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

Subject: Electronic Disclosure RFI (RIN 1210-AB50)

Greetings:

On behalf of the American Council of Life Insurers ("ACLI"), we are writing to provide information in response to the Department of Labor ("DOL") Request for Information ("RFI") regarding electronic disclosure by employee benefit plans, published in the Federal Register on April 7, 2011. ACLI is pleased that the Department has undertaken this effort.

The American Council of Life Insurers is a national trade organization with more than 300 members that represent more than 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension, 401(k) and 403(b) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

We believe that the Department should view electronic disclosure as no less than the equivalent of paper disclosure and electronic delivery as no less effective than the U.S. Mail. Since the issuance of the Department's 2002 safe harbor electronic delivery rule, web-based media has become the dominant means of delivering information electronically over tangible electronic media such as CD-Rom, magnetic disk, etc. Today, ACLI member companies offer employee benefit plan participants access to product, plan and account information on the Internet. As noted in the preamble to the RFI, U.S. Census data indicates that a large majority of Americans have access to the internet. Over 80% of private sector workers have internet access with close to 88% residing in a household where another resident has Internet access.

The Department's safe harbor rule provides for paper as the default disclosure method. Thus, even when the disclosure is available online, absent participant action, plans must also prepare and mail paper versions of much of this same information to plan participants. The costs associated with these mailings are significant. Plans will invest in more robust electronic delivery arrangements and minimize the use of paper mailings when the rules clearly support electronic delivery as a default.

## Recommendations

ACLI recommends the rule be changed to encourage the use of electronic disclosure. The delivery rule should recognize web-based disclosure arrangements as reasonable and effective means of delivery. The Department's delivery rule should provide that, when a participant provides the plan with an electronic mail ("email") address, a notice sent to the participant's email address is a reasonable and effective method of delivery, putting email on par with U.S. Mail. With appropriate notice, the rule should permit plans to use web-based disclosure as a default means of delivering required disclosures. We understand that not everyone has Internet access today. Thus, plans that elect to use web-based disclosure as the default must afford participants an effective opportunity to elect to receive required disclosures in paper form.

## Web Based Disclosure Arrangements

The delivery rule should recognize that the Internet is an effective means of delivery for participants. Plans should be permitted to convey a required disclosure by placing the required information on a website and notifying the participants that the disclosure is available, the nature of the disclosure and its web location. Plans should be permitted to provide this initial notice by email and by other electronic means such as Twitter or text message and by U.S. Mail when no email or other electronic address is on file for the participant.

It is common for employee benefit plans to use internet based platforms to provide participants with access to plan information including personal account information and to permit participants to update information such as street and email addresses and to initiate transactions such as investment changes and withdrawals. Personal IDs and passwords are used for authentication. IDs and passwords may be established by the participant via the web through a registration process during which the participant confirms his or her identity by way of certain personal information on file with the plan. They may also be provided to the participant on a temporary basis with the participant establishing a personal ID and password during the first "login."

As noted, the internet is broadly available. Computer devices offer Internet software as standard fare. The two major companies offering personal computer operating systems, Apple and Microsoft, provide web browsers and email programs with their operating systems. Internet web browsers are provided free of charge by Google, Mozilla and others. In addition to personal "desk top" and "lap top" computers, there are a range of personal devices such as smart phones and readers or computing pads with internet browser capabilities. As for email, Internet service providers offer customers web-based email programs and email addresses. Google and Yahoo offer these same services free of charge. Also, individuals with web access may elect to use social media and notification tools such as Twitter and those with cell phone may elect to receive text messages to keep up to date with various parties on a real time basis.

The Internet has become a popular and convenient means by which to obtain and share information, 24/7. Similar to hand delivery, web-based information is conveyed directly to the individual, not to a physical location. It is available wherever the individual has Internet access, beyond a single worksite or residence. This permits plans to provide information to participants on travel for business or pleasure, when moving residences, or when a street address is no longer valid. The Internet may also be used by participants to store information. Participants may treat the plan's website as a means to store plan information without the need to file, store, and keep current paper documents at home. Plans use websites not only to provide information but to facilitate transactions. Thus, web based information can facilitate immediate action. For example, a participant may make investment changes following a review of plan fee and fund performance information. Likewise, the review of an automatic contribution arrangement notice may lead participants to change contribution rates.

