

Department of Labor Proposed Regulations §§ 2520.104b-1 & 2520.107-1 Regarding Use of Electronic Media

May 6, 1999

Mr. Robert J. Doyle
Office of Regulations & Interpretations
Pension and Welfare Benefits Administration
U.S. Department of Labor
Room N-5669
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Department of Labor Proposed Regulations §§ 2520.104b-1 & 2520.107-1 Regarding Use of Electronic Media

Dear Mr. Doyle:

ASPPA is a national organization of approximately 3,700 members who provide actuarial, consulting, administrative, legal and other professional services for about one-third of the qualified retirement plans in the United States, the majority of which are maintained by small businesses. ASPPA's mission is to educate pension actuaries, consultants, administrators and other benefits professionals and to preserve and enhance the private retirement system as part of the development of a cohesive and coherent national retirement income policy. Its large and broad based membership gives it unusual insight into current practical problems with ERISA and qualified retirement plans, with a particular focus on the issues faced by smaller employers.

In January 1999, the Department issued proposed regulations §§ 2520.104b-1 & 2520.107-1, regarding the use of electronic media to distribute summary plan descriptions, summaries of material modifications and summary annual reports, and maintain plan records. We strongly support the Department's effort to permit plan sponsors and administrators to take advantage of new information technologies (IT) and encourage the Department to further expand the availability of IT to other ERISA notice requirements, as described below.

Coordination with IRS. In a related development, the Internal Revenue Service (IRS) has also weighed in on using new technologies in plan administration. In December 1998, the IRS issued proposed regulations permitting the electronic delivery of notices required for benefit distributions, including notice of distribution options and 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. These regulations would also permit participants to consent to a distribution electronically or by telephone. 63 Fed. Reg. 70071 (Dec. 18, 1998).

Moreover, in Notice 99-1, 1999-2 I.R.B. 1 (Jan. 11, 1999), the IRS makes it clear that it does not bar participant enrollment, contribution elections, beneficiary designations (other than designations requiring spousal consent), direct rollover elections and 401(k) elections through the use of electronic media.

We urge the Department to coordinate with the IRS in providing guidance relating to IT, in order to avoid inconsistent guidance from the two agencies and to promote efficient plan administration. For example, we urge the Department to 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.

We also suggest that the Department and the IRS create a joint task force, with industry representatives, to address the continuing technical issues raised by IT, including establishing parallel standards under ERISA and the Code for security and privacy of electronically-transmitted information.

Protection of Terminated Employees. The proposed regulations may not adequately protect employees who do not have a printed Summary Plan Description (or other permitted document) and then lose access to an electronic version of the document upon termination of employment. It may be appropriate to require notice within some

period (e.g., one year) after termination of employment reminding the participant of his or her right to obtain a written copy of the document.

Period In Which Document Must Be Available. The proposed regulations should address the *period* in which the document must be available electronically and the *period* in which notice concerning availability of the document is available. For example, assume that the employer posts its SPD at a specified web site and sends an e-mail regarding availability of the document which complies with the proposed regulations. The following questions should be addressed:

- a. Many systems routinely purge e-mails after some period of time in order to make room on the user's hard drive or for security reasons. Has "delivery" been effected if the e-mail is purged after 30 days? If the employee has not printed the SPD, he or she may lose ready access to it. This problem may be addressed by requiring periodic (e.g., annual) notice.
- b. Must the SPD be retained at the web site for as long as it is current? How long must an SAR be posted?

Answers to Questions Raised in Preamble. With regard to question 1 raised in the Preamble, we believe that the proposed procedures should be expanded to encompass other notices or disclosures required under ERISA, including (a) individual benefit statements; (b) notices and disclosures required by ERISA § 404(c) and regulations thereunder; (c) notices and other disclosures permitted to be provided electronically by the IRS; (d) notice of a benefit freeze under ERISA § 204(h); and (e) notice of failure to make a required contribution under ERISA § 101(d). However, where the particular disclosure is participant-specific, appropriate security safeguards are necessary.

Regarding question 2, all disclosures are time sensitive, in that they put a participant on notice of his or her rights and trigger applicable limitations periods. Nonetheless, additional safeguards should not be necessary unless the participant may lose an important right by inaction within a relatively short period. Thus, although some additional safeguard may be appropriate for COBRA elections, no additional requirements should apply, for example, to notice under ERISA § 204(h) (because failure to act within 15 days does not waive the participant's right to challenge an amendment under ERISA).

Regarding question 3, we support making IT alternatives available outside of the worksite at the election of the participant. The participant's consent should be renewed from time to time to assure that he or she continues to have access to the particular electronic medium.

Regarding question 4, we support the use of IT for delivery of information under Section 104(b)(2) and (4), subject to the standards proposed. Again, where the particular disclosure is participant-specific, appropriate security safeguards are necessary.

Regarding question 5, see the response to question 1 above.

These comments were developed by ASPPA's Department of Labor Committee. The principal author is Fredric S. Singerman of the Washington, D.C. office of the law firm of Seyfarth, Shaw, Fairweather & Geraldson, with William Berke of Benefits Associates, Inc.

Sincerely,

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