The Fiduciary Duty of Participant Disclosures

Kevin A. Wiggins, Esq.

Thorp Reed & Armstrong, LLP
One Oxford Centre
301 Grant Street, 14th Floor
Pittsburgh, PA 15219
412-394-2401
kwiggins@thorpreed.com

TABLE OF CONTENTS

I. Introductory Overview

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), contains three broad categories of disclosures: automatic, upon request, and availability. First, some disclosures are automatically required at specific times or upon certain events. For example, a summary plan description ("SPD") must generally be furnished automatically to a participant within 90 days after the participant enters the plan. *See* ERISA § 104(b)(1)(A). An example of an event-driven notice is the blackout notice required by ERISA § 101(i). Second, some provisions of ERISA, including § 104(b)(4), require the administrator to furnish certain documents upon a participant's request. Finally, administrators are required to make certain materials available to participants for examination at reasonable times and places. *See* § 104(b)(2) of ERISA.

The extent of a fiduciary's duty of disclosure can also vary depending on the circumstances. In some scenarios, a fiduciary may have a duty to furnish disclosures automatically, *e.g.*, "out of the blue." In others, the fiduciary may have no duty until it receives an inquiry from a participant, at which time a duty may arise to respond to the inquiry. In a third scenario, the fiduciary may voluntarily furnish information to participants, but that information may later change. It could also be that the fiduciary discovers the information was inaccurate or incomplete. In those cases, the fiduciary may have a duty to supplement, update, correct, or clarify a fiduciary's previous communications.

An in-depth discussion of ERISA's disclosure requirements is outside the scope of this presentation. Instead, as background, this presentation first provides a brief review of ERISA's disclosure requirements, including a history of their development. After the brief review, the presentation is devoted to the new participant disclosure requirements issued by the Department of Labor ("Department") at 29 C.F.R. § 2550.404a-5(a) – (j) (hereafter, "Final Regulations").

II. Common Law Trustee Duty of Disclosure

Congress used the common law of trusts as its starting point when, in 1974, it enacted ERISA's disclosure requirements. *See Mondry v. American Family Mut. Ins. Co.*, 557 F.3d 781, 807-08 (7th Cir. 2009). "At common law, a trustee is obliged to provide beneficiaries, at their request, 'complete and accurate information as to the nature and amount of the trust property,' and also 'such information as is reasonably necessary to enable [them] to enforce [their] rights under the trust or to prevent or redress a breach of trust.'" *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 656 (4th Cir. 1996) (quoting Restatement (Second) of Trusts § 173 & cmt. c. (1959)). The Restatement (Third) of Trusts provides the following:

> (1) Except [for revocable trusts] or as permissibly modified by the terms of the trust, a trustee has a duty:
>
> > (a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;
> >
> > (b) to inform beneficiaries of significant changes in their beneficiary status; and
> >
> > (c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.
>
> (2) Except [for revocable trusts] or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for

> information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

Restatement (Third) of Trusts § 82 (2005).

Even before ERISA, however, Congress required disclosure of plan information to participants and beneficiaries as early as 1959.

III. Historical Development of ERISA Disclosures

A. Welfare and Pension Plans Disclosure Act

Before ERISA, Congress passed the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"). The WPPDA required the administrator of a plan to "publish" to each participant a description of the plan and an annual financial report. An administrator who failed or refused, upon written request, to furnish a description or annual report to a participant or beneficiary could, in the court's discretion, be liable to the participant or beneficiary for up to $50 per day. Congress repealed the WPPDA effective January 1, 1975. *See* 29 U.S.C. § 1031. In its place, Congress enacted ERISA.

B. ERISA

While debating ERISA, the House and the Senate each recognized the shortcomings of the WPPDA and the importance of providing information to plan participants. In ERISA's legislative history, the Committee on Labor and Public Welfare said:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended. It was expected that the information disclosed would enable employees to police their plans. But experience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan — what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted.

S. Rep. No. 127, 93rd Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863. To effect the changes deemed necessary, Congress enacted Part 1 of Subtitle B of Title I of ERISA, which is titled "Reporting and Disclosure."

IV. ERISA Disclosure Requirements

A. Statutory Duties

Part 1 of Subtitle B of Title I of ERISA, which includes ERISA §§ 101 – 110, 29 U.S.C. § 1021 – 1030, imposes a variety of reporting and disclosure duties on plan administrators. These duties originally included the requirement to file an annual report (Form 5500), furnish participants a summary of the annual report ("SAR"), furnish participants a summary plan description ("SPD") and a summary of material modifications ("SMM"), and furnish certain documents to participants upon request, including the plan document and a statement of vested benefits.

Since ERISA was passed in 1974, the administrator's reporting and disclosure requirements have expanded significantly. The Pension Protection Act of 2006 alone created at least ten new participant notice requirements.

Now, depending on the type of plan, administrators of retirement plans may have a duty to provide participants with benefit statements; notices related to qualified survivor annuities, qualified domestic relations orders, and distributions; notices denying benefit claims; blackout notices; notice of a right to divest employer securities; suspension of benefits notices; notice of a failure to meet minimum funding standards; plan funding notices; notices of funding-based restrictions; notices of transfers of excess pension assets to retiree health benefit accounts; notices of significant reductions in future benefit accruals; and notices of automatic contribution arrangements. Moreover, many plan administrators also serve as plan fiduciaries who are subject to the disclosure requirements of ERISA § 404(c), including the disclosure requirements for qualified default investment alternatives ("QDIA") and the disclosure requirements that apply to automatic rollovers to IRAs. Many are also administrators for health and welfare plans, which carry their own disclosure obligations. There may also be disclosure requirements imposed by other laws, such as federal securities laws or the Internal Revenue Code of 1986, as amended ("Code"). Finally, administrators may be subjected to several filing obligations with the Internal Revenue Service (the "Service"), the Department, or the Pension Benefit Guaranty Corporation.

B. Fiduciary Duty of Disclosure Under Case Law

Some courts have held that § 404(a)(1) of ERISA imposes common law trustee duties of disclosure on ERISA fiduciaries. *See Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec. Inc.*, 93 F.3d 1171 (3rd Cir. 1996); *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997). Not all courts have agreed. For example, in *Faircloth, supra*, 91 F.3d at 657, the United States Court of Appeals for the Fourth Circuit held that ERISA's fiduciary duties in § 404(a)(1) do not require plan fiduciaries to furnish, upon request, documents that are not required by ERISA § 104(b)(4). *See also Ehlmann v. Kaiser Found. Health Plan of Tex.*, 198 F.3d 552 (5th Cir. 2000) (ERISA § 404 does not impose a duty of automatic disclosures of physician compensation to health plan participants); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir.1998) (en banc). When a fiduciary does speak, however, it must do so honestly. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489 (1996). Moreover, once a fiduciary speaks, it may have a duty under ERISA § 404(a)(1) to supplement its disclosures. Thus, the fiduciary duty of disclosure "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the [fiduciary] knows that silence might be harmful." *Griggs v. E. I. DuPont de Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001) (*quoting Bixler v. Central Pa. Teamsters Health and Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993)).

Now the Department has entered the field. With the issuance of the Final Regulations, the Department has adopted the position that ERISA § 404(a)(1) does in fact impose some duty of disclosure, at least for administrators of participant-directed individual account plans.

V. Participant Disclosures: Overview

A. Introduction to Final Regulations

The Department has declared that plan administrators have a fiduciary duty under ERISA § 404(a)(1)(A) and (B) to take steps to ensure that participants and beneficiaries of plans with participant-directed investments are provided sufficient information regarding the plan to make informed decisions about the management of their accounts. *See* 29 C.F.R. § 2550.404a-5(a). Thus, the Department has ruled that ERISA § 404(a)(1) imposes a duty of disclosure above and beyond what is required by ERISA's express statutory disclosure requirements. It appears the Department believes an administrator of a participant-directed-investment plan has an implied duty under § 404(a)(1) to furnish participants with information that is sufficient to ensure participants manage the plan's assets prudently.

B. Brief Summary of Requirements of Final Regulations

The Final Regulations:

- Impose an ERISA fiduciary duty on administrators of plans with participant-directed investments to furnish the disclosures required by the Final Regulations;
- Provide relief from liability for inaccurate or incomplete information if the administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative;
- Require compliance with the Final Regulations as a condition for reliance on ERISA § 404(c) (in addition to the requirements imposed by the § 404(c) regulations);
- Require disclosure of (1) general plan-related information, (2) plan-wide administrative expenses, and (3) individual expenses before a participant or beneficiary can direct investments;
- Require disclosure of (1) general plan-related information, (2) plan-wide administrative expenses, and (3) individual expenses at least annually;
- Require quarterly statements of plan-wide administrative expenses actually charged against plan accounts;
- Require quarterly statements of individual expenses actually charged against plan accounts;
- Require automatic disclosure of certain investment-related information in the form of a comparative chart;
- Require disclosure of certain investment-related information subsequent to a participant's or beneficiary's investment;
- Require disclosure of certain investment-related information upon request; and
- Provide certain transition rules.

