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submitted via e-ori@dol.gov

United States Department of Labor
Washington, DC

RE: RIN 1210-AB50
REQUEST FOR INFORMATION REGARDING ELECTRONIC DISCLOSURE BY EMPLOYEE BENEFIT PLANS

The Profit Sharing/401k Council of America (PSCA) is pleased to offer our comments in response to the Department's Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (the RFI). We commend the Department's decision to review this important issue in response to the growing role of electronic and Internet-based media as the preferred source of information for most Americans. We wholeheartedly agree with the Department's finding that "electronic disclosure can be as effective as paper based communications, and that it can lower costs and administrative burdens and increase timeliness and accuracy for all involved."[1] Lower costs will be reflected in operating expenses paid by plan participants and increase the willingness of businesses to offer a retirement plan to their workers. PSCA believes that the current rules on electronic distribution can be modernized while still protecting the interests of participants and beneficiaries who prefer paper-based disclosures.

PSCA, a national non-profit association of 1,000 companies and their 6 million employees, advocates increased retirement security through profit sharing, 401(k), 403(b), and related defined contribution programs to federal policymakers and makes practical assistance with profit sharing, 401(k), and 403(b) plan design, administration, investment, compliance and communication available to its members. PSCA, established in 1947, is based on the principle that "defined contribution partnership in the workplace fits today's reality." PSCA's services are tailored to meet the needs of both large and small companies with members ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

Our comments are limited to defined contribution retirement plans.

As the RFI reports, Internet access is widely available in American households. PSCA's members' experience generally accords with the 2009 Census Bureau findings as reported in the RFI that 80 percent of private sector workers have personal access to the Internet from some location. Another 7.6 percent

[1] DOL Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, *76 FR 19285,* April 7, 2011.

reside in a household where someone else has Internet access. Thus, we strongly believe that the regulations should provide increased opportunities for plan sponsors to deliver benefits information electronically, while retaining participants' right to request a paper copy of such information at any time.

Below we respond to several of the specific questions set forth in the RFI; we describe our recommendation that the standard under FAB 2006-03 apply to all electronic disclosure; and we request interim relief with respect to the distribution of disclosures pursuant to the participant fee disclosure regulations until the Department finalizes its activities in response to this RFI.

Specific Questions under the RFI

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 those plans? (Question 3)

Response to Question 3: PSCA does not have exact data to answer Question 3. Due to the limitations of the current rules for electronic distribution under Labor regulation 2520.104b-1(c), we believe the volume of such notices that are currently electronically delivered is not necessarily commensurate with the extent that plan sponsors' use electronic media for other participant communications required to administer plans. PSCA surveys plan sponsors annually on their use of Internet based communications for various plan operations, as reported in the table below. In 2009, 91.9 percent of all plans, and 96.4 percent of plans with 5,000 or more participants, used the Internet for at least one type of participant or beneficiary communication. We believe that this data (rather than data on electronic delivery of notices required under ERISA disclosure rules) is indicative of the likely adoption of a modernized electronic distribution safe harbor for disclosures required under ERISA.

Percentage of companies providing services via the Web[2]

	Plan Size by Number of Participants					
Service Provided	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%
Loans	42.7%	50.7%	66.5%	80.0%	79.0%	64.6%
Hardship Distributions	23.1%	28.1%	38.2%	51.4%	54.3%	39.5%
Final/Retirement Distributions	29.4%	36.3%	52.4%	65.4%	71.0%	51.6%
None	13.3%	10.3%	5.8%	4.3%	3.6%	7.2%

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

Should the Department's current electronic disclosure safe harbor be revised? (Question 9)
If the safe harbor should be revised, how should it be revised? (Question 10)

Response to Questions 9 and 10: Field Assistance Bulletin 2006-03 (the FAB) should be used as a template for modernization of the Department's rule under 2520.104b-1(b) regarding a safe harbor for the use of electronic delivery of required disclosures, as detailed in our recommendation below.

Recommendation

The FAB 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 regulation provides, in paragraph 1.401(a)-21(c)(2), that information may be provided electronically without the recipient's consent provided that the "electronic medium used to provide an applicable notice [is] a medium that the recipient has the effective ability to access." The Treasury standard is more liberal than the Department's standard in 2520.104b-1(c)(2) in that there is no requirement that access to the electronic medium be in a location where the participants perform their job duties or that use of the medium be an integral part of those duties.

