

THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy



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VIA Federal eRulemaking Portal <http://www.regulations.gov>

June 6, 2011

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

Attention: E-Disclosure RFI

Re: Request for Information Regarding Electronic Disclosure by Employee Benefit Plans
[RIN 1210—AB50], 76 Fed. Reg. 19285 (Apr. 7, 2011)

Messieurs and Mesdames:

The Financial Services Roundtable (the “Roundtable”) appreciates the opportunity to comment on the request for information (the “RFI”) by the Department of Labor (the “Department”) concerning the use of electronic media by employee benefit plans to furnish information to plan participants and beneficiaries who are covered by employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).¹ The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

Executive Summary

The Financial Services Roundtable supports increasing incentives and opportunities for Americans to save and invest. It is our belief that providing these opportunities for Americans is important because savings increases domestic investment, encourages economic growth, and results in higher wages, financial freedom, and a better standard of living. The Roundtable believes that most Americans should approach retirement with a comprehensive strategy that incorporates a number of retirement vehicles. Consumer education about retirement savings products can help consumers make

¹ Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (2010).

sound investment decisions and allow them to maximize their retirement savings. Further gains can be achieved through better use of investment advice, and by promoting policies that provide for more diversified, dynamic asset allocation, more institutional products, and exploration of new and innovative methods to help individuals make better investment decisions.

Americans rely on retirement plans to supplement Social Security and private savings.² In 2009, \$2,121 billion of retirement assets were held in defined benefit plans compared to \$3,336 billion of assets in defined contribution plans.³ Americans have increased their participation in 401(k) plans by 250 percent over the last twenty-five years.⁴

For the reasons described below, we believe that ERISA plan participants and beneficiaries would greatly benefit from liberalized electronic disclosure rules under ERISA. Specifically, the Roundtable recommends the following:

- Electronic communications should be the “default” delivery mode for ERISA-required communications absent an affirmative election to the contrary by a plan participant or beneficiary.
- The standards in Field Assistance Bulletin No. 2006-03 should apply to delivery of statements required by Regulation 29 C.F.R. § 404a-5(g), pending further guidance from the Department.

² Insurance Information Institute and The Financial Services Roundtable, THE FINANCIAL SERVICES FACT BOOK at 37 (2011) (“THE FINANCIAL SERVICES FACT BOOK”), available at [http://www.fsround.org/publications/pdfs/2011/Financial_Services_Factbook_2011\[1\].pdf](http://www.fsround.org/publications/pdfs/2011/Financial_Services_Factbook_2011[1].pdf).

³ *Id.* at 43 (Source: Securities Industry and Financial Markets Association).

⁴ *Retirement Security: 401(k)s* (Sept. 23, 2010) (“*Retirement Security*”), available at <http://www.fsround.org/fsr/pdfs/fast-facts/2010-09-23-RetirementSecurity.pdf>.

I. Electronic delivery provides participants and beneficiaries with “on-demand” access to their ERISA plan account information and on-line educational and plan account management tools.

Technological innovations (including wide-spread adoption of the Internet and social media) have revolutionized electronic communications in the years since the Department last issued regulations on electronic disclosures in 2001. The Roundtable believes that appropriately updated regulations would allow ERISA plans to provide participants and beneficiaries with information in a format that they are more likely to utilize. For example, e-mail communications can be more effective than paper documents in generating responses from plan participants.⁵

By using electronic media, we believe ERISA plans would incur a significant reduction in expenses associated with preparing and distributing paper disclosure documents.⁶ Consequently, eliminating printing, distributing, and discarding of large volumes of printed disclosure documents would lower the energy and transportation costs necessary to deliver substantial volumes of paper documents, as well as reduce the impact of solid waste on the environment.

Modern communications methods offer an efficient and effective means to interact with plan participants and beneficiaries.

