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By Federal eRulemaking Portal

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-5655
Washington, DC 20210
Attention: E-Disclosure RFI

Re: Department of Labor, Employee Benefits Security Administration, RIN 1210-AB50

Ladies and Gentlemen:

Verrill Dana, LLP, on behalf of itself and certain of its clients, submits these comments in response to the Department's request for information regarding electronic disclosure by employee benefit plans. The group of clients comprises a cross-section of business types and sizes, and includes both for-profit and tax-exempt entities.

We commend the Department for its efforts in addressing the important issue of electronic disclosure, and we support expansion and modification of the current standards for electronic distribution of plan disclosures required under ERISA. As discussed below, we urge the Department to adopt a new, simplified safe harbor that allows for more widespread use of electronic disclosure and provides flexibility for electronic disclosure to adapt to technological advances.

Our specific comments are set forth below.

1. General Comments

The current standards for electronic distribution of required plan disclosures were adopted in 2002. Though the current standards provide a safe harbor and not a bright-line rule, we believe the current standards do not acknowledge (a) the broad-based use and standardization of electronic delivery methods via employer and plan service provider communications and portals, (b) the time and cost associated with manually delivering paper copies of plan disclosures, and, most importantly, (c) the potential lack of participant and beneficiary interest in receiving paper disclosures. Hampered by the current rules, many plan sponsors continue to rely on paper disclosure, which they and their employees find outmoded as an information delivery system and wasteful.

2. Responses to Specific Department Questions

a. Question 6: Most significant impediments to increasing the use of electronic media. Our clients unanimously report that the most significant impediment to increasing the use of electronic media is the current safe harbor itself. Clients find it cumbersome, difficult, and expensive to deliver electronic disclosures in accordance with the safe harbor, as the safe harbor contains a number of different rules and conditions for different types of plans, disclosures, and recipients. Some of our clients have expressed a desire to increase the use of electronic disclosure but have decided not to when faced with implementing a system requiring a wide variety of different notice procedures. In some cases the clients had a difficult time understanding the various requirements, while in others the clients feared that the highly variable procedures necessitated by the safe harbor would be prone to administrative error. By adopting a simplified safe harbor that reduces the number of different rules and conditions applying to the use of electronic disclosure, the Department would remove the most significant impediment to increasing the use of electronic media for delivering plan disclosures.

b. Question 7: Evidence of participants' and beneficiaries' increased interest in receiving employee benefit plan information electronically. Several years ago one of our clients delivered an annual report and benefits brochure in paper format to participants' and beneficiaries' homes. The client's employees complained loudly that the company was being wasteful with paper, incurring unnecessary postage expense, and saddling employees with additional "junk mail." As this anecdote illustrates, workers have become accustomed and expect to receive employee benefit plan information electronically, and they have a low tolerance for receiving materials at their homes in paper format.

c. Questions 11, 12, and 13: Disclosure for different types of employee benefit plans, disclosures, and recipients. As discussed in our response to Question 6, we strongly encourage the Department to adopt a simplified safe harbor by reducing the number of different rules and conditions that apply to the use of electronic disclosure for different types of plans, disclosures, and recipients. We also encourage the Department to adopt rules that provide flexibility for plan sponsors, service providers, and participants and beneficiaries to take advantage of future technological advances.

As discussed in our responses to other questions, we believe that electronic media provide uniquely suited opportunities for plan sponsors and service providers to deliver time-sensitive disclosures and disclosures containing personal information. Electronic media allow plan sponsors and service providers to instantaneously notify participants and beneficiaries of available disclosures and to hide disclosures containing personal information behind a password. Therefore, we do not believe there are any limitations to the types of disclosures suitable for electronic delivery.

