

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2520****RIN 1210-AB50****Request for Information Regarding Electronic Disclosure by Employee Benefit Plans**

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Request for information.

**SUMMARY:** The Department of Labor is reviewing the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries covered by employee benefit plans subject to the Employee Retirement Income Security Act (ERISA). In 2002, the Department adopted standards for the electronic distribution of plan disclosures required under ERISA. The purpose of the review is to explore whether, and possibly how, to expand or modify these standards taking into account current technology, best practices and the need to protect the rights and interests of participants and beneficiaries. This request for information (RFI) solicits views, suggestions, and comments from plan participants and beneficiaries, employers and other plan sponsors, plan administrators, plan service providers, health insurance issuers, and members of the financial community, as well as the general public, on this important issue.

**DATES:** Comments must be submitted on or before June 6, 2011.

**ADDRESSES:** You may submit written comments to any of the addresses specified below.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [e-ORI@dol.gov](mailto:e-ORI@dol.gov). Include RIN 1210-AB50 in the subject line of the message.

- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: E-Disclosure RFI.

All submissions received must include the agency name and Regulation Identifier Number (RIN) for this rulemaking. Comments received will be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and made available for public inspection at the Public Disclosure Room, N-1513, Employee

Benefits Security Administration, 200 Constitution Avenue, NW., Washington, DC 20210, including any personal information provided. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Comments posted on the Internet can be retrieved by most Internet search engines. Comments may be submitted anonymously. Persons submitting comments electronically are encouraged not to submit paper copies. All comments will be made available to the public.

**FOR FURTHER INFORMATION CONTACT:**

Thomas M. Hindmarch, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

On July 19, 1977, the Department of Labor (Department) adopted general standards governing the delivery of all information required to be furnished to participants, beneficiaries, and other specified individuals under title I of ERISA.<sup>1</sup> See 29 CFR 2520.104b-1. These standards require that plan administrators use delivery methods reasonably calculated to ensure actual receipt of such information by plan participants, beneficiaries and other specified individuals. See § 2520.104b-1(b)(1). For example, in-hand delivery to an employee at his or her worksite is acceptable, as is material sent by first-class mail. On April 9, 2002, the Department amended § 2520.104b-1 to establish a “safe harbor” for the use of electronic media to satisfy the general furnishing requirement in § 2520.104b-1(b). See § 2520.104b-1(c).<sup>2</sup> The specific requirements of the safe harbor are discussed below.

On January 18, 2011 the President issued Executive Order 13563, “Improving Regulation and Regulatory Review.” Executive Order 13563 reaffirms the importance of achieving regulatory goals through the most innovative and least burdensome tools available. It also emphasizes the importance of public participation in the regulatory process (in section 2) and retrospective consideration of existing regulatory policies (in section 6).

In light of these goals, and in consideration of Administration-wide policies encouraging electronic dissemination of information to the public by federal government agencies

consistent with the principles of transparency, participation, and collaboration, EBSA is issuing this RFI to facilitate consideration of its approach to electronic disclosure by employee benefit plans. The Department is aware that electronic disclosure can be as effective as paper based communications, and that it can lower costs and administrative burdens and increase timeliness and accuracy for all involved. The Department also is aware that some of America’s workers may not have reasonable access to the Internet, and others may prefer traditional (paper) disclosure methods for important financial interactions regarding their pensions and other employee benefits.

The Department recognizes that there have been substantial changes in technology since over time, both in the workplace and at home, including: The expansion of broadband through cable, fiber optic and wireless networks; hardware improvements to servers and personal computers improving storage, memory, recovery, and computing power; introduction of smart phones, net books and other personal computing devices; and social networking (e.g., LinkedIn, Facebook, and Twitter).

At least some evidence suggests that these changes have resulted in a substantial increase in access to and utilization of electronic media. For instance, the 2009 U.S. Census Bureau Current Population Survey (Census) found that 76.7% of the households in the United States have access to the Internet from some location.<sup>3</sup> The Census data further shows that of the 139.1 million private sector workers approximately 111.7 million have access to the Internet from some location. Of the remaining 27.4 million workers who do not have personal access, approximately 10.6 million reside in a household where someone else has Internet access.

