



The
ERISA
Industry
Committee

June 3, 2011

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

Re: Request for Information Regarding Electronic Disclosure
RIN: 1210-AB50

Ladies and Gentlemen:

The ERISA Industry Committee (“ERIC”) is pleased to respond to the Department of Labor’s request for information regarding electronic disclosure by employee benefit plans. The request was published in the *Federal Register* on April 7, 2011.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, and other welfare benefits of America’s largest employers. ERIC’s members provide comprehensive benefits directly to tens of millions of active and retired workers and their families.

ERIC’s members invest considerable time and expense providing useful communications to participants, beneficiaries, and others, and improving those communications. ERIC’s members have found that electronic communications offer significant advantages to plan sponsors, administrators, participants, and beneficiaries, including the following:

- **Cost-efficiency.** Providing communications electronically reduces the cost of preparation and distribution.
- **Time-efficiency.** Electronic communications get to recipients faster than paper communications. The time difference ranges from a few days to more than two weeks.

- ***Interactive capability.*** Interactive features make many electronic communications more user-friendly than paper communications. For example, most electronic documents have search features and can include hyperlinks to relevant background information.
- ***Privacy.*** A secure electronic system offers more privacy protection than paper communications. For example, when a document is delivered by mail, there is no way to control who reads it. Usernames and passwords protect against unauthorized access.
- ***Keeping track of updates.*** A well-managed Web site can alleviate the burden of saving paper documents and keeping personal files up to date. A Web site can provide immediate access to relevant documents.
- ***Environment.*** Use of electronic media saves paper.

The Department's existing safe harbor for electronic disclosure, set forth in 29 C.F.R. § 2520.104b-1(c), significantly restricts the feasibility of using electronic disclosure. Of particular concern is the requirement to obtain affirmative consent unless access to the applicable electronic medium is an "integral part of [the participant's] duties."

We recognize that not everyone has Internet access and that some people prefer to receive paper in the mail. However, we do not believe these facts justify the burdens of the existing consent requirements. The proposal set forth below provides sufficient protection for individuals who do not wish, or are not able, to receive communications electronically.

PROPOSED EXPANSION OF SAFE HARBOR

The safe harbor should allow electronic disclosure if the following conditions are satisfied:

1. If the sender does not have the recipient's e-mail address, the existing affirmative consent requirements must be satisfied.
2. If the sender has the recipient's e-mail address, affirmative consent should not be required, provided that the recipient may elect a paper version of any legally required disclosure. The notice requirements in items 3 and 4, below, would ensure that the opportunity to elect paper is effective. This condition is discussed beginning on page 4, below.
3. Each electronic disclosure must include a statement of the recipient's right to request and obtain a paper version and any charge for paper, and a phone number and e-mail address for technical assistance and requesting paper. In accordance with Treas. Reg. § 1.401(a)-21(c)(2), no additional notice should be required if the recipient has the effective ability to access the medium that is

used for the disclosure. As discussed beginning on page 5, below, it is not necessary to require that access be “an integral part of [the participant’s] duties.”

4. For anyone who does not satisfy the “effective ability to access” condition, the plan administrator must send or cause to be sent a paper “opt-out notice.” The notice should include the following information:
 - A description of the documents that will be provided electronically;
 - An explanation of how electronic information will be delivered (*e.g.*, by e-mail to the address on file with the plan administrator or posting on a Web site). If information will be delivered by e-mail, the notice should include the sender’s name;
 - Access instructions, including a description of the hardware and software requirements for viewing, printing, and saving;
 - The recipient’s right to request and obtain paper versions of required disclosures, and any charges for paper; and
 - A phone number, e-mail address, and physical address for questions and requests to receive paper disclosures.

The notice should be provided before the first electronic disclosure and annually thereafter. The notice is discussed beginning on page 4, below.

