

U.S. Chamber of Commerce

June 6, 2011

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 re: Electronic Disclosure by Employee Benefit Plans

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter in response to the request for information on electronic disclosure by employee benefits plans (“RFI”), issued by the Department of Labor (“Department” or “DOL”) on April 7, 2011.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

The DOL issued the request for information as part of its review of the use of electronic media by employee benefit plans. The purpose of the review is to consider the expansion or modification of the current rules on electronic delivery in light of “current technology, best practices, and the need to protect the rights and interests of participants and beneficiaries.”¹ The Chamber applauds this effort and urges the DOL to modernize the current rule on electronic delivery to conform to technological innovations and practices. Moreover, we urge further and immediate action on this issue to facilitate the effective dissemination of necessary and useful information to plan participants.

Specifically, we recommend that the DOL standard for electronic delivery be changed to encourage the use of electronic delivery and to allow, for those plan sponsors that wish, that electronic delivery be the default delivery option for benefit notices. The Chamber believes that modernizing the restrictive rules on electronic delivery in this manner is a critical element in the larger task of reforming employee benefit plan notice and disclosure requirements so that

¹ 76 FR 19285.

important information can be effectively provided without being submerged in an avalanche of useless or rarely useful information.

Introduction

Employee benefit plan fiduciaries are required to provide a wide variety of notices or disclosures to plan participants. Although there is a reason, even a good reason, for every notice or disclosure requirement, the Chamber's members believe that excessive notice requirements are counterproductive in that they overwhelm participants with information, which many of them ignore because they find it difficult to distinguish the routine, e.g., summary annual reports, from the important. Excessive notice requirements also drive up plan administrative costs without providing any material benefit. Requiring hard copy delivery of notices and other disclosures is an antiquated approach that compounds these problems.

As noted in the preamble to the request, the world has changed drastically in the past several decades. Much of the information we receive and distribute is done electronically. In today's world, far more people depend on the electronic delivery of information than on the mail system or on personal delivery. Electronic disclosure is faster, cheaper, and better than any other form of delivery. Among the reasons it is better, is that: senders can track delivery; the information can be easily stored by the recipient; the information can be searchable; and hypertext links can be included to guide recipients to other useful information.

We encourage the DOL to update its policies not only because of changes in custom and practice but also because we believe it is in the best interests of plan participants. Plan sponsors are faced with two increasingly conflicting goals—providing information required under ERISA and providing this information in a clear and streamlined manner. In addition to required notices, plan sponsors want to provide information that is pertinent to the individual plan and provides greater transparency. However, this is difficult with the amount of required disclosures that currently exist. Allowing plan sponsors to provide notices electronically would help to alleviate some of this burden. Moreover, it would allow plan sponsors to provide even greater information to participants who are interested by including links to more detailed information.

Our comments below provide further detail on our recommended changes to the DOL rules on electronic delivery and the needs for such changes.

Comments

Our comments are grouped under the topics outlined in the request for information.

Access and Usage Questions

Workers Have Sufficient Access to the Internet to Make Electronic Disclosures a Reasonable Alternative to Paper Delivery. The Chamber does not have survey information on internet access; however, we believe that the census information provided in the preamble builds a strong case for the frequency of internet access. The preamble notes that according to the 2009

U.S. Census Bureau Current Population Survey, over 76% of households have internet access from some location. Moreover, of the 139.1 million private sector workers, over 120 million have access to the Internet from some or reside in a household where someone else has Internet access.² These numbers indicate that the majority of workers have sufficient access to the internet either at home or at work to make the receipt of electronic notices a viable and suitable alternative to paper delivery.

In addition, the Profit Sharing/401k Council of America surveyed plan sponsors on the use of Internet based communications for various plan operations and found that in 2009, 91.9 % of all plans, and 96.4% of plans with 5,000 or more participants used the Internet for at least one type of participant or beneficiary communication. The table below provides further detail on the type of electronic disclosures that are currently being provided.

Percentage of companies providing services via the Web³

<i>Service Provided</i>	<i>Plan Size by Number of Participants</i>					
	1-49	50-199	200-999	1,000-4,999	5,000+	All Plans
Enrollments	35.7%	31.5%	57.1%	77.3%	79.0%	57.0%
Plan Inquiries	57.3%	67.1%	80.1%	89.7%	84.8%	76.7%
Contribution Changes	42.7%	56.2%	71.7%	84.9%	89.1%	69.7%
Balance Inquiries	86.7%	89.7%	92.1%	94.1%	96.4%	91.9%
Investment Changes	85.3%	87.7%	91.6%	92.4%	95.7%	90.7%

These findings correspond with Fidelity Investments' data, where for the 2010 calendar year, 72.2% of individual plan participants received their defined contribution quarterly statements electronically. Moreover, of the participants whose plan sponsors elect paper distribution as the default, 61% proactively elect electronic statements.⁴ Thus, not only do plan participants have access to electronic media but also a majority of them seem to favor electronic delivery over paper distribution.

