

June 3, 2011

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

Dear EBSA:

The purpose of this letter is to submit comments regarding the request for information with respect to the current electronic disclosure regulations, DOL Regulation Section 2520.104b-1 (the "Regulations"). These comments are in response to the Department's Request for Information, dated April 7, 2011, 76 Fed. Reg. 19285, (the "RFI"). The comments expressed herein are submitted on behalf of two Fortune 500 companies that have over 300,000 combined employees in all 50 states. The companies sponsor a multitude of ERISA health, welfare, pension, 401(k) and other plans for the benefit of employees, retirees and their eligible dependents.

### **Regulation Background**

Before addressing our specific comments, we first would like to briefly discuss the structure of the Regulations. The Regulations are drafted in a two-part form, with the first part providing the general rule in subsection (b)(1) and the second part providing a safe harbor with respect to certain types of electronic disclosures in subsection (c).

Subsection (b)(1) provides that a plan administrator shall use measures reasonably calculated to ensure actual receipt of materials by plan participants, beneficiaries and other specified individuals (collectively, "Participants"). Material which is required to be furnished to all Participants covered under the plan must be sent by a method or methods of delivery likely to result in full distribution. Although subsection (b)(1) provides the general rule, it also sets forth examples that appear to operate as safe harbors. For example, subsection (b)(1) continues by providing that in-hand delivery to an employee at his or her worksite is acceptable, and that it is also acceptable to furnish materials as an insert in a periodical distributed to employees such as a company newsletter. Material distributed through first-class mail also appears to be a safe harbor.

In 2002, the Department published final regulations regarding the disclosure safe harbor for electronic media. This safe harbor is located in subsection (c) of the Regulation and requires generally that:

- The plan administrator take appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt of the information and protects the confidentiality of personal information;
- The electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document;
- Notice is provided in electronic or non-electronic form, at the time a document is furnished electronically, that appraises the Participant of the significance of the document and of the right to request and obtain a paper version of such document; and
- A paper version is furnished upon request.

The above requirements apply with respect to two categories of Participants. The first category are Participants who have the ability to effectively access documents furnished in electronic form at work and with respect to whom access to a computer at work is an integral part of the Participant's job duties. The second category includes any Participant who affirmatively consents to receiving documents through electronic media (based on the specific rules in subsection (c)) and who has not withdrawn such consent.

### **Specific Regulation Comments**

#### **1. The existing structure of the Regulation with a general rule and various safe harbors should be retained.**

As noted above, the Regulation sets forth a general rule that a plan administrator shall use measures reasonably calculated to ensure actual receipt of materials by Participants. The Regulation then sets forth various safe harbors, including for electronic media. This structure has worked well for plan administrators, because it takes into account the myriad different methods that plan administrators could use to distribute plan materials, without requiring exact methods to be used. As noted in the RFI, since the final regulations in 2002, a number of new types of electronic media have been created. This trend is likely to continue, and plan administrators should not be locked into requirements that mandate the use of a specific distribution method or a specific type of electronic media. Thus, in making changes to the Regulation, the Department should retain the same general rule that allows plan administrators to use any number or type of distribution methods, including new methods that may arise in the

future. The Department should then supplement the general rule with various safe harbors for one or more common or specific distribution methods as noted in comments (2) and (3) below.

**2. The safe harbor in subsection (c)(1) of the Regulation should be revised to specifically allow the use of an email that either contains an attachment of the document or a clickable link to the document on a website.**

The preamble to the 2002 final regulations discussed a question with respect to websites. The discussion related to whether the safe harbor in subsection (c) would apply to disclosures of plan information maintained in a separate section of a company's website that is easily accessible from its home page. See, 67 Fed. Reg. at 17268 (April 19, 2002). At that time, the Department provided that using a company's website as a method of providing information is similar to using an insert to a company publication, which is cited in the general standard in subsection (b)(1). The Department noted that a plan administrator relying on such website disclosure must still satisfy all the conditions of the safe harbor, including notifying Participants of the availability of the particular disclosure document and its significance by sending written or electronic notice, and directing them to the document on the website.

