

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

Submitted electronically to
e-ORI@dol.gov

Re: RIN 1210-AB50
Request for Information Regarding Electronic Disclosure by Employee Benefit Plans

The Pension Rights Center welcomes this opportunity to comment on delivering information to participants and beneficiaries through electronic means. The Center is a nonprofit consumer organization that has been working since 1976 to promote and protect the retirement security of American workers and their families.

The Center supports the current safe harbor for electronic disclosure. The safe harbor distinguishes between those employees who can effectively access documents in electronic form at any location where they work and who have access to the employer's computer network as part of their duties and those employees who do not work with computers on a daily basis and do not access the employer's computer network as part of their duties.

Under the current safe harbor, persons working with computers as part of their jobs can receive electronic disclosures without giving prior permission. The other group of employees -- those who do not work with computers -- and beneficiaries may opt in and receive electronic communication with permission. **Thus, any expansion of the rules for electronic disclosure will apply only to those employees who do not work with computers and have not agreed to receive disclosures electronically and to beneficiaries who have not chosen to receive information electronically.**

The current safe harbor reflects a careful balancing of the interests of participants and beneficiaries and the interests of efficient plan administration. It recognizes that there are costs in providing paper copies of documents, but also that there are costs in loss of benefits if participants fail to receive, understand, or save vital information when it is delivered electronically.

We believe that the safe harbor should be strengthened by requiring that participants affirmatively consent to the electronic delivery of a Summary Plan Description or the Periodic Pension Benefit Statement, even for employees who work with computers daily.

In assessing the current rules, there are several points to consider. First, for individual account plans, the Department's disclosure rules do not require all investment-related information to be delivered individually to participants. The final regulations for fee disclosure to participants use

a layered approach to disclose investment information so that supplemental investment information may be presented on a website.¹ Paper copies must be provided upon request.

Secondly, electronic disclosure is not the exclusive means of reducing the burden of disclosure requirements for plan administrators. The Center has previously testified that use of model notices and standard language, combining disclosure notices, and tailoring disclosure requirements to the specific notice might be ways to streamline disclosure requirements.²

Questions

Access and Usage

Question 1: *What percentage of people in this country has access to the Internet?*

Since the Department's current safe harbor rule already permits electronic disclosure for workers who work with computers as part of their jobs and have access to the employer's computer network, the important question is whether people have Internet access at home.

The October 2009 Current Population Survey information on computer use and ownership shows that less educated individuals and householders are least likely to have Internet access from home or from any location. Asians are most likely to live in a household with Internet access (84.4 percent) while Hispanics are the least likely (57.4 percent). The proportion of African Americans reporting Internet access is 60.0 percent and, for non-Hispanic whites, it is 79.2 percent. Similarly, those individuals who did not graduate from high school are least likely to live in a household with Internet access (38.8 percent). The percent of high school graduates living in a household with Internet access is 63.1 percent. For individuals with some college, the percentage is 78.7 percent, and, for persons with a college degree or higher, it is 90.2 percent.³

Older households and individuals are less likely to have access to a computer. Of householders age 55 and older, 41.8 percent reported no Internet use at home. The figure for Individuals aged 45 to 64 years is 76.9 percent while, for those over 65, only 53.3 percent live in a household with Internet access.⁴

The numbers confirm that the most vulnerable populations are the least likely to have computers at home or Internet access at home.

What is access? We agree with the Department of Labor's previously stated position that making electronic information systems available in common areas of the workplace is not a

¹See: Department of Labor, "Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans; Final Rule," October 20, 2010.

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24323>

² Statement of the Pension rights Center on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries before the ERISA Advisory Council, September 2009.

http://www.pensionrights.org/policy/presentations/090915statement_of_prc_erisa_advisory_council.pdf

³ U.S. Census Bureau, Current Population Survey, "Reported Internet Usage for Individuals 3 Years and Older, by Selected Characteristics: 2009," October 2009, Table 2.

<http://www.census.gov/population/socdemo/computer/2009/tab02.xls>

⁴ Ibid., Tables 1 and 2.

permissible means to deliver required documents to participants.⁵ Similar reasoning applies to other public locations, such as libraries. It should not be necessary to seek access at libraries or other public locations to find information vital to retirement security.

Simply having a computer at home does not by itself mean that a participant or beneficiary can “access” plan disclosures. As the Department noted in the overview to the 2002 final rules, hardware and software must be compatible. Frequent changes in technology can pose problems for participants and beneficiaries, especially for those who are not computer literate.⁶

Similarly, having Internet access at home does not guarantee that the user is computer literate and can maneuver through the information delivered or store it in appropriate files for future access. Some individuals will have a computer at home but not a printer. Although it is possible to request paper copies, participants may be less inclined to request a paper copy than to save a paper copy already provided. Pension information is often complex. Reading complex information on a computer is difficult, even for those familiar with pension and investment terminology.

