

DEPARTMENT OF LABOR**Pension and Welfare Benefits Administration****29 CFR Part 2520**

RIN 1210-AA71

Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans**AGENCY:** Pension and Welfare Benefits Administration, Labor.**ACTION:** Notice of proposed rulemaking and Request for information.

SUMMARY: This document contains proposed rules under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), concerning the disclosure of certain employee benefit plan information through electronic media and standards for the maintenance and retention of employee benefit plan records in electronic form. The proposal would establish a safe harbor pursuant to which all pension and welfare benefit plans covered by Title I of ERISA may satisfy their obligations to furnish summary plan descriptions, summaries of material modifications, updated summary plan descriptions, and summary annual reports using electronic media. With respect to recordkeeping, the proposal would provide standards concerning the use of electronic media, including electronic storage and automatic data processing systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. This document also sets forth the Department's view that, in the absence of final regulations or other guidance, good faith compliance with the standards set forth in these proposed regulations will, with respect to the disclosure and recordkeeping requirements specifically addressed in the proposed regulations, constitute compliance with a reasonable interpretation of 29 CFR 2520.104b-1 and ERISA sections 107 and 209. In addition, the Department is inviting public comments on a number of issues relating to the use of new technologies in the administration of employee benefit plans that are not specifically addressed by the proposed rules. The proposed rules, if adopted, would affect employee pension and welfare benefit plans, including group health plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: Written comments on these proposed rules must be received by the

Department of Labor on or before March 29, 1999.

ADDRESSES: Interested persons are invited to submit written comments (preferably three copies) concerning the proposed rules and request for information to: Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5669, Washington, DC 20210. Attention: Proposed New Technology Rules. Written comments may also be sent by Internet to the following address: "etechreg@pwba.dol.gov" (without the quotation marks). All submissions will be open to public inspection and copying in the Public Disclosure Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5638, Washington, DC, from 8:00 a.m. to 4:30 p.m., E.S.T.

FOR FURTHER INFORMATION CONTACT: Katherine Lewis, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC, 20210, (202) 219-8521 (not a toll-free number).

SUPPLEMENTARY INFORMATION:**A. Background**

Section 1510(a) of the Taxpayer Relief Act of 1997 (TRA 97)¹ directs the Secretary of Labor to issue guidance designed to interpret the notice, election, consent, disclosure, time requirements, and related recordkeeping requirements of ERISA as applied to the use of new technologies by sponsors and administrators of retirement plans. Section 1510 further requires that the guidance maintain the protection of the rights of plan participants and beneficiaries. Any regulations applicable to this guidance may not be effective until the first plan year beginning at least six months after the issuance of final regulations.

The proposed disclosure rule would amend § 2520.104b-1(c) to establish a safe harbor pursuant to which all pension and welfare benefit plans covered by Title I of ERISA may satisfy the obligations described in ERISA section 104(b)(1) and 104(b)(3) to furnish summary plan descriptions (SPDs), summaries of material modifications (SMMs), updated SPDs, and summary annual reports (SARs) using electronic media. The proposed recordkeeping rule would provide standards concerning the use of electronic media, including electronic

storage and automatic data processing (ADP) systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. In addition, the Department is inviting public comments on a number of issues relating to the use of new technologies in the administration of employee benefit plans that are not specifically addressed by the proposed rules.

The Department's regulation at 29 CFR 2520.104b-1 governs the delivery of information required to be furnished to participants and beneficiaries under Part I of Title I of ERISA. In April 1997, the Department, in accordance with a separate directive under section 101(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA),² issued an interim disclosure rule, § 2520.104b-1(c), that provides a "safe harbor" for using electronic media to furnish SPDs, SMMs, and updated SPDs to participants of group health plans.³ The Department invited and received public comments on the interim rule. However, the Department is deferring changes to the interim rule pending consideration of public comments on the broader-based rule proposed herein. The Department's objective is to avoid piecemeal rulemaking in this area by having the interim disclosure rule for group health plans and this proposal converge so that a single final rule is issued following consideration of public comments on the full range of issues relevant to the use by all welfare and pension plans covered by Title I of ERISA of electronic media as a method of furnishing documents under § 2520.104b-1. In this regard, comments previously submitted to the Department in connection with the interim rule need not be resubmitted. A discussion of the proposed rules contained in this document is set forth below.

