March 27, 2012

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

Subject: Electronic Delivery Guidance under Section 404(a) of ERISA

Dear Madam Assistant Secretary:

Thank you for your letter dated December 22, 2011. We appreciate that the Department is engaged in a review of the current electronic disclosure safe harbor. We have survey data to share regarding EBSA's Technical Release 2011-03R and electronic disclosures generally. From survey results and discussions with various companies, we are concerned that this interim guidance does not provide meaningful incentives or make it more feasible for employee benefit plan sponsors and their service providers to use electronic media instead of paper. With the compliance date of the participant fee disclosure rule fast approaching, we are also concerned that the Department's most recently issued regulatory agenda does not include guidance on electronic disclosure.

We encourage the Department to pursue a policy that, in operation, would encourage and facilitate the use of modern electronic forms of communication. Such a policy would have a direct and beneficial impact on plans, plan sponsors, plan participants and beneficiaries. Participants of all ages and incomes increasingly prefer to access information online and believe that doing so makes it easier to act on the information. For this reason and others, a recently issued policy brief by the Progressive Policy Institute recommends allowing default e-delivery of 401(k) statements and retirement plan documents as one of five ideas for a smarter government.[1] The brief explains that the current system of default paper delivery actually works against the goal of helping Americans make the right decisions about their retirement planning because, among other things, "the density of printed disclosure is, for many people, intimidating," and "the static nature of printed materials does not invite the kind of interactive engagement people need to have to manage their retirement portfolios intelligently." The brief also expresses concern about the immediate obsolescence of paper statements noting that "[b]y the time a statement arrives in someone's mailbox, the stock markets may have made a major turn for the better or for the worse."

The impact on retirement savings due to the increased costs of paper notices also is a concern of our membership. Presently, the increased costs attendant to paper disclosure in 401(k) plans could reduce participants' retirement savings, the very savings we are working to increase with enhanced transparency. Ultimately, plan participants will likely bear the additional cost of delivering the required disclosures to non-participating employees in the plan when such costs are not paid by the employer and are instead allocated among participant accounts.

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[1] *See* Kim, "When Paperwork Attacks! Five Ideas for Smarter Government," Progressive Policy Institute Policy Brief (March 2012), available at http://progressivepolicy.org/wp-content/uploads/2012/03/03.2012-Kim_When-Paperwork-Attacks-Five-Ideas-for-Smarter-Government.pdf.

We have reviewed EBSA's Technical Release 2011-03R and discussed it with various companies and have concluded that the guidance provides little relief beyond that already available through the current safe harbor, particularly as it relates to affirmative consent and dependence on paper as the default method of delivery. In fact, a recent survey of companies conducted by the SPARK Institute confirmed that most major service providers/recordkeepers will not attempt compliance with the Technical Release.[2] Some of the concerns raised by responding companies who do not plan to rely on the Technical Release include the inability of existing systems to support the Technical Release approach without costly changes, the required affirmative action on a per participant basis for plans to use electronic communications and the administrative impracticality of the required implementation and monitoring.

As reflected in the same survey, these companies continue to believe that, unlike Technical Release 2011-03R, prior guidance adopted by the Department in December 2006 in the form of Field Assistance Bulletin (FAB) 2006-03, does provide a viable approach to encouraging and fostering electronic disclosure by employee benefit plans, while providing important safeguards for ensuring that participants who still want to receive required disclosures in paper format can do so. In fact, the Department provided a similar approach for non-participating employees in the recently released final regulations implementing the summary of benefits coverage (SBC) requirements of the Affordable Care Act.

As you know, the Department took the position in FAB 2006-03 that the electronic disclosure safe harbor regulation, at 29 CFR § 2520.104b-1(c), is not the exclusive means by which plans could satisfy their obligations to furnish individual benefit statements. In this regard, the Department specifically recognized compliance with Treasury/IRS rules (26 CFR § 1.401(a)-21) relating to the use of electronic media as an acceptable means by which individual benefit statements can be furnished to plan participants and beneficiaries under Title I of ERISA. The Department further recognized the use of continuous access, secure websites as an acceptable means of furnishing required information to participants and beneficiaries.

Under the current Technical Release guidance, plan-related information that is not included in a pension benefit statement and investment-related information that must be provided under the participant disclosure regulations are inexplicably subject to more burdensome and complex electronic disclosure standards than individual benefit statements that contain specific and personal information about an individual's account balance and selected investments. Additionally, the electronic disclosure rules that apply to the participant disclosure regulations are more burdensome and complex than the standards found to be protective by the Department of the Treasury and the IRS for most of its participant communications under the Internal Revenue Code.

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[2] Twenty-five record keepers, who are among the largest service providers in the retirement plan industry, responded to the survey. Only 4 (or 16%) of those surveyed indicated that they intended to support or rely on the Technical Release, including one that was still researching system capabilities. A copy of the survey is included for your consideration.

The stricter requirements are even harder to justify given the absence of any information or data that suggests significant compliance problems with personalized individual benefit statement disclosures during the five year period since the Department's issuance of the FAB.

We believe the efficiencies and cost savings, as well as benefits to participants, attendant to electronic disclosure are well established. Electronic communication today is no longer the exception, it is the norm. We, therefore, encourage the Department to move forward with interim guidance that facilitates and encourages the use of electronic disclosure as the primary means by which plan information is furnished to plan participants and beneficiaries. In this regard, we specifically request that the Department issue interim guidance (*i.e.,* guidance pending the adoption of a revised final electronic disclosure safe harbor regulation) as soon as possible that extends the now well-established and workable standards of FAB 2006-03 to all participant disclosures under title I of ERISA or, at a minimum, those currently required under the new 404a-5 regulations.

Sincerely,

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Society of Pension Professionals & Actuaries
ERISA Industry Committee
Financial Executives International Committee on Benefits Finance
Financial Services Institute
Financial Services Roundtable
Insured Retirement Institute
Investment Company Institute
Plan Sponsor Council of America
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce

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

Enclosure