Question 2: *What percentage of workers has access to the Internet at work? Does access vary by demographic group or occupation?*

The Bureau of Labor Statistics reported on computer use at work in 2005 using data from an October 2003 special supplement to the Current Population Survey.⁷ Slightly over half (55.5 percent) reported using a computer and Internet or e-mail at work. The report stated that computer use varied significantly by occupation. The rate of use was “relatively high for managers and professionals (about 80 percent) and sales and office workers (67 percent). In contrast, about 26 percent of workers in natural resources, construction, and maintenance and production, transportation, and material moving occupations used a computer at work.”

Similarly, the report stated that “there was a great deal of variation by industry with regard to the use of computers and the Internet. Among private non-agricultural industries, persons employed in financial activities had the highest rates of computer (82.4 percent) and Internet use (68.9 percent). In contrast, computer- and Internet- use rates were lowest in the leisure and hospitality (30.4 and 17.6 percent, respectively) and construction (28.1 and 21.0 percent, respectively) industries.”

According to the latest available Bureau of Labor statistics on occupations by numbers of employees, the 10 largest occupations in 2010 were retail salespersons, cashiers, office clerks, food preparation and serving workers, registered nurses, waiters and waitresses, customer service representatives, janitors and cleaners, laborers and material movers, and secretaries

⁵ See the Overview, “Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans; Final Rule,” p.17265, April 9, 2002. (<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=19158>)

⁶ Moreover, costs may be associated with some computer updates. For example, the latest version of Internet Explorer introduced in the spring of 2011 is not compatible with Windows XP, the operating system currently with the most users. In order to use the latest version of Internet Explorer and receive the updated protection against SPAM and viruses, consumers will need to buy a new computer or upgrade the old operating system, which is also costly.

⁷ Bureau of Labor Statistics, Department of Labor, “Computer and Internet Use at Work in 2003,” August 2005. (<http://www.bls.gov/news.release/pdf/ciuaw.pdf>)

and administrative assistants.⁸ These 10 occupations represented 20 percent of total U.S. employment in May 2010. From this data one can extrapolate that these individuals are unlikely to work in occupations that have daily computer and internet access.

General Questions

Question 9: *Should the Department's current safe harbor be revised?*

The Pension Rights Center believes the current Department of Labor rules for electronic disclosure generally strike the right balance between the needs of participants and beneficiaries for accessible plan information and the efficiencies of electronic transmission. We want to emphasize the importance of the current requirement that those who do not have access to computers must give affirmative election before receiving disclosures electronically.

Electronic disclosures are less efficient when applied to non-consenting participants and beneficiaries who do not have easy access to an employer's computer system at work or at home. These persons are more likely to need paper copies of disclosures, require a confirmation that they have actually received the disclosure, change e-mail providers, and in general may require more customer services. Most importantly, they also are more in danger of not receiving important information about their retirement security if the information is provided in electronic form.

We would recommend, however, that the Department consider strengthening the safe harbor for electronic delivery of the Summary Plan Description and Periodic Pension Benefit Statement to require that those crucial disclosures only be delivered electronically with affirmative consent by a participant, even for employees who work with computers daily. These are the most important disclosures participants receive. It is important that participants read them and retain them for future reference even into retirement.⁹

Questions 12 and 13: *Should there be different rules for different types of disclosures or recipients?*

Yes, for certain information different rules could apply. However any differentiation needs to be done with caution and should be based on the needs of participants and beneficiaries. Any disclosure regime allowing for the automatic provision of plan communications via electronic means should still require affirmative consent before replacing paper with electronic versions of Summary Plan Descriptions and individual benefit statements.

The key determinant for differentiating between types of disclosures and types of recipients should rest on the recipient's access to disclosures in electronic form. When designed so that necessary information is easily accessible to the intended recipients, establishing different conditions for delivery may be appropriate. The Department has already made the most important distinction between those with easy and continuing access to an employer's computer

⁸ Bureau of Labor Statistics, Occupational Employment Statistics, "Employment and wages of the largest occupations, May 2010." (http://www.bls.gov/oes/current/largest_occ.htm)

⁹ The Pension Rights Center previously made this suggestion in testimony before the ERISA Advisory Council on September 15, 2009. See Statement of the Pension Rights Center on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries before the ERISA Advisory Council, September 2009. (http://www.pensionrights.org/policy/presentations/090915statement_of_prc_erisa_advisory_council.pdf)

network and those who do not have that access. Similarly, the Department already determined that supplemental investment information may be made available on an Internet website. However, many ERISA disclosures should be provided in their entirety.

The Summary Plan Description may be lengthy but the information it contains is vital to participants' retirement security. Participants need this document in its entirety and in a form they can store and reference in future years. The Department should be, and we believe is, mindful of the need for paper versions of documents to be stored for future reference.

Question 14: *Should the use of a continuous access website be encouraged?*

For required disclosures, use of a continuous access website is only appropriate for employees who use computers daily and have access to the employer's computer network. An opt-in provision for other employees and beneficiaries is appropriate. For the reasons we have discussed previously, a continuous access website is not an appropriate means of delivery for employees who do not work with computers and do not have access to the employer's computer network as part of their jobs and have not chosen to opt in. Similarly, a website is not an appropriate means of delivery for beneficiaries who have chosen not to opt in.

