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Requests for Information Regarding Electronic Disclosure by Employee Benefit Plans

Comment On: EBSA-2011-0006-0001

Requests for Information Regarding Electronic Disclosure by Employee Benefit Plans

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Comment on FR Doc # 2011-08288

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General Comment

9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?
10. If the safe harbor should be revised, how should it be revised? Please be specific.
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?
12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?
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 or conditions differ?
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., paper, e-mail, 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).

15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For e

Attachments

EBSA-2011-0006-DRAFT-0001.1: Comment on FR Doc # 2011-08288

Comments on Electronic Disclosure by Benefit Plans

9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?
No – the current system is working well.

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

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 – they should follow the same rules.

12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?
No – consistency makes it easier to implement and follow.

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 or conditions differ?
No – should all be the same (consistency).

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., paper, e-mail, 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).

It would lessen the burden of distributing individual notices – the information would be consistent. Annual notification to participants and beneficiaries of their ability to access benefit information. The Web site could have a note at the end telling participants and beneficiaries they can request and receive paper copies.

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? See Question 26. Plan sponsors should decide, but give participants the ability to request and receive paper copies.

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 other electronic communication were not accessible?

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?
If they do not have electronic access.

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 e-mail accounts?

If participants and beneficiaries do not have compatible hardware and software they can elect to receive a paper copy.

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 eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.

20. In general, the E-SIGN Act permits electronic disclosure of health plan materials but does not apply to cancellation or termination of health insurance or benefits electronically. Are there special considerations the Department should take into account for group health plan disclosures (including termination of coverage and privacy issues)?

21. Many group health plan disclosures are time-sensitive (e.g., COBRA election notice, HIPAA certificate of creditable coverage, special enrollment notice for dependents previously denied coverage under the ACA, denials in the case of urgent care claims and appeals). Are there special considerations the Department should take into account to ensure actual receipt of time-sensitive group health plan disclosures?

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

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

Choosing the email setting that notifies you an email has been received and read.

24. What are current practices for ensuring that the e-mail address on file for the participant is the most current e-mail address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose 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?

The onus would be on the participants or beneficiaries to provide updated email addresses.

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

Executive Order 12866 (EO 12866) requires an assessment of the anticipated costs and benefits to the government and the public of a significant rulemaking action, and of the alternatives considered, using the guidance provided by the Office of Management and Budget. Under EO 12866, a determination must be made whether implementation of this rule will be economically significant. A rule that has an annual effect on the economy of \$100 million or more is considered economically significant.

In addition, the Regulatory Flexibility Act may require the preparation of an analysis of the impact on small entities of proposed rules and regulatory alternatives. A regulatory flexibility analysis must generally include, among other things, an estimate of the number of small entities subject to the regulations (for this purpose, plans, employers, and issuers and, in some contexts small governmental entities), the expense of the reporting, recordkeeping, and other compliance requirements (including the expense of using professional expertise), and a description of any

significant regulatory alternatives considered that would accomplish the stated objectives of the statute and minimize the impact on small entities. For this purpose, the Agency considers a small entity to be an employee benefit plan with fewer than 100 participants.

The Paperwork Reduction Act requires an estimate of how many "respondents" will be required to comply with any "collection of information" requirements contained in regulations and how much time and cost will be incurred as a result. A collection of information includes recordkeeping, reporting to governmental agencies, and third-party disclosures.

The Department is requesting comments that may contribute to the analyses that will be performed under these requirements, both generally and [[Page 19290]] with respect to the following specific areas:

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 plan participants and beneficiaries when information is furnished electronically?
No

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? 10%
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? Not necessary

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? No Would this preference change if participants were aware of the additional cost associated with paper disclosure?

28. What impact would expanding electronic disclosure have on small plans? None Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?

29. Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Can password protect a PDF file. Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure? PDF file

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? Tremendous benefit to standardize – one set of rules to follow.