5. The plan administrator must take measures reasonably calculated to ensure that the disclosure system results in actual receipt of transmitted information and protects the confidentiality of personal information. This condition follows the existing requirement in 29 C.F.R. § 2520.104b-1(c)(1)(i), except that the phrase “appropriate and necessary measures reasonably calculated” would be replaced with “measures reasonably calculated.” The change is discussed on page 6, below.
6. Electronically delivered documents must satisfy the existing style, format, and content requirements set forth in 29 C.F.R. § 2520.104b-1(c)(1)(ii).

The conditions set forth above should be a safe harbor. Other approaches should also be permitted if the administrator takes measures reasonably calculated to ensure actual receipt of the material and protect the confidentiality of personal information. The “measures reasonably calculated” standard should evolve as electronic media become even more widespread than they already are.

DISCUSSION OF PROPOSED CHANGES TO EXISTING REGULATION

1. The existing affirmative consent requirement should apply only if the sender does not have the recipient's e-mail address.

We understand the concern that some workers do not have Internet access or simply prefer paper over electronically disclosed materials. However, it is safe to assume that anyone who has an e-mail address has Internet access. For cases where this assumption is incorrect or the individual simply prefers electronic disclosure, the notice and opportunity to elect paper disclosure described below will provide adequate protection.

2. If the sender has the recipient's e-mail address, affirmative consent should not be required, provided that the recipient may opt out of receiving required disclosures electronically.

As noted in the Department's RFI, access to electronic media has become significantly more widespread since 2002, and there has been a corresponding increase in the use of electronic communication. As a result of these changes, participants, consumers, and others have grown accustomed to receiving important information electronically. In addition, those who are unable or unwilling to receive information electronically have grown accustomed to requesting a paper version.

The required statement and opt-out notice described in items 3 and 4 of our proposal provide an effective opportunity for anyone who prefers paper to request paper. The opt-out notice would be distributed in the same manner as other important disclosures have traditionally been distributed, and would be short and simple enough to get the reader's attention. Providing the opt-out notice annually would protect individuals who later decide that they prefer paper disclosures.

The responsibility to read the opt-out notice and act on it is no more significant than other participant responsibilities. For example:

- In participant-directed individual account plans, participants are responsible for making investment decisions. Participants and beneficiaries who are defaulted into a qualified default investment arrangement ("QDIA") bear the risk of loss even though the default might not be appropriate for their circumstances.¹ Opt-out notices would be provided as often as QDIA notices. See ERISA § 404(c)(5)(B); 29 C.F.R. § 2550.404c-5(c)(3).

¹ See, e.g., DOL & SEC Joint Investor Bulletin on Target Date Retirement Funds (May 6, 2010), available at <http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf> ("Target date funds do not eliminate the need for you to decide, before investing and from time to time thereafter, whether the fund fits your financial situation.").

- Many plans have automatic enrollment. Individuals who do not want the default enrollment level must make affirmative elections. Those who fail to act are enrolled in accordance with the default instructions, even though the default might not be consistent with their preferences. Opt-out notices would be provided as often as automatic-enrollment notices. *See, e.g.*, ERISA § 514(e)(3)(B).
- Almost all health plans require eligible individuals to make coverage elections during open-enrollment windows. Individuals must read the open-enrollment materials and make elections that suit their needs. Those who do not can miss out on valuable benefits.

In each case, plans rely on participants to make important decisions. Of course, there will inevitably be individuals who do not read the notices or fail to act by a stated deadline. The remedy for this problem, however, is not to require affirmative consent for everything. Just as employees and others are trusted to read and act on QDIA, automatic-enrollment, and open-enrollment notices, they should be trusted to read and act on opt-out notices. The safe harbor should not assume that opt-out notices will be ignored.

3. It is not necessary to require that access to the applicable information system be “an integral part of [the participant’s] duties.”

Under the Department’s existing safe harbor, affirmative consent is required for electronic disclosure unless—

- The participant “[h]as the ability to effectively access” electronic documents in his or her work location; *and*
- “[A]ccess to the . . . electronic information system is an integral part of [the participant’s] duties.”

