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June 6, 2011

Submitted Electronically
Office of Regulations and Interpretation
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Electronic Disclosure by Employee Benefit Plans RFI (RIN 1210-AB50)

Dear Assistant Secretary Phyllis Borzi:

We write in response to the Department's request for comments on the standards for electronic disclosure of employee benefit information. We have entered an era of rapid changes in technology and the Department is to be commended for evaluating how these changes should apply to employer sponsored employee benefits.

Transparency and timely disclosure of employee benefit information are fundamental requirements of the Employee Retirement Security Act of 1974 (ERISA). Approximately 170 million workers, retirees and their families depend on employer provided benefits and meaningful notice of all plan documents is critical to their access to these benefits. ERISA specifies a significant number of documents and disclosures that must be provided and generally requires that documents be "understandable to the average participant to reasonably apprise them of their rights."[1]

The following are the important principles that we believe the Department should consider with respect to the documents participants and beneficiaries receive and the format in which they will be received:

The Department's rules should clearly specify the documents and disclosures affected. Since the Department's issuance of this request for comments, the US Supreme Court released its

[1] Some concern has been expressed that there are too many ERISA required documents and disclosures and we would welcome the Department's consideration of and proposals to streamline the number of required disclosures.

ruling in *Cigna v. Amara*. ERISA experts are still parsing the full meaning of this decision, but it may affect the legal weight of the ERISA required Summary Plan Document (SPD). Since the

SPD is the main document provided to participants on the terms of their plan, lessening its legal status has major implications for any consideration of documents disclosed to workers. The Department should ensure that employers and their plan administrators are required to provide meaningful disclosure of the full "terms of the plan" (i.e. plan trust documents) and apprise participants if any provided documents are NOT legally binding. The Department should provide consistent disclosure rules and conform all guidance to such rules.

The Department should make clear that employers and plan administrators must oversee the disclosure process. Although, there are a few employers who handle 100% of their employee benefits, most employers use one or more outside service provider firms. Since the employer is the only party consistently acting as a fiduciary with respect to employee benefit decisions, the employer must oversee the disclosure process. Consistent with ERISA's longstanding fiduciary rules, the employer should make the decision solely in the participants' interests. Employers and plans should not be permitted to receive financial incentives that create a conflict of interest in this process.

The initial election for electronic disclosure should be made through a paper process and clearly identify the documents to which it applies. If the first contact made to a participant is electronic, there is no assurance that the participant understood the agreement. Many individuals have little experience conducting legal transactions via computer and it is commonplace not to read electronic disclaimers and waivers as non-negotiable boilerplate. Many studies have documented weaknesses in internet usage among particular groups of workers, such as older or lower-income workers with little experience with or access to computers, as well as differences in how men and women access information on the internet.

Participants should always easily be able to request paper documents and terminate electronic disclosure consent. Paper copies also should always be available in the employer's human resources office or other physical places for employee information.

Employers and plan administrators should periodically notify participants of their electronic and paper disclosure rights. Employers and plan administrators must consider participant access to printers and assure the ability and affordability of printing long documents. Employers and plan administrators should periodically survey participants to determine their understanding of and satisfaction with plan disclosures.

All electronically posted documents must be easy to find and be written in the same "understandable to the average participant" manner as paper documents. If documents are amended or modified in any significant way, workers must also be able to view the prior documents that apply to them.

As always, the Department must provide clear guidance to employers and plans, and monitor compliance to ensure all parties understand their rights and obligations. We look forward to working with you and interested stakeholders to provide updated and understandable disclosure rules.

Sincerely,

GEORGE MILLER
Senior Democratic Member

ROBERT E. ANDREWS
Ranking Member, Subcommittee on Health, Employment, Labor and Pensions