

April 19, 2012

The Honorable Phyllis C. Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW, Suite S-2524  
Washington, DC 20210

Re: Electronic Disclosure

Dear Assistant Secretary Borzi:

The undersigned consumer, labor, women's and retiree organizations are writing to express our strong support for the participant protections for 401(k) participants included in Labor Department regulation 29 CFR 2520.104b-1(c) and Technical Release 2011-03R. We represent the interests of millions of participants and beneficiaries on the receiving end of these disclosures, many of whom do not have access to a computer at work, or who are not computer literate. These individuals would be denied vitally important information if these rules were changed. For the reasons set forth in the attached memorandum, we urge the Department to maintain and strengthen these protections, and reject calls to replace them.

Receiving clear and accessible information about 401(k) fees and investment options is critical if people are to be able to protect and understand their 401(k) benefits. In our view, the Department of Labor has already provided employers and financial institutions with sufficient latitude by allowing them to automatically provide information electronically to those people who work with their employer's computer network as an integral part of their day job. This is a compromise we support. But where employees do not use a computer in their everyday work, it must be up to them to decide – not financial institutions or their employers – whether they should get this critical information by mail or electronically.

While there are costs to paper copies, there are greater costs when participants and beneficiaries miss significant information about their 401(k) plans – which are the predominant retirement savings vehicle for millions of Americans. In our view, the Department of Labor rules and a strengthened Technical Release would generally strike an appropriate balance between administrative efficiency and the interests of participants and beneficiaries.

We applaud the Department's strong commitment to meaningful and effective disclosure to participants, and urge you to retain the participant protections incorporated in the Department of Labor regulations and the Technical Release.

Sincerely,

AFL-CIO  
Consumers Union  
National Consumers League  
National Council of La Raza  
National Women's Law Center  
Pension Rights Center  
Service Employees International Union

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cc: The Honorable J. Mark Iwry

Senior Advisor to the Secretary and

Deputy Assistant Secretary for Retirement and Health Policy

Department of the Treasury

The Honorable Cass R. Sunstein

Administrator, Office of Information and Regulatory Affairs

Michael L. Davis

Deputy Assistant Secretary, Employee Benefits Security Administration

U.S. Department of Labor

## MEMORANDUM

Re: Electronic Disclosure

**Overview.** Labor Department regulation 29 2520.104b-1(c) and the participant protections included in Technical Release 2011-03R provide critical protections to participants and beneficiaries in private retirement plans. Regulation 2520.104b-1(c) provides electronic disclosure rules for all private retirement plans. Technical Release 2011-03R gives interim guidance for electronic transmission of fee and investment disclosures required to be given to participants and beneficiaries in self-directed individual account plans under Labor Department regulation 29 CFR 2550.404a-5. These protections should be retained and strengthened.

**Background.** Labor Department regulation 29 CFR 2550.404a-5 requires that certain fee and investment disclosures be made to individuals participating in 401(k) plans and their beneficiaries. These disclosures include information crucial to good investment decision-making, such as descriptions of investment alternatives, how and when investments can be changed, administrative expenses that can be charged against a participant's account, a quarterly statement giving fees and expenses actually charged, data on the past performance of the investment alternatives, and the annual operating expenses of investment alternatives expressed as a dollar amount.

The disclosure rules for fee and investment information reflect the Department of Labor's reasoned judgment that this information is critically important for employees with self-directed accounts, who must do their own planning and investing for retirement. Disclosure is also vital for the many retirees who are managing their retirement accounts to make their investments last for their lifetimes. Further, fee and investment information is particularly important to beneficiaries, such as spouses, former spouses, or alternate payees, who would be relatively less familiar with retirement plan information than participants.

Labor Department rules pertaining to electronic disclosure of information required to be provided to all participants and beneficiaries under Title I of ERISA are set forth in regulation 29 CFR 2520.104b-1(c). Technical Release 2011-03R applies these rules to the fee and investment disclosures required for 401(k) plans by Labor Department regulation 29 CFR 2550.404a-5.

Regulation 2520.104b-1(c) makes a distinction between employees who work with their employer's computer network as an integral part of their duties and employees who do not. Automatic electronic disclosures are permitted for employees who work with their employer's computer network. However employees who do not work with their employer's computer network must affirmatively consent to receiving electronic disclosures. Former employees, retirees, and beneficiaries (including surviving spouses and former spouses) must also consent to receiving electronic disclosures.

In addition, Regulation 2520.104b-1(c) provides that when automatic electronic disclosures are permitted, they must be furnished using measures reasonably calculated to ensure actual receipt of the material. Meeting this standard requires, among other things, that plan administrators take steps to determine whether or not the information is actually being received and to ensure the

confidentiality of personal information. The rules also require that all participants and beneficiaries receive notice at the time a document is furnished electronically, describing the significance of the documents and the right to request a paper version of the documents.

