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Via Electronic Mail (e-ORI@dol.gov)

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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

Attention: E-Disclosure RFI

Ladies and Gentlemen:

I respectfully submit these comments in response to the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans published by the Department of Labor (the "Department") in the Federal Register on April 11, 2007, at 76 Fed. Reg. 19,825 (April 7, 2011) ("RFI"). I submit these comments as a plan participant and as a member of the general public. I speak only for myself, not for my employer, any client, or anyone else.

I. Introduction

I am an employee benefits attorney with over fifteen years of experience advising clients on their disclosure obligations under ERISA. I have designed numerous plan communications and helped clients design media used to furnish information to participants. I served as the Chairperson of the 2009 ERISA Advisory Council Working Group on Promoting Retirement Literacy and Security by Streamlining Disclosures; I drafted the language from that working group's report which was quoted in the RFI.¹ Finally, I served in the United States Navy with duties that required me to be a communications specialist. Thus, I learned a great deal about effective communications while I served my country.

The Department's efforts over the years to improve participant communications have been both laudable and invaluable. In enacting ERISA, Congress recognized that plan disclosures are vital for each "individual participant [to] know[] exactly where he stands with respect to the plan-what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the

¹ As noted above, my comments herein reflect only my personal comments. They should not in any way be construed as reflective of the ERISA Advisory Council, any member of the ERISA Advisory Council, or anyone related to the Department of Labor.

persons to whom the management and investment of his plan funds have been entrusted.”² “[Although] Congress was concerned chiefly with protecting the employees’ expectations of pension benefits, it also realized that employers would not create, maintain, or expand pension plans if ERISA imposed too much cost. Consequently, the entire statute is a finely tuned balance between protecting benefits for employees while limiting the costs to employers.”³ The Department’s attempts to implement this balance in connection with electronic disclosures should prove to be no easy task, and the Department should be praised for its undertaking. Thank you for your hard work.

II. The Department Should Not Eliminate or Diminish the Requirement That Administrators Ensure Actual Receipt of Plan Materials

ERISA’s disclosure scheme requires plan administrators to communicate information to plan participants, beneficiaries, or other specified individuals.⁴ All communications require someone who sends the information to be communicated and someone to receive that information. Under ERISA, the plan administrator (or its agents) is generally the sender and the participants (or their agents) are generally the receivers.

Effective communication requires five steps: (1) creation, (2) transmission, (3) receipt, (4) comprehension, and (5) confirmation. First, the sender must create the information to be communicated. Second, the sender must transmit that information. Third, the receiver must actually receive the information. Fourth, the receiver must comprehend the information received. The fifth step requires the receiver and the sender to come together and confirm the underlying meaning of the information communicated, *i.e.*, reach a “meeting of the minds.”

The foregoing can be illustrated by applying this model to a typical delivery of a summary plan description (“SPD”) to a participant. When the plan administrator drafts the SPD, it creates the information to be communicated. Historically, the administrator would transmit that information by mail or hand delivery to the participant, and the participant would receive it by mail or hand delivery. Then the participant, ideally, would read the SPD and understand it. Finally, the effectiveness of the communication would be maximized if the participant were to approach the administrator with questions and the administrator and participant would come to a “meeting of the minds” on the meaning of the SPD.

Generally, ERISA only regulates the first three steps in the communication model described above. This too can be illustrated by reference to the delivery of the SPD. First, ERISA § 102 (and related regulations and other guidance) governs the content of the information

² Legislative History of the Employee Retirement Income Security Act of 1974, Volume 1 at p. 613 (Senate Report 93-127).

³ See, e.g., *A-T-O, Inc. v. Pension Benefit Guarantee Corp.*, 634 F.2d 1013, 1021 (6th Cir.1980) (citing S.Rep. No. 94-383 (1974), reprinted in 1974 U.S.C.C.A.N. 5166, 5167).

⁴ See 29 C.F.R. § 2520.104b-1(b)(1). Hereafter, the term “participants” in these comments should be construed to include participants, beneficiaries, and/or specified individuals, whichever is appropriate for the context.

that ERISA requires a plan administrator to create. Second, ERISA §§ 101 and 104 govern the requirements for transmitting that information to the participant. Third, in its regulations at 29 C.F.R. § 2520.104b-1(b)(1), the Department of Labor has interpreted the term “furnish” in ERISA §§ 101 and 104 to require an administrator to “use measures reasonably calculated to ensure actual *receipt* of the material by plan participants...” (emphasis added). In this way ERISA, at least to some extent, regulates the receipt of plan information by participants. ERISA does not require participants to understand the information received, nor does it require them to seek out the plan administrator to come to a meeting of the minds on the information.