Over the past few years, the Department has engaged in various rulemakings and other initiatives involving disclosures to participants and beneficiaries. Examples include the qualified default investment alternative regulation (29 CFR 2550.404c-5), the participant-level fee disclosure regulation (29 CFR 2550.404a-5, 75 FR 64910), the pension benefit statement initiative (FAB 2006-03), the annual funding notice regulation (29 CFR 2520.101-4; FAB 2009-01; proposed § 2520.101-5, 75 FR 70625), and the target date fund initiative (75 FR 73987).

<sup>3</sup> The Census information may be found at <http://www.census.gov/population/www/socdemo/computer.html>.

<sup>1</sup> 42 FR 37186.

<sup>2</sup> 67 FR 17264.

Increasingly, commenters on these initiatives request that the Department take recognition of changes in technology, as other federal regulatory agencies have, and revisit, update, and modernize the electronic disclosure safe harbor to promote electronic disclosure of employee benefit plan information to the greatest extent possible. They argue that such forms of disclosure would be more efficient, less burdensome, and less costly than paper for plans and, therefore, participants. Not everyone, however, agrees that electronic disclosure is appropriate for all participants and beneficiaries or for all disclosures. Some caution against broadening the electronic disclosure safe harbor, arguing that some workers do not have reasonable Internet access, or that they simply prefer paper over electronically disclosed materials even when they have access.

In light of these differing views and the significance of the issues surrounding the use of electronic disclosure, the Department has decided to explore whether and how to expand or modify the current standards under ERISA applicable to the electronic distribution of required plan disclosures. To that end, the Department, through this RFI, is soliciting the views of the public on this important issue. Set forth below are a list of questions.

In considering the questions set forth in this RFI, commenters are encouraged to take into account the following information:

#### *Electronic Disclosure Under ERISA*

As noted above, on April 9, 2002, the Department established its electronic disclosure safe harbor. See § 2520.104b-1(c). As a safe harbor, § 2520.104b-1(c) is not the exclusive means for using electronic media to satisfy the requirements of § 2520.104b-1(b)(1). Plan administrators may find that other procedures will allow them to meet the general delivery requirements of § 2520.104b-1. However, following the conditions of the safe harbor provides assurance that the general delivery requirements under § 2520.104b-1(b)(1) have been satisfied.

The safe harbor is available only if: (1) The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt of transmitted information and protects the confidentiality of personal information relating to the individual's accounts and benefits; (2) the electronically delivered documents are prepared and furnished in a manner that is consistent with the

style, format and content requirements applicable to the particular document; (3) notice is provided to each participant, beneficiary or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted and of the right to request and obtain a paper version of such document; and (4) upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents. § 2520.104b-1(c)(1)(i) through (iv).

The safe harbor applies only for two categories of individual recipients. The first category consists of 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 § 2520.104b-1(c)(2)(i). The second category consists of participants, beneficiaries and other persons who are entitled to documents under title I of ERISA, but who do not fit into the first category. For this category, the safe harbor assumes the utilization of electronic information systems beyond the control of the plan or plan sponsor. The current safe harbor, therefore, provides that the second category of individuals must affirmatively consent to receive documents electronically. See § 2520.104b-1(c)(2)(ii)(A). The safe harbor relief is not available with respect to these individuals in the absence of such consent.