29 C.F.R. § 2520.104b-1(c)(2)(i) (emphasis added). In contrast, the Treasury Department’s regulation on electronic notices, published in 2006, requires only that the recipient have “effective ability to access” the electronic medium. Treas. Reg. § 1.401(a)-21(c)(2).

In light of the recent explosion in electronic media, the Department should adopt Treasury’s “effective ability to access” standard. A paper opt-out notice should not be required for anyone who has access to the applicable electronic medium—for example, through a computer on the employee’s desk or a laptop or smart phone, as well as through a public terminal at the workplace.

In the preamble to its 2002 regulation, the Department compared providing a public terminal to making documents available in a location frequented by participants.² This comparison does not hold.

First, when documents are simply made available in a location frequented by participants, the *only* way to get a copy is to go to the location, find the documents (if any are left), and pick one up. In contrast, when information is circulated electronically, individuals can read it from almost anywhere, and there is no risk of documents disappearing. A public terminal is a tool to facilitate downloading, reading, and printing in the workplace. It enhances (rather than inhibits) access to information.

Second, when information is distributed by e-mail, providing a public terminal is different from merely placing materials in a location frequented by employees, because the information is sent directly to each participant's e-mail inbox. A better comparison would be to placing documents in office mailboxes or cubbies. This method of delivery would be permissible, even though employees have to walk over to their mailboxes to collect their mail. The conclusion should not be different merely because the mailbox is electronic.

In short, most employees today have access to electronic media through countless devices, and they use electronic media even if access to electronic media is not an integral part of their duties. Accordingly, the Department should adopt the "effective ability to access" standard, and the standard should be flexible enough to accommodate access through any device available to the employee.

4. The requirement to take "appropriate and necessary measures reasonably calculated . . ." should be changed to require "measures reasonably calculated . . ."

Under the Department's disclosure regulation, a plan administrator fulfills its disclosure obligation if it "use[s] measures reasonably calculated to ensure actual receipt of the material."³ The "measures reasonably calculated standard" is not qualified by an additional "appropriate and necessary" requirement.

In 2002, the Department stated that "the standard for furnishing materials . . . should not be stricter for electronic disclosures than for other methods of delivery."⁴

² Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, 67 Fed. Reg. 17264, 17265 (Apr. 9, 2002).

³ 29 C.F.R. § 2520.104b-1(b)(1). This standard has been in effect since 1977. *See, e.g.*, Summary Plan Description Requirements; Interim Regulations, 42 Fed. Reg. 14266, 14267 (Mar. 15, 1977) ("[T]he plan administrator must use a method . . . which [is] reasonably designed to get the information into the hands of the people who are supposed to have it.").

⁴ 67 Fed. Reg. at 17267.

Consistent with this policy, the “measures reasonably calculated” standard for electronic disclosure should be the same as for paper disclosure. Accordingly, the words “appropriate and necessary” should be deleted.

Also, any future guidance should make clear that the “measures reasonably calculated” standard is flexible. There is no single “best practice” approach to ensuring receipt or protecting confidentiality.

5. The conditions set forth in ERIC’s proposal adequately address the concerns that have been raised with respect to electronic disclosure.

As discussed above, the fact that some individuals still prefer paper does not justify defaulting everyone to paper. The conditions for ERIC’s proposed safe harbor adequately protect those who either do not have effective access to electronic media or simply prefer to receive paper disclosures. For example:

- Affirmative consent would still be required for anyone whose e-mail address is not on file with the sender.
- The requirement to state in each electronic disclosure that the recipient may request paper ensures that people who receive electronic disclosures know they may request paper.
- The annual paper opt-out notice ensures that people who prefer paper are reminded at least once a year of how to request paper disclosures.
- The requirement to take measures reasonably calculated to protect confidentiality provides more protection against fraud and other misconduct than the existing requirements for paper disclosures.

RESPONSES TO SPECIFIC QUESTIONS

6. Access and Usage Questions (Questions 1-8)

Almost all of ERIC’s members currently furnish some disclosures electronically. In general, members’ electronic disclosure policies do not distinguish among plan types. However, some members use electronic disclosure more for some benefits than for other benefits.