### Electronic Mail

Plans should be permitted to use email to deliver information to participants in the same way they use a street address. If a participant provides the plan with an email address, the plan should be permitted to choose to deliver required disclosures to that email address. Electronic mail or email offers users many benefits. Email provides instantaneous delivery of information. For senders, it is possible to receive immediate confirmation of the delivery of time sensitive information. If an email address is stale, senders are notified immediately. Delivery is made directly to the intended recipient, not to a location where residents and non-residents may have access.

### Innovations Continue

We recommend the Department adopt delivery rules that recognize these changes in communication technologies and that encourage plans to stay current with the ways in which Americans communicate and transact while mindful of workers without access to these technologies. We believe that the data on Internet access clearly supports permitting a shift to electronic delivery as a default method of delivery. We also believe that it is important that there be a clear and effective opportunity for workers to direct that delivery be made in paper form. Again, plans and service providers will invest in more robust electronic delivery arrangements and minimize the use of paper when the rules support electronic means as a default.

### Interim Guidance Needed

Issued on October 20, 2010, the new participant disclosure requirements set forth in Regulation 29 CFR 2550.404a-5 reserved a section for rules on the manner of furnishing the new disclosure. In the preamble to this rule, the Department noted that it is exploring whether and how to expand or modify the standards applicable to the electronic distribution of required plan disclosures, announced that it would be publishing this RFI; and that the Department anticipated that it would resolve this issue in advance of the compliance date of the new rule, currently plan years beginning on or after November 1, 2011, to ensure appropriate notice for plans. If the Department now anticipates that such resolution may not be made in time, we recommend that, in the interim, the transitional relief provided to plans under Field Assistance Bulletin 2006-03 be extended to this rule. We ask that the Department issue interim guidance that views the continuous availability of the required disclosures on a website to constitute "good faith" compliance, provided that participants are timely notified of the availability of the information and are afforded an effective opportunity to elect to receive the disclosures in paper form.

## RFI Questions

<u>Access and Usage Questions</u>

**1. What percentage of people in this country has access to the Internet at work or home? Of this percentage, what percentage has access at work versus at home? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)?**

According to national surveys conducted throughout 2009, it has been found that between 74% and 79% of American adults (over age 18) use the internet, and between 60% and 63% have broadband connections at home. It was also found that 55% of American adults connect wirelessly (using Wi-Fi or via laptops or through handheld devices and/or smart phones.

While demographics do have an impact on access/usage the gaps are closing as more and more people commonly use the internet to access information. For example, the percentage of people age 65 and older who access the internet has more than doubled since 2000. In addition, 95% of younger adults (ages 18-29), including those now entering the workforce, have access. See http://www.pewinternet.org/Reports/2010/Internet-broadband-and-cell-phone-statistics.aspx and http://www.pewinternet.org/Data-Tools/Get-the-Latest-Statistics/Infographics.aspx

**5. What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?**

While the most common methods of electronic communication seem to be continuous access web and email, there is growing reliance on social media (Facebook, Twitter, LinkedIn, etc.) for information.

**6. What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?**

The current affirmative election requirement is the most significant impediment to increasing the use of electronic media. As plans with auto-enrollment have greater participation levels than plans that require affirmative consent to enroll, we expect that the use of electronic media on a default basis will lead to greater use of such media.

It is becoming more common to hear participants asking for electronic communications (in general), however getting people to actively make a decision regarding e-delivery is an uphill battle. Allowing negative election is imperative to increase the adoption of electronic delivery.

Privacy is also an issue that is always top of mind for providers and plan sponsors. To address privacy concerns, participants should be notified that the materials are available to be viewed via continuous access web. Participants would be able to access the information after a secure login process.

**7. Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?**

In response to a recent survey of participants conducted by a member company, the results suggest the desire and willingness on the part of participants to receive information electronically. Reasons for wanting primarily electronic delivery include a desire to "go green" and also an ease of use. Participants have expressed the idea that allowing them to access the information electronically, at their convenience, is preferable to receiving paper copies of these materials in the mail.

**8. Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?**

With the growing popularity and technology of cell phones/smart phones, texting and instant message communications could have a big impact on how companies/providers communicate with consumers/participants. Social media is also a communication method changing the way people are informed.

Texting has become the communication method of choice for the Gen Yers. Social Media has also become hugely popular across all demographics.