In general, the affirmative consent condition requires plans to ensure that an individual has affirmatively consented, in electronic or non-electronic form, to receiving documents through electronic media and has not withdrawn such consent. Alternatively, in the case of documents to be furnished through the Internet or through other electronic communication networks, the individual must have affirmatively consented or confirmed consent electronically, in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent, and must have provided an address for the receipt of electronically furnished documents. In addition, prior to consenting, the individual must be provided, in electronic or non-electronic

form, a clear and conspicuous statement indicating: (1) The types of documents to which the consent would apply; (2) that consent can be withdrawn at any time without charge; (3) the procedures for withdrawing consent and for updating the participant's, beneficiary's or other individual's address for receipt of electronically furnished documents or other information; (4) the right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and (5) any hardware and software requirements for accessing and retaining the documents. Further, following consent, if a change in such hardware or software requirements creates a material risk that the individual will be unable to access or retain electronically furnished documents, the individual: (1) Is provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents; (2) is given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and (3) again consents in accordance with the requirements above. See § 2520.104b-1(c)(2)(ii).

#### *Electronic Disclosure Under the Internal Revenue Code*

The Department of Treasury and the Internal Revenue Service (IRS) have issued guidance relating to the use of electronic media of notices or elections with respect to a retirement plan. In 2000, final regulations were issued relating to the use of electronic media for the delivery of certain participant notices and consents that are required to be provided in connection with distributions from retirement plans.

In 2003, the Department of Treasury and IRS published final regulations under section 4980F under the Internal Revenue Code (Code) that also apply for purposes of section 204(h) of ERISA (2003 section 4980F regulations).<sup>4</sup> Under Q&A-13(c) of § 54.4980F-1, notice required under section 4980F of the Code or section 204(h) of ERISA (section 204(h) notice) may be provided electronically if certain requirements are satisfied. The section 204(h) notice must actually be received by the applicable individual or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing the section 204(h) notice results in actual receipt of the notice. In addition, the

<sup>4</sup> 68 FR 17277.

plan administrator must provide the applicable individual with a clear and conspicuous statement that the individual has a right to receive a paper version of the section 204(h) notice without the imposition of fees and, if the individual requests a paper copy of the section 204(h) notice, the paper copy must be provided without charge. The 2003 section 4980F regulations also provide a safe harbor method at 26 CFR 54.4980F-1, Q&A-13(c)(3), for delivering a section 204(h) notice electronically, which is substantially the same as the consumer consent rules of E-SIGN (described below under the heading “*Electronic Signatures in Global and National Commerce Act*”).<sup>5</sup>

On October 20, 2006, the Department of Treasury and IRS published final regulations under the Code setting forth standards for electronic systems that make use of an electronic medium to provide a notice to a recipient, or to make a participant election or consent, generally with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan.<sup>6</sup> These regulations provide two methods by which such plans or arrangements are permitted to provide an applicable notice<sup>7</sup> to a recipient through the use of an electronic medium. Under the first method, an applicable notice is permitted to be provided electronically after the recipient consents to the electronic delivery of the notice (consumer consent method). The consumer consent method reflects the consumer consent requirements in E-SIGN. The second method does not require consent by the recipient, but when the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing at no charge (alternative method). In addition, any recipient of the notice must be

<sup>5</sup> The 2003 section 4980F regulations were issued under amendments to the Code and ERISA contained in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), which was enacted after enactment of ESIGN. The EGTRRA amendments, at section 4980F(g) of the Code and section 204(h)(7) of ERISA, authorize regulations allowing section 204(h) notice to be provided using new technologies.

<sup>6</sup> 71 FR 61877.

<sup>7</sup> Section 1.401(a)-21(e) defines an applicable notice as any notice, report, statement, or other document required to be provided to a recipient under a retirement plan, employee benefit arrangement, or individual retirement plan. Section 1.401(a)-21(a)(3) provides that § 1.401(a)-21 does not apply to any notice, election, consent, disclosure, or other obligation over which the Department of Labor or the Pension Benefit Guaranty Corporation (PBGC) has interpretive authority under Title I or IV of ERISA or to any provision of the Internal Revenue Code over which the Labor Department or PBGC has interpretive authority.