Since 2002 the prominence and use of employee benefit websites has risen dramatically. Many companies use either a private intranet site, a public internet site, or both, to store and display summary plan descriptions, annual enrollment materials and other important benefit disclosures (collectively referred to as a "Benefit Website"). Some Benefit Websites are only available to employees who are accessing the Benefit Website through an employer's computer system. However, the majority of Benefit Websites are available on the internet. Some are open to the general public without logging in with a username and password, while others require a username and password.

For those Participants who satisfy the requirements of subsection (c)(2)(i) or (ii), many plan administrators send an email to the Participant's email address (i.e., the work email address or other email address to which the Participant has consented) that describes the significance of the document and includes a clickable link to the Benefit Website. For example, if a new SMM is posted to the Benefit Website, the plan administrator would send an email to an employee's work email address that included a short description of the new SMM with a clickable link to the Benefit Website. Participants who click the link would be directly sent to the Benefit Website.<sup>1</sup>

While the above distribution method is not specifically described in the Regulation, it is clearly contemplated by the discussion in the 2002 preamble. At same time, over the years a question has arisen whether subsection (c)(1) allows the use of a clickable link or whether the actual

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<sup>1</sup> The link is either to the actual document within the Benefit Website, or the link is to the Benefit Website, generally, in which case the Benefit Website or the email contains instructions on how to find the specific document.

document must be sent as an attachment to the email. We believe that both methods were contemplated by the 2002 preamble discussion, and that both methods satisfy the requirements of the subsection (c) safe harbor. Due to prevalence of these two distribution methods, the Regulation should be revised to specifically include them in the safe harbor.

**3. The Regulation should be revised to include the “Postcard Method” (as described below) as an approved safe harbor distribution method for any Participant.**

Many plans have Participants that do not satisfy the provisions of subsection (c)(2) of the Regulation, either because an employee does not use a computer at work or because the consent procedure set forth in subsection (c)(2)(ii) is overly complicated. Some plan administrators have devised an alternate distribution method for these Participants. Each plan administrator's specific method may differ in some respects, but typically contain the following elements (referred to herein as the “Postcard Method”):

- The Participant is sent a postcard, letter or other written communication (collectively, a “Postcard”) via first class mail to the Participant’s home address or other address on file with the plan;
- The Postcard provides that a new document has been posted to the plan’s Benefit Website and lists the specific internet address of the Benefit Website<sup>2</sup>;
- The Postcard satisfies the requirements in subsection (c)(1)(iii), e.g., the Postcard includes a short description of the new posted document;
- The Postcard also provides that Participants may receive a written copy via first class mail, if the Participant calls a toll-free phone number<sup>3</sup>; and
- The requirements of subsection (c)(1)(iv) are satisfied, e.g., if a Participant calls the number and requests a copy, a copy is mailed to his or her home address.

In our view, the Postcard Method satisfies the general rule in subsection (b)(1) and it should be adopted as a new specific safe harbor under the Regulations for all Participants for the following reasons.

First, the Postcard Method is the functional equivalent of the safe harbor requirements in subsection (c)(1). The Postcard is mailed to the Participant’s home or other address, which is a specific distribution method in subsection (b)(1) and informs Participants where and how to find the document. Therefore, it satisfies the requirements in subsection (c)(1)(i)(A). (The requirements of subsection (c)(1)(i)(B) are typically not applicable, because the document is of a

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<sup>2</sup> The Benefit Website is an internet site that is available to the general public, or available to only Participants with a username and password. For those Participants who do not have a username and password, the Benefit Website sets forth the procedures on how to obtain a username and password, thereby obtaining access to the site.

<sup>3</sup> The toll-free number is typically a number that is specifically dedicated to benefit issues.

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general nature that includes no personal information.) The documents included on the Benefit Website satisfy the style, format and content requirements, and thereby meet the requirements of subsection (c)(1)(ii). Further, as noted above, the provisions of subsection (c)(1)(iii) and (iv) are satisfied (e.g., by including a description of the document, a toll free number and mailing of a printed copy upon request). In essence, the Postcard functions the same as an email for those that satisfy the requirements of subsection (c)(2) (see comment (2) above).

