

**MEMO# 25082**

April 11, 2011

## **DOL Seeks Comments on ERISA Electronic Disclosure Rules; ICI Forming RFI Working Group**

ACTION REQUESTED

[25082]

April 11, 2011

TO: PENSION COMMITTEE No. 9-11

PENSION OPERATIONS ADVISORY COMMITTEE No. 6-11 RE: DOL SEEKS COMMENTS ON ERISA ELECTRONIC DISCLOSURE RULES; ICI FORMING RFI WORKING GROUP

The Department of Labor published a request for information on whether and possibly how to revise its 2002 rule on the electronic distribution of employee benefit plan information, taking into account current technology, best practices and the need to protect participants' rights and interests. [\[1\]](#) Comments are due June 6, 2011.

The Institute plans to file a comment letter on the RFI that we will circulate to the Pension/Pension Operations Advisory Committee for comment before it is filed.

If you would like to participate in a working group of members on whom we can call for quick feedback on specific issues related to the RFI, as we draft the comment letter, please contact Anna Driggs at [adriggs@ici.org](mailto:adriggs@ici.org) or 202-218-3573.

The RFI acknowledges changes in technology since 2002, Administration-wide policies encouraging electronic dissemination of information to the public by federal government and President's Executive Order 13563 that encourages achievement of the regulatory goals through the most innovative and least burdensome tools. [\[2\]](#) The RFI also states that not everyone agrees that electronic disclosure is appropriate for all participants or for all disclosures.

The RFI poses 30 questions, grouped in four broad topics:

(1) Access and usage. The RFI seeks data on Internet access by the U.S. population and ERISA participants, including data on plans currently using e-delivery and information on impediments to a broader use of e-delivery.

(2) General questions on whether and how the Department should change its existing safe harbor rule and whether the Department should encourage or require the use of web sites for disclosures and subject to what conditions.

## **Current rule**

The Department's rule generally requires employers to distribute ERISA-required materials using measures reasonably calculated to ensure actual receipt. The Department's 2002 rule establishes a non-exclusive safe harbor that allows electronic distribution only to: (1) a participant who has the ability to effectively access e-documents at any location where the participant is reasonably expected to perform his or her duties as an employee and for whom access to the employer's electronic information system is an integral part of those duties, or (2) an individual who has provided affirmative consent.

An employer using the safe harbor must (1) take appropriate and necessary measures reasonably calculated to ensure that its system for furnishing documents results in actual receipt and protects confidentiality of any personal information; (2) furnish e-documents in a manner that is consistent with the style, format and content requirements applicable to the particular document; (3) provide notice to the participant that apprises the participant of the significance of the document when it is not otherwise reasonably evident and of the right to obtain a paper copy upon request; and (4) furnish a paper version upon request.

## **Special “web site delivery ” rule for pension benefit statements**

Field Assistance Bulletin 2006-03 provides a more flexible electronic delivery rule for delivery of pension benefit statements, pending issuance of further guidance. [\[3\]](#) The FAB allows plans to make pension benefit statement information available on a secure web site, provided participants are notified of the availability of this information and how to access it and told they can request a paper version of the benefit statement, free of charge. As another alternative, the FAB permits plans to use Treasury rules on electronic distribution.

(3) Technical questions. The RFI seeks comments on technical questions about hardware, software, spam blockers, when participants should have the right to opt out of e-delivery; whether and how affirmative consent impedes the use of e-media, whether it places a substantial burden on e-commerce and whether eliminating it materially would increase the risk of harm to participants.

(4) Costs and benefits questions, including impact on participants and small plans.

As stated earlier, comments to the Department are due June 6, 2011. If you have any particular issues you would like the Institute to comment on, please call or email the undersigned.

Anna Driggs  
Associate Counsel

**endnotes**

[1] A copy of the RFI is available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24850&AgencyId=8&DocumentType=1>. While the RFI also covers e-delivery for ERISA health and welfare plans, this memorandum focuses on retirement plans only.

[2] See [Memorandum](#) to Pension Members No. 19-11 [25078], dated April 8, 2011.

[3] See [Memorandum](#) to Pension Members No. 75-06 [20718], dated December 21, 2006, and [Memorandum](#) to Pension Members No. 21-08 [22415], dated April 10, 2008.

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