General Questions

**9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?**

Yes. The current safe harbor's consent requirement unduly restricts plans from utilizing web-based delivery as a default means of delivery. The cost of complying with the current default paper regime is high. Thus, this cost must be considered when service providers determine their compensation needs. Today, it is typical for these costs to be borne by plan participants. Web-based and other electronic delivery methods offer an opportunity to dramatically reduce this cost in the employer based retirement system. In addition to cost reductions, web-based delivery is superior to paper communications. Information available on a website can be accessed beyond a single worksite or residence. This permits plans to notify participants on travel for business or pleasure, when moving residences, or when a street address would no longer be valid. Participants may treat the plan's website as a means to store plan information without the need to file, store, and keep current paper documents at home. Web-based information provides greater safety over documents delivered via US mail which may be stolen from a mailbox, opened by other residents, or misdirected to another address.

A plan's web site offers participants the opportunity to act upon the information received, e.g., a fee and fund performance disclosure may lead to investment changes, an automatic contribution arrangement notice may lead to a change in a contribution rate. Web based information can facilitate action.

**10. If the safe harbor should be revised, how should it be revised? Please be specific.**

Plans should be permitted to use electronic web-based solutions as a default means of delivering required disclosures. To ensure delivery to those without access, participants must be provided with an effective opportunity to elect to receive required disclosures in paper form, e.g. an election made by phone.

**11. Should a revised safe harbor have different rules or conditions for different types of employee benefit plans (e.g., pension versus welfare plans)? If so, why and what differences?**

No.

**12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?**

No.

**13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?**

No.

**14. To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such**

**notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of the disclosures provided on the Web site(s).**

The Department should encourage the use of web-based media for all disclosures. An initial, annual and, in certain circumstances such as severance from employment, event based notice regime informing the participants of the website, describing required and other disclosures available on the website in broad terms, e.g. plan fee information, and how to elect to receive the required disclosures in paper form should be sufficient.

**15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt into or out of electronic disclosures? See Question 26.**

Any default approach, whether the default is paper or electronic, leaves to the participant whether to receive disclosures via the default method or any alternative method available. The decision as to the default method and other available methods should rest with the plan sponsor.

**16. Should a revised safe harbor contain conditions to ensure that individuals with disabilities are able to access disclosures made through electronic media, such as via continuous access Web sites? If so, please describe the conditions that would be needed. Also, please identify whether such conditions would impose any undue burdens on employee benefit plans, including the costs associated with meeting any such conditions. What burden and difficulty would be placed on employees with disabilities if the Web sites and/or other electronic communication were not accessible?**

Legislation such as the Americans with Disabilities Act has served to foster the development of assistive technologies for people with disabilities. In addition, most computer vendors support persons with disabilities by incorporating accessibility utilities into operating systems such as Microsoft Windows, Apple Macintosh, and UNIX. Personal computers and other electronic devices equipped with assistive technology permit individuals to function independently at school, work, and home, and allow access to information from a variety of sources (including but not limited to continuous access web, instant message and email) to a greater extent than traditional paper medium.

There are a number of organizations and technologies in place to assist individuals with disabilities with access to computers and electronic media. A comprehensive reference on such access can be found at: http://www.disabled-world.com/assistivedevices/computer/

In light of the availability of these technologies to the general public and in particular the disabled, we see no need to place an addition burden on plan administrators utilizing electronic media over those that utilize only paper media.

<u>Technical Questions</u>

**17. If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?**

We should allow any and all participants the ability to opt out of electronic delivery of materials, free of charge. Any participant who prefers traditional delivery of the disclosures, regardless of the reason, should be provided an effective opportunity to make such election.

**18. The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work e-mail accounts?**

The current hardware and software provisions are not necessary for web-based delivery systems. To use web-based media, a participant needs a browser. The two major companies offering personal computer operating systems, Apple and Microsoft, provide web browsers and email programs with their operating systems. In addition, internet web browsers are provided free of charge by Google and Mozilla. In addition to personal “desk top” and “lap top” computers, there are a range of personal devices such as smart phones and readers or computing pads with internet browser capabilities.