In practice, electronic disclosure tends to be more common for active salaried employees than for others, because most active salaried employees have computers at their desks. We believe that this statistic would change if the electronic disclosure safe harbor is broadened.

ERIC's members that furnish information electronically generally use a combination of e-mails and Web sites. Many of ERIC's members tend to prefer links to their Web sites over attachments to e-mails. Three advantages of links are:

- An e-mail with a link is generally much smaller (data-wise) than an e-mail with an attachment. Using links therefore reduces the frequency of e-mails bouncing back as a result of being too large.
- When confidential information is being transmitted, linking to a password-protected Web site can add security. There can be two layers of security that are not available through paper communications: (i) a password to read e-mail and (ii) if desirable, a second password (or other access restriction, such as use of an intranet site that is not available to the general public) to view sensitive documents on the Web site.
- When recipients are directed to a Web site, they can see other resources that are available to help them learn more about their benefits and manage their affairs.

However, other members find it easier and more convenient to use stand-alone e-mails or e-mails with attachments, or simply to post documents on a Web site. In addition, some members have replaced links with instructions on how to log on to the Web site, in order to mitigate the risk of phishing.

The most significant impediment to increased electronic disclosure is the narrowness of the Department's existing safe harbor. Many plan sponsors and administrators have concluded that the burden of the existing consent requirement outweighs the benefits of electronic disclosure.

Question 6 of the RFI suggests that privacy and access issues might also be impediments to increasing the use of electronic media. However, these concerns are not more significant for electronic disclosure than for paper disclosure. For example, there is no way to ensure that a paper document sent by first class mail will actually be delivered to the intended recipient. Addresses on file with the plan are often out of date or incorrect. An individual's responsibility to notify the plan of an e-mail address change is no different from the responsibility to notify the plan of a new physical address.

Electronic media actually help to reduce privacy and access problems. First, as noted above, electronic communications can have more password protections than paper communications. Second, recipients have access to electronic information no matter where they are. Third, many people keep their e-mail addresses unchanged for longer than their physical addresses.

Of course, not everyone has embraced electronic media. However, the notice and opt-out opportunity described in ERIC's proposed safe harbor will adequately protect those who do not wish to receive information electronically.

7. General Questions (Questions 9-16)

As discussed above, the electronic disclosure safe harbor should be revised to allow electronic disclosure to be the default if the sender has the recipient's e-mail address. ERIC supports allowing people to opt out of electronic disclosure, and notifying them of their right to do so. However, it is not necessary to provide protections beyond those described in our proposal.

The requirements for the safe harbor should not vary by type of plan. Although plan administrators might choose to use electronic media for some disclosures but not others, the underlying principle of taking measures reasonably calculated to ensure actual receipt does not demand treating some plans or types of disclosures differently from others.

ERIC's members are not aware of any specific concerns for individuals with disabilities that are not also present with respect to paper communications. If anything, use of electronic media should improve access to information for individuals with disabilities. For example, computer software can convert electronic disclosures to different media (*e.g.*, a voice communication) that are more accessible than paper for people with disabilities.

The Department should encourage plan sponsors and administrators to make more information available on Web sites and through other electronic means. As discussed above, electronic communications offer many advantage over paper. The best way to encourage more use of Web sites is to make the electronic disclosure safe harbor less burdensome. Reducing the burden will encourage more plan administrators to use electronic disclosure. If this is done, use of plan Web sites should become more widespread.

8. Technical Questions (Questions 17-24)

The E-SIGN Act's consumer disclosure rules should not apply to employee benefit plans. Most employee benefit plan disclosures do not involve commercial transactions or unknown vendors. In addition, the notice and opt-out opportunity are not available for routine consumer transactions. Providing an adequate opportunity to opt out is sufficient to protect those who do not wish to receive electronic communications. Requiring administrators to obtain and keep track of affirmative consents adds a significant burden that is not necessary.