The decline in defined benefit plans⁷ underscores the importance of equipping individuals to assume greater responsibility for understanding their investment alternatives, making investment decisions consistent with their particular goals and tolerance for risk, and funding their retirement savings accounts. We are concerned that too many Americans may lack adequate retirement savings. Private-sector pensions are likely to become the safety net for more and more Americans in response to governmental initiatives to address public-sector entitlement spending (*e.g.*, Social Security and Medicare).⁸ The Roundtable believes that the availability of “on-line guidance tools”⁹ and delivery of

⁵ See Fidelity Investments Personal and Workplace Investing Recordkeeping Statistics (“Keeping employees engaged *via* email yields response rates that are three times higher than those receiving print communications (10.6% vs. 3.6%).”).

⁶ An ERISA plan pays certain plan expenses from plan assets. Thus, electronic delivery of mandatory ERISA disclosure documents could reduce expenses properly allocated to the plan (*i.e.*, printing and delivery costs) and increase plan assets available to pay benefits. For example, one of our members estimates the cost of mailing paper statements to all of its existing participants and beneficiaries exceeds \$30 million annually just for printing and postage. This member estimates the costs will exceed \$21 million to print and mail the new participant disclosure material (*i.e.*, the new comparative chart and other disclosures required as a result of the participant fee disclosure regulations) to all participants and beneficiaries.

⁷ See James E. McWhinney, *The Demise of the Defined-Benefit Plan*, available at <http://www.investopedia.com/articles/retirement/06/DemiseofDBPlan.asp#13070266275532&close> (“Thomas J. Mackell Jr., Chairman of the Board of the [Federal Reserve Bank](#) of Richmond, gave a speech in New York at the end of January 2006 in which he announced that he anticipates that defined-benefit plans will fade away over the next five years.”).

⁸ See THE FINANCIAL SERVICES FACT BOOK, *supra* note 2 at 38 (According to the Investment Company Institute, employer-sponsored plans accounted for almost two thirds of Americans’ retirement assets in 2009.). See also, *Retirement Security*, *supra* note 4 (“Forty-five percent (45%) of Americans believe that IRAs and 401(k)s will be the major source of retirement income, compared to Social Security (34%), work-sponsored pension plans (23%), saving accounts or CDs (22%), home equity (20%), and individual stock investments (20%).”).

⁹ A number of plan sponsors and their service providers have developed a variety of on-line tools to assist ERISA plan participants with monitoring their plan accounts, evaluating investment alternatives, reviewing account balances, changing investment options, increasing or decreasing contribution amounts, modeling a pension benefit, checking

ERISA plan documents to participants using those communications methods preferred by plan participants may encourage more employees to participate in ERISA plans sponsored by their employers,¹⁰ and to increase their plan contributions.¹¹

The Department's current rules often inhibit an ERISA plan's ability to use electronic media to communicate with plan participants and beneficiaries.

The Department's current rules often inhibit ERISA plans from providing information in a format that is both more effective in communicating important information to plan participants and beneficiaries, and less costly for plans to administer. A prime example is the inability (for all practical purposes) of ERISA plans to use the "e-proxy" rules promulgated by the Securities and Exchange Commission (the "Commission")¹² to comply with the proxy delivery requirements of section 404(c) of ERISA.¹³ The e-proxy rules apply to the provision of proxy materials (including the proxy statement, a proxy card, the glossy annual report and any other soliciting materials). The Commission's rules provide for these materials to be made available to shareholders *via* a publicly-accessible Internet website.

The e-proxy rules provide issuers with two delivery methods: *Notice and Access* or *Full-Set Delivery*. Under the "notice and access" option, an issuer can satisfy the proxy delivery requirements by delivering a Notice of Internet Availability of Proxy Materials to shareholders at least forty calendar days before the annual meeting date and posting proxy materials on an Internet website. A Broadridge Financial Solutions study found that the savings from using the "notice and access" option amount to hundreds of millions of dollars, primarily due to printing and postage savings.¹⁴ Alternatively, under the "full-set delivery" option, issuers may deliver copies of proxy materials in paper or electronic form; however, they also must post a copy of those materials on the Internet.