“effectively able” to access the electronic medium used to provide the notice. See generally 26 CFR 1.401(a)-21(b) and (c). These regulations also modified the 2003 section 4980F regulations to require that a section 204(h) notice comply with the regulations under § 1.401(a)-21. The current section 4980F regulations retain the requirement in the 2003 section 4980F regulations that the section 204(h) notice actually be received by the applicable individual or that the plan administrator take appropriate and necessary measures reasonably calculated to ensure that the method for providing the section 204(h) notice results in actual receipt. See 26 CFR 54.4980F-1, Q&A-13(c)(1).

*Electronic Disclosure of Proxy Materials and Prospectuses Under Securities Law*

In 2007, the Securities and Exchange Commission (SEC) amended its rules under the Securities Exchange Act of 1934 to provide a method to furnish proxy materials by posting them on an Internet Web site and providing shareholders with notice of the availability of the proxy materials.<sup>8</sup> In 2009, the SEC adopted amendments permitting a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act of 1933 by sending or giving investors a summary prospectus and providing the statutory prospectus on an Internet Web site.<sup>9</sup> Under both rules, copies of the documents must be sent at no charge to shareholders requesting such copies. See 17 CFR 240.14a-16; 17 CFR 230.498. The SEC has also previously provided interpretive guidance on the use of electronic media to deliver information under the federal securities law.<sup>10</sup>

*2006 ERISA Advisory Council Working Group Report on Prudent Investment Process*

On August 9, 2006, and September 21, 2006, a working group of the ERISA Advisory Council held a hearing on numerous issues pertaining to the management of plan assets, including the use of electronic media for disclosures required by regulations under section 404(c) of ERISA. Thirteen witnesses testified at this hearing. In response to this hearing, the working group issued the “Report of the Working Group on Prudent Investment Process.” With respect to the Department’s electronic disclosure safe harbor as

<sup>8</sup> 72 FR 4148 and 72 FR 42221.

<sup>9</sup> 74 FR 4546.

<sup>10</sup> 60 FR 53458, 61 FR 24644, 65 FR 25843, and 73 FR 45862.

applied to defined contribution pension plans, the Report states:

The Working Group would like to recommend to the Department of Labor that the Department should reconsider its rules for electronic transfer of notices and the delivery of ‘sufficient information.’ The Working Group heard extensive testimony regarding the growth of the internet and its use by plan participants. Access to and use of the internet has grown significantly since the DOL first considered electronic delivery. The Working Group recommends that the electronic delivery standard should be relaxed from the ‘integral part of the employee’s duties’ standard currently employed to a ‘reasonable access’ standard.

This Report can be accessed at [http://www.dol.gov/ebsa/publications/AC\\_1106A\\_report.html](http://www.dol.gov/ebsa/publications/AC_1106A_report.html).

*2007 ERISA Advisory Council Working Group Report on Participant Benefit Statements*

On July 12, 2007 and September 18, 2007, a working group of the ERISA Advisory Council held a public hearing on the pension benefit statement requirements under section 105 of ERISA, as amended by section 508 of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 949-952. Thirteen witnesses testified at this hearing. In response to this hearing, the working group issued the “Report of the Working Group on Participant Benefit Statements.” In this Report, the Working Group recommended that “the Department of Labor should update its regulations regarding electronic communication to a ‘reasonable access’ standard as in the Department of Treasury safe harbor regulation in recognition of the continued advancement in Web-based communication and the increase in its use by participants.” In support of this recommendation, the Report explains:

Following an animated discussion, the Working Group came to a consensus that although the American workforce is becoming more computer literate, it is not yet appropriate to make electronic delivery of participant statements the norm. In addition to access and ability to use issues, many participants who are computer literate are better served with paper when managing their plan asset. However, the Treasury rules regarding communication provide incentive for plan sponsors to migrate to electronic delivery. In any event, the new regulations should reexamine the use of electronic communication for benefit statements to recognize the changes in technology and the participant group’s use of it.

This Report can be accessed at <http://www.dol.gov/ebsa/publications/AC-1107c.html>.

