Electronic Plan Administration

August 6, 2001

Ms. Anne Combs, Assistant Secretary
Pension and Welfare Benefits Administration
United States Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

RE: Electronic Plan Administration

Dear Assistant Secretary Combs:

ASPPA strongly supports the effort by the Department of Labor ("Department"), and particularly the Pension and Welfare Benefits Administration ("PWBA"), to permit plan sponsors and administrators to take advantage of new information technologies (IT) in distributing certain required documents to plan participants. ASPPA encourages the Department to further expand the availability of IT to other requirements of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), as described below. On June 30, 2000, the Electronic Signatures in Global and National Commerce Act ("Act") became law. We urge the Department to actively support the implementation of the Act on behalf of participants, beneficiaries, plan sponsors, and employers by recognizing that employee benefit plans and their participants will benefit from the ability to convert, to the extent it is prudent to do so, to electronic, paperless plan administration.

ASPPA is a national organization of approximately 4,200 members who provide actuarial, consulting, administration, legal and other professional services for qualified plans and tax-sheltered annuities. ASPPA's members and their clients are committed to compliance with the legal requirements affecting these plans and arrangements.

This letter provides a brief description of the Act and current Departmental and Internal Revenue Service ("IRS") guidance and raises specific issues for which we believe input by the PWBA would be very helpful to the benefits community.

Agency Guidance on New Technology

In 1999, the Department proposed regulations permitting the electronic distribution of summary plan descriptions (SPDs), summaries of material modifications (SMMs) and summary annual reports (SARs) for employee benefit plans covered by ERISA. Prop. Department Reg. §2520.104b-1(c). The Proposed Regulations, referred to as the new technology regulations, also addressed the use of electronic media for maintenance and retention of employee benefit plan records. Prop. Department Reg. §2520.107−1.

Under the Department's guidance (which employers are currently entitled to rely on), electronic distribution of SPDs, SMMs and SARs is permitted only for participants who have the ability to "effectively access" documents furnished in electronic form and convert them to paper form without charge. In addition, the following requirements apply:

- The administrator must take "appropriate and necessary measures" to ensure that the system results in actual receipt by participants of transmitted information and documents (*e.g.*, using return-receipt electronic mail or conducting periodic reviews or surveys to confirm receipt of transmitted information);

- The electronically delivered documents must be prepared and furnished in a manner consistent with the applicable style, format and content requirements for SPDs for the applicable "hard copy" documents;

- Each participant must be provided notice, through electronic means or in writing, apprising him or her of the documents to be furnished electronically, the significance of the document and the right to request and receive a paper copy free of charge; and

- Upon request of any participant, the plan administrator must furnish a paper copy of the document free of charge.

The Department's Proposed Regulations also address electronic record maintenance and retention. In general, the Department takes the position that the record maintenance and retention requirements imposed by ERISA would be satisfied by using electronic media if the following requirements are met:

- The electronic record keeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the electronic records;

- The electronic records are maintained in a reasonable order and in a safe and accessible place, so that they may be readily examined (*e.g.*, the system should provide for indexing, preserving, retrieving and reproducing the electronic records);

- The records are readily convertible into legible paper copy;

- The electronic record keeping system is not subject to any agreement or restriction that would limit the ability to comply with any reporting and disclosure requirements of ERISA;

- Adequate records management practices are implemented (*e.g.*, procedures for labeling electronic records, providing a secure storage environment, creating back-ups, etc.); and

- The electronic records must exhibit "a high degree of legibility and readability" when displayed on a computer terminal.

In Notice 99-1, the IRS made it clear that the Internal Revenue Code does not bar participant enrollment, contribution elections, beneficiary designations (other than designations requiring spousal consent), direct rollover elections and 401(k) elections using electronic media. In addition, on February 8, 2000, the IRS finalized the proposed regulations regarding electronic delivery of notices required for benefit distributions; including notice of distribution options; the right to roll benefits over into an individual retirement account or another qualified retirement plan; notice of the right to defer distribution to normal retirement age; and notice concerning voluntary tax withholding. Treas. Reg. §§1.402(f)-1, 1.411(a)-11 & 35.3405-1.

We encourage the Department to coordinate with the IRS in providing guidance relating to IT. For example, the Department should issue guidance, possibly in the form of an interpretive bulletin, making it clear that the use of IT consistent with IRS Notice 99-1 and proposed regulations promulgated by the IRS under Sections 402(f) and 411(a)(11) of the Code are not inconsistent with Section 404 of ERISA.