Technical Release 2011-03R pertains specifically to the use of electronic media to furnish fee and investment disclosures to participants and beneficiaries in 401(k) plans. With one important exception, the participant protections of the Technical Release, although not exactly the same, mirror the protections of the Regulation 2520.104b-1(c), the electronic disclosure rules applicable to all participants and beneficiaries. The exception relates to certain fee and investment disclosures which can be included in quarterly benefit statements. Under the temporary enforcement guidance of a 2006 Field Assistance Bulletin, FAB 2006-03, quarterly benefit statements can be automatically delivered electronically under either Labor Department Regulation 2520.104b-1(c) or an alternative Treasury Department regulation discussed below. In effect, the Treasury regulation allows electronic delivery of benefit statements to participants and beneficiaries who do not work with computers without their affirmative consent.

The Technical Release also provides that fee and investment disclosures can be furnished electronically to participants and beneficiaries who voluntarily provide an e-mail address to their employer, plan sponsor or administrator, in response to a required initial notice asking for an e-mail address. This effectively requires that participants and beneficiaries give affirmative consent to receiving these disclosures electronically. In addition, those participants and beneficiaries who provide an email address must be advised of the right to receive free paper copies of disclosures and the right to opt-out of electronic receipt of disclosures at any time, and must be given an annual follow-up notice. The Technical Release specifically states that employers or plan administrators cannot just assign an e-mail address to a participant or beneficiary and consider that the participant or beneficiary gave that e-mail address voluntarily.<sup>1</sup>

The standards set forth in the Technical Release, consistent with Regulation 2520.104b-1(c) focus on whether or not the medium of electronic transmission is “reasonably calculated to ensure actual receipt” of the fee and investment disclosures required under Regulation 2550.404a-5.

In contrast, Treasury Regulation 26 CFR 1.401a-21 on electronic disclosures for employee benefit plans provides an alternative method of disclosure.<sup>2</sup> Under this alternative rule, which is adopted by Field Assistance Bulletin 2006-03 as one of two possible rules for furnishing quarterly benefit statements electronically, required disclosures can be made electronically if the participant or beneficiary has “the effective ability to access” the electronic medium used to provide the notice. The Treasury alternative rule, and thus FAB 2006-03, does not require affirmative consent from participants and beneficiaries before they are sent disclosures

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<sup>1</sup> The Technical Release provides that, under this alternative method of consenting to electronic disclosures, plan administrators must ensure the confidentiality of personal information and takes measures “reasonably calculated to ensure that the electronic delivery system results in actual receipt” of the information (such as by using return receipt or bounce-back e-mail features, or by conducting periodic reviews or surveys).

<sup>2</sup> This rule is an exemption to the provisions of E-SIGN. E-SIGN is the Electronic Signatures in Global and National Commerce Act. It permits an exemption from consumer consent when consumer consent would impose a substantial burden on electronic commerce and an alternative method would not increase the material risk of harm to recipients. See Section 104(d)(1) of E-SIGN. <http://www.gpo.gov/fdsys/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf>

electronically. As a practical matter, this standard gives plan administrators complete discretion to determine whether participants or beneficiaries have the effective ability to access the medium. Moreover, the alternative Treasury rule, and thus FAB 2006-03, does not require employers or plan administrators to address whether or not the information was actually received, or to ensure the confidentiality of personal information of the participants or beneficiaries.

**Changes urged by business and financial organizations.** In a March 27, 2012 letter to Assistant Secretary of Labor Phyllis C. Borzi, groups representing business and financial services sectors urged the Department of Labor to rescind the Technical Release and instead broadly adopt the disclosure standards outlined in Field Assistance Bulletin 2006-03, which as noted above, permits electronic disclosure under either the Department of Labor or the Department of the Treasury rules.<sup>3</sup>

The signatories to the March 27 letter contend that the Technical Release should be replaced because its protections will result in additional costs, in the form of paper copies, which will ultimately be borne by plan participants. They argue that the Department of Labor should promote a standard that “facilitates and encourages the use of electronic disclosure as the *primary means* by which plan information is furnished to plan participants and beneficiaries.”<sup>4</sup> And they contend that in the absence of “any information or data that suggests significant compliance problems” with the standards for individual benefit statements under Field Assistance Bulletin 2006-03,<sup>5</sup> the FAB 2006-03 standard should be extended to the fee and investment disclosures required under Labor Department regulation 29 CFR 2550.404a-5.