C. Effective Date

The disclosure requirements of the Final Regulations will become effective in two stages.

- The annual disclosures must be furnished by August 30, 2012.
- The quarterly disclosures are due by November 14, 2012.

The Final Regulations provide certain transition rules, which are discussed in Section VIII below.

D. Definitions

A glossary of defined terms can be found as Exhibit A to this outline. The advisor should review those definitions before continuing.

E. Which Plans Are Subject to the Final Regulations

The Final Regulations apply to "covered individual account plans" that are subject to Part 4 of Subtitle B of Title I of ERISA, 29 U.S.C. §1104 *et. seq.*[1] A covered individual account plan is any participant-directed individual account plan, except it does not include individual retirement accounts or individual retirement annuities under Code Sections 408(k) (simplified employee pension, or "SEP") or 408(p) (simple retirement account). An "individual account plan" is a pension plan (including a defined contribution plan, such as a 401(k) plan) which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's accounts. Since they do not apply to defined benefit plans, the Final Regulations, at least for now, would not apply to a cash balance plan that provides for participant-directed interest crediting (assuming this would be allowed by the Service).[2]

F. Who is Responsible for the Disclosures

The "administrator" of the covered individual account plan has the responsibility to furnish the disclosures required by the Final Regulations. The administrator is defined in Section 3(16) of ERISA as the person designated in the plan document or, if no one is designated, the plan sponsor. In many cases, the administrator will be the employer that sponsors the plan. Some companies may, however, appoint a committee to be the administrator. Such appointment must be in the plan document or made pursuant to a process identified in the plan document. Thus, the advisor must review the plan document to identify the administrator correctly.

An administrator may delegate its disclosure duties and thereby designate someone to act on its behalf to furnish the required disclosures. In doing so, the administrator has a fiduciary duty to exercise prudence in selecting such person and the duty to monitor that person's performance.

G. To Whom Must the Disclosures Be Made

The Final Regulations require disclosures to each participant and each beneficiary who, pursuant to the terms of the plan, has the right to direct the investment of assets held in, or contributed to, his or her individual account. Whether this means the participant must have the right to direct investments as a legal matter or a factual matter is not clear. It appears the practical interpretation would be that disclosures are not required until the participant or beneficiary has a right to direct investments as a factual matter. The more prudent approach would be, where feasible, to furnish the required disclosures before the participant or beneficiary has the legal right to direct investments. This issue is discussed in more detail in Section VI(A)(2)(b).

A overly-literal reading of the Final Regulation could also suggest that disclosures are not required if the participant or beneficiary has the right to direct investments pursuant to an instrument that is not formally part of the plan document. For example, if a plan's qualified domestic relations order ("QDRO") procedures authorize a potential alternate payee to direct the investment of the portion of the participant's account segregated for the alternate payee pursuant to ERISA § 206(d)(3)(H)(i) (while the determination of the qualified status of the domestic relations order is pending), would that right arise pursuant to the "terms of the plan" or the QDRO procedures? The better interpretation is to define the phrase "terms of the plan" in the Final Regulations as any instrument that governs the plan. This is consistent with the Department's position that the duty of disclosure arises under ERISA § 404(a), because ERISA § 404(a)(1)(D) requires a fiduciary to discharge its duties in accordance with the

[1] Plans that are not subject to ERISA's fiduciary duties, such as governmental plans, "top-hat" plans, and foreign plans, are not subject to the Final Regulations.

[2] The Service has not yet approved this design for cash balance plans. If it does, administrators for those plans should consider following the Final Regulations, even if the Department of Labor does not extend them to cash balance plans. This is particularly true for those employers located in a jurisdiction where a Court of Appeals has held that ERISA § 404(a)(1) imposes a duty to disclose independently of Part 1 of Subtitle B of Title I of ERISA.

documents and instruments governing the plan. Under this interpretation, the disclosures must be furnished to any participant or beneficiary who has the right to direct the investment of his or her account, whether the allocation of investment responsibility derives from the terms of the formal plan document or a different instrument that governs the plan.

VI. Participant Disclosures: Plan-Related Information

A. General Plan-Related Information

Under the Final Regulations, a plan administrator is required to provide the general plan-related information described below.

1. General Plan-Related Information Required to Be Disclosed

A plan administrator must disclose the following plan related information:

- An explanation of the circumstances under which participants and beneficiaries may give investment instructions;
- An explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfer to or from a designated investment alternative;
- A description of or reference to plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;
- An identification of any designated investment alternatives offered under the plan;
- An identification of any designated investment managers; and
- A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

2. Time of Disclosure of General Plan-Related Information

(a) The plan-related information described above must be disclosed to each participant and each beneficiary on or before the date he or she can first direct his or her investments and at least annually thereafter.

(b) It may not always be feasible to furnish disclosures on or before the date a participant or beneficiary has, under the terms of the plan, the legal right to direct the investment of his or her account. To illustrate, a beneficiary of a deceased participant may, under the terms of the plan, have a legal right to direct the investment of a participant's account on the date of the participant's death. Yet the average plan administrator will generally not have the skills necessary to foresee a participant's death. Requiring that disclosures be made prior to a participant's death would require the administrator to acquire the skills of a psychic, oracle, or even a holy prophet or a saint. Certainly the Department does not intend to impose such a requirement. It appears then that the better interpretation is disclosures are not required until the participant or beneficiary has the right, as a factual matter, to direct investments.

A participant or beneficiary could conceivably have the legal right to direct investments, but not have actual access on the same date, in the following scenarios:

- The death of a participant;
- A participant's hire date; or
- The date a QDRO is approved.

Many other scenarios are possible. For example, because of the rules governing 401(k) elections, when a new plan is adopted, participants often have the legal right to direct investments before any deferral is made, and conceivably before the participant even has an account.

To address such scenarios, administrators should adopt a practice of sending out the required disclosures with the plan's early communications to an individual who has obtained a legal right to direct his or her investments. The earlier the better, and the plan's first communication would be best. For example, when the administrator approves a QDRO, it could include the required disclosures in the letter that notifies the alternate payee of the QDRO's approval. When a participant dies, the disclosures could be sent with the first communications mailed to the beneficiary, *e.g.*, in a distribution package. Administrators should review their plan documents to determine when participants and beneficiaries first have a legal right to direct investments, and then review the plan's operations to determine how and when, as a factual matter, participants and beneficiaries obtain access to the plan's systems that enable them to direct their investments. Logically there must be some communication with participants and beneficiaries for them to access their accounts. The disclosures should be sent with that communication.

It should be noted that the Department or a court could rule that the Final Regulations require disclosure on or before the date the participant or beneficiary has the legal right, under the terms of the plan, to direct the investment of his or her account. Administrators should thus consult with legal counsel if they wish to ensure their practices comply with the law.

3. Medium of Disclosure of General Plan-Related Information

The general plan-related information may be disclosed in the plan's SPD, the participant's or beneficiary's benefit statement, or a separate written document. In any event, the disclosure must be made at the times required in Section VI(A)(2)(a) above, notwithstanding the timing of disclosures required for delivery of the SPD or the benefit statement.

4. Changes to General Plan-Related Information Due 30 to 90 Days in Advance of Effective Date of Change

If there is a change to the general plan-related information, each investing participant and beneficiary must be furnished a description of the change at least 30 days, but not more than 90 days, in advance of the effective date of the change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of the change must be furnished as soon as reasonably practical.

Note: A blackout notice would generally include a change to general plan-related information. Under ERISA § 101(i) and the regulations, a blackout notice is generally due at least 30 days, but not more than 60 days, in advance of the last date on which participants or beneficiaries could exercise their rights affected by the blackout.

B. Plan-Wide Administrative Expenses That May Be Charged

A plan administrator is required to disclose an explanation of the plan-wide administrative expenses described below.

1. Plan-Wide Administrative Expenses Required to Be Disclosed

The administrator must disclose an explanation of any fees and expenses for general plan administrative services (*e.g.*, legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative. The administrator must also disclose the basis on which such charges will be allocated (*e.g.*, pro rata, per capita) to, or affect the balance of, each individual account.