Electronic Signatures Act

Background. The Act applies broadly at the federal level, and to ERISA, in particular. Section 514(d) of ERISA makes it clear that ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States," including the Electronic Signatures Act. A colloquy between Senators Gramm and Abraham while the Act was under consideration specifically contemplates that the Act will affect ERISA–covered plans:

> Sen. Gramm: "It is my understanding that [the Act] would cover all activities relating to employee benefit plans or any other type of tax-favored plan, annuity or account, such as an IRA, a 403(b) annuity, or an education savings program, including all related tax and other required filings and reports. Is this correct?"
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> Sen. Abraham: "Yes, and as a result, the act would apply to such activities as the execution of a prototype plan adoption agreement by an employer, the execution of an IRA application by an individual, and the waiver of a qualified joint and survivor annuity by a plan participant's spouse and the designation of any beneficiary in connection with any retirement, pension, or deferred compensation plan. . . ." [146 Cong. Rec. S5283 (June 16, 2000).]

The Act generally became effective on October 1, 2000. The record retention provisions, however, became effective March 1, 2001. A state or federal agency could have delayed the effective date of these provisions in order to propose rules regarding retention, but only to June 1, 2001.

The language of the Act is clear and explicit: electronic signatures and records are to be offered the same recognition, validity, and legal effect as paper records. The Act creates three categories of electronic records that can be used in employee benefit plans: (1) electronic signatures; (2) electronic records; and (3) electronic retention of records. Utilizing these provisions will reduce significantly the administrative costs of providing benefits to employee benefit plan participants and beneficiaries and improve the accuracy of the delivery of benefits.

Electronic Signature. The Act gives electronic signatures and on-line transactions the same legal force as those created or entered into with pen-and-paper. Section 101(a) of the Act provides that "a signature, contract, or other record . . . may not be denied legal effect, validity, or enforceability solely because it is in electronic form." Further, "a contract . . . may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." Act §101(a)(2).

An important feature of the Act is that it is "technologically neutral" – that is, it does not dictate the type of technology the parties may use to create an electronic signature or to enter into a transaction. Thus, the term "electronic signature" is defined as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." Act § 106 (5). This could encompass pushing a specified number or code on a telephone key pad; pressing "I Accept" on a web page; or sending an e-mail indicating the acceptance of terms. The key is that the person executing the transaction intended to sign the contract. The Act does not explicitly address the possibility that an electronic signature may be "forged." As with paper signatures, this is a matter of proof from a legal perspective. Thus, plans may use electronic signature for a variety of participation features, such as investment choices in an individual account plan, for dependent care coverage.

Further, if a statute or regulation requires that a signature be notarized, made under oath, or otherwise verified, that too may be done electronically. Act § 101(g). This provision is intended to permit notaries and other officers to perform their functions electronically so long as they provide all information required by law for notarization or authorization (which would presumably require that the notary and signatory be at the same terminal). The Act removes any requirement for a stamp, seal or other embossing device that might otherwise preclude entering into the contract by electronic means.

Electronic Records. The Act also authorizes the use of electronic records in consumer transactions. Anywhere "a statute, regulation, or rule of law requires that information . . . be provided or made available to a consumer in writing," an electronic record may be substituted. Act §101(c). However, the Act does not *require* a person to use or accept electronic records or electronic signatures. Act §101(b)(2). Among other things, Congress was worried that consumers might be "forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher." 146 Cong. Rec. S5220 (June 15, 2000) (statement of Senator Leahey). Thus, in order for the use of electronic records to be valid, the consumer must affirmatively consent to their use; and the consumer has the option of withdrawing that consent. We believe many consumers will want to use electronic records. And to the extent participants are consumers, participants should also be able to use electronic records.

Significantly, the consumer's consent must be given electronically, "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information." Act §101(c)(1)(C)(ii). This "reasonable demonstration" requirement would be satisfied, for example, if the consumer replies in a manner that indicates he or she has actually accessed the electronic record – by sending a reply email, clicking on the appropriate icon at a website, or by pressing the appropriate telephone key when prompted by an IVR system.