*2009 ERISA Advisory Council Report on Promoting Retirement Literacy and Security by Streamlining Disclosures*

On July 23, 2009 and September 15, 2009, the ERISA Advisory Council, in furtherance of its focus on the issue of promoting retirement literacy and security by streamlining disclosures to participants and beneficiaries, held a public hearing to study the efficacy of ERISA's reporting and disclosure schemes, as well as problems and costs related to such disclosures. Approximately 18 witnesses testified at this hearing. Upon conclusion of the hearing, the full ERISA Advisory Council reached consensus and issued a report entitled "Promoting Retirement Literacy and Security by Streamlining Disclosures." In this Report, the Council recommended that:

[T]he Department of Labor permits plan administrators to rely on the IRS Regulations in order to comply with ERISA's disclosure requirements. The Council believes that the IRS Regulations will adequately protect the rights of those participants who are actively employed because it will generally be very simple for administrators to determine whether active employees have reasonable access to the electronic medium used to furnish the disclosure. The Council believes that administrators will not furnish those individuals who are not working actively—such as retirees or beneficiaries—with electronic disclosure unless the administrator has a working electronic mail address for such individuals. In that way, participants who are not actively employed and plan beneficiaries will be protected.

In support of this recommendation, the Report explains:

Electronic communications have enormously improved the retirement system for both plans covered by ERISA and their participants. They have improved participant education, retirement planning, and plan participation. Electronic communications have allowed plans to furnish more information to participants and beneficiaries for less cost. They have simplified plan administration and improved plan recordkeeping. All of these benefits of electronic communication have improved retirement security, which was and remains an underlying goal of ERISA. The Council believes that this goal of retirement security would be better served if the DOL would expand the array of electronic media that plan administrators may use to satisfy ERISA's disclosure requirements.

The Report can be reviewed at <http://www.dol.gov/ebsa/publications/2009ACreport2.html>.

*Electronic Signatures in Global and National Commerce Act*

The Electronic Signatures in Global and National Commerce Act (E-SIGN), 17 U.S.C. 7001–7021, generally provides that electronic records and signatures

have the same legal effect as their paper counterparts.<sup>11</sup> When a statute, regulation, or other rule of law requires that information relating to a transaction be provided or made available to a consumer<sup>12</sup> in writing, section 101(c) of E-SIGN requires that the consumer must first affirmatively consent to receive the information electronically in a manner that reasonably demonstrates the consumer's ability to access the information in electronic form. 17 U.S.C. 7001(c). However, section 104(d)(1) of E-SIGN, 17 U.S.C. 7004(d)(1), authorizes a Federal regulatory agency to exempt, without condition, a specified category or type of record from the consumer consent requirements in section 101(c). The agency may issue an exemption only if it is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

**B. Request for Information**

The purpose of this RFI is to solicit views, suggestions and comments from plan participants and beneficiaries, employers and other plan sponsors, plan administrators, plan service providers, health insurance issuers, and members of the financial community, as well as the general public on whether, and possibly how, to expand or modify the Department's current electronic disclosure safe harbor. To facilitate consideration of the issues, the Department has set forth below a number of questions. Respondents need not answer every question, but should identify, by its number, each question addressed. Interested persons are also encouraged to address any other matters they believe germane to the general topic of the RFI.

*Access and Usage Questions*

1. What percentage of people in this country has access to the Internet at work or home? Of this percentage, what percentage has access at work versus at home? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)?

2. What percentage of participants and beneficiaries covered by an ERISA plan has access to the Internet at work

or home? Of this percentage, what percentage has access at work, at home, or both? Does access vary by demographic groups (e.g., age, socioeconomic, race, national origin, etc.)? What percentage of participants and beneficiaries uses the Internet to access private information such as personal bank accounts?

3. What percentage of pension benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of plans (e.g., single-employer plans versus multiemployer plans, defined benefit pension plans versus defined contribution pension plans, etc.), types of participants and beneficiaries (e.g., active, retired, deferred vested participants) and types of disclosures (e.g., all required title I disclosures versus select disclosures).