The annual opt-out notice also obviates the need to police the media used for disclosures—other than to require that the sender take measures reasonably calculated to ensure actual receipt and protect confidentiality of personal information. In practice, electronic communications disseminated by ERIC's members can generally be viewed with basic software that is pre-loaded or available for free on most computers. The existing "measures reasonably calculated" standard is sufficient to protect against transitioning to new media that are not widespread; and the annual opt-out notice provides a safety valve for anyone who does not keep up with technology changes.

ERIC's proposed safe harbor is also sufficient to protect against concerns regarding spam filters and similar devices. The annual opt-out notice would include the name of the sender of any e-mails, so that recipients can make sure that their e-mail systems accept mail from that sender. Those who do not wish to receive e-mails from the plan will be allowed to opt out; and the annual opt-out notice will remind anyone who has not received anything in a while to reach out to the plan and see if there is a problem.

As noted above, we do not believe that special considerations are necessary for health or other plans. The privacy protections available for electronic media are generally better than those available for paper disclosures; and there is no evidence that the risk of important information not being delivered or read is any greater for electronic disclosures than for paper disclosures. To the contrary, electronic information reaches recipients faster, and is easier to get to, than paper documents.

The following information responds to the Department's specific questions about current practices:

- ***Confirming receipt.*** In general, if a paper communication is not delivered, it is eventually returned to the sender. Anything that is not returned is assumed to have been received and read.
- ***Time-sensitive information.*** To convey time-sensitive information (*e.g.*, resolution of a claim related to emergency medical treatment), administrators often try to reach the participant, beneficiary, or service provider by phone, fax, or e-mail. However, it is not always possible to connect by phone or fax. E-mail is often the most effective way to transmit time-sensitive information.
- ***Keeping e-mail addresses up-to-date.*** In general, the processes for keeping e-mail addresses up-to-date are analogous to practices for paper addresses. Most e-mail systems notify the sender of any messages that are not delivered. When this happens, the administrator can send a paper copy to the recipient's last known address.

9. Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act Questions (Questions 25-30)

As discussed above, electronic delivery saves plans, sponsors, and participants money. The cost of required disclosures affects plan participants and beneficiaries—as a result of either plan assets being used to pay expenses or a decline in the resources available to fund benefits. In recent years, these costs have increased dramatically due to new disclosure requirements and increased scrutiny of summary disclosures. Expanding the electronic disclosure safe harbor would help to reduce these costs.

ERIC's members believe that it would be appropriate to inform participants of the costs of furnishing paper disclosures. However, disclosure of this information should not be required.

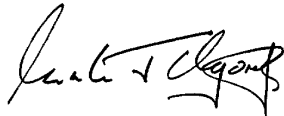
Question 25 of the RFI expresses concern that asking participants to print electronic documents would transfer printing costs from plans to participants. We do not believe this concern is significant. First, as noted above, participants are already affected by the cost of printing. Electronic disclosure reduces these costs. Second, participants would be responsible only for the printing costs that they wish to incur. Those who do not wish to incur additional printing costs can read and save documents electronically, request paper disclosures, or print only the pages of interest to them.

Question 29 of the RFI addresses the difference between sending an e-mail with the disclosure attached versus a link to a Web site. ERIC's members do not believe that one form is more likely to be read, retained, and acted upon than the other. Attachments and links to Web sites are discussed above, on page 8.

Finally, we believe that coordination among the Department, Treasury, and the SEC to develop a single disclosure standard would benefit plan sponsors, participants, and beneficiaries. A single set of rules would reduce the incidence of inadvertent noncompliance and ease the burden of learning and implementing multiple sets of rules. As noted above, these savings would benefit plan participants and beneficiaries.

ERIC appreciates the opportunity to provide comments on electronic disclosure. If you have any questions concerning our comments, or if we can be of further assistance, please let us know.

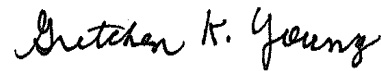
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