B. The Proposed Regulations*1. Expanding the HIPAA Interim Disclosure Rule to All Welfare and Pension Plans Covered Under Title I of ERISA*

The proposed disclosure rule would amend § 2520.104b-1(c) to establish a safe harbor pursuant to which all pension and welfare benefit plans covered by Title I of ERISA may satisfy certain disclosure obligations described in ERISA section 104(b)(1) and 104(b)(3) using electronic media. This would expand the safe harbor set forth in the interim disclosure rule for group health plans to all plans covered under Title I of ERISA and expand the disclosure

²Pub. L. 104-191, enacted August 21, 1996.³See 62 FR 16979 (April 8, 1997).¹Pub. L. 105-34, enacted August 5, 1997.

documents covered by the safe harbor to include SARs. In the Department's view, a method of electronic delivery appropriate for the furnishing of SPDs, SMMs, and updated SPDs by group health plans would also be appropriate for furnishing those documents by other types of plans, and for furnishing SARs, given the similar nature of the information provided and similar furnishing requirements.⁴ These actions are consistent with comments received by the Department in connection with the interim rule.

This proposal adopts the approach of the interim rule, which describes safe harbor conditions under which electronic disclosures will be deemed to satisfy the disclosure requirements under 29 CFR 2520.104b-1. As with the interim rule, the proposed amendment is intended to establish a safe harbor on which plan administrators may rely in delivering plan disclosures through electronic media, but is not intended to represent the exclusive means by which the requirements of § 2520.104b-1 may be satisfied using electronic media.

Proposed paragraph (c)(1) of § 2520.104b-1 sets forth the same conditions currently in the interim rule for group health plans. In this regard, the proposal provides, at paragraph (c)(1)(i)-(ii), that: (i) the administrator takes appropriate and necessary measures to ensure that the system for furnishing documents results in actual receipt by participants of transmitted information, such as through the use of a return-receipt electronic mail feature or periodic reviews or surveys by the plan administrator to confirm the integrity of the delivery system; and (ii) electronically delivered documents are prepared and furnished in a manner consistent with the style, format and content requirements applicable to the disclosure (see 29 CFR 2520.102-2 through 2520.102-5, and 29 CFR 2520.104b-10). Proposed paragraph (c)(1)(iii) requires notification to each

participant, through electronic means or in writing, apprising the participant of the disclosure documents furnished electronically (e.g., SPDs, summaries of material changes to the plan, changes to information included in the SPD, and SARs), the significance of the documents (e.g., the document contains summary descriptions of changes in the benefits described in your SPD), and the participant's right to request and receive, free of charge, a paper copy of each such document from the plan administrator. The notification requirement is designed to ensure that participants who, for example, receive a disclosure document as an attachment to an electronically transmitted message or in the form of a message and hyperlink to a plan internet site will be put on notice that the communication contains important plan information. As the Department explained in issuing the interim rule, the safe harbor criteria are generally intended to ensure that a system of electronic communication utilized by a plan administrator for distribution of disclosure information results in the actual delivery of such information to participants, and that the information delivered is equivalent in both substance and form to the disclosure information the participants would have received had they been furnished the information in paper form.

As with the interim rule, it is the view of the Department that participants have a general right to receive required plan disclosures in paper form from the plan administrator. Accordingly, the proposal would require that where a plan administrator uses electronic media as the method for delivering required plan disclosures, participants must be afforded the opportunity to obtain the disclosures from the plan administrator in paper form, free of charge. The obligation to furnish paper copies of documents furnished through electronic media is set forth in proposed paragraph (c)(1)(iv). The Department specifically invites public comment on the relative costs and benefits of this requirement in light of the separate safe harbor requirement, discussed below, that participants must have the opportunity at their worksite to convert furnished documents from electronic form to paper form, free of charge.

Proposed paragraph (c)(2), like the interim rule, describes the participants with respect to whom the electronic delivery of plan disclosures will be deemed to be an acceptable method of delivery for fulfilling the disclosure obligation under § 2520.104b-1(b)(1). Such participants must have the ability to effectively access at their worksite

documents furnished in electronic form, and the opportunity at their worksite to convert furnished documents from electronic form to paper form, free of charge.

Comments submitted on the interim disclosure rule for group health plans requested clarification of what constitutes a "worksite" for purposes of the safe harbor. It is the view of the Department that, for purposes of the safe harbor, a worksite would include any location where an employee is reasonably expected to perform his or her duties and where access to the employer's electronic information system is an integral part of those duties. In this regard, the Department believes that the actual location of the worksite (e.g., an employee's home, a client's office, or an employee's hotel room) is of less importance than the employee being reasonably expected to access the employer's information system in the course of performing his or her duties and, therefore, more likely to receive timely communication of plan information. Comments were also received requesting clarification of the safe harbor provisions requiring that participants have the opportunity to convert electronic documents to paper copies at their worksite location. The Department believes that this provision of the safe harbor may be satisfied by ensuring that participants have access to a printer at their principal worksite location. For example, if an employee works at home four days a week and at his or her employer's office one day a week, it is the view of the Department that the employee's principal worksite location would be his or her home. On the other hand, if an employee travels to the offices of various clients four days a week and is in the employer's office one day a week, it is the view of the Department that the employee's principal worksite location would be the employer's office.