4. What percentage of employee welfare benefit plans covered by ERISA currently furnish some or all disclosures required by ERISA electronically to some or all participants and beneficiaries covered under these plans? Please be specific regarding types of welfare plans (e.g., health, disability, etc.), types of participants and beneficiaries (e.g., active employees, retirees, COBRA Qualified Beneficiaries, etc.) and types of disclosures (e.g., all required title I disclosures versus select disclosures).

5. What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?

6. What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?

7. Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or willingness on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?

8. Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?

<sup>11</sup> The rules of section 101 of E-SIGN do not apply to certain consumer notices. These include consumer notices that are necessary for the protection of a consumer's health, safety, or shelter (e.g., cancellation of health benefits or life insurance and foreclosure on a credit agreement secured by an individual's primary residence). See section 103(b)(2)(B) and (C) of E-SIGN.

<sup>12</sup> Section 106(1) of E-SIGN generally defines a consumer as an individual who obtains products or services used primarily for personal, family, or household purposes.

*General Questions*

9. Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?

10. If the safe harbor should be revised, how should it be revised? Please be specific.

11. Should a revised safe harbor have different rules or conditions for different types of employee benefit plans (e.g., pension versus welfare plans)? If so, why and what differences?

12. Should a revised safe harbor have different rules or conditions for different types of disclosures (e.g., annual funding notice, quarterly benefit statement, COBRA election notice, etc.)? If so, why and what differences?

13. Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?

14. To what extent should the Department encourage or require pension and welfare benefit plans to furnish some or all disclosures required under title I of ERISA through a continuous access Web site(s)? In responding to this question, please address whether and how frequently participants and beneficiaries should be notified of their ability to access benefit information at the Web site(s) and the most appropriate means to provide such notice. For example, should participants and beneficiaries receive a monthly notification of their ability to access benefit information or should they receive a notification only when an ERISA-required disclosure is added to the Web site? How should such notifications be furnished (e.g., paper, e-mail, etc.)? Please also address what steps would be needed to ensure that participants and beneficiaries understand how to request and receive paper copies of the disclosures provided on the Web site(s).

15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt into or out of electronic disclosures? See Question 26.

16. Should a revised safe harbor contain conditions to ensure that individuals with disabilities are able to access disclosures made through electronic media, such as via continuous access Web sites? If so, please describe the conditions that would be needed. Also, please identify whether such conditions would impose any undue burdens on employee benefit plans, including the costs associated

with meeting any such conditions. What burden and difficulty would be placed on employees with disabilities if the Web sites and/or other electronic communication were not accessible?

*Technical Questions*

17. If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?

18. The Department's current regulation has provisions pertaining to hardware and software requirements for accessing and retaining electronically furnished information. In light of changes in technology, are these provisions adequate to ensure that participants and beneficiaries, especially former employees with rights to benefits under the plan, have compatible hardware and software for receiving the documents distributed to their non-work e-mail accounts?

19. Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.

20. In general, the E-SIGN Act permits electronic disclosure of health plan materials but does not apply to cancellation or termination of health insurance or benefits electronically. Are there special considerations the Department should take into account for group health plan disclosures (including termination of coverage and privacy issues)?

21. Many group health plan disclosures are time-sensitive (e.g., COBRA election notice, HIPAA certificate of creditable coverage, special enrollment notice for dependents previously denied coverage under the ACA, denials in the case of urgent care claims and appeals). Are there special considerations the Department should take into account to ensure actual receipt of time-sensitive group health plan disclosures?

22. Do spam filters and similar measures used by non-workplace (personal) e-mail accounts, pose particular problems that should be taken into consideration?

23. What is the current practice for confirming that a participant received a

time-sensitive notice that requires a participant response?

24. What are current practices for ensuring that the e-mail address on file for the participant is the most current e-mail address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?