General Questions

The Department's Current Electronic Disclosure Safe Harbor Should be Revised. The Department's current electronic disclosure safe harbor does not sufficiently encourage the use of electronic delivery. Therefore, the DOL should expand its current safe harbor to allow for electronic means as the standard form of delivery for all required and recurring participant communications and documents, including the use of the "notice and access" approach where participants, beneficiaries and other investors must be provided notice of, and access to,

²76 FR 19285 citing Census information found at <http://www.census.gov/population/www/socdemo/computer.html>.

³ PSCA's Annual Survey of Profit Sharing and 401(K) Plans, Reflecting 2009 Plan Experience, Profit Sharing / 401k Council of America, September 2010.

⁴ Fidelity Investments, (December 2010), based on participants and beneficiaries using Fidelity's participant website.

documents via a website or other platform. This approach should apply to both retirement as well as health and welfare plan communications.

In addition, we believe that the changes to the safe harbor should consider the rapid changes in technology. As such, the electronic delivery rules should be flexible enough to provide the opportunity to adapt to changing technology and allow for the individual needs of present and future participants and beneficiaries.

Changes to the Safe Harbor Should be Based upon Field Assistance Bulletin 2006-3. The Chamber recommends that the Department’s safe harbor for the use of electronic delivery of required disclosures be changed in accordance with the guidance provided under Field Assistance Bulletin 2006-3.⁵ Field Assistance Bulletin 2006-03 provides that, for purposes of satisfying section 105 of ERISA, relating to the furnishing of pension benefit statements, good faith compliance is met if, in addition to the safe harbor for disclosure through electronic media in 2520-104b-1(c), disclosure is provided in accordance with section 1.401(a)-21 of the Treasury regulations. That Treasury regulation provides that information may be provided electronically without consumer consent provided that the “electronic medium used to provide an applicable notice must be a medium that the recipient has the effective ability to access.” The Treasury standard differs from the Department of Labor standard in that the ability to effectively access the electronic medium is not required to be in a location where the participant performs their job duties and use of the medium does not have to be an integral part of those duties.

In addition, FAB 2006-3 specifies that “provid[ing] participants with continuous access to benefit statement information through one or more secure websites” will be considered good faith compliance with the requirement to furnish benefit statement information. In using this method, plan sponsors must notify participants and beneficiaries of the availability of the information and how it can be accessed. In addition, the plan sponsor must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the benefit statement. We recommend that the modernization of the electronic delivery rules include this form of compliance.

As noted in the RFI, three different ERISA Advisory Council working groups have recommended modernization of the Department’s safe harbor for electronic disclosure.⁶ Moreover, the Department itself recognized the need for a modernized safe harbor in FAB 2006-03 and in Field Assistance Bulletin 2008-03 which permits the use of the Treasury standard for notices regarding qualified default investment alternatives. Consequently, there is consensus that the DOL safe harbor should be updated. The Chamber recommends that the DOL safe harbor be changed to incorporate the electronic disclosure standards under the FABs. Specifically, the DOL safe harbor should allow the broader Treasury standard of effective ability to access an electronic medium, including by providing notice of continuous availability of required information through the use of a secure web site.

⁵ The safe harbor rule is found under ERISA section 2520.104b-1(b).

⁶ 76 FR 19287, 19288. The preamble notes that in 2006, 2007, and 2009, ERISA Advisory Council working groups all held hearings and issued reports recommending that the DOL rules on electronic delivery be updated.

Guidance Provided Under Field Assistance Bulletin No. 2006-03 Should Apply Immediately to Disclosures Under the Participant Fee Disclosure Rules. In anticipation of the notices required under the new participant fee disclosure regulation, the Chamber urges the DOL to extend the application of FAB 2006-03 to these notice requirements. The participant disclosure regulation is scheduled to take effect at the end of 2011. Therefore, plans have only six months before the initial notices must be provided under the new participant disclosure regulation. Moreover, these first disclosures must be provided to all current participants and eligible employees. This will be a major undertaking that will require significant administrative and financial resources.

Several commenters to the proposed regulation recommended that the safe harbor on electronic delivery be expanded to accommodate the additional notice requirements.⁷ However, the DOL did not feel it was appropriate to address the issue at that time and instead, in the final rule, reserved paragraph (g) relating to “manner of furnishing” to address electronic delivery at a later time. In the preamble to the final rule, the DOL stated that it will be issuing a notice for comments on electronic delivery (the current request that we are responding to) and that, “[i]t 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.”⁸ Because the RFI was issued recently, there is 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 the fee disclosure regulation becomes effective. Therefore, we recommend that 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.

