

COMMENT LETTER

July 7, 2011

Joint Letter: Electronic Delivery Guidance Under Section 404(a) of ERISA (pdf)

July 7, 2011 The Honorable Hilda L. Solis Secretary of Labor U.S. Department of Labor 200 Constitution Avenue, NW Washington, DC 20210 The Honorable Jacob J. Lew Director of Office of Management and Budget The Office of Management and Budget 725 17th Street, NW Washington, DC 20503 Subject: Electronic Delivery Guidance under Section 404(a) of ERISA Dear Madam Secretary and Mr. Lew: We are writing to request guidance on the final rule under Section 404(a) of the Employee Retirement Income Security Act ("ERISA") (29 CFR 2550.404a-5) (the "Final Rule"). The Final Rule sets forth new requirements for the disclosure of plan and investment related information, including fee and expense information, to participants and beneficiaries of participant-directed individual account plans subject to ERISA. We seek guidance that would facilitate the delivery of the required disclosures via electronic means. The Final Rule reserves paragraph (g) to address the use of electronic disclosure pending a Department review of the 2002 electronic communication rule (29 CFR 2520.104b-1). The preamble to the Final Rule concludes that: "It is anticipated, however, that resolution of this issue will occur in advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans" (75 FR 64923). The Department recently proposed an extension of applicability date under the Final Rule published at 76 Fed. Reg. 31544 on June 1, 2011. This proposed extension would amend the Final Rule's 60-day transition period to 120 days. Thus, for a plan operating under a plan year beginning on November 1, 2011, the plan fiduciary would have until the end of February 2012 to provide the required disclosures to plan participants. We appreciate the Department's desire to review the legal framework regarding the use of electronic media by plans subject to ERISA. We note the Department's Request for Information ("RFI") regarding electronic disclosure by employee benefit plans, published in the Federal Register on April 7, 2011 (76 FR 19285). The RFI concerns the use of electronic media to furnish information to participants and beneficiaries covered by employee benefit plans subject to ERISA. The Department received 75 responses to the RFI. The Department will need sufficient time to review and analyze these responses and to propose any new regulation, including a rule for the "manner of furnishing" section reserved under the Final Rule. We are concerned that this work may not be completed in advance of the current or proposed applicability date of the Final Rule. Thus, in the interim, we ask that the Department provide that disclosures under the Final Rule may be distributed in the manner described in Field Assistance Bulletin ("FAB") No. 2006-03. Issued soon after the enactment of the Pension Protection Act of 2006, FAB 2006-03 acknowledged the substantial time and expense that would be incurred by service providers (and consequently, plan sponsors and

plan participants) in complying with the new pension benefit statement requirements. The FAB stated that the Department would view the continuous availability of pension benefit information on a secure website to constitute “good faith” compliance, provided that participants are notified of the availability of statement information, how to obtain access to the website, and how to obtain paper statements if so desired. The FAB also stated that the Department would view the furnishing of pension benefit information in accordance with the provisions of Treasury Regulation section 1.401(a)-21 as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries. The information required to be disclosed under the Final Rule easily can be furnished in the same manner as the quarterly benefit statements. Indeed, these two requirements are so intertwined that the Final Rule expressly allows the annual notice to be provided as part of a quarterly benefit statement. Until any new electronic media regulations take effect, the transitional relief in FAB 2006-03 should be expanded to cover the delivery to participants of disclosures required under the Final Rule. Such transitional relief would mitigate disruption to and the cost of plan administration and provide participants and beneficiaries with a more consistent and efficient delivery experience. Mailing the extensive written disclosures required by the new regulation to participants and beneficiaries who currently engage plans via online access would be wasteful, costly and, for many participants and beneficiaries, unwanted. FAB 2006-03 provides clear protections to those participants or beneficiaries who either don’t have ready access to the Internet or simply prefer to receive their plan information in paper form. We would expect plans to satisfy those same conditions for the new participant disclosures made available online. Madam Secretary and Mr. Lew July 7, 2011 Page 3 Plans have a little more than six (6) months before the initial notices must be provided under the Final Rule to all current participants and any eligible employee. This is an enormous undertaking. In order to meet this extraordinary initial disclosure obligation without needlessly expending extensive resources, plan administrators and their service providers need immediate confirmation that the parameters set forth in FAB 2006-03 can be applied to the delivery of participant disclosures under the Final Rule. Further delay will result in greater costs to the employee benefit plan system. Sincerely, American Bankers Association American Benefit Council American Council of Life Insurers American Society of Pension Professionals & Actuaries Committee on Investment of Employee Benefit Assets Defined Contribution Institutional Investment Association ERISA Industry Committee Financial Services Roundtable Insured Retirement Institute Investment Company Institute Profit Sharing/401(k) Council of America Securities Industry and Financial Markets Association Small Business Council of America Society for Human Resource Management SPARK Institute U.S. Chamber of Commerce cc: The Honorable Phyllis C. Borzi Assistant Secretary, Employee Benefits Security Administration The Honorable Cass R. Sunstein Administrator, Office of Information and Regulatory Affairs