*Comments Regarding Economic Analysis, Paperwork Reduction Act, and Regulatory Flexibility Act*

Executive Order 12866 (EO 12866) requires an assessment of the anticipated costs and benefits to the government and the public of a significant rulemaking action, and of the alternatives considered, using the guidance provided by the Office of Management and Budget. Under EO 12866, a determination must be made whether implementation of this rule will be economically significant. A rule that has an annual effect on the economy of \$100 million or more is considered economically significant.

In addition, the Regulatory Flexibility Act may require the preparation of an analysis of the impact on small entities of proposed rules and regulatory alternatives. A regulatory flexibility analysis must generally include, among other things, an estimate of the number of small entities subject to the regulations (for this purpose, plans, employers, and issuers and, in some contexts small governmental entities), the expense of the reporting, recordkeeping, and other compliance requirements (including the expense of using professional expertise), and a description of any significant regulatory alternatives considered that would accomplish the stated objectives of the statute and minimize the impact on small entities. For this purpose, the Agency considers a small entity to be an employee benefit plan with fewer than 100 participants.

The Paperwork Reduction Act requires an estimate of how many "respondents" will be required to comply with any "collection of information" requirements contained in regulations and how much time and cost will be incurred as a result. A collection of information includes recordkeeping, reporting to governmental agencies, and third-party disclosures.

The Department is requesting comments that may contribute to the analyses that will be performed under these requirements, both generally and

with respect to the following specific areas:

25. What costs and benefits are associated with expanding electronic distribution of required plan disclosures? Do costs and benefits vary across different types of participants, sponsors, plans, or disclosures? Are the printing costs being transferred from plans to plan participants and beneficiaries when information is furnished electronically?

26. If electronic disclosure were the default method for distributing required plan disclosures, and assuming "opting out" were an option, what percentage of participants would likely "opt-out" of electronic disclosure in order to receive paper disclosures? Should participants be informed of increased plan costs, if any, attendant to furnishing paper disclosures at the time they are afforded the option to opt out or into an electronic disclosure regime?

27. Do participants prefer receiving certain plan documents on paper rather than electronically (e.g., summary plan descriptions versus quarterly benefit statements), and what reasons are given for such preference? Would this preference change if participants were aware of the additional cost associated with paper disclosure?

28. What impact would expanding electronic disclosure have on small plans? Are there unique costs or benefits for small plans? What special considerations, if any, are required for small plans?

29. Is it more efficient to send an e-mail with the disclosure attached (e.g., as a PDF file) versus a link to a Web site? Which means of furnishing is more secure? Which means of furnishing would increase the likelihood that a worker will receive, read, retain and act upon the disclosure?

30. Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?

Signed at Washington, DC, this 1st day of April, 2011.

**Phyllis C. Borzi,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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**BILLING CODE 4510-29-P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket No. USCG-2011-0197]

RIN 1625-AA00

#### Safety Zone; Commencement Bay, Tacoma, WA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to amend 33 CFR 165.1305 to expand the established safety zone during the annual Tacoma Freedom Air Show on the fourth of July. The proposed safety zone expansion would establish a larger clear area for low flying aircraft during this event. This rule is necessary to help ensure the safety of the maritime public and event participants during this annual event and will do so by prohibiting any person or vessel from entering or remaining within the safety zone during this event.

**DATES:** Comments and related material must be received by the Coast Guard on or before May 9, 2011. Requests for public meetings must be received by the Coast Guard on or before May 9, 2011.

**ADDRESSES:** You may submit comments identified by docket number USCG-2011-0197 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this proposed rule, call or e-mail Ensign Anthony P. LaBoy, USCG Sector Puget Sound Waterways Management Division, Coast Guard; telephone 206-217-6323, e-mail [SectorPugetSoundWWM@uscg.mil](mailto:SectorPugetSoundWWM@uscg.mil). If you have questions on viewing or

submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### SUPPLEMENTARY INFORMATION:

#### Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.

#### Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG-2011-0197), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via <http://www.regulations.gov>) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via <http://www.regulations.gov>, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG-2011-0197" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.