By establishing a scheme that regulates not just the first two, but the first three, steps of effective communications, the Department has taken great strides toward the goals of Congress in enacting ERISA. The importance of the Department’s interpretation of the term “furnish” to require administrators to use measures reasonably calculated to ensure actual receipt cannot be overstated. If the Department were to diminish this requirement, then it could severely diminish the effectiveness of ERISA’s disclosure scheme. And if it were to eliminate the requirement, it would eliminate an entire step in the process of effective communications.

It is clear that administrators’ enhanced access to electronic media should prove to be very beneficial to plan sponsors and to participants, primarily through reduced costs. The Department should, however, consider the extent to which it could diminish, or even eliminate, such a critical step in the process of effective communications when it promulgates electronic communication regulations. Moreover, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change....” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Since the Department first issued these regulations, Congress has adopted subsequent ERISA disclosure provisions and thus adopted the Department’s interpretation of ERISA. Accordingly, the Department should not modify its prior interpretation of the statute.

III. Responses to Select Portions of the RFI

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.)?

The individuals who most likely need ERISA disclosures are the least likely to have Internet access. According to the RFI, the 2009 U.S. Census Bureau Current Population Survey (“2009 Census”) found that 76.7% of the households in the United States have access to the Internet from some location. This could be read as suggesting that substantially all Americans have access to the Internet. Such a construction, however, should not be applied to all participants. Instead, the Department should consider the underlying data.

The data that underlies the 2009 Census shows that only 68.7% of the U.S. households have internet access at home; almost one-third of all U.S. households do not. It is not likely that Congress intended to allow administrators simply to place required disclosures in a place of public access – such as the local library – and then inform the participant of the location. It is more likely that Congress generally intended that administrators would furnish the information to

participants at home or in the workplace. Accordingly, Internet access at some place other than home or work should not play a significant role in the Department's considerations.

The data underlying the 2009 Census further illustrates that a vast disparity in Internet access exists among different demographics. According to the survey, only 63% of individuals age 55 and older have access to the Internet anywhere, though that number will likely increase as time goes by. Approximately 64% of Hispanics have Internet access, and only 41% of those who did not complete high school have Internet access. These numbers should not be overlooked by the Department as it promulgates its new regulations.

Finally, there appears to be nothing in the 2009 Census that shows how many individuals have access to printers or electronic storage devices that would enable the individual accessing the Internet to print or otherwise store the information received through the Internet.

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

Administrators may wish to use "social networking" Internet sites, such as Facebook, LinkedIn, or Twitter, to furnish electronic disclosures to participants. For example, employees, former employees, and others have the ability to connect with many employers on those websites. It would be rare for anyone to connect with an employer through, for example, Facebook, in order to receive employee benefit plan disclosures. Rather, they would likely connect for potential networking opportunities, to look up old friends, or other reasons, and may not be diligent in checking their social networking accounts. At the same time, it is not beyond the realm of possibility that administrators could use such websites to post or send ERISA disclosures.

9. Should the Department's current electronic disclosure safe harbor be revised?

For the reasons set forth in my response to Number 8 above, I do not agree with the report of the 2009 ERISA Advisory Council when it said "administrators will not furnish those individuals who are not working actively--such as retirees or beneficiaries--with electronic disclosure unless the administrator has a working electronic mail address for such individuals." Instead of focusing on electronic mail, as the 2009 Advisory Council report did, the Department should investigate ways in which administrators could use a company intranet or networking sites to furnish disclosures to participants electronically. Even long e-mail lists can be costly to maintain for large employers. Thus, finding a way to permit administrators to use other media, such as a company intranet, would reduce costs even more.

