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May 24, 2011

Thomas M. Hindmarch
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: Electronic Disclosure Request for Information
RIN 1210-AB50

Dear Mr. Hindmarch:

TIAA-CREF writes in response to the Department of Labor (“DOL”) request for information concerning of the use of electronic media to furnish information to participants within employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”)¹.

We encourage the DOL to modernize its electronic delivery guidance to largely permit electronic delivery as the default method of delivery, subject to certain safeguards to preserve each participant’s right to request to receive paper delivery of any required disclosure materials at any time without charge.

A default e-delivery standard will benefit both plan sponsors and plan participants through reduced expense and more timely and effective access to plan materials. E-delivery will enable participants to understand more readily and evaluate the benefits of their plan. DOL’s adoption of a default e-delivery standard will also help it meet the requirements Executive Order 13563 (“Order”) imposes upon DOL to seek ways to improve its regulations.² DOL can magnify the benefits of a default e-delivery standard by coordinating with the Securities and Exchange Commission (“SEC”), as also required by the Order, so that the SEC also may consider a similar e-delivery standard governing the many plan materials it separately regulates.

¹ Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (Apr. 7, 2011).

² Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011).

I. OUR EXPERIENCE WITH E-DELIVERY

TIAA-CREF is a leading provider of retirement services in the academic, research, medical and cultural fields. We manage retirement assets on behalf of 3.7 million participants at more than 15,000 institutions nationwide. We are an organization comprised of several affiliated entities having aggregated assets under management or administration of \$453 billion.³ We offer a range of retirement annuities, mutual funds and plan administrative/record keeping services to help individuals and institutions meet their retirement plan savings and administration goals. Teachers Insurance and Annuity Association of America (“TIAA”) is a life insurance company domiciled in the State of New York that operates on a not-for-profit basis. TIAA is the TIAA-CREF affiliate responsible for providing plan administrative and record keeping services to plan sponsors.

In its role as plan record keeper, TIAA estimates it incurs an annual expense of \$50 million to prepare and deliver written regulatory disclosure materials to plan participants who have not opted for e-delivery.⁴ These materials generally consist of written disclosures and statements required by either the Internal Revenue Service (“IRS”), DOL, or the SEC. In aggregate, these materials consist of over 1,000,000,000 pages and 2,700 tons of paper each year. The associated production and mailing costs ultimately are borne by both plan sponsors and participants through record keeping fees and expenses inherent in the underlying plan investments, such as a mutual fund’s expense ratio.

One third of our plan participants already receive plan materials through e-delivery. We believe the reason this figure is not higher is due to both participant inertia and the need for modern e-delivery standards. Despite this, we still are experiencing e-delivery adoption rate increases of 100,000 to 150,000 new participants each year, and the trend is accelerating. We have a success rate of nearly 99% in receiving notification that a message was successfully delivered electronically. This rate is also climbing as participants realize the widespread benefits of e-mail. Our record keeping system monitors for failed e-delivery attempts, and where identified, automatically reverts the participant to paper delivery via regular mail for the rejected mailing and all future ones.

The savings we experience from the lower costs of e-delivery flow through to plan sponsors and participants. Our current e-delivery adoption rates already reduce expenses per enrolled participant by approximately \$10 per year. We estimate a universal default e-delivery standard could reduce overall material production and delivery costs by approximately 60%. Greater use of e-delivery should continue to reduce expense ratios and record keeping charges to plan sponsors and participants.

Based upon this positive experience with e-delivery within plans, we offer the following comments.

³ As of December 31, 2010.

⁴ The \$50 million figure does not yet factor in expenses attributable to the significant new disclosures required by Section 404(a) of the Employment Retirement Income Security Act of 1974.

II. DOL SHOULD ALLOW ELECTRONIC DELIVERY AS THE DEFAULT STANDARD

DOL should adopt a default e-delivery standard that permits plan sponsors, administrators and their vendors to deliver ERISA required plan disclosure materials electronically whenever they have a valid participant e-mail address or the participant has established on line account access. This standard should consist of the following process:

1. Plan administrators would provide existing participants with reasonable advance written notice via regular mail of the conversion to e-delivery, a listing of all documents affected and a description of how to elect in advance of the conversion or any time thereafter to receive any documents free of charge through regular mail. The written notice would inform plan sponsors and participants how to configure their e-mail server firewall to recognize the sender as a “safe” e-mail domain to avoid spam filters.
2. Plan administrators would return any participant subject to e-delivery back to regular mail upon notice of a rejected e-delivery attempt provided that a successful e-delivery re-attempt is not effected within a reasonable period of time.
3. Plan administrators would deliver publicly available materials not containing personal information via an embedded hyperlink that transports the participant to the plan administrator’s or record keeper’s public website where the document is directly hosted. TIAA believes the embedded hyperlink approach will be vastly preferable to most parties as opposed to sending alternatively an e-mail with an attached document because sending a large e-mail attachment can consume a portion of the participant’s computer memory and affect computer performance. Moreover, the use of hyperlinks allows the participant always to access an “evergreen” or most recent version of the document.
4. For materials involving personal information, plan administrators would send an e-mail alerting the participant to the availability of the new document and an embedded hyperlink taking the participant to a secure log in webpage for the participant’s account where he or she would utilize a unique log in identification and password to access the materials.
5. Plan administrators would send annually via regular mail to all participants a written reminder notice of all plan materials available in written format and how to request such materials by paper delivery free of charge.

The above process would provide plan participants with timely and efficient access to plan disclosures and information. The process also includes sufficient safeguards to ensure each participant actually receives the materials as well as preserving each participant’s right to retain or revert to paper delivery upon request.