2. Time of Disclosure of Plan-Wide Administrative Expenses That May Be Charged

The plan-wide administrative expenses described above must be disclosed to each investing participant and beneficiary on or before the date he or she can first direct his or her investments and at least annually thereafter. See Section VI(A)(2)(b) above for more details.

3. Medium of Disclosure of Plan-Wide Administrative Expenses That May Be Charged

The plan-wide administrative expenses may be disclosed in the plan's SPD, the participant's or beneficiary's benefit statement, or a separate written document. In any event, the disclosure must be made at the times required in Section VI(B)(2) above, notwithstanding the timing of disclosures required for delivery of the SPD or the benefit statement.

4. Changes to Plan-Wide Administrative Expenses Due 30 to 90 Days in Advance of Effective Date of Change

If there is a change to the plan-wide administrative expenses, each participant and each beneficiary must be furnished a description of the change at least 30 days, but not more than 90 days, in advance of the effective date of the change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of the change must be furnished as soon as reasonably practical.

C. Plan-Wide Administrative Expenses Actually Charged

1. Quarterly Reporting

At least quarterly, a statement must be provided that includes the dollar amount of the plan-wide administrative expenses described in Section VI(B) above that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participant's or beneficiary's account for such services.

2. Description of Services

In addition to the dollar amount, the statement must include a description of the services to which the charges relate (*e.g.*, plan administration, including recordkeeping, legal services, or accounting services). Moreover, if applicable, the statement must include an explanation that, in addition to the fees and expenses disclosed on the statement, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (*e.g.*, through revenue sharing arrangements, Rule 12b-1 fees, or sub-transfer agent fees).

3. Medium of Disclosure of Plan-Wide Administrative Expenses Actually Charged

The plan-wide administrative expenses actually charged in the preceding quarter may be included as part of the participant's or beneficiary's pension benefit statement or a separate written statement.

D. Individual Administrative Expenses That May Be Charged

1. Individual Administrative Expenses Required to Be Disclosed

The administrator must disclose an explanation of any fees and expenses that may be charged against the individual accounts of a participant or beneficiary on an individual, rather than a plan-wide, basis (*e.g.*, fees attendant to processing plan loans or QDROs, fees for investment advice, fees for brokerage windows, commissions, front or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

2. Time of Disclosure of Individual Administrative Expenses That May Be Charged

The individual administrative expenses described above must be disclosed to each participant and each beneficiary on or before the date he or she can first direct his or her investments and at least annually thereafter. See Section VI(A)(2)(b) above for more details.

3. Medium of Disclosure of Individual Administrative Expenses That May Be Charged

The individual administrative expenses that may be charged to accounts may be disclosed in the plan's SPD, the participant's or beneficiary's benefit statement, or a separate written document. In any event, the disclosure must be made at the times required in Section VI(D)(2) above, notwithstanding the timing of disclosures required for delivery of the SPD or the benefit statement.

4. Changes to Individual Administrative Expenses Due 30 to 90 Days in Advance of Effective Date of Change

If there is a change to the individual administrative expenses, each investing participant and beneficiary must be furnished a description of the change at least 30 days, but not more than 90 days, in advance of the effective date of the change, unless the inability to provide such advance notice is due to events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of the change must be furnished as soon as reasonably practical.

E. Individual Administrative Expenses Actually Charged

1. Quarterly Reporting

At least quarterly, a statement must be provided that includes the dollar amount of the individual administrative expenses described in Section VI(D) above that are actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the participants or beneficiaries account for such services.

2. Description of Services

In addition to the dollar amount, the statement must include a description of the services to which the charges relate (*e.g.*, loan processing fee).

3. Medium of Disclosure of Plan-Wide Administrative Expenses Actually Charged

The individual administrative expenses actually charged in the preceding quarter may be included as part of the participant's or beneficiary's pension benefit statement or a separate written statement.

F. Other Issues for Plan Related Information

The rules below apply to the disclosures of the plan-related information described in Sections VI(A) – (E):

- All disclosures must be based on the latest information available to the plan.
- The requirement to furnish disclosures on or before the date on which a participant or beneficiary can first direct his or her investments may be satisfied by furnishing the most recent annual disclosures and any applicable updates.
- Unless otherwise required, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.
- The information required to be prepared by the administrator must be written in a manner calculated to be understood by the average plan participant.

VII. Participant Disclosures: Investment-Related Information

A. Introduction

In addition to the plan-related disclosures described in Section VI above, administrators are required to disclose the investment-related information described in this Section VII. The investment-related disclosures can be divided into three categories:

- Investment-related information required to be disclosed automatically in the form of a comparative chart;
- Investment-related information required be disclosed subsequent to investment; and
- Investment-related information required to be disclosed upon request.

B. Comparative Chart

1. Introduction

The investment-related information described in Section VII(C) below, together with the investment-related information described in this Section VII(B) (where applicable), must be disclosed in a chart or similar format that is designed to facilitate of comparison of such information for each designated investment alternative available under the plan and prominently displays the date. Plan administrators are free to furnish participants and beneficiaries with additional information that the plan administrator determines appropriate for such comparisons, provided such information is not inaccurate or misleading.

2. Additional Information

In addition to the information described in Section VII(C), the comparative chart must include the following:

- The name, address, and telephone number of the plan administrator (or a person or persons designated by the administrator to act on its behalf) to contact for the provision of information that must be provided upon request (see Section VII(E) below);

- A statement that additional investment-related information (including more current performance information) is available at the Internet Web site addresses described in Sections VII(C)(5), below; and

- A statement explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a Web site under Section VII(C)(5) (for both variable and fixed-return investments) or VII(C)(7) (seventh bullet point) (relating to annuities), below.

3. Model Comparative Chart

The Department has issued a model comparative chart that administrators may use for their disclosures. If the model comparative chart is used and accurately completed, taking into account each designated investment alternative offered under the plan, then the administrator is deemed to have satisfied the disclosure requirements of this Section VII(B). A copy of the Department's model comparative chart is included as Exhibit B to this presentation.

C. Automatic Disclosures Required for Investment-Related Information

The investment related information required to be disclosed automatically includes (1) identifying information, (2) performance data, (3) benchmarks, (4) fee and expense information, (5) an Internet Web site address, (6) a glossary, and (7), where applicable, annuity information. **The investment-related information described in this Section VII(C) must be furnished in the form of the comparative chart described in Section VII(B).**

The automatic disclosures described in this Section VII(C) must be furnished to each investing participant and beneficiary on or before the date on which he or she can first direct his or her investments and at least annually thereafter.

1. Identifying Information

With respect to each designated investment alternative offered under the plan, the administrator must furnish (a) the name of the designated investment alternative and (b) the type or category of the investment (*e.g.*, money market fund, balanced fund (stock and bonds), large cap stock fund, employer stock fund, or employer securities).

2. Performance Data

(a) Variable Investment Return**.** If the designated investment alternative does not have a fixed rate of return, participants and beneficiaries must be provided the average annual total return of the investment for 1-, 5-, and 10-year periods (or the life of the investment, if shorter) ending on the date of the most recently completed calendar year. A statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future must also be included.

If the designated investment alternative is designed to invest primarily in employer securities that are not a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment, then average annual total

return means the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period, assuming reinvestment, plus the difference between the stock price (consistent with ERISA Section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period. Reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid. For example, and ignoring the reinvestment of dividends for simplicity, if a share is $100 at the beginning of the measurement period and $115 at the close, and dividends paid totaled $5 over the period, the disclosed return would be 20% ((5 + 115 – 100)/100).

(b) Fixed Investment Return. For designated investment alternatives that have a fixed or stated rate of return for a term, the annual rate of return and the term of the investment must be disclosed. If the issuer has the right to adjust the fixed or stated rate of return prospectively during the term, the disclosure must include the current rate of return, the minimum rate guaranteed, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain the most recent rate of return (*e.g.*, telephone or Web site).

3. Benchmarks

For designated investment alternatives that do not have a fixed rate of return, the name and returns of an appropriate broad-based securities market index over 1-, 5-, and 10-calendar year periods (or the life of the alternative, if shorter) comparable to the performance data periods provided under Section VII(C)(2) above (Performance Data), must be provided. An index administered by an affiliate of the investment issuer, its investment adviser, or its principal underwriter does not qualify as an appropriate index, unless such index is widely recognized and used. Investment options with fixed rates of return are not subject to the requirement to disclose benchmarks.