Electronic Delivery Should Be an Allowable Default Option. As has been proven by the success of automatic enrollment and automatic escalation, apathy often plays a significant role in how employee “decisions” are made. Thus, we believe that while most participants prefer electronic disclosures, if they are required to affirmatively elect electronic disclosure, many of them probably will not do so, wasting significant resources needlessly. Furthermore, given the numbers of workers that have access to the internet, we do not believe that allowing electronic delivery as the default option would be a burden on workers. In addition, all workers would be given clear notice of their right to receive paper copies of communications at no-charge. Therefore, we believe an employer should be permitted to provide all required disclosure electronically if (a) it believes that most of its recipients will have the effective ability to access the disclosures, and (b) it provides hard copies to those persons who state that they do not have effective access to electronic disclosures or would prefer to receive hard copies.

Plan Sponsors Should Not Be Required to Use Electronic Disclosure. There are some plan sponsors for whom electronic delivery may not be the most efficient or secure method of communication. For example, a small business owner that does not have intranet capabilities might find electronic delivery options administratively and financially burdensome. Or a plan sponsor who is aware that its work force does not have consistent internet access might find it more efficient to use paper notices. Therefore, we believe it is still necessary to ensure that these

⁷ 75 Fed. Reg. 64922.

⁸ 75 Fed. Reg. 64922, 64923.

plan sponsors have the flexibility to provide notices in a way that meets the needs of its work force.

Rules Surrounding Access for Individuals with Disabilities Should be Flexible Enough to Allow for Innovations in Technology. The Chamber believes modernizing the safe harbor must be carefully balanced so that individuals with disabilities have meaningful access to electronic disclosure, that the economic and other costs to businesses in doing so will be minimized, and that the very innovation that has fueled the drive for new technologies is not stifled.

The ever-changing nature of electronic messaging, e.g., Web technology, combined with the ever-expanding concept of accessibility and ongoing changes to accessibility standards such as the World Wide Web Consortium's ("W3C") Web Content Accessibility Guidelines ("WCAG") 2.0 and the Section 508 Standards, will make it difficult for the DOL to dictate particular technologies that should be used to ensure accessibility. In addition, access to the Web is no longer limited to computers. Web content can be viewed via mobile devices, televisions and game consoles. As such, requiring specific adaptive devices to an office computer may not be the most efficient method of ensuring accessibility for a particular participant. Consequently, any requirements must establish accessibility criteria in a way with which businesses can readily comply, even if compliance results in varying degrees of accessibility across the various platforms on which Web or other electronic content is available.

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

Updating the Electronic Delivery Rules Fulfills the Mandates of the President's Executive Order 13563. Earlier this year, the President issued Executive Order ("E.O.") 13563 which expresses the President's views on how regulations should be promulgated and what procedures agencies should follow when seeking input and justifying their regulations. Section 6 of E.O. 13563 specifies that agencies are to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." As noted in the introduction, our members are increasingly concerned that the volume of required notices is overwhelming participants. We believe that updating the safe harbor for electronic delivery will allow plan sponsors to provide required information more effectively and will allow participants to receive this information in a manageable manner. In addition, we believe the expansion of electronic delivery will relieve burdens associated with paper delivery for both parties.

As noted in the preamble to the request, other federal agencies have incorporated electronic disclosure as part of their business practice.⁹ Most notably, the Internal Revenue Service has taken significant steps in this area. In addition to the broader standard for employee benefit plan notices, the IRS has taken steps to expand electronic delivery in the use of tax return information. Through recently passed laws, the IRS now mandates electronic filing by certain tax preparers of

⁹ 76 Fed. Reg. 19286, 19287 discussing electronic disclosure rules in the Department of Treasury and the Securities and Exchange Commission.

income tax and information returns.¹⁰ By modernizing its electronic delivery safe harbor, the DOL will be moving in accordance with other federal agencies and the President's directive to update regulatory requirements.

Small Plan Sponsors May Face Unique Burdens. The Chamber believes that allowing the plan sponsor to choose whether to use electronic disclosure as a default option is important to ensure that small business plan sponsors are not faced with an overwhelming burden. As mentioned above, there are small business plan sponsors who may have no or limited access to electronic delivery mechanisms. For these plan sponsors, requiring the use of electronic delivery would impose an enormous administrative and financial burden. Consequently, we feel it is extremely important that electronic delivery as the default be allowable only at the option of the plan sponsor.

Conclusion

It is necessary to maintain a balance between ensuring actual delivery of information and effective delivery, without inundating participants with information that they do not need or want. Updating the rules on electronic delivery can go a long way to maintaining such a balance. Through the use of electronic delivery, participants can access more (or less) information as they deem necessary. Again, we applaud the DOL for this initiative and we look forward to further discussions and to working with you on these issues. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy Johnson", with a stylized flourish at the end.

Randy Johnson

¹⁰ Worker, Homeownership, and Business Assistance Act of 2009, Public Law 111-92 (123 Stat. 2984, 2997 (2009)).