III. DEFAULT ELECTRONIC DELIVERY IS CONSISTENT WITH DOL’S OBLIGATIONS UNDER THE ORDER

The e-delivery protocol described above will help DOL comply with the Order directing federal agencies to improve existing regulations.

The Order mandates in pertinent part that federal agencies:

- A. “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. [Our regulatory system] must take into account benefits and costs...It must ensure that regulations are accessible...”
- B. “tailor its regulations to impose the least burden on society...”
- C. “select in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental [benefits]...” [emphasis added]⁵

A default e-delivery standard meets each of these requirements—it is innovative, less burdensome, cost effective, easily accessible and almost has no effect on the environment.⁶

The Order itself further highlights the ubiquity of the Internet, specifically referencing the Internet as a powerful medium for federal agencies to use when discussing proposed regulations with the public.⁷ We believe the Order’s acceptance of the Internet as a mainstream communication tool is equally well founded for delivering financial information. The Investment Company Institute (“ICI”) found in a recent study that 90% of U.S. households owning mutual funds had Internet access; and of this group, 93% used the Internet to obtain access to e-mail and 82% used the Internet for financial purposes.⁸

IV. THE ORDER REQUIRES DOL CONSULT WITH THE SEC GIVEN THE OVERLAPPING JURISDICTION AS TO PLAN PARTICIPANT DOCUMENTS AND ALSO TAKE INTO ACCOUNT EXISTING DEPARTMENT OF TREASURY GUIDANCE.

The Order explicitly recognizes that federal agencies do not regulate in a vacuum and must consider coordination with other agencies.

“**Sec. 3. *Integration and Innovation.*** Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization...”⁹

⁵ Order, 76 Fed. Reg. at 3821.

⁶ We note that a default e-delivery standard also meets the standard under ERISA § 505 that the Secretary may prescribe such regulations as she finds necessary or appropriate.

⁷ Id.

⁸ 2010 Investment Company Fact Book 50th Edition, *A Review of Trends and Activity in the Investment Company Industry*. Pages 90-91. Available at www.icifactbook.com.

⁹ Order, 76 Fed. Reg. at 3822.

This mandate is especially significant within the retirement plan context. While DOL regulates many plan disclosures, the bulk of plan participant mailings both in terms of number and weight are subject to SEC oversight and its separate e-delivery guidance issued under the federal securities laws. These materials include quarterly account statements, prospectuses, their supplements and annual updates.

The SEC set forth its e-delivery requirements in three different interpretive releases from 1995, 1996 and 2000.¹⁰ These releases require:

- A. Investors be provided *notice* of electronic delivery of SEC required documents;
- B. Investors must be provided with reasonable *access* to the required document in its electronic format; and
- C. Issuers, broker-dealers and others that have a legal obligation to deliver required documents must have *evidence of delivery*.

The third prong—evidence of delivery—is where DOL should focus its coordination with the SEC. The SEC states that “evidence of delivery” is any evidence that enables an entity to reasonably establish that an investor actually received a required document electronically, comparable to the assurance of delivery one receives from putting a paper document in the mail. In both the 1995 and 1996 Releases, the SEC indicated that delivery may be evidenced in several ways, including but not limited to informed participant consent or through evidence that an investor actually received the document, such as by an e-mail return-receipt.

DOL can further promote e-delivery within retirement plans by asking the SEC to consider issuing companion guidance affirming the proposed default e-delivery standard is consistent with the SEC’s now over 10 year old e-delivery guidance cited above. Such coordination between DOL and the SEC would assist DOL in achieving the greatest effect with its modernized DOL e-delivery guidance provided the large number of plan materials separately governed by the SEC.¹¹

Were the DOL to adopt our proposed e-delivery structure, we believe it would also harmonize its standards with that of the Department of the Treasury governing the delivery of plan disclosures required by the IRS.¹² These standards, issued in 2006, provide that interested parties can provide plan participants with

¹⁰ See Use of Electronic Media, SEC Release No. 33-7856 (Apr. 28, 2000) (“2000 Release”); Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, SEC Release No. 33-7288 (May 9, 1996) (“1996 Release”); Use of Electronic Media for Delivery Purposes, SEC Release No. 33-7233 (Oct. 6, 1995) (“1995 Release”).

¹¹ We note that effective coordination with the SEC also meets the standard under ERISA § 506(a) which promotes coordination with other agencies as the Secretary may find practicable and consistent with law in order to avoid unnecessary expense and duplication of functions.

¹² See Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents. RIN 1545-BD68 (Oct. 20, 2006).

required disclosures electronically where the participant is effectively able to obtain access to the electronic medium used to provide the notice and also is advised that he or she can receive the applicable disclosure in writing at no charge.¹³ Harmonization is an explicit goal of the Order.¹⁴

V. CONCLUSION

We very much appreciate the opportunity to comment on this issue and DOL's continued focus on protecting the interests of investors. Should you wish to discuss our comments, please call me at 303.626.4229.

Very truly yours,

Adym W. Rygmyr
Managing Director & Broker-Dealer General Counsel
TIAA-CREF Individual & Institutional
Services, LLC

cc: Phyllis Borzi, Assistant Secretary of Labor for Employee Benefits Security Administration
Michael Davis, Deputy Assistant Secretary of Labor for Employee Benefits Security Administration
Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations for Employee Benefits Security Administration
Joe Canary, Acting Director Office of Regulations and Interpretations Employee Benefits Security Administration
Robert Cook, Director, Division of Trading and Markets, SEC
Meredith Cross, Director, Division of Corporate Finance, SEC

¹³ Id., at 19.

¹⁴ Order, 76 Fed. Reg. at 3822.