4. Fee and Expense Information

(a) Variable Investment Return. For investment options that do not have a fixed rate of return, the following must be disclosed:

- The amount and a description of each shareholder-type fee (fees charged directly against a participant's or beneficiary's investment, such as commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees, which are not included in the total annual operating expenses of any designated investment alternative) and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part (such as round trip, equity wash, or other restrictions);

- The total annual operating expenses of the investment expressed as a percentage (*i.e.*, expense ratio), as provided on the investment's Form N-1A, Form N-3 or N-4, as appropriate (this rule does not apply to investment options designed to invest primarily in employer securities unless the option is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment).

- The total annual operating expenses expressed as a dollar amount for each $1,000 invested (this rule does not apply to designed investment alternatives designed to invest primarily in employer securities unless the option is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment);

- A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and

- A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants or beneficiaries can visit the Employee Benefit Security Administration's Web site for an example demonstrating the long-term effect of fees and expenses.

(b) Fixed Investment Return. If the investment has a fixed rate of return, then the amount and a description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer, or withdrawal of the investment in whole or in part must be disclosed.

5. Internet Web Site Address

(a) Variable Investment Return. If the designated investment alternative's rate of return is not fixed for the term of the investment, then the investment-related information that must be disclosed includes an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information:

- The name of the alternative's issuer;

- The alternative's objectives or goals in a manner consistent with SEC Form N-1A or N-3, as appropriate.

- The alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks in a manner consistent with SEC Form N-1A or N-3, as appropriate (or, if the designated investment alternative is designed to invest primarily in employer securities, an explanation of the importance of a well-balanced and diversified investment portfolio);

- The alternative's portfolio turnover rate in a manner consistent with SEC Form N-1A or N-3, as appropriate (this rule does not apply to designated investment alternatives designed to invest primarily in employer securities);

- The investment's performance data described under Section VII(C)(2) above (Performance Data) updated on at least a quarterly basis, or more frequently if required by other law; and

- The alternative's fee and expense information described in Section VII(C)(4) above (Fee and Expense Information) (this rule does not apply to designated investment alternatives designed to invest primarily in employer securities unless the alternative is a fund with respect to which participants or beneficiaries acquire units of participation, rather than actual shares, in exchange for their investment).

(b) Fixed Rate of Return. If the designated investment alternative's rate of return is not fixed for the term of the investment, then the investment-related information that must be disclosed includes an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to the following information:

- The name of the alternative's issuer;

- The alternative's objectives or goals (*e.g.*, to provide stability of principal or guarantee a minimum rate of return);

- The alternative's performance data under Section VII(C)(2) above (Performance Data) updated on at least a quarterly basis, or more frequently if required by other law; and

- The alternative's fee and expense information described in Section VII(C)(4) above (Fee and Expense Information).

6. Glossary

The administrator must furnish participants and beneficiaries a general glossary of terms to assist them in understanding the designated investment alternatives, or an Internet Web site address that is sufficiently specific to provide access to such a glossary along with a general explanation of the purpose of the address.

7. Annuity Options

If a designated investment alternative is part of a contract, fund, or product that permits participants or beneficiaries to allocate contributions toward the future purchase of a stream of retirement income payments guaranteed by an insurance company, then the administrator must furnish participants and beneficiaries the following information to the extent it is not included in Section VII(C)(4) above (Fee and Expense Information):

- The name of the contract, fund, or product;

- The option's objectives or goals (*e.g.*, to provide a stream of fixed retirement income payments for life);

- The benefits and factors that determine the price (*e.g.*, age, interest rates, form of distribution) of the guaranteed income payments;

- Any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option (*e.g.*, lockups) and any fees or charges applicable to such withdrawals or transfers;

- Any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, such as surrender charges, market value adjustments, and administrative fees;

- A statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and

- An Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to (1) the name of the option's issuer and of the contract, fund, or product; (2) a description of the option's objectives or goals; (3) a description of the option's distribution alternatives/guaranteed income payments (*e.g.*, payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments; (4) a description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternative/guaranteed income payments (*e.g.*, age, interest rates, other annuitization assumptions); (5) a description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and fees or charges applicable to a withdrawal or transfer; and (6) a description of any fees that will reduce the value of amounts allocated by participants or

beneficiaries to the option (*e.g.*, surrender charges, market value adjustments, or administrative fees).

D. Investment-Related Information Provided Subsequent to Investment

The administrator is required to furnish each investing participant and beneficiary, subsequent to the investment, any materials the plan receives relating to voting, tender or similar rights appurtenant to the investment, to the extent such rights are passed through to the participant or beneficiary under the terms of the plan.

E. Information Provided Upon Request

The administrator is required to furnish each investing participant and beneficiary, upon request, the following information relating to designated investment alternatives:

- Copies of prospectuses (or, alternatively, any short-form or summary prospectuses, the form of which has been approved by the Securities and Exchange Commission) for the disclosure of information to investors by entities registered under either the Securities Act of 1933 or the Investment Company of 1940, or similar documents related to designated investment alternatives that are provided by entities that not registered under of those Acts;

- Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the plan's designated investment alternatives, to the extent provided to the plan;

- A statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and

- A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets under the ERISA plan asset regulations (29 C.F.R. § 2510.3-101) and the value of each such asset (or the proportion of the investment which it comprises).

VIII. Transition Rules

For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines that it does not have the information on expenses attributable to the plan that is necessary to calculate the required 5-year and 10-year average annual total returns for a designated investment alternative that is not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or the plan administrator may use the most recently reported total annual operating expenses of the designated investment alternative as a substitute for such expenses. When a plan administrator uses a reasonable estimate or the most recently reported total annual operating expenses as a substitute for actual expenses pursuant to this transition rule, the administrator must inform participants of the basis on which the returns were determined. No disclosure of returns is required for periods before the inception of a designated investment alternative.

IX. Method of Delivery

A. Written Disclosures

Under the Department's regulations at 29 C.F.R. § 2520.104b-1(b), whenever the administrator of a plan has a disclosure requirement, it is required to use measures reasonably calculated to ensure actual receipt of the material by the participant or beneficiary. The plural use of the word "measures" implies that no particular method of delivery is mandatory, and that "administrators have discretion to determine the appropriate delivery method in a

given case." *Klotz v. Xerox Corp.*, 332 Fed. Appx. 668, 670, No. 08-3214-cv, 2009 WL 1585770 (2nd Cir. June 5, 2009). Both the regulations and the Courts have provided that the following methods of delivery are acceptable:

- In-hand delivery to an employee at his or her worksite;
- As a special insert in a periodical distributed to employees, such as a union newspaper or a company publication if the distribution list for the periodical is comprehensive and up-to-date and a prominent notice on the front page of the periodical advises readers that the issue contains an insert with important information about rights under the plan and ERISA which should be read and retained for future reference;
- First-class mail;
- Second- or third-class mail, but only if return and forwarding postage is guaranteed and address correction is requested. Any returned mail should be hand-delivered or sent via first-class mail;
- Facsimile to a participant's attorney with a confirmation that the fax was successfully transmitted;
- Delivery by a university through its campus mail system; and
- Delivery via interoffice mail.

Whether any form of delivery is adequate depends on the surrounding facts and circumstances. Thus, for example, in some cases delivery through interoffice mail might be sufficient, but in other cases it may not. If challenged, the administrator should be ready to provide a court with evidence that the notices were in fact furnished via measures reasonably calculated to ensure actual receipt. Such evidence may come in the form of a company policy or a company's usual business practices. Other evidence that courts have accepted are (1) testimony of employees that they mailed the notices, (2) testimony of other participants that they received the notices, (3) copies of lists of names and addresses to whom the notices were furnished, and (4) copies of other business records indicating that the notices were sent.

B. Electronic Disclosures

1. Regulations

Regulations issued by the Department at 29 C.F.R. § 2520.104b-1(c) provide two safe harbors that administrators may use to furnish ERISA disclosures electronically. All of the disclosures required by the Final Regulations can be furnished electronically under one of the two safe harbors. Thus, provided that the other requirements of the safe harbor are satisfied, disclosures required under the Final Regulations can be furnished electronically to individuals who meet the requirements of one of the following classifications:

(a) Integral Part of Duties. This safe harbor applies to participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties.

(b) Affirmative Consent. This safe harbor applies to other participants (*e.g.*, retirees, former employees, and active employees who do not use a computer as an integral part of their duties), beneficiaries (*e.g.*, surviving spouse, alternate payees), and other persons entitled to disclosures under ERISA who affirmatively consent to receiving disclosures through electronic media in the manner prescribed by the regulations.