It would be helpful if the Department were to replace the requirement that an electronic information system be an integral part of a participant's duties with a requirement that the participant, as part of his or her duties, access the electronic information system at regular intervals. In my view, it should be acceptable under the Department's current regulations for an administrator to place a paper SPD in a physical in-box on a participant's desk, assuming the administrator has no reason to believe the participant would not check his or her in-box at regular intervals (*e.g.*, the administrator is not aware that the participant is absent long term due to a disability). Similarly, it should be acceptable for an administrator to place the SPD in the

participant's chair, or to clip or tape the SPD to the participant's computer screen – again assuming the administrator has no reason to believe the participant would not sit down in his or her chair and work on the computer at regular intervals. If the Department can conclude that taping an SPD to a computer screen, under these circumstances, would be acceptable, then it should be able to conclude that loading the SPD electronically into the employee's computer is also acceptable under the same circumstances. Thus, such a safe harbor would apply if the employee, as part of his or her duties, accesses a computer at regular intervals and, when accessing the computer, receives notice that the SPD is electronically available and information on how to access it. (The remaining requirements of the safe harbor would continue to apply). This could be accomplished, for example, by requiring a window to pop up (1) with the first page of the SPD, (2) that notifies the participant that the SPD is available and provides information on how to access it, and (3) that requires the participant to close the window in a manner that would be similar to removing the taped SPD from the computer screen to continue working. Other methods of notification may be acceptable to the Department. The important point is that the Department would eliminate the requirement that the electronic information system be an integral part of the employee's duties, and replace that with a requirement that (1) the employee, as part of his or her duties, access the electronic information system at regular intervals and (2) notice of the availability of the SPD and information on how to access it be furnished to the participant. Such a safe harbor could apply to any company intranet or even any social networking site, so long as the employee is required, as part of his or her job duties, to access that medium at regular intervals. The above model would be available only in those situations where the participant is required as part of his or her duties to access the electronic medium at regular intervals. It would not be available in other circumstances.

It may be worth noting that administrators already are generally entitled to a rebuttable presumption that a document which is e-mailed is received. *See, e.g., Kennell v. Gates*, 215 F.3d 825, 829 (8th Cir. 2000); *cf. Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 947 (8th Cir. 1999); *compare SSI Medical Services, Inc. v. State Dept. of Human Services, Div. of Medical Assistance and Health Services*, 146 N.J. 614, 624, n.1, 685 A.2d 1, 6 n.1 (N.J. 1996). The safe harbor creates an irrebuttable presumption that the required disclosure has in fact been furnished (assuming the conditions of the safe harbor are satisfied), whether or not the information is actually received. For this reason, the Department should take considerable caution when modifying the safe harbor.

The provisions of the safe harbor that require participant consent should also be modified. Administrators sometimes wish to respond to a written request for documents by sending the requested document via e-mail. The Administrator may also explain that it can send the requested document via e-mail free of charge, but would impose any permissible costs if the participant demands a paper copy. Such a common, simple exchange, however, is complicated by the numerous requirements imposed by the regulations for consent. Instead, an administrator should be able to rely on a short statement from the requesting participant, such as "I hereby understand that I have a right to receive a paper copy of the requested document, but that I would be charged for reasonable copying costs not to exceed \$0.25 per page. I hereby waive that right and in lieu thereof agree to receive the document by at attachment sent to me in an e-mail. I further agree to contact you if for any reason I am unable to print the document after I receive it. Finally, I agree that if at a later date I am unable to access the electronic document for any

reason, I will still have the right to request the document again, including a paper document, subject to any costs that may be imposed. This consent to receive the document electronically applies only to this request.”

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?

Not allowing participants the right to opt out of electronic disclosures and receive only paper disclosures would increase the material risk of harm to participants. *See* 15 U.S.C. § 7004(d)(1). Even since 1997, when Congress first addressed electronic disclosures with Section 1510(a) of the Taxpayer Relief Act of 1997, the change in technologies has made a great deal of information that is electronically stored either inaccessible or quite costly to access. For example, if information is stored using out-of-date software, it could cost thousands of dollars to generate the software needed to access the information. Yet, participants, who rarely have any control over the software used, often need to keep track of pension and welfare benefit information for up to thirty or more years. Thus, participants should continue to have the ability to receive paper disclosures, though the Department should re-confirm that administrators can charge for additional copies.

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)?

Electronic disclosures should not be permitted for any notice of the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities). Any rule that would permit such electronic disclosures would appear to be contrary to congressional intent.

Thank you for your attention to these matters.

Respectfully submitted,



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