A key issue that may affect the Act's impact on ERISA plan administration is whether, or when, a plan participant is a "consumer." Section 106(1) of the Act defines a "consumer" as "an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes...." This would appear to apply, for example, to a 401(k) plan participant making an investment decision or requesting a distribution or loan, because the participant is in a similar position to an investor accessing a bank or mutual fund account. It is less clear, however, whether a pension plan participant is similarly a "consumer" for purposes of the Act, although the legislative history quoted above suggests that is the case. We urge the Department to set forth

clear guidance on this issue.

Retention of Records. Under Section 101(d) of the Act, if a statute or regulation requires that a contract or record be retained, this requirement is satisfied by the retention of an electronic record of the required information, provided that two conditions are met: first, the record must accurately reflect the information set forth in the contract or other record; and second, the record must remain accessible to all who are entitled to access it for the time required by law in a form capable of being reproduced. If these conditions are satisfied, even the requirement that a particular contract or other record be an *original document* (such as under a statute of frauds) will be satisfied. The Act also permits retention of an electronic record containing the information on the front and back of a check, in lieu of the original check (or a photocopy of the check).

Excluded Transactions. Although the Electronic Signatures Act was intended to apply broadly, certain transactions and records are specifically exempt, including notice of cancellation of health or life insurance benefits.

Implications of the Act

ASPPA believes that the Act should have a major impact on the administration of many employee benefits plans. Because of the Act's broad preemption of both federal and state laws that would otherwise require action in writing, plan administrators may design and implement systems for paperless administration and electronic record keeping with a much higher degree of confidence that these systems will stand up to legal challenge. Likewise, the Act will increase the efficacy of employee benefit transactions – including claims processing – with vendors and providers.

In order to assist the employee benefits community to fully realize the efficiencies of electronic administration, we urge PWBA and the Department to incorporate the following recommendations into ongoing and future regulatory interpretations for the benefit of all plan participants, fiduciaries and sponsors.

1. The Department should clarify that plan participants are "consumers" under the Act for purposes of receiving electronic records and communications.

2. The Department should confirm, throughout the department's regulations, that an electronic transmission to or from a participant, or between the employer and plan administrator (*e.g.,* notice of termination for COBRA), which is provided in accordance with the Act or the Department's regulations is a "writing." For example, the Department's recent claims regulations indicate that benefit determinations may be delivered electronically, but no similar language is included with respect to notice of the extension of time for claims as processing. *See* 29 C.F.R. §2560.503-1(f). While the treatment of electronic communications the same as written communications should ultimately apply to communications with the Department as well, we do not address this in our comments today.

3. The Department should ensure that the new technology regulations are consistent with the purpose of the Act. We agree with the Department's approach of permitting electronic distribution of documents without advance consent by the participant, where the participant has a right to request a paper copy if he or she chooses to do so. However, the Department should not place the burden on the administrator to assure that a participant has the ability to print documents where the participant may request a paper copy in any case. Many participants who do not have access to computers at work have them at home, and the Department's current regulations make electronic distribution to these participants unreasonably cumbersome.

4. The Department should coordinate with the IRS in finalizing the new technology regulations. Any actions or interpretations the Department takes should be in harmony with the Internal Revenue Service to ensure the same standards apply from both agencies. While the agencies typically work together with respect to qualified employee benefit plans, independent standards or interpretations in the information technology arena could lead to confusion and administrative burden. In particular, the Department should endorse IRS Notice 99-1.

5. The Department should confirm that employers may use electronic communications and

notices as the primary or default means of administration, including electronic distribution of records and making electronic elections, provided employees have access to electronic communications media at home or at the worksite. Electronic transactions are now the state of the art for 401(k) plans, in particular, where information can be provided and transactions processed by telephone or on-line. Requiring the administration to support paper-based transactions is no longer necessary to protect participants as they may continue to request paper confirmation of transactions and notices as they deem necessary.

6. The Department should expand the scope of the existing and proposed new technology regulations to permit electronic distribution of any notice otherwise required in writing (*e.g.*, Section 204(h) notices; HIPAA certificates of coverage, etc.). Compliance with spousal consent requirements in electronic form will require additional consideration.

7. The Department should make clear in the new technology regulations that there is no distinction between (a) actual delivery and (b) posting a document on a website and simultaneously delivering an e-mail with a link to the website and notice of the posting and the participant's right to request a paper copy.

The principal authors of this letter were Frederic Singerman, with assistance from Michael Canan, of ASPPA's Department of Labor Subcommittee. We would be pleased to further discuss ASPPA's thoughts regarding electronic plan administration in person at your convenience.

Sincerely,

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