Any new standard must, of course, take into account participants and beneficiaries who may not have routine access to the Internet through employment with the plan sponsor or who are not familiar or comfortable with electronic media. Our clients support, first, expanding the safe harbor to allow for disclosures to be furnished through electronic worksite kiosks or similar facilities, which would permit employees who do not regularly use computers in performing their job duties to access required disclosures in the same manner as employees who do regularly use computers in performing their job duties. Such facilities would afford electronic worksite access to additional participants, whose receipt of electronic disclosures could be monitored and whose personal data could be password protected. Second, participants and beneficiaries who do not have routine access to an employer's or plan's Web site should be able to affirmatively elect to receive disclosures on Web sites maintained by their employer or by plan service providers. Absent the plan sponsor's receipt of affirmative consent, the disclosures should be sent through the U.S. mail, as is required under the current safe harbor.

d. Question 14: Extent to which electronic disclosures should be encouraged or required. As discussed in our responses to other questions, we favor automatic electronic disclosure whenever technologically possible and reasonable. The plan sponsor, consistent with its duty to ensure proper delivery and receipt of disclosure materials, should be able to determine whether to use electronic media as the default method of furnishing required disclosures. We urge the Department to encourage greater use of electronic disclosures. We believe continuous access Web sites are an integral part of electronic disclosures, and we encourage the Department to incorporate the transitional guidance for benefit statements under Field Assistance Bulletin No. 2006-03 into any new electronic disclosure safe harbor. Participants and beneficiaries should receive notification whenever a required disclosure is added to the Web site, and the notification should be by electronic means unless the recipient has asked to receive paper copies of plan disclosures or has opted out of electronic delivery. The notification should also inform participants and beneficiaries about how to access the Web site, their right to request free paper copies of any disclosure, and the frequency with which the particular disclosure is provided.

e. Question 15: Who should decide whether disclosures are furnished electronically. We strongly believe that plan sponsors should be able to decide whether to use electronic media as the default method of furnishing required disclosures to all intended recipients, provided that the active participants are allowed to receive paper copies of disclosures free of charge upon request and former participants are allowed to opt out of receiving the disclosure electronically. (Our clients generally do not perceive any advantage to allowing current employees to opt out of electronic disclosure, but would instead provide both electronic disclosures and printed mailings to those who request paper copies.) This would place the decision whether to furnish electronic disclosures squarely on the plan sponsor, who is in the best position to know what approach best suits the participants and beneficiaries in its plans. Additionally, if a plan sponsor decides not to use electronic media as the default method of furnishing required disclosures, participants and beneficiaries should continue to have the ability to opt in and request electronic disclosures if that is their preferred method of delivery and the employer has the capacity to provide information through electronic media.

f. Question 25: Costs and benefits associated with expanding electronic distribution of required plan disclosures. The benefits of electronic communication are noted throughout this comment letter. We strongly believe that providing required plan disclosures electronically is far superior to providing the disclosures by any other means, and any retreat from electronic delivery of information would be a strange, burdensome, and expensive departure from our clients' communication strategies. The following summary describes principle benefits of electronic disclosure.

i. Prevalence of electronic communication. Many of our clients, including those with retail or manufacturing operations, already provide robust Internet and/or Intranet sites that their employees use daily to complete everyday tasks and activities. These clients, as well as others who do not rely as heavily on internal Web sites, typically use electronic media for their internal communications and to distribute important information. Most of our clients report placing the vast majority of their employee systems, including travel booking, pay check, expense reimbursement, annual enrollment, benefits statement, vacation, and performance review systems, on their internal Web sites. Employees and former employees are used to receiving important information electronically, and have come to rely on electronic media as a primary means of receiving communication and information.

ii. Preference for electronic media. Our clients highly value the ability to connect with their employees through the employees' preferred media, believing that employees will be better informed and more fully engaged when messages and materials are delivered through media with which the employees are familiar and conversant. Our clients already deliver documents and information by many means, including e-mails, Internet portal postings, digital signage, podcasts, webcasts, company blogs, share point sites, and online newsletters, and generally seek to deliver information and news electronically whenever possible. The evolution from paper to electronic communication has been very well received.

