the standard in Field Assistance Bulletin 2006-3 and apply it to all required communications across the various plan types. That standard, which is set out below, correctly recognizes that virtually everyone has access to the Internet, through their homes or relatives' homes, their phones, public libraries, schools, churches, community centers and even their televisions.

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.

³ For example, many people believe that they can store plan information much more readily (and in a more "transportable" and efficient manner if they have it in electronic format. Almost all email services now have nearly unlimited storage capacity, and "cloud" services provide even more ready access.

We believe the Department found the right balance with this standard. We are fully appreciative of the need to make sure that plan sponsors (and prospective clients, in the case of the section 408(b)(2) disclosure requirements) and plan participants and beneficiaries understand their right to obtain written disclosure, and offer some suggestions for how the Department can satisfy itself that these reminders are clear and prominent. To that end, SIFMA urges the Department to permit plan sponsors and plan participants to be notified of their right to obtain a free written version of the communication either by mail, by email where the plan sponsor has provided its email address to the service provider, or the participant has a work related email address, or by nonwork email, where the deferred vested participant or beneficiary has provided an email.

SIFMA also suggests that the Department provide a safe harbor to meet this requirement, which could include one or more of the following: (i) posting of notice at workplaces in the same manner as notices posted under the Fair Labor Standards Act and the Occupational Safety and Health Act, (ii) written notice sent to the participant's or beneficiary's last known address, or (iii) prominent notice on one of the following: account statements, the summary plan description, enrollment materials, annual benefit statements, or other communications.

SIFMA agrees with the Department that any such notice, and all electronic communications, as well as the secure website, should prominently contain a statement that the participant or beneficiary may receive written materials without charge by mail if he or she contacts the plan administrator by phone, email or regular mail. A toll-free number should be provided for such contact. In addition, SIFMA suggests that the Department may want to consider a link on the website that would permit a participant or beneficiary to request written materials.

We urge the Department not to require secure websites for every employer and every plan. In our view, plan sponsors are moving in this direction on their own, and a Department requirement that it exist for all workforces and all plans is neither necessary nor appropriate. In our judgment, plan sponsors should decide what to make available electronically, and participants should decide whether they want written materials instead. We think a government mandate in this area would be a mistake.⁴ A voluntary system works; flexibility makes this attractive.

Finally, we believe that requiring PDF attachments is inadvisable. Links allow material to be up to date and accurate; if a document is sent by PDF, and then revised and another PDF sent even a year or two later, a participant or plan sponsor may retain the wrong email, or retain neither. A link always provides the best access to up-to-date documents. In reviewing the approaches by other agencies, it is useful to review the developments by the SEC in provision of certain prospectuses and affiliate marketing disclosures.⁵

⁴ SIFMA also disagrees with the notion that the Department should impose different rules for individuals with disabilities. The scope of such an endeavor is too broad and too intrusive and will be extremely costly.

⁵ In 2005, the SEC adopted a new set of prospectus delivery rules that established an "access equals delivery" standard for many, but not all, securities. Under that standard, if an issuer posted a prospectus online for easy investor access, broker-dealers were not required to provide a final prospectus with confirmation for certain securities transactions. *See* Securities Act Release No. 8591, 70 Fed. Reg. 44722 (Aug. 3, 2005). In 2009 the SEC promulgated the summary prospectus rule which allowed investment company issuers to be deemed to deliver a fund's statutory

We appreciate the Department's outreach in this effort and we hope you will not hesitate to contact us if you believe we have additional information or perspective that would be useful to you.

Sincerely,



Lisa J. Bleier
Managing Director, Government Affairs
Securities Industry and Financial Markets Association

prospectus by posting it on a website. *See* Inv. Co. Act. Rel. No. IC-28584, 74 Fed. Reg. 4546 (Jan. 26, 2009). In defending the access equals delivery model for statutory prospectuses, the SEC noted that “A recent survey indicated that 90% of investors surveyed had access to the Internet [and that] over half (56%) rely on the Internet to some extent (ranging from ‘a little’ to ‘completely’) in making investment decisions....The survey report further indicated that 53% of respondents who own mutual funds accessed investment information via the Internet.” *Id.* at 4560, n. 195. FINRA also has supported the notion of access equals delivery for mutual fund prospectuses and, in the context of commenting on the SEC’s profile prospectus rule, stated that: (i) “Internet disclosure is the only effective way to assure that investors receive the information they desire at the point of sale. The Commission should mandate Internet delivery of the point of sale disclosure document;” and (ii) “the SEC should take an ‘access equals delivery’ approach to mutual fund prospectus delivery.” *See* Letter from Robert G. Glauber (Chairman and CEO of NASD) to Jonathan G. Katz (Secretary of the SEC) (March 31, 2005) (available at: <http://www.sec.gov/rules/proposed/s70604/nasd033005.pdf>).