

Douglas O. Kant  
Senior Vice President &  
Deputy General Counsel

FMR LLC Legal Department

82 Devonshire Street, V7A Boston, MA 02109  
Phone: 617-563-6645 Fax: 617-385-1862  
Email: doug.kant@fmr.com



May 13, 2011

**SUBMITTED ELECTRONICALLY**

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

Re: E-Disclosure RFI

Ladies and Gentlemen:

The U.S. Department of Labor ("Department") published a request for information ("RFI") in the Federal Register on April 7, 2011 (76 FR 19285). The RFI concerns the use of electronic media to furnish information to participants and beneficiaries covered by employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA").

This response to the RFI is submitted on behalf of the group of financial service companies for which FMR LLC is the parent company and which is known as Fidelity Investments (collectively, "Fidelity Investments"). Fidelity Investments provides record keeping, investment management, communications, and trustee or custodial services to thousands of Internal Revenue Code ("Code") Section 401(k), 403(b) and other benefit plans covering millions of employees and their beneficiaries.

We appreciate the Department's desire to review the legal framework regarding the use of electronic media by plans subject to ERISA, and we will file a detailed response to the questions in the RFI. However, this letter focuses on the questions raised in item 14 of the RFI and a serious timing problem concerning the applicability date of the new participant disclosure regulations under section 404(a)(1) of ERISA. To address the issue, we ask that the Department confirm that disclosures under the participant regulation may be distributed under the guidance provided under Field Assistance Bulletin No. 2006-03 (the "FAB").

**The FAB**

Section 508 of the Pension Protection Act of 2006 ("PPA") imposed a new requirement that defined contribution plans that permit participants to direct the investment of their accounts provide account statements to participants at least on a quarterly basis. The provision of

participant account statements on a quarterly basis was generally followed as a practice in the 401(k) market by the 1990's. However, the increasing amount of information to be provided and the delays inherent in mailing paper statements increasingly demonstrated its limitations.

Improvements in Internet technology and a dramatic increase in Internet access and utilization in this country permitted a better solution for most individuals. For over a decade, Fidelity Investments has provided plan participants with the ability to review the status of their account investments online in "real time" so that, for example, a participant can see his or her account investment in plan options valued as of the market close on the preceding business day. In addition, a participant can obtain a custom statement for specified periods via the website. We understand that other major service providers developed similar Internet solutions as well. The plan sponsor and employee communities responded quite positively to these developments. The new PPA statement requirement threatened to disrupt this process.

Issued soon after the enactment of PPA, the FAB acknowledged the substantial time and expense that would be incurred by service providers (and consequently, plan sponsors and plan participants) in complying with the new statement requirements. The FAB stated that the Department would view the continuous availability of pension benefit information on a secure website to constitute "good faith" compliance, provided that participants are notified of the availability of statement information, how to obtain access to the website, and how to obtain paper statements if so desired.

### **The Participant Disclosure Regulation**

The participant disclosure regulation is scheduled to take effect at the end of 2011. It has a paragraph reserved for rules regarding the use of electronic disclosure pending a Department review of the 2002 regulation (29 CFR 2550.404a-5(g)). The regulation preamble concludes that: "It is anticipated, however, that resolution of this issue will occur in advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans." [75 FR 64923]. However, the RFI was only issued recently, and there is simply not enough time for the Department to receive and analyze responses to the RFI, finish work on a new regulation, and supplement the participant disclosure regulation with rules regarding the use of electronic media before that regulation becomes effective.

In consideration of the lengthy period of time that this process will likely require, the transitional relief in the FAB should cover the new participant disclosure requirements set forth in Regulation 29 CFR 2550.404a-5 until any new electronic media regulation takes effect. This would provide participants and beneficiaries with a consistent online experience – providing

them with all the information deemed necessary for investment-decision making as well as the account balance information already required under the PPA rules. Mailing the extensive written disclosures required by the new regulation to the majority of participants and beneficiaries who prefer online access will be wasteful and, for many participants and beneficiaries, an unwanted return to prior practice.

We understand that some participants or beneficiaries either don't have ready access to the internet or simply prefer to receive their plan information in paper form. The FAB already addresses those needs or wants with its rules regarding the conditions of notice and availability of paper upon request. We would expect to satisfy those same conditions for the new participant disclosures made available online. Specifically, for the initial and annual notice, the participant would be notified of the availability of the notice at that time. In addition, if a change notification is required, participants could again be notified that the website contains updated information so they would be informed of such change. In either case, a paper notice could be requested if the participant or beneficiary desired.

We also understand that the FAB was issued as a transitional rule, not as a wholesale replacement of the current regulation governing electronic communications. The RFI is intended to formally initiate the process of determining whether and to what extent the "safe harbor" in regulation 29 CFR 2520.104b-1(c) will be replaced. In the intervening period, however, it would be least disruptive to apply the current guidance as a consistent standard for periodic participant disclosure. Online participant statements were developed in large part because of the sheer bulk of the material, the need to provide the information periodically, and the benefits of up-to-date information as well as providing a better participant experience. The new participant disclosures have similar criteria and the participant experience would be similarly enhanced if it were permissible to leverage the FAB guidance.

Plans have only have six (6) months before the initial notices must be provided under the new participant disclosure regulation. These first disclosures must be provided to **all** current participants and eligible employees. This is an enormous undertaking – in our case, it will involve potentially mailing to over 20 million individuals.

In order to meet this extraordinary initial disclosure obligation without needlessly expending extensive resources, plan administrators and their service providers need immediate confirmation that the FAB analysis will, pending the effective date of a new electronic communications regulation, apply for purposes of delivering participant disclosures under the

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Page 4 of 4  
May 13, 2011

new regulation. The longer the confirmation is delayed, the greater the additional costs in development to prepare for the effective date of the participant disclosure regulations.

We would be pleased to provide any additional information or meet to discuss this topic in more detail if that would be deemed helpful.

\*\*\*\*\*

Respectfully,



Douglas O. Kant  
Senior Vice President and  
Deputy General Counsel

DOK/jam