Employees should be notified of any material change in information presented on a continuous access website, either new or modified pension information or a change in website access or design. Notice should be provided within the required timeframe and include a statement of the right to a paper copy. We agree with the Department's previously stated view that merely furnishing a general notice on a periodic basis would not attract the attention of participants and beneficiaries to important information.¹⁰ Continuous use websites are a helpful tool when available and we support their use. However such sites should not be the sole method for individuals to receive required disclosures.

Question 15: *Should participants or plan sponsors and administrators decide who should be given disclosures electronically?*

Participants and beneficiaries, other than those employees who work with computers daily, should be the ones to decide whether or not to accept electronic disclosures. Participants and beneficiaries are best able to determine their access to a computer, the capabilities of the computer itself and their own abilities to utilize a computer.

The Pension Rights Center previously expressed our opposition to the Internal Revenue Service rules for electronic disclosure that under an exception to E-SIGN give the plan administrator the right to determine who is "effectively able" to access the medium.¹¹ It is our view that participants and beneficiaries are in the best position to make that determination. Under an opt-in regime, employers may still remind participants and beneficiaries regularly of their opportunity to receive disclosures electronically and of any cost savings to the plan as a method of encouraging acceptance.

¹⁰ Department of Labor, "Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans; Final Rule," p.17267, April 9, 2002. (<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=19158>)

¹¹ See: Statement of the Pension Rights Center on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries Before the ERISA Advisory Council, September 15, 2009. (http://www.pensionrights.org/policy/presentations/090915statement_of_prc_erisa_advisory_council.pdf)

Other federal agencies have retained the opt-in method of electronic disclosure. The Securities and Exchange Commission recently amended its rules for mutual fund disclosures to permit furnishing of the complete statutory prospectus on an Internet website. However, key information must be sent or given to investors in a summary prospectus. Delivery of the summary prospectus can only be done electronically with affirmative consent, the opt-in method.¹²

Technical Questions

Question 17: *Under what circumstances should participants have a right to opt out of electronic disclosure?*

Participants and beneficiaries who have agreed to receive required disclosures electronically should have the right to opt out of electronic disclosure at their own request after giving appropriate notice. In particular there should be no restrictions on the timing of an opt-out election. Circumstances change. Participants and beneficiaries should not be required to give explanations for a request to opt out.

Question 19: *Would eliminating the affirmative consent requirement increase the material risk of harm to participants and beneficiaries?*

Yes, eliminating the affirmative consent requirement in our view could increase the probability of causing material harm to participants and beneficiaries who don't work with computers on a daily basis and may therefore miss important information. Without ready computer access and knowledge, individuals might miss important disclosures, especially information where timing is important such as black-out notices, benefit election deadlines or material plan amendments. This group of participants and beneficiaries would be most in need of paper copies and is the group most likely to have difficulty accessing an electronic disclosure. (See our discussion on access under Questions 1 and 2).

Question 25: *What costs and benefits would be associated with expanding electronic disclosure of required plan information?*

In assessing costs and benefits, the costs of paper and postage should be evaluated against the costs to participants and beneficiaries of missed information (see our discussion of costs on pages 1 and 2). The cost of printing required disclosures initially delivered electronically certainly would fall on participants and beneficiaries, especially for disclosures that state they should be retained for future reference. A different issue is the cost of paper copies provided upon request. Initial disclosures on paper are generally cost free. However, currently there can be charges for copies of some disclosures when made on request. Charging for copies is an added expense to the participant and beneficiary. It also could complicate the process of requesting a paper version.

¹² Securities and Exchange Commission, "Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Final Rule," footnote 197, January 26, 2009. (<http://www.sec.gov/rules/final/2009/33-8998fr.pdf>); See also Securities and Exchange Commission, "SEC Interpretation: Use of Electronic Media." (<http://www.sec.gov/rules/concept/34-42728.htm>.)

Other cost considerations include the cost of software and hardware necessary to produce, retain and view disclosures. There are also growing security threats to electronic data and costs associated with data protection and security. For participants accessing their information on their own computers, the costs are borne by participants to maintain current and operating hardware and software.

Final Comment

We have focused our comments on electronic disclosure primarily through the use of documents viewable on a computer. However, we are aware of other forms of electronic disclosures that plans may use to disclose information. We are especially concerned about voice mail and other automated information provided over a telephone connection as a means of electronic disclosure. It is our view that required pension disclosures cannot be delivered in an understandable manner by voice mail nor are most participants able to record or otherwise retain copies of these disclosures for future reference. Pension disclosures generally are complicated. Voices can be difficult to understand. Automatic phone calls are often ignored. Call-backs can be difficult at best. The Pension Rights Center recommends that the Department of Labor adopt a rule prohibiting use of any voice delivery technology to provide required disclosures.

The Pension Rights Center appreciates this opportunity to present our views on electronic disclosure to participants and beneficiaries in employee benefit plans.

Respectfully submitted,



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