ERISA plans generally cannot use the notice and access model to comply with the proxy delivery requirements under section 404(c) of ERISA. Given the loss of section 404(c) protection if required documents are not delivered, it simply is not worth the risk to attempt to determine which participants or beneficiaries may receive electronic disclosures of proxy materials and which may not. Thus, these materials are routinely delivered in paper format to all participants and beneficiaries, with the attendant printing and delivery costs to the ERISA plan.

market conditions, obtaining research reports, and setting up "watch lists" and account "alerts" based on parameters specified by the plan participant or beneficiary owner.

¹⁰ See Fidelity Investments data based on 29,000 participants completing a myPlan Interaction from January 2010 through December 2010 ("After using a savings planning tool, 87% of participants doubled their deferral rate from 4% to 8%.).

¹¹ See Fidelity Investments data based on 317,000 participants using Portfolio Review and making a change in their "investment mix" or an exchange from January 2010 through December 2010 ("After using Portfolio Review, the online guidance tool, 55% made a change to their investment allocations.").

¹² 17 C.F.R. § 240.14a-16 (These rules generally became effective beginning with the 2008 proxy season.). See *Shareholder Choice Regarding Proxy Materials*, Securities Exchange Act Release No. 56135 [File No. S7-03-07; RIN 3235—AJ79], 72 *Fed. Reg.* 42222 (Aug. 1, 2007).

¹³ Section 404(c) of ERISA, 29 U.S.C. § 1104(c).

¹⁴ Broadridge Financial Solutions, Inc., *Notice and Access: Statistical Overview of Use with Beneficial Shareholders* (June 30, 2009), available at <http://www.broadridge.com/notice-and-access/NAStatsStory.pdf> ("Since July 2007, 2,016 distributions have utilized Notice and Access model, and Broadridge estimates that this has resulted in savings, net of fees, of \$382 million.").

E-proxy provides a good example of the downsides of the current overly-restrictive ERISA electronic disclosure régime. However, paper delivery of summary plan descriptions and other ERISA-required documents raises the same basic issues. With respect to ERISA plans, the impediments imposed by the Department's current electronic disclosure rules clearly are the predominant reason why electronic media are not used more frequently.

The Roundtable asks the Department to adopt standards mandating electronic communication as the default delivery method for ERISA plan disclosures.

In light of the demonstrated benefits of electronic disclosures to ERISA plan participants and beneficiaries, as well as the reduced costs to ERISA plans and the potential to reduce the impact on the environment of printing, distributing, and discarding paper documents, we ask the Department to adopt standards mandating electronic delivery as the "default" delivery method. The Roundtable recognizes that there must be appropriate safeguards for this approach, and recommends the following:

- Upon an individual becoming eligible to participate in an ERISA plan (including any person who becomes eligible to receive benefits under an ERISA plan), or at any time thereafter, the participant (or beneficiary) would be informed in writing (*via* electronic communication or otherwise) that required plan disclosure documents will be delivered electronically *unless* the participant or beneficiary makes an election to receive paper documents. The election could be made either *via* electronic communication or paper media.¹⁵
- The ERISA plan participant or beneficiary may subsequently request in writing (*via* electronic communication or otherwise) receipt of paper versions of ERISA plan documents.
- The ERISA plan administrator takes steps it deems reasonably appropriate to verify that the system for furnishing documents results in the document being delivered to the e-mail address, text number, or other method elected by the participant (or beneficiary),¹⁶ and protects the confidentiality of personal information relating to the individual's accounts and benefits.
- The electronically-delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the paper version of the particular mandatory disclosure document.
- Notice is provided to each participant, beneficiary or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted and of the right to request and obtain a paper version of such document.

¹⁵ We believe the power to "opt out" of electronic delivery of required ERISA plan information would fully protect the interests of those plan participants and beneficiaries that may prefer delivery of paper documents.