**Discussion.** The business and financial groups do not assert that FAB 2006-03 is equally protective of participants’ and beneficiaries’ rights, because they cannot. The reality is that computer access and usage in the United States is very much a function of age, occupation, education and income. The 2009 Current Population Survey (CPS) reports that 27 million workers over the age of 15 report no access to the Internet, either at home or at another location.<sup>6</sup> Recent studies have shown that the most vulnerable populations are the least likely to have computers at home or access to the Internet at home or at work. The CPS reported that only 49 percent of Hispanics said they accessed the Internet from any location, while 74 percent of Whites and 59 percent of Blacks reported accessing the Internet. Just over half of high school graduates (57 percent) reported accessing the Internet, while 90 percent of college graduates said they accessed the Internet from some location. A 2005 Bureau of Labor Statistics report on computer use at work stated that persons employed in financial services had the highest rates of computer use (82 percent) and persons employed in leisure, hospitality and construction had the lowest rates (18 percent to 28 percent).<sup>7</sup>

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<sup>3</sup> Letter to Phyllis C. Borzi from American Bankers Association et al (March 27, 2012).

<sup>4</sup> *Id.*, emphasis added.

<sup>5</sup> *Id.*

<sup>6</sup> Current Population Survey, October 2009, Table 2, “Reported Internet Usage for Individuals 3 Years and Older, by Selected Characteristics: 2009.

<http://www.census.gov/hhes/computer/publications/2009.html>

<sup>7</sup> See 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 U.S. Census Bureau, Survey of Income and Program

Moreover, receiving ERISA-mandated disclosures through electronic media requires more than access to a computer. The computer must have the hardware and software necessary to access particular websites and the kinds of files that contain the disclosures – which frequently take the form of long and complex documents. Whether in html or pdf format, the participant or beneficiary must not only be able to gain access these documents, but also be able to read and maneuver through the complex information provided. The participant or beneficiary would need to have enough memory on his or her computer (or a thumb drive) to store the complex documents containing the disclosures, or have a printer. Moreover, even participants and beneficiaries with computers may have difficulty navigating complicated websites. Paper documents enable the participant or beneficiary, particularly older individuals, to re-read the disclosures or share them with friends, family members, or advisors, in the event that the participant or beneficiary has questions or concerns. It is therefore important that participants and beneficiaries affirmatively consent to electronic disclosures.

Furthermore, the Labor Department rules and the Technical Release are appropriately solicitous of maintaining the confidentiality of participants' and beneficiaries' personal information. Even persons who are computer literate may have very legitimate concerns about receiving personal financial information over systems that are sometimes subject to hackers and that could be vulnerable to persons seeking to use private information for their own profit. The Treasury regulation, in contrast, does not require employers or plan administrators furnishing electronic notices to take steps to ensure the confidentiality of the personal information of the participant or beneficiary.

Most important, the IRS rule would allow plan administrators to determine the ability of plan participants' and beneficiaries' to access disclosures electronically, leading to possible overestimates, particularly in the case of individuals who are lower paid or who have lower educational levels.

**Conclusion.** Given that many participants and beneficiaries may lack access to computers and Internet access or sufficient computer literacy to navigate complex disclosures, the Labor Department rules and the Technical Release are more protective of participants' and beneficiaries' access to the required disclosures than the Treasury regulation or the Field Assistance Bulletin. Indeed, the Labor Department rules reflect the fact that these participants and beneficiaries are best able to judge for themselves whether they can effectively receive electronic communications. In addition, the Labor Department rules and Technical Release require employers and plan administrators to take reasonable steps to keep personal information confidential, while the Treasury alternative rule, and thus FAB 2006-03, does not.

Because fee and investment information is so critical to assisting participants in self-directed individual account plans and beneficiaries in making financial decisions underpinning their retirement security, the focus in Regulation 2520.104b-1(c) and Technical Release 2011-03R on the actual receipt of that information is wholly appropriate.

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Participation, 2004, Table 4 "Reported Computer and Internet Access for Individuals 15 Years and Older, by Selected Characteristics: 2005." <http://www.census.gov/hhes/computer/publications/2007.html>

While there are costs to paper copies, any such costs are dwarfed by the harm that results when participants and beneficiaries fail to actually receive significant information that enables them to make investment decisions about their retirement accounts. Particularly for workers and beneficiaries who have lower account balances, the risk of making uninformed investment decisions may disproportionately reduce their retirement savings.

There is one area where the Technical Release urgently needs strengthening. It permits quarterly fee statements to be delivered under the Field Assistance Bulletin, which gives plan administrators the option of following the Treasury regulation allowing automatic electronic delivery to all participants and beneficiaries without their affirmative consent. To be fully protective of participants, the Department should consider revising the Field Assistance Bulletin.

With this exception, where the Labor Department has affirmatively concluded that participants and beneficiaries need certain information to make investment decisions, the electronic delivery standard should enable participants and beneficiaries, especially the most vulnerable, to receive it. Technical Release 2011-03R and the Department of Labor rules strike an appropriate balance between administrative efficiency and the interests of participants and beneficiaries.