

June 3, 2011

The Honorable Phyllis Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Dear Assistant Secretary Borzi:

The Investment Company Institute urges the Department to issue guidance quickly to allow plans to use the framework in Field Assistance Bulletin 2006-03 (FAB) on at least an interim basis for the new participant disclosures under ERISA section 404(a). The Department should provide this interim relief so plans can use the same delivery mechanisms for participant disclosure information that are available for quarterly benefit statements while the Department completes a broad review of its electronic disclosure rules.

The final participant disclosure rule reserved the issue of *how* disclosure would be furnished in anticipation of resolving before the compliance date whether disclosures could be provided electronically. The first participant disclosures, however, are due on November 1, 2011, with the bulk beginning on January 1, 2012, and must be made to every worker in the U.S. eligible to participate in a participant-directed ERISA plan.<sup>1</sup> Using 2007 data, the Department estimates that 72 million participants will receive the disclosure.<sup>2</sup> Without relief, these disclosures will have to be provided in paper for all participants except those that qualify for e-delivery under the Department's restrictive 2002 safe harbor rule.

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<sup>1</sup> The Department has proposed only limited deadline relief—proposing to extend the 60-day transition provision in the rule to 120 days and applying the transition rule to participants who become eligible for the plan between the applicability date and the end of the 120-day period.

<sup>2</sup> The Department concludes that 38% of participants will receive the disclosure electronically. See 75 Fed. Reg. 64933 n. 45. The Department does not state how it arrived at this percentage nor whether this figure assumed that the Department would complete its modernization of its 2002 safe harbor in advance of the compliance date of the regulation.

While the Department has undertaken a full review in an RFI process of whether and how to update its 2002 electronic disclosure regulation,<sup>3</sup> it is apparent the Department will not complete the project in advance of the compliance date for the participant disclosure rule. Temporary guidance is required and the approach in the FAB is the most effective and least disruptive interim step.

The FAB allows plans greater flexibility (pending further guidance) to provide pension benefit statements electronically than the Department's 2002 "safe harbor." It would allow plans to furnish pension benefit statements following the Department of Treasury's regulation (26 C.F.R. § 1.401(a)-21), which generally requires that participants have the right to paper copies upon request and either consent to electronic disclosure or have the effective ability to access the medium through which the disclosure is provided. Alternately, the FAB allows plans to provide participants with continuous access to the information on pension benefit statements through a secure website provided participants receive an initial and annual notice of the availability of information on the website, how to access the information, and how to receive paper copies free of charge.

**The FAB approach is well suited for the new participant disclosure rule.** The participant disclosure rule provides participants with information to assist them in making the decisions required of them under the plan and monitoring those decisions over time. The goals of the participant disclosure and benefit statement rules are similar – to provide key information to participants on a regular basis so they can manage their accounts. The information required by the participant disclosure regulation easily can be available continuously on a secure website just as quarterly benefit statements are. Indeed, these two requirements are so intertwined that the participant disclosure rule expressly allows the annual notice to be provided *as part of* a quarterly statement.

The FAB approach is especially well suited for plans that use online enrollment. Plans and their service providers commonly use the Internet both for enrollment and making investment changes.<sup>4</sup> The purpose of the new initial participant disclosure is to help participants in the decisions they need to make when they join the plan; presenting that information in connection with an online enrollment allows the participant to have the information handy during the process.

Moreover, the new participant disclosure requires plans to have a website. The rule requires plans to provide a link, in the comparative investment chart, to a website that contains additional

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<sup>3</sup> The Institute will submit a comment letter with detailed responses to the RFI.

<sup>4</sup> According to the Profit Sharing/401k Council's 2009 annual member survey, 57% of all plans, and 79% of plans with 5,000 or more participants, provide enrollment via the Internet. In addition, 91% of all plans, and 96% of plans with 5,000 or more participants, offer investment changes via the Internet. For more information, see the Institute's response to Question 2 of the RFI.

important information about the plan's investments, including information on risks and performance updates.<sup>5</sup> If the comparative chart were itself online, it would be easier for participants to access this additional information because the website address can be hyperlinked.

**Adopting the FAB approach as a temporary step is cost-effective.** The cost of paper delivery of just the initial notice required under the rule is enormous. Using estimates the Institute developed in connection with the SEC's summary prospectus rule, we estimate that the cost of printing and mailing the initial disclosure to 72 million participants would range from \$37.4 million to \$49.3 million. This is based on printing costs of this disclosure ranging from \$7.6 million for black and white copies to \$17.6 million for color copies. In addition to printing costs, the costs of mailing the participant disclosures would be nearly \$31.7 million using first-class postage (currently at \$0.44) or nearly \$30 million using pre-sorted first-class postage (currently at \$0.414). (Our response to Question 25 of the RFI includes more information on the data behind these estimates.<sup>6</sup>)

Our members believe that if the Department adopts the FAB approach, costs of printing and mailing will be avoided for a large number of participants, particularly those participants who are being furnished benefit statements electronically under the FAB.

**Adopting the FAB approach as a temporary step would not relieve plans of any of the substantive requirements of the rule.** The rule requires that the investment chart be presented in a format that facilitates comparison of the plan's designated alternatives. The rule also requires that participants are told how to obtain, free of charge, paper copies of the information on the Internet. If the Department were to allow the FAB approach as an interim step, the plan and its service providers still would need to meet all of the substantive requirements of the rule.

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We have worked closely with the Department on the participant disclosure and 408(b)(2) regulations and your staff has been very open to meeting with us on technical issues related to implementation. We understand the Department is considering providing informal guidance, such as FAQs. We urge that the guidance include an extension of FAB 2006-03 to permit plans the option to satisfy the new participant disclosure rule using the methods described in the FAB pending the outcome of the Department's electronic delivery review.

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<sup>5</sup> The rule also allows plans to provide an Internet address where the glossary can be accessed.

<sup>6</sup> The figures quoted are for printing and mailing to 72 million participants, reflecting 2007 printing costs but current postage rates. We are unable to provide estimates of costs plans may incur for technology or labor to set up e-delivery and maintain e-delivery, and, thus, we cannot estimate a net cost savings for allowing e-delivery as a default option.

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Please feel free to contact the undersigned at 202.326.5826 (podesta@ici.org), Michael Hadley at 202.326.5810 (mhadley@ici.org), or Anna Driggs at 202.218.3573 (adriggs@ici.org) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary S. Podesta". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Mary S. Podesta

Senior Counsel – Pension Regulation