The FAB also provides:

> "With regard to pension plans that provide participants with continuous access to benefit statement information through one or more secure web sites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notice must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105."

The FAB requires that the notice be written in an understandable manner. Finally, the notice must be provided both in advance of the first date on which the benefit statement must be furnished and annually thereafter.

PSCA recommends that 2520.104b-1(c) be amended to incorporate both methods of disclosure under the FAB: (a) the relaxed Treasury standard of effective ability to access an electronic medium as set forth in 1.401(a)-21; and (b) notice of continuous availability of the information required to be disclosed on a secure web site (including the right to request a paper-based disclosure).

The following points support our recommendation:

1. As the RFI points out, modernization of the Department's safe harbor for electronic disclosure has been recommended by three separate ERISA Advisory Council working groups.

2. Field Assistance Bulletin 2008-03, Guidance Regarding Qualified Default Investment Alternatives (QDIA), permits the use of the Treasury Department guidance under 1.401(a)-21 to meet the QDIA notice requirements.

3. In the preamble to the 2002 rule which added the electronic distribution safe harbor to 2520.104b-1,[3] the Department itself appears to have authorized the recommended approach, although it is not reflected in the substance of the rule. In the section titled "Miscellaneous Issues Involving the Use of Electronic Media," the preamble provides:

> "Two commenters asked the Department to clarify whether the safe harbor would apply to disclosures of plan information maintained in a separate section of a company's website that is easily accessible from its home page with access generally restricted to employees and others by password and PIN requirements. The Department believes that using a company's website as a method of providing information is similar to using an insert to a company publication, which is cited in the general standard in 29 CFR 2520.104b-1(b) as an acceptable method of ``furnishing'' disclosures within the meaning of the regulation provided the distribution list for the periodical is comprehensive and up-to-date and a prominent notice appears on the front page of the publication advising readers that the publication contains important information about rights under the plan. A plan administrator relying on such website disclosure must still satisfy all the conditions of the safe harbor. ***For example, participants and beneficiaries would have to be notified of the availability of the particular disclosure document and its significance by sending written or electronic notice, as described in Sec. 2520.104b-1(c)(1)(iii), directing them to the document on the website, and the administrator would still be required to take appropriate and necessary measures to ensure the website system for furnishing documents results in actual receipt, e.g., the website homepage should contain a prominent link to the website sections that contain information about the plan, the website should include directions on how to obtain a replacement for a lost or forgotten password to the extent one is needed, and disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries are notified of their availability." (Emphasis added).***

Interim relief is needed for the participant fee disclosure requirement.

The Department's Final Rule on Fiduciary Requirements for Disclosure in Participant Directed Individual Account Plans[4] is applicable for individual account plans for plan years beginning on or after November 1, 2011. Paragraph (g), relating to "manner of furnishing" is reserved. In the preamble to the rule, the Department explains that the current disclosure rules under 2520.104b-1 apply, but that paragraph (g) is reserved in light of the planned publication of the RFI that is the subject of this comment letter. The Department also notes in the preamble that it anticipates that the issues raised in the RFI will be resolved

[3] Final Rule Relating to the Use of Electronic Communications and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans; Final Rule, *67 FR 17264*, April 9, 2002.
[4] *75 FR 64910*, October 20, 2010.

in advance of the fee disclosure applicability date, "so as to ensure for appropriate notice for plans". On June 1, 2011, the Department issued a notice proposing to extend the transition rule for the initial disclosures under the rule from 60 days to 120 dates after the applicability date.

Based on past experience, PSCA believes that it is very unlikely that the issues raised in this RFI will be resolved and any changes promulgated in a final rule prior to the applicability date of the participant fee disclosure rule or in time for plan administrators to adjust their systems to incorporate any changes before the required initial disclosures, despite the new transition rule. The fee disclosure rule creates a significant new challenge because fee disclosure must be provided not only participants and beneficiaries, but to all eligible employees. **Accordingly, PSCA respectfully requests that the Department issue guidance providing that the relief under Field Assistance Bulletin 2006-03 relating to alternative methods to provide electronic disclosure be applicable to the disclosure requirements under the participant fee disclosure rule until such time as the Department's rules pursuant to the this RFI are finalized and plan administrators are afforded time to make necessary system changes.**

Thank you for considering our comments. If I can of any assistance, or if you have any questions, please do not hesitate to contact me at 202 863 7272.

Sincerely,

Edward Ferrigno