I have heard that some Department officials have expressed skepticism with the Postcard Method. This may have been because the Postcard Method was not fully explained as set forth above, but it may also be because the actual document is not provided to the Participant (just the Postcard). However, the same is true with respect to the safe harbor in subsection (c)(1). The subsection (c)(1) safe harbor does not require that the actual document be provided via electronic media. In the situation described in comment (2) above, the person still must click on the link (and likely log into the Benefit Website) to access the document. This is similar to accessing the same document on a Participant's home computer, public computer, smartphone or other electronic device. Further, the safe harbor in subsections (c)(1) and (c)(2) does not require access to a printer, but requires a procedure for the Participant to obtain a written copy. The same is true with respect to the Postcard Method.

Second, the Postcard Method is environmentally friendly. The Postcard Method not only reduces paper consumption, it also saves on landfill space and reduces greenhouse gases.

Third, the Postcard Method reduces the regulatory burden on plan administrators and saves money. Participants have actually questioned employers and plan administrators regarding why the company continues to incur the cost of printing and distributing paper copies given the prevalence of electronic media. Due to the numerous mailings required by ERISA, some Participants have even said that they prefer the Postcard because it allows them to obtain copies of only the items they prefer to read. Thus, similar to the electronic media safe harbor, it ensures that only those Participants who desire a printed copy, actually receive a printed copy.

Fourth, the Postcard Method would align the ERISA rules with the SEC notice and access rules for retirement plans. In 2007, the SEC adopted new SEC "notice and access" rules to provide proxy materials to shareholders. See, 72 Fed. Reg. 42222, (August 1, 2007). Under these rules, the company sends out a one-page written notice informing shareholders that they can obtain proxy materials (e.g., the annual report, proxy statement and proxy form) on a website (similar to a Benefit Website). The notice must include a preaddressed, postage-paid reply card for requesting a paper copy of the proxy materials and most companies provide a toll-free number to call for a paper copy of the proxy materials.

If a 401(k) plan or ESOP uses this procedure to solicit directions from plan Participants as to how proxies should be voted for employer securities in their plan accounts, this procedure does

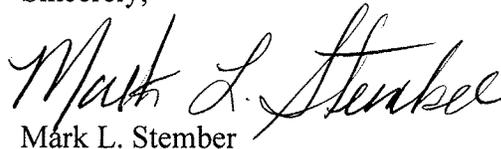
not satisfy the current ERISA safe harbor in subsection (c). This increases the regulatory and administrative burden on 401(k) plans and ESOPs, because they cannot take advantage of the simpler SEC notice and access rules. Adopting the Postcard Method would allow retirement plans to satisfy both the SEC notice and access rules as well as the ERISA distribution rules at the same time, without burdening plan administrators with extra layers of cost and complication.

In adopting the Postcard Method, we strongly urge the Department to not burden plan administrators with a complicated consent procedure for the Postcard Method. The Postcard, as set forth above, already contains an “opt out” provision, because it allows Participants to obtain a paper copy should the Participant desire a paper copy.

Requiring the “opt out” to apply automatically to any future correspondence (e.g., similar to the provisions in Prop. Reg. Section 2590.715-2719(e)(2)(ii) for non-English materials), would not be desirable to Participants because many Participants want to receive a specific document, such as an SPD, in writing, while not burdening the Participant with all other kinds of paper documents that may be required under ERISA. Further, requiring the “opt out” to apply automatically to future correspondence would unnecessarily burden plan administrators with complicated administration because it would require plans to have two sets of lists – one for “opt outs” and another for those that did not opt out<sup>4</sup>. Offering Participants the ability to pick and choose which document they receive in writing each time a new document is published fosters efficient plan administration while at the same time ensuring Participants receive required ERISA documentation.

We appreciate the opportunity to submit these comments and urge your careful consideration of our recommendations. If you have any questions, please feel free to contact me.

Sincerely,



Mark L. Stember

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<sup>4</sup> Many plans already are required to obtain separate lists of Participants, such as a separate list for Participants who qualify for electronic media and another for those that do not qualify. An automatic “opt out” procedure would actually create four separate lists in those situations, thereby increasing the possibility of administrative error. Separate distribution lists is a relatively simple concept, but for a large employer with a multitude of plans, eligible populations, computer systems and vendors, creation and maintenance of distribution lists is a complicated administrative procedure.