¹⁶ We ask that the Department not impose specific requirements on the mode of delivery. For example, we understand that one demographic of the American consumer prefers to communicate *via* text messaging and Facebook posts, rather than e-mail. Facebook is a relatively new technology that presently has over 500 million active users. Facebook Factsheet, <http://www.facebook.com/press/info.php?factsheet> (last visited June 3, 2011). In our view, the Department's regulations should not impede adoption of various electronic media that respond to consumer choices about how they would like providers of ERISA benefit plans to communicate with them. Electronic communication methods constantly evolve, and technology changes could quickly make any mode of communication mandated by rule or regulation obsolete.

- Upon request, the ERISA plan participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.

The Roundtable believes that ERISA plan participants and beneficiaries are almost certainly more likely to actually read and respond to information that is provided electronically.¹⁷ Additionally, the Roundtable believes that the alternative approach we propose protects the interests of lower-income and disabled individuals, because they would have the ability to choose to receive documents in paper form if they prefer.

In conclusion, increased use of electronic communications to deliver disclosure documents mandated by ERISA would be better for ERISA plans, ERISA plan participants and beneficiaries, and the environment. We urge the Department to do all that it reasonably can to encourage this modern form of communication.

II. We ask the Department to interpret its rules to permit plans to continue to provide ERISA plan participants and beneficiaries with real-time Internet-based account access.

We are aware that many ERISA plans provide participants and beneficiaries with quarterly statements for their accounts *via* electronic access to Internet-based secure websites. These Internet-based solutions also offer participants and beneficiaries “on-demand” access to their account information (including valuation of plan assets as of the market close on the preceding business day).

The Roundtable understands that rule 404a-5(g) under ERISA¹⁸ concerning electronic disclosures of ERISA plan information to plan participants and beneficiaries is scheduled to become effective at the end of 2011. However, the regulations concerning use of electronic media have yet to be promulgated, and plans are likely to require a substantial lead-time to implement the new requirements. As a consequence, if ERISA plans must revert back to a paper-delivery-based system to provide the required disclosures, it is likely to cause substantial disruption for participants and beneficiaries, and concomitant cost burdens for ERISA plans.

This reversion to a paper-delivery-based system will not provide any discernable benefits to participants and beneficiaries that are in any way comparable to the real-time account access currently available to them *via* electronic account access. The expenses associated with printing and delivering the information, however, will be a cost these account holders bear indirectly by virtue of the allocation of plan assets to cover these costs—assets which otherwise could have been directed toward benefits for plan participants and beneficiaries.

To ameliorate this potentially adverse impact on ERISA plans, and on their respective participants and beneficiaries, we ask the Department to confirm that the disclosures required by rule 404a-5(g) may be disseminated pursuant to the Department’s guidance in Field Assistance Bulletin No. 2006-03 (the “FAB”). We anticipate that extension of the FAB would be an interim measure, which

¹⁷ Plans that use e-mail systems to deliver ERISA plan disclosures are able to trace delivery of particular e-mail communications to the ultimate computer used by the recipient: the plan participant or beneficiary. Plans that provide participants and beneficiaries with access to plan information (including required ERISA disclosures) *via* a secure web-site are able to trace each log-in to the secure site. The security of the web-site is based, in part, on a requirement that the plan participant or beneficiary use a password to gain access.

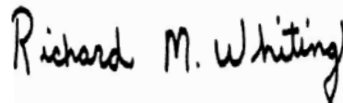
¹⁸ 29 C.F.R. § 2550.404a-5(g).

would remain in effect pending final adoption of electronic disclosure rules and a reasonable period¹⁹ for ERISA plans to implement fully the new electronic disclosure regulations.

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If it would be helpful to discuss the Roundtable's specific comments or general views on electronic disclosures by ERISA plans, please contact me at Rich@fsround.org. Please also feel free to contact the Roundtable's Senior Regulatory Counsel, Brad Ipema, at Brad.Ipema@fsround.org.

Sincerely yours,



Richard M. Whiting
Executive Director and General Counsel
Financial Services Roundtable

With a copy to: Phyllis C. Borzi, Assistant Secretary
Employee Benefits Security Administration

¹⁹ We would be pleased to work with the Department to determine an appropriate phase-in period for full implementation of the new electronic disclosure rule.