2. Continuous Access Websites: Field Assistance Bulletin 2006-3 (December 20, 2006)

The Department has also issued other guidance on electronic disclosures in the form of Field Assistance Bulletin 2006-03 ("FAB 2006-03").[3] FAB 2006-03 provides general guidance regarding good faith compliance with the requirement of § 105 of ERISA, as amended by section 508(a) of the Pension Protection Act of 2006 ("§ 105"). In FAB 2006-03, the Department first states that furnishing benefit statements in compliance with the electronic safe harbor described in Section IX(B)(1) above constitutes good faith compliance with § 105. Second, FAB 2006-03 allows administrators to furnish benefit statements in a form that satisfies the Service's regulations at Treas. Reg. § 1.401(a)-21. Third, FAB 2006-03 states that administrators may furnish benefit statements as required by § 105 through a continuous access website. More specifically, FAB 2006-03 states that the availability of a statement through one or more secure continuous access web sites constitutes good faith compliance with § 105, provided that participants and beneficiaries have been furnished notification that explains the availability of the statement and how the statement can be accessed by participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the statement required under § 105. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a statement could be furnished under electronic disclosures allowed in FAB 2006-3, and furnished both in advance of the date on which a plan is required to furnish the first statement pursuant to § 105 and annually thereafter.

3. Technical Release No. 2011-03R: Application of Electronic Disclosure Rules to Participant Disclosure Requirements of the Final Regulations

On September 13, 2011, the Department issued Technical Release 2011-03, which provided guidance on the use of electronic media to furnish the participant disclosures required by the Final Regulations. Subsequently, on December 8, 2011, the Department issued Technical Release No. 2011-03R ("TR 2011-03R"), which revised and replaced Technical Release 2011-03. TR 2011-03R provides administrators with informal, non-binding guidance on the use of electronic media to furnish the participant disclosures required by the Final Regulations. A copy of TR 2011-3R is attached as Exhibit C to this presentation.

First, TR 2011-03R confirms that administrators may use the electronic safe harbors described in Section IX(B)(1) above to satisfy any of the disclosure requirements of the Final Regulations. Thus, the safe harbors may be used to furnish investing participants and beneficiaries with both the required plan-related information and the comparative chart.

Second, TR 2011-03R provides that the participant disclosures of the Final Regulations that may be disclosed on a pension benefit statement may be furnished in the same manner that other information disclosed on the statement is furnished. For example, if the statement is furnished through a secure continuous access Web site in accordance with FAB 2006-03, then the participant disclosures that may be provided on a pension benefit statement may also be furnished electronically in the same manner. The Final Regulations permit the following information to be disclosed on a pension benefit statement:

- The general plan-related information in Section VI(A) above;
- The plan-wide administrative expenses in Section VI(B) above; and

[3] Field Assistance Bulletin 2006-3 is a memorandum from the Director of the Office of Regulations and Interpretations, in the Employee Benefits Security Administration ("EBSA") for the Department, to the Director of Enforcement for the EBSA. It is not official guidance and is not binding on the Department of Labor or any court. It is, however, generally deemed to be helpful insight into the view of the Department on the matters addressed in the Field Assistance Bulletin.

- The individual expenses in Section VI(D) above.

However, the other participant disclosures, which cannot be furnished on a pension benefit statement, may not be furnished electronically under the guidance provided by FAB 2006-03.

Third, TR 2001-03R provides that investment-related information, *i.e.*, the comparative chart, may be furnished as part of, or along with, pension benefit statements, either in paper form (see Section IX(A) above) or electronically in accordance with the requirements described below.

Fourth, TR 2011-03R provides that, pending further guidance, any of the participant disclosures required by the Final Regulations may be furnished electronically, including through a continuous access website, if the six requirements in (a) – (f) below are met.

(a) Voluntary Provision of E-mail Address. Participants and beneficiaries entitled to receive the participant disclosures under the Final Regulations must voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an e-mail address for the purpose of receiving the participant disclosures. The e-mail address must be provided in response to a request accompanied by an Initial Notice, as described in (b) below. If the provision of an e-mail address is a condition of employment or participation in the plan, such e-mail address shall not be treated as being provided voluntarily. The mere establishment or assignment of an e-mail address by an employer or plan sponsor for a participant or beneficiary will not be treated as a voluntary provision of an e-mail address. The participant or beneficiary, however, may subsequently and voluntarily furnish such e-mail address to the employer, plan sponsor or plan administrator (or its designee) for the purpose of receiving the participant disclosures if the Initial Notice described in (b) below is provided contemporaneously. If a participant, however, is required to provide an e-mail address electronically in order to access a secure continuous access Web site housing the required disclosure, the provision of such e-mail address is considered voluntary where an Initial Notice is provided in accordance with paragraph (b) below.

(b) Initial Notice. The Initial Notice must be clear and conspicuous, provided contemporaneously and in the same medium as the request for the e-mail address and contain the following information:

- A statement that providing an e-mail address for the receipt of the participant disclosures is entirely voluntary, and that as the result of providing the e-mail address, the required disclosures will be made electronically;

- Identification or a brief description of the disclosures that will be furnished electronically and how it can be accessed by participants and beneficiaries;

- A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of any of the participant disclosures provided electronically and an explanation of how to exercise that right;

- A statement that the participant or beneficiary has the right, at any time, to opt out of receiving the participant disclosures electronically and an explanation of how to exercise that right; and

- An explanation of the procedure for updating the participant's or beneficiary's e-mail address.

(c) Annual Notice. Commencing with the year beginning after the year that the participant or beneficiary voluntarily provided his or her e-mail address in accordance with (a) above, and annually thereafter, the plan administrator shall furnish an Annual Notice to each such

participant or beneficiary. For purposes of this paragraph (c), "year" means a calendar year, plan year, or any other 12-month period selected by the plan administrator.

The Annual Notice must contain the information set out in the bullet points of (b) above. The Annual Notice must be furnished on paper in accordance with the Department's regulations described in Section IX(A) above. Alternatively, the plan may furnish the Annual Notice electronically by sending it to the e-mail address on file for the participant or beneficiary if there is evidence that such participant or beneficiary interacted electronically with the plan after the date the Annual Notice for the preceding year was furnished (or in the case of the first Annual Notice, after the date the Initial Notice was furnished). Examples of electronic interaction include, but are not limited to: the participant or beneficiary updating, resubmitting, or confirming his or her e-mail address to the plan; the participant or beneficiary sending an electronic message to the plan; logging onto a secure continuous access Web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant or beneficiary.

(d) Delivery. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information (*e.g.*, using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, *etc.*).

(e) Confidentiality. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.

(f) Calculated To Be Understood. Notices furnished to participants and beneficiaries shall be written in a manner calculated to be understood by the average plan participant.

(g) Transition Rule. Under a transition rule in TR 2011-03R, with respect to e-mail addresses of participants and beneficiaries that are on file with the employer, plan sponsor or plan administrator (or its designee) on the date specified in subparagraph b. of this paragraph (g) (the "Transition Group"), the conditions in paragraphs (a) and (b) above are deemed satisfied if a Transition Group Initial Notice, described below, is furnished to the Transition Group as follows:

a. The Transition Group Initial Notice must contain the information set out in the bullet points of (b) above;

b. The Transition Group Initial Notice must be furnished no earlier than 90 nor later than 30 days prior to the date the initial disclosures are required under the effective date for the Final Regulations are provided to the Transition Group;

c. The Transition Group Initial Notice must be furnished on paper in accordance with the Department's regulations described in Section IX(A) above. Alternatively, the plan may furnish the Transition Group Initial Notice electronically by sending it to an e-mail address on file for a participant or beneficiary if there is evidence of electronic interaction with the plan, within the meaning paragraph (c) above, during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph (g).

This Special Transition Provision is not available for an e-mail address established or assigned by the employer, plan sponsor or its or their designee unless there is evidence that such e-mail address was used by the participant or beneficiary for plan purposes during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph (g). For this purpose, examples of using e-mail address for plan

purposes include, but are not limited to, the participant or beneficiary; sending an electronic message to the plan from such e-mail address; receiving and opening an electronic message sent by the plan to such e-mail address; or logging onto a secure continuous access Web site housing plan information, using such e-mail address as the username.

EXHIBIT A
DEFINED TERMS

1. "**At least annually thereafter**" means at least once in any 12-month period, without regard to whether the plan operates on a calendar year or fiscal year basis.

2. "**At least quarterly**" means at least once in any 3-month period, without regard to whether the plan operates on a calendar year or fiscal year basis.

3. "**Average annual total return**" means the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N-1A, N-3, or N-4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan.