iii. Increase in use of electronic communication by service providers. Our clients report that many of their service providers are encouraging access to benefits-related information via computers and hand-held devices. For example, in many instances retirement plan service providers have defaulted to providing quarterly benefit statements by electronic access to an Internet site, with an option for participants and beneficiaries to receive paper statements if they prefer. Similarly, retirement and welfare plan service providers seem to be moving away from delivering contribution postcards and explanations of benefits to participants and beneficiaries by U.S. mail, instead delivering these notices electronically. Again, these changes have been very well received.

iv. Timeliness of delivery and life of disclosure. Posting and storing required disclosures on an employer or service provider Web site allows participants and beneficiaries an easy means by which to access current and past disclosures when their individual attention is centered on a particular benefit program (*i.e.*, before a leave, at termination or retirement, or whenever a specific benefits question arises) or when the time is convenient for them to review the disclosures. A single, printed mailing can easily be mislaid or discarded, thereby reducing the participant's or beneficiary's ability to review the disclosure when it becomes important to the individual. Similarly, electronic distribution provides disclosures to participants and beneficiaries more quickly than distribution in any paper format, and in the event of an error the disclosure can be quickly corrected, re-posted to the pertinent Web sites, and redistributed to recipients, sometimes within minutes and without incurring additional delivery expense.

v. Success in reaching intended recipient. Our clients report that regulatory notices sent to participants and beneficiaries by U.S. mail are often unrecognized, discarded as "junk mail," or simply ignored. Additionally, electronic communications are more secure than paper communications because they can be password protected, while paper materials can be opened by someone other than the intended recipient, lost, or stolen.

vi. Cost management. Electronic delivery reduces expenses related to printing and mailing paper disclosures to participants and beneficiaries. These expenses are frequently paid by the plan as part of its administrative expenses and ultimately borne by plan participants and beneficiaries.

vii. Decreased environmental impact. Providing materials and information by electronic means rather than in paper format reduces consumption of energy and natural resources. Many of our clients have an expressly stated corporate mission of promoting sustainability and preserving the environment, and using electronic communications fosters the commonly-stated corporate priority of "going green."

g. Likelihood of participants opting out of default electronic disclosure. As discussed in other responses, our clients believe their workers, whether at work, home, or some other location, have reliable and constant Internet access. Further, most of our clients' employee systems are already online, and some of these systems (such as employee compensation and benefits statements) are available only online. Our clients provide important benefits-related communications electronically not only because it is more efficient and reduces expense, but because electronic communication has become their workforces' preferred medium. Current employees, and increasingly former employees as well, prefer to receive and maintain important benefits-related and personal information electronically, and, perhaps more importantly, expect to access this information through systems available any time of the day or night. To a quickly growing number of participants, printed mailings are wasteful and a hassle. For these reasons and many others discussed throughout this comment letter, our clients strongly believe that the great majority of their workforces would not opt out of receiving electronic disclosures.

h. Question 30: Extent to which employee benefit plans would benefit from a single electronic disclosure standard. As discussed in our responses to the Department's Questions 6 and 11, 12, and 13, we support the adoption of a single, unified electronic disclosure standard by the Department and Treasury.

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We believe that the number of employees, plan participants, and beneficiaries who are precluded from use of electronic media by lack of Internet access or technological illiteracy is declining, and will continue to decrease in the near and far term. Internet access has become widespread, both in the workplace and at home, and participants and beneficiaries are quickly adopting electronic media as their primary means of communicating and storing information.

We strongly encourage the Department to adopt new electronic disclosure rules as discussed herein. Doing so will allow for expanded use of electronic disclosure and provide greater protections to plan participants and beneficiaries.

We appreciate the opportunity to submit these comments. If you have any questions or would like to discuss these issues further, please do not hesitate to contact me or Misti Munster at Verrill Dana.

Sincerely,

Suzanne E. Meeker