**19. Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.**

The current consent requirement results in paper as a default. Because of this requirement, plans and service providers have yet to invest in more robust electronic delivery arrangements, nor to more broadly minimize the extensive use of paper. For participants, as we have noted, there are material risks to receiving information via the U.S. Mail, e.g., delivery to the wrong address, access to mail by residents and non-residents, receipt delays when away. The affirmative consent requirement should be eliminated. The rule should focus on describing the attributes of what is reasonably accessible, e.g., when a participant provides an email address, it is reasonable for the plan sponsor to conclude that a communication sent to the address will be accessible to the participant. The rule should not prescribe a particular default delivery regime. The rule should be protective of participants without requisite electronic tools, ensuring that they are afforded an effective opportunity to elect paper delivery. Such a rule would give plans options as to how to structure the delivery of required disclosures. Plans should be permitted to develop communication strategies that best fit the plan and its participants including the use of electronic delivery as a default. For example, plans that received a high rate of elections for paper delivery may well change to a paper default delivery system.

**20. In general, the E-SIGN Act permits electronic disclosure of health plan materials but does not apply to cancellation or termination of health insurance or benefits electronically. Are there special considerations the Department should take into account for group health plan disclosures (including termination of coverage and privacy issues)?**

So long as participants and beneficiaries are properly notified upon an event and are afforded an effective opportunity to elect paper, web-based disclosure should be permitted as a default means of delivering required disclosures.

**22. Do spam filters and similar measures used by non-workplace (personal) e-mail accounts, pose particular problems that should be taken into consideration?**

No. With spam filters, mail is still received. The individual determines whether to block or unblock the receipt of future mailings.

**23. What is the current practice for confirming that a participant received a time-sensitive notice that requires a participant response?**

Whether by paper or via electronic mail, disclosures are sent with return “address.” Confirmation of delivery is assumed when US mail or email is not returned to sender.

**24. What are current practices for ensuring that the e-mail address on file for the participant is the most current e-mail address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?**

It is common practice to change a participant to a paper process when an email address is incorrect and rejects the transmission. Email users typically have the ability to update email addresses online at any time.

<u>Comments Regarding Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act</u>

**25. What costs and benefits are associated with expanding electronic distribution of required plan disclosures? Do costs and benefits vary across different types of participants, sponsors, plans, or disclosures? Are the printing costs being transferred from plans to plan participants and beneficiaries when information is furnished electronically?**

Expanding the use of electronic disclosure will reduce costs significantly. For example, fee disclosures to be provided later this year will be especially costly due to the length of these documents, and the fact that it must be delivered to actives and terminated participants, but also non-participating eligible employees. As we noted above, the cost of complying with the default paper regime is high. This is a cost that is considered when service providers determine their compensation needs. Today, it is typical for these costs to be borne by plan participants. Web-based and other electronic delivery methods offer an opportunity to dramatically reduce this cost in the employer based retirement system.

**27. Do participants prefer receiving certain plan documents on paper rather than electronically (e.g., summary plan descriptions versus quarterly benefit statements), and what reasons are given for such preference? Would this preference change if participants were aware of the additional cost associated with paper disclosure?**

ACLI members believe that the paper default supports inertia with regard to electronic delivery. For example, 401(k) plans that enroll employees at a deferral rate of zero have lower contribution rates than plans that "auto-enroll" employees at a rate greater than zero. ACLI members report that it is common to hear complaints from participants that they receive too many paper mailings and questioning why they couldn't simply access the information online at the plan's website.

**28. What impact would expanding electronic disclosure have on small plans? Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?**

Small plans would not have a different "cost per participant" than large plans. These plans have the same challenges of larger plans when it comes to tracking terminated participants or beneficiary accounts. Small plans in general will pay more for recordkeeping services simply based on not having the scale to leverage institutionally priced investments. Communication charges should not be impacted by the size of the plan; participants in small plans still receive all the same regulatory mailings as large plans.

**29. Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure?**

Email attachments are less efficient and are generally not recommended. It has become common practice to discourage direct delivery or attachment downloads contained within an email due to the high proliferations of viruses and other malware that may accompany documents. Requiring users to click on a link, enter secured credentials at a web site, and view their information under the cloak of a secure socket layer (SSL) web site has proven to be much safer and secure for users of the internet.

**30. Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?**

A single standard would help to minimize implementation costs and ease plan administration.

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On behalf of the ACLI member companies, thank you for consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department on these important issues.

Sincerely yours,

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