4. "**Designated Investment Alternative**" means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term "designated investment alternative" does not include "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

5. "**Total annual operating expenses**" means:

(i) In the case of a designated investment alternative that is registered under the Investment Company Act of 1940, the annual operating expenses and other asset-based charges before waivers and reimbursements (*e.g.*, investment management fees, distribution fees, service fees, administrative expenses, separate account expenses, mortality and expense risk fees) that reduce the alternative's rate of return, expressed as a percentage, calculated in accordance with the required Securities and Exchange Commission form, *e.g.*, Form N-1A (open-end management investment companies) or Form N-3 or N-4 (separate accounts offering variable annuity contracts); or

(ii) In the case of a designated investment alternative that is not registered under the Investment Company Act of 1940, the sum of the fees and expenses described in paragraphs (A) through (C) below before waivers and reimbursements, for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year:

(A) Management fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return;

(B) Distribution and/or servicing fees as described in the Securities and Exchange Commission Form N-1A that reduce the alternative's rate of return, and

(C) Any other fees or expenses not included in paragraphs (A) or (B) above that reduce the alternative's rate of return (*e.g.*, externally negotiated fees, custodial expenses, legal expenses, accounting expenses, transfer agent expenses, recordkeeping fees, administrative fees, separate account expenses, mortality and expense risk fees), excluding brokerage costs described in Item 21 of Securities and Exchange Commission Form N-1A.

EXHIBIT B
MODEL COMPARATIVE CHART

Model Comparative Chart

ABC Corporation 401k Retirement Plan
Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

Table 1—Variable Return Investments

Name/ Type of Option	Average Annual Total Return as of 12/31/XX				Benchmark			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30% S&P 500
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77% US Prime Market 750 Index
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09% MSCI EAFE
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16% Russell Midcap
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01% Barclays Cap. Aggr. Bd.
Other								
F Fund/ GICs www. website address	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75% 3-month US T-Bill Index
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99% 3-month US T-Bill Index
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46% S&P 500 23.95% Generations 2020 Composite Index*	N/A	N/A	3.09% 3.74%

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments			
Name/ Type of Option	**Return**	**Term**	**Other**
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

Table 3—Fees and Expenses			
Name / Type of Option	**Total Annual Operating Expenses** As a %	Per $1000	**Shareholder-Type Fees**
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International Stock	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.
D Fund/ Mid Cap ETF	0.20%	$2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds			
E Fund/ Bond Index	0.50%	$5.00	N/A
Other			
F Fund/ GICs	0.46%	$4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65%	$6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50%	$15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments			
H 200X / GIC	N/A		12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A		5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of

		each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if you own 30 shares at age 65, you will receive $300 per month over your life.	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share. The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25% surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

		beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	

Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

EXHIBIT C
TECHNICAL RELEASE 2011-03R

TECHNICAL RELEASE 2011-03R

DATE: DECEMBER 8, 2011

SUBJECT: REVISED INTERIM POLICY ON ELECTRONIC DISCLOSURE UNDER 29 CFR 2550.404a-5

INTRODUCTION

On September 13, 2011, the Department issued Technical Release 2011-03 (TR 2011-03), which sets forth an interim enforcement policy regarding the use of electronic media to satisfy the disclosure requirements under 29 CFR 2550.404a-5. In response, staff at the Department's Employee Benefits Security Administration (EBSA) has received inquiries on whether, and to what extent, TR 2011-03 is intended to apply to continuous access Web sites and whether, and under what circumstances, the release permits investment-related information, specifically comparative chart information required by paragraph (d) of section 2550.404a-5, to be furnished as part of a pension benefit statement described in section 105 of the Employee Retirement Income Security Act (ERISA). In issuing TR 2011-03, it was not EBSA's intent to preclude the use of continuous access Web sites. Nor was it EBSA's intent to preclude furnishing comparative chart information as part of, or along with, pension benefit statement information, either through electronic media under the conditions in section C of the release or in paper form. After reviewing TR 2011-03 in light of these inquiries, EBSA is persuaded that plan administrators and their service providers would benefit from the requested clarifications. In lieu of issuing a separate document, designed to be read in conjunction with TR 2011-03, EBSA has instead decided to revise and restate TR 2011-03 as Technical Release 2011-03R. The revised technical release is identical to TR 2011-03 except as necessary to clarify the aforementioned issues.

BACKGROUND

With regard to the use of electronic media generally, the Department has issued a regulation, at 29 CFR 2520.104b-1(c), setting forth conditions under which a plan administrator will be deemed to satisfy the requirement, in section 2520.104b-1(b)(1), that disclosures under title I of ERISA must be furnished using "measures reasonably calculated to ensure actual receipt of the material." The safe harbor of section 2520.104b-1(c) is limited to individuals who meet the requirements of one of the following classifications:

> ***Integral Part of Duties.*** The safe harbor applies to participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties. *See* 29 CFR 2520.104b-1(c)(2)(i).

Affirmative Consent. The safe harbor also applies to other participants (*e.g.*, retirees, former employees, and active employees who do not use a computer as an integral part of their duties), beneficiaries (*e.g.*, surviving spouse, alternate payees), and other persons entitled to disclosures under title I of ERISA who affirmatively consent to receiving disclosures through electronic media in the manner prescribed by the regulation. *See* 29 CFR 2520.104b-1(c)(2)(ii).

On December 20, 2006, the Department issued Field Assistance Bulletin 2006-03 (FAB 2006-03) to provide general guidance regarding good faith compliance with the changes made to the pension benefit statement provisions of section 105 of ERISA by section 508(a) of the Pension Protection Act of 2006.[1] In FAB 2006-03, the Department stated that the furnishing of required pension benefit statement information in accordance with the safe harbor of 29 CFR 2520.104b-1(c) would constitute good faith compliance with section 105. FAB 2006-03 also states that "[f]or purposes of section 105, the Department, pending further guidance and review of the provisions of section 2520.104b-1(c), will view the furnishing of pension benefit statements in accordance with [Treasury regulation] section 1.401(a)-21,[2] as good faith compliance with the requirement to furnish benefit statements to participants and beneficiaries." In addition, with respect to secure continuous access Web sites, FAB 2006-03 states:

> With regard to pension plans that provide participants continuous access to benefit statement information through one or more secure web sites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a pension benefit statement could be furnished under this Bulletin, and furnished both in advance of the date on which a plan is required to furnish the first pension benefit statement pursuant to section 105(a)(1)(A)(i) and (ii) of ERISA and annually thereafter.

On October 20, 2010, the Department published a final rule in the Federal Register regarding fiduciary requirements for disclosure in participant directed individual account plans, which is codified at 29 CFR 2550.404a-5.[3] Paragraphs (e)(1) and (2) of this rule provide that certain fee

[1] Pub. L. No. 109-280, 120 Stat. 780 (2006).
[2] 26 CFR 1.401(a)-21 relates to the use of electronic media to provide certain notices and documents required to be furnished under the Internal Revenue Code.
[3] 75 FR 64909.

and expense information may be included in a quarterly pension benefit statement required by section 105(a)(1)(A)(i) of ERISA.[4]

Paragraph (g) of the final rule, relating to the manner of furnishing information under section 2550.404a-5, is reserved. The Department decided to reserve paragraph (g) pending its review of a then yet to be published request for information seeking public comments, views and data relating to the electronic distribution of plan information to participants and beneficiaries. In the preamble to the final rule, the Department anticipated that it would have completed its review of the request for information and provided guidance sufficiently in advance of the compliance date for section 2550.404a-5 of the final rule so as to ensure appropriate notice to plans. The preamble to the final rule also states that pending issuance of any new guidance regarding electronic disclosure, the "general disclosure regulation at 29 CFR 2520.104b–1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures at paragraph (c) of that regulation."[5]

Section 2550.404a-5 applies to plan years beginning on or after November 1, 2011.[6] Under the transitional rule of section 2550.404a-5(j)(3)(i), the "initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investments" had to be furnished no later than 60 days after such applicability date. In July of 2011, the Department adopted a final rule which modified the transitional rule of paragraph (j)(3)(i) by extending the time to provide such initial disclosures until the later of 60 days after the applicability date or 60 days after the effective date of 29 CFR 2550.408b-2(c).[7] As a result of this change, the earliest date that disclosures have to be made under 29 CFR 2550.404a-5 is May 31, 2012.

