



June 6, 2011

Submitted Electronically Via E-mail (e-ORI@dol.gov)

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

RE: Request for Information Regarding Electronic Disclosure by Employee Benefit Plans

Dear Sir/Madam:

We at Pension Consultants, Inc. believe that the Department of Labor should modernize the 2002 safe harbor for electronic disclosures. Please see our responses below, in darkened font, to the Department's queries:

1. What percentage of people in this country has access to the Internet at work or home? Of this percentage, what percentage has access at work versus at home? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)?

Many sources have estimated that approximately 80% of Americans have access to the internet at home in 2010, and 92% of Americans have access to the internet either at work at home. The number of Americans with internet access at home increased from approximately 76% in 2009 to 80% in 2010.

2. What percentage of participants and beneficiaries covered by an ERISA plan has access to the Internet at work or home? Of this percentage, what percentage has access at work, at home, or both? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)? What percentage of participants and beneficiaries uses the Internet to access private information such as personal bank accounts?

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Clearly some industries would be higher than others. However, because active participation in a plan presumes employment, and because 92% of Americans have access to the internet at either work or home, it is reasonable to conclude that 92% or more of active ERISA plan participants have access to the internet. Additionally, it is reasonable to conclude that at least 80% of inactive participants and beneficiaries have access to the internet.

3. What percentage of pension benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of plans (e.g., single-employer plans versus multiemployer plans, defined benefit pension plans versus defined contribution pension plans, etc.), types of participants and beneficiaries (e.g., active, retired, deferred vested participants) and types of disclosures (e.g., all required title I disclosures versus select disclosures).

More than half of our pension plan clients make no electronic disclosures at all. A very small percentage rely heavily on electronic disclosures. A sizable minority use electronic disclosures selectively but do so in addition to, rather than in lieu of, paper disclosures.

5. What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?

Continuous web access is the most common among our clients.

6. What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?

We believe that most of the impediments that critics of electronic disclosures have articulated (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.) are not unique to electronic disclosures but are more general concerns that affect paper disclosures as well.

7. Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or

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willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?

Yes, and as evidence, the Department should look to the success of paperless banking and paperless bill pay.

8. Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?

The increase use of smart phones and mobile internet devices and the rapid evolution of smart phone applications could positively impact the effectiveness of electronic disclosures, as these trends will result in an intensified and more constant nexus between plan participants and the digital distribution of information.

9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?

The electronic safe harbor should be revised to further encourage plan sponsors to move towards a paperless model. In light of recent regulations such as the participant fee disclosure regulations under ERISA Section 404(a), plan sponsors will face greater disclosure volume. Liberalizing the electronic safe harbor disclosure will compliment these new rules because it will make compliance less onerous for plan sponsors and will make the disclosures more accessible (both practically and conceptually) to participants and beneficiaries.

A key reason for making a move to paperless is cost reduction. A move towards greater electronic disclosure would reduce the real estate needed to store documents and reduced time for filing paper. Reduced printing is another area that may not result in any substantial cost savings. Since most firms either own or lease their printers under some long-term arrangement, there is not a great opportunity for cutting cost by getting rid of printers (it seems that most firms keep them). If the firm can avoid having to purchase new equipment and just continue with the old machines, a real cost savings will occur.

In addition to these hard cost savings, efficiency improvement is one of the largest benefits your firm will experience from a move towards electronic disclosures – both from the plan sponsor and the participant and beneficiary perspectives. But perhaps the greatest benefit of all is to the environment for cutting down on the use of paper.

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

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Currently, the safe harbor requires the participant to have the ability to access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee; and for accessing the electronic information system to be an integral part of the participant's duties as an employee.

These requirements greatly limit the ability of plan sponsors with large workforces that do not sit at desks all day to make electronic disclosures.

While the use of kiosks of computer stations for such workers is not a good alternative, employers should be able to make electronic disclosures to those employee for which it has a record of email address, whether it be professional or personal.

Additionally, rather than require intended recipients to affirmatively consent to electronic disclosures, employers should be permitted to begin with electronic disclosures and give participants and beneficiaries the ability to affirmatively opt for paper disclosures.

For participants and beneficiaries for which the employer has no email address on file, the employer should make paper disclosures until they can solicit an email address from the intended recipient. Once an email address is obtained, the employer should be allowed to switch to electronic disclosures unless the participant or beneficiary affirmatively opts for the paper disclosures to continue.

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?

Our experience is limited to pension plans, but we are unaware of any factors that would warrant a separate set of rules and conditions for welfare plans.

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?

While we support a comprehensive shift away from paper disclosures and do not generally believe it is necessary for the safe harbor to impose different conditions for different types of disclosures, we believe that if any disclosures should be held to a more exacting standard or more strictly tied to a paper disclosure mechanisms, it should be those disclosures where there is a clear material benefit to the participant for possessing a paper copy that is independent from content of the disclosure itself.

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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, access to the internet and other technology should be the only factor in evaluating different classes of recipients.

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.

It should largely be the plan sponsor's decision, but plan sponsors should have the ability to opt out of electric disclosures.

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?

Reasonable accommodations for disabled employees should be considered. For example, blind employees may be furnished brail paper disclosures or audio dictations of the disclosure content.

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?

While we believe plan sponsors should have greater freedom to begin with electronic disclosures, we believe that participants and beneficiaries should always retain the ability to opt into a paper disclosure method.

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.

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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.

Yes, this is a strong impediment. Sociological data indicates that individuals only take affirmative steps when they are strongly encouraged to do so. Thus, participants who are neutral or favor electronic disclosure but do so with a low degree of emotional salience will tend to not opt in, and employers should be deprived of the electronic disclosure option because of participant neutrality or salience.

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?

A unified standard would obviously cut down on plan sponsors' compliance costs.

Sincerely,

Chase A. Tweel, JD, LLM
ERISA Analyst

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