From public comments made on a number of its regulatory initiatives in the last few years, the Department was aware that in some instances, electronic disclosure might be just as effective as paper-based communications, may lower costs and administrative burdens and increase timeliness and accuracy. At the same time, the Department was aware that some workers and retirees may not be sufficiently computer literate to receive information electronically or have reasonable access to the Internet, and others may simply prefer traditional paper disclosure. In light of the differing views and the significance of the issues surrounding electronic disclosure under title I of ERISA, the Department published the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans (E-Disclosure RFI) in the Federal Register on April 7, 2011.[8] The Department received approximately 80 comments. Some commenters expressed the view that the current safe harbor of 29 CFR 2520.104b-1(c) is outdated and limits the ability of plans to realize the benefits of using electronic media to furnish disclosures

[4] Paragraph (e)(1) states that "information required to be disclosed in paragraphs (c)(1)(i), (c)(2)(i)(A) and (c)(3)(i)(A) of this section may be provided as part of the plan's summary plan description furnished pursuant to ERISA section 102 or as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i), if such summary plan description or pension benefit statement is furnished at a frequency that comports with paragraph (c)(1)(i) of this section." Paragraph (e)(2) states that the "information required to be disclosed pursuant to paragraphs (c)(2)(ii) and (c)(3)(ii) of this section may be included as part of a pension benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i)."

[5] *See* discussion under B.6 *Manner of Furnishing* of the preamble to the final rule. 75 FR 64909 at 64922, 64923.

[6] 29 CFR 2550.404a-5(j)(2).

[7] *See* 76 FR 42539 (July 19, 2011). This rule delays the effective date of 29 CFR 2550.408b-2(c) to April 1, 2012.

[8] 76 FR 19285.

required by title I of ERISA (*e.g.*, reduction of costs; environmental impact). A subset of those commenters suggested that the current safe harbor be modified to permit plans to furnish all disclosures required under title I of ERISA in a manner similar to the guidance provided under FAB 2006-03. On the other hand, the Department also received comments that the current safe harbor of 29 CFR 2520.104b-1(c) does not adequately ensure that participants and beneficiaries will receive the required disclosures and suggested strengthening the affirmative consent requirements of the safe harbor (*e.g.*, extend the current affirmative consent requirements for certain disclosures to active employees who use a work computer as an integral part of their duties; annual renewal of affirmative consent to receive electronic disclosures). The Department is reviewing the E-Disclosure RFI comments for purposes of determining whether, and possibly how, it would modify the electronic disclosure rules of 29 CFR 2520.104b-1(c).

DISCUSSION

Representatives of plan sponsors, service providers and others in the employee benefits community have expressed concern about the approaching applicability date of 29 CFR 2550.404a-5 and the absence of guidance under paragraph (g) of the final rule regarding the use of electronic media to furnish the required disclosures. A number of such persons have requested that the Department extend the guidance provided under FAB 2006-03 regarding the use of electronic media to furnish pension benefit statements under section 105 of ERISA to the furnishing of all fee and expense information required under section 2550.404a-5. Although the Department is declining to do so at this time, it recognizes that some form of interim relief may be necessary, since the Department may not be able to provide final regulatory guidance regarding the manner of furnishing disclosures under section 2550.404a-5(g) until after the compliance date of section 2550.404a-5.

CONCLUSIONS

A. PLAN-RELATED INFORMATION REFERENCED IN SECTION 2550.404a-5(e).

Disclosures required by section 2550.404a-5(c) that are included in a pension benefit statement in accordance with section 2550.404a-5(e)(1) or (e)(2) may be furnished in the same manner that the other information included in the same pension benefit statement is furnished. For example, if the pension benefit statement information is furnished through a secure continuous access Web site in accordance with the guidance provided under FAB 2006-03, then the information included as part of the pension benefit statement in accordance with section 2550.404a-5(e)(1) or (e)(2) may also be furnished electronically in the same manner. However, disclosures required by section 2550.404a-5 that are not furnished as part of a pension benefit statement in accordance with section 2550.404a-5(e)(1) or (2) may not be furnished electronically under the guidance provided by FAB 2006-03.

B. INVESTMENT-RELATED INFORMATION IN SECTION 2550.404a-5(d).

Consistent with section 2550.404a-5, investment-related information under section 2550.404a-5(d) may be furnished as part of, or along with, pension benefit statement information, either electronically in accordance with section C of this release or in paper form in accordance with section 2520.104b-1(b).

C. ALL SECTION 2550.404a-5 INFORMATION.

General. The plan administrator may use the safe harbor of section 2520.104b-1(c) to furnish section 2550.404a-5 disclosures through electronic media. Alternatively, pending further guidance, a plan administrator may furnish section 2550.404a-5 disclosures through electronic media (including a continuous access Web site) in accordance with the conditions described below:

Conditions. Except as provided under the Special Transition Provision of paragraph 7, below, all of the conditions of paragraphs 1 through 6, below, must be satisfied:

1. Voluntary Provision of E-mail Address. Participants and beneficiaries entitled to receive information under section 2550.404a-5 must voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an e-mail address for the purpose of receiving disclosures required by section 2550.404a-5. The e-mail address must be provided in response to a request accompanied by an Initial Notice, as described in paragraph 2, below. If the provision of an e-mail address is a condition of employment or participation in the plan, such e-mail address shall not be treated as being provided voluntarily.[9] If a participant, however, is required to provide an e-mail address electronically in order to access a secure continuous access Web site housing the required disclosure, the provision of such e-mail address is considered voluntary where an Initial Notice is provided in accordance with paragraph 2, below.

2. Initial Notice. The Initial Notice must be clear and conspicuous, provided contemporaneously and in the same medium as the request for the e-mail address and contain the following information:

    a. A statement that providing an e-mail address for the receipt of the required section 2550.404a-5 disclosures is entirely voluntary, and that as the result of providing the e-mail address, the required disclosures will be made electronically;
    b. Identification or a brief description of the section 2550.404a-5 information that will be furnished electronically and how it can be accessed by participants and beneficiaries;

[9] The mere establishment or assignment of an e-mail address by an employer or plan sponsor for a participant or beneficiary will not be treated as a voluntary provision of an e-mail address. The participant or beneficiary, however, may subsequently and voluntarily furnish such e-mail address to the employer, plan sponsor or plan administrator (or its designee) for the purpose of receiving the section 2550.404a-5 information if the Initial Notice described in paragraph 2 above is provided contemporaneously.

c. A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of any of the section 2550.404a-5 information provided electronically and an explanation of how to exercise that right;
d. A statement that the participant or beneficiary has the right, at any time, to opt out of receiving the section 2550.404a-5 information electronically and an explanation of how to exercise that right; and
e. An explanation of the procedure for updating the participant's or beneficiary's e-mail address.

3. Annual Notice. Commencing with the year beginning after the year that the participant or beneficiary voluntarily provided his or her e-mail address in accordance with paragraph 1, above, and annually thereafter, the plan administrator shall furnish an Annual Notice to each such participant or beneficiary. For purposes of this paragraph 3, "year" means a calendar year, plan year, or any other 12-month period selected by the plan administrator.

   The Annual Notice must contain the information set out in subparagraphs b. through e. of paragraph 2, above. The Annual Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Annual Notice electronically by sending it to the e-mail address on file for the participant or beneficiary if there is evidence that such participant or beneficiary interacted electronically with the plan after the date the Annual Notice for the preceding year was furnished (or in the case of the first Annual Notice, after the date the Initial Notice was furnished). Examples of electronic interaction include, but are not limited to: the participant or beneficiary updating, resubmitting, or confirming his or her e-mail address to the plan; the participant or beneficiary sending an electronic message to the plan; logging onto a secure continuous access Web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant or beneficiary.[10]

4. Delivery. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information (*e.g.*, using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, *etc.*).

5. Confidentiality. The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.

[10] The electronic interaction described in this paragraph is relevant only for whether the Annual Notice may be furnished electronically rather than in paper. Such interaction, for purposes of paragraph 3, is not a substitute for the condition in paragraph 1, above, relating to the voluntary provision of an email address. Thus, for example, if a plan sent an e-mail to a participant at an address on file that had not been voluntarily provided by the participant for the purpose of receiving the disclosures under 29 CFR 2550.404a-5, although the participant's opening of that email may be evidence that the participant has access to the Internet, it is not a substitute for the requirement that an e-mail address must be voluntarily provided to the employer, plan sponsor, or plan administrator (or its designee).

6. Calculated To Be Understood. Notices furnished to participants and beneficiaries shall be written in a manner calculated to be understood by the average plan participant.

7. Special Transition Provision. With respect to e-mail addresses of participants and beneficiaries that are on file with the employer, plan sponsor or plan administrator (or its designee) on the date specified in subparagraph b. of this paragraph 7 (the "Transition Group"), the conditions in paragraphs 1 and 2 shall be deemed to be satisfied if a Transition Group Initial Notice, described below, is furnished to the Transition Group as follows:

    a. The Transition Group Initial Notice must contain the information set out in subparagraphs b. through e. of paragraph 2, above;
    b. The Transition Group Initial Notice must be furnished no earlier than 90 nor later than 30 days prior to the date the initial disclosures required under 29 CFR 2550.404a-5(j)(3)(i)(A) are provided to the Transition Group;
    c. The Transition Group Initial Notice must be furnished on paper in accordance with 29 CFR 2520.104b-1(b). Alternatively, the plan may furnish the Transition Group Initial Notice electronically by sending it to an e-mail address on file for a participant or beneficiary if there is evidence of electronic interaction with the plan, within the meaning paragraph 3, above, during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7.

    This Special Transition Provision is not available for an e-mail address established or assigned by the employer, plan sponsor or its or their designee unless there is evidence that such e-mail address was used by the participant or beneficiary for plan purposes during the 12-month period preceding the date the Transition Group Initial Notice is furnished in accordance with subparagraph b. of this paragraph 7. For this purpose, examples of using e-mail address for plan purposes include, but are not limited to, the participant or beneficiary: sending an electronic message to the plan from such e-mail address; receiving and opening an electronic message sent by the plan to such e-mail address; or logging onto a secure continuous access Web site housing plan information, using such e-mail address as the username.

D. Scope of Technical Release.

This Technical Release establishes a temporary enforcement policy until the Department issues further guidance in this area. Under this policy, the Department will not take any enforcement actions against a plan administrator who complies with the conditions in this Technical Release. The relief in this Technical Release is specifically limited to the furnishing requirement under 29 CFR 2520.104b-1(b)(1) as it applies to the disclosures under 29 CFR 2550.404a-5. This is an expression of the Department's enforcement policy but it does not address the rights or obligations of other parties. No inferences should be drawn that the guidance provided under either this Technical Release or FAB 2006-03 will be reflected in changes, if any, to the current electronic disclosure safe harbor of 29 CFR 2520.104b-1(c).

FOR FURTHER INFORMATION CONTACT: Thomas M. Hindmarch or Janet Song, Employee Benefits Security Administration, Department of Labor, at 202-693-8500.

EXHIBIT D
INDUSTRY LETTER ON TECHNICAL RELEASE 2011-03R

March 27, 2012

The Honorable Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Subject: Electronic Delivery Guidance under Section 404(a) of ERISA

Dear Madam Assistant Secretary:

Thank you for your letter dated December 22, 2011. We appreciate that the Department is engaged in a review of the current electronic disclosure safe harbor. We have survey data to share regarding EBSA's Technical Release 2011-03R and electronic disclosures generally. From survey results and discussions with various companies, we are concerned that this interim guidance does not provide meaningful incentives or make it more feasible for employee benefit plan sponsors and their service providers to use electronic media instead of paper. With the compliance date of the participant fee disclosure rule fast approaching, we are also concerned that the Department's most recently issued regulatory agenda does not include guidance on electronic disclosure.

We encourage the Department to pursue a policy that, in operation, would encourage and facilitate the use of modern electronic forms of communication. Such a policy would have a direct and beneficial impact on plans, plan sponsors, plan participants and beneficiaries. Participants of all ages and incomes increasingly prefer to access information online and believe that doing so makes it easier to act on the information. For this reason and others, a recently issued policy brief by the Progressive Policy Institute recommends allowing default e-delivery of 401(k) statements and retirement plan documents as one of five ideas for a smarter government.[1] The brief explains that the current system of default paper delivery actually works against the goal of helping Americans make the right decisions about their retirement planning because, among other things, "the density of printed disclosure is, for many people, intimidating," and "the static nature of printed materials does not invite the kind of interactive engagement people need to have to manage their retirement portfolios intelligently." The brief also expresses concern about the immediate obsolescence of paper statements noting that "[b]y the time a statement arrives in someone's mailbox, the stock markets may have made a major turn for the better or for the worse."

The impact on retirement savings due to the increased costs of paper notices also is a concern of our membership. Presently, the increased costs attendant to paper disclosure in 401(k) plans could reduce participants' retirement savings, the very savings we are working to increase with enhanced transparency. Ultimately, plan participants will likely bear the additional cost of delivering the required disclosures to non-participating employees in the plan when such costs are not paid by the employer and are instead allocated among participant accounts.

---

[1] *See* Kim, "When Paperwork Attacks! Five Ideas for Smarter Government," Progressive Policy Institute Policy Brief (March 2012), available at http://progressivepolicy.org/wp-content/uploads/2012/03/03.2012-Kim_When-Paperwork-Attacks-Five-Ideas-for-Smarter-Government.pdf.

We have reviewed EBSA's Technical Release 2011-03R and discussed it with various companies and have concluded that the guidance provides little relief beyond that already available through the current safe harbor, particularly as it relates to affirmative consent and dependence on paper as the default method of delivery. In fact, a recent survey of companies conducted by the SPARK Institute confirmed that most major service providers/recordkeepers will not attempt compliance with the Technical Release.[2] Some of the concerns raised by responding companies who do not plan to rely on the Technical Release include the inability of existing systems to support the Technical Release approach without costly changes, the required affirmative action on a per participant basis for plans to use electronic communications and the administrative impracticality of the required implementation and monitoring.

As reflected in the same survey, these companies continue to believe that, unlike Technical Release 2011-03R, prior guidance adopted by the Department in December 2006 in the form of Field Assistance Bulletin (FAB) 2006-03, does provide a viable approach to encouraging and fostering electronic disclosure by employee benefit plans, while providing important safeguards for ensuring that participants who still want to receive required disclosures in paper format can do so. In fact, the Department provided a similar approach for non-participating employees in the recently released final regulations implementing the summary of benefits coverage (SBC) requirements of the Affordable Care Act.

As you know, the Department took the position in FAB 2006-03 that the electronic disclosure safe harbor regulation, at 29 CFR § 2520.104b-1(c), is not the exclusive means by which plans could satisfy their obligations to furnish individual benefit statements. In this regard, the Department specifically recognized compliance with Treasury/IRS rules (26 CFR § 1.401(a)-21) relating to the use of electronic media as an acceptable means by which individual benefit statements can be furnished to plan participants and beneficiaries under Title I of ERISA. The Department further recognized the use of continuous access, secure websites as an acceptable means of furnishing required information to participants and beneficiaries.

Under the current Technical Release guidance, plan-related information that is not included in a pension benefit statement and investment-related information that must be provided under the participant disclosure regulations are inexplicably subject to more burdensome and complex electronic disclosure standards than individual benefit statements that contain specific and personal information about an individual's account balance and selected investments. Additionally, the electronic disclosure rules that apply to the participant disclosure regulations are more burdensome and complex than the standards found to be protective by the Department of the Treasury and the IRS for most of its participant communications under the Internal Revenue Code.

---

[2] Twenty-five record keepers, who are among the largest service providers in the retirement plan industry, responded to the survey. Only 4 (or 16%) of those surveyed indicated that they intended to support or rely on the Technical Release, including one that was still researching system capabilities. A copy of the survey is included for your consideration.

The stricter requirements are even harder to justify given the absence of any information or data that suggests significant compliance problems with personalized individual benefit statement disclosures during the five year period since the Department's issuance of the FAB.

We believe the efficiencies and cost savings, as well as benefits to participants, attendant to electronic disclosure are well established. Electronic communication today is no longer the exception, it is the norm. We, therefore, encourage the Department to move forward with interim guidance that facilitates and encourages the use of electronic disclosure as the primary means by which plan information is furnished to plan participants and beneficiaries. In this regard, we specifically request that the Department issue interim guidance (*i.e.,* guidance pending the adoption of a revised final electronic disclosure safe harbor regulation) as soon as possible that extends the now well-established and workable standards of FAB 2006-03 to all participant disclosures under title I of ERISA or, at a minimum, those currently required under the new 404a-5 regulations.

Sincerely,

American Bankers Association
American Benefits Council
American Council of Life Insurers
American Society of Pension Professionals & Actuaries
ERISA Industry Committee
Financial Executives International Committee on Benefits Finance
Financial Services Institute
Financial Services Roundtable
Insured Retirement Institute
Investment Company Institute
Plan Sponsor Council of America
Securities Industry and Financial Markets Association
Small Business Council of America
The SPARK Institute
U.S. Chamber of Commerce

cc:
The Honorable J. Mark Iwry
Senior Advisor to the Secretary and Deputy Assistant Secretary for Retirement and Health Policy, Department of the Treasury

The Honorable Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs

Michael L. Davis
Deputy Assistant Secretary, Employee Benefits Security Administration

Enclosure