2. *Electronic Recordkeeping*

Section 107 of ERISA provides, in relevant part, that "[e]very person subject to a requirement to file any report or to certify any information therefor under this title or who would be subject to such a requirement but for an exemption or simplified reporting requirement * * * shall maintain records on the matters of which disclosure is required which will provide in sufficient detail the necessary basic information and data from which the documents thus required may be verified, explained, or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets,

⁴To the extent that other disclosure obligations under Title I of ERISA may be satisfied through the furnishing of an SPD, the furnishing of the SPD to a participant by electronic means in accordance with the proposed rule will satisfy such other disclosure requirements with respect to the participant the same as if the SPD were provided in paper form. The safe harbor provisions, however, are limited to communications to participants at their worksites. The safe harbor would not cover electronic communication of an SPD to a participant at his or her worksite as a way of satisfying the COBRA notice obligation under section 606(a)(1) to the covered employee's spouse even if the SPD contained the required COBRA information and it was furnished electronically to the participant at the time he or she commenced coverage under the plan. Elsewhere in this document the Department is specifically requesting comments on the use of electronic media to satisfy disclosure obligations with respect to beneficiaries, including spouses.

receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than six years after the filing date of the documents based upon the information which they contain * * * Persons required to retain records for purposes of section 107 include any person who is or may be required under Title I of ERISA to file any report (e.g., the plan administrator) or to certify any information for such reports (e.g., insurance carriers or other organizations which provide some or all of the benefits under the plan, banks or similar institutions which hold some or all of the assets of the plan, and plan sponsors). In addition to the record retention requirements of section 107, ERISA section 209 generally requires records to be maintained by employers with respect to each employee sufficient to determine the benefits due or which may become due to the employee under a pension benefit plan and authorizes the Secretary to prescribe regulations governing such records. In the case of a pension plan adopted by more than one employer, section 209(a)(2) requires employers to furnish to the plan administrator the information necessary for the administrator to maintain the records and requires the administrator to maintain the records.

No specific provision of Title I of ERISA or any regulation issued thereunder sets forth rules or standards regarding the use of electronic media as the form in which records are retained. The Department is proposing to adopt a new regulation, 29 CFR 2520.107-1, to provide standards concerning the use of electronic media, including electronic storage and ADP systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. The proposal, however, is not intended to define or address the types of records required to be maintained under sections 107 and 209, nor the period of time for which records must be retained under those sections of the Act.

In general, the proposed regulation provides that electronic media may be used for purposes of complying with the records maintenance and/or retention requirements of sections 107 and 209, provided: (1) The recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form; (2) the electronic records are maintained in reasonable order, in a safe and accessible place, and in such manner as they may be readily inspected or examined (for example, the recordkeeping system should be capable of indexing, retaining, preserving,

retrieving and reproducing the electronic records); (3) the electronic records can be readily converted into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA, and (4) adequate records management practices are established and implemented (for example, following procedures for labeling of electronically maintained or retained records, providing a secure storage environment, creating back-up electronic copies and selecting an off-site storage location, observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records; and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).⁵ The proposal also provides that the electronic recordkeeping system may not be subject to any agreement or limitation that would, directly or indirectly, compromise a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA. In addition, the proposed regulation provides guidance regarding when original records may be discarded after they have been transferred to electronic media.

The Department wishes to emphasize that the duty to maintain records in accordance with Title I of ERISA cannot be avoided by contract, delegation or otherwise. Use of a third party to provide an electronic recordkeeping system does not relieve the person responsible for the maintenance and retention of records required under Title I of ERISA of the responsibilities described therein. For example, if the administrator of a plan arranges with a service provider to perform functions with respect to the plan and, pursuant to the arrangement, the service provider

⁵The proposed standards are not inconsistent with guidance issued by the Internal Revenue Service under section 6001 of the Internal Revenue Code of 1986 regarding the maintenance of books and records on an electronic storage system or within an ADP system. See Rev. Proc. 97-22, 1997-13 I.R.B. 9, and Rev. Proc. 98-25, 1998-11 I.R.B. 7. The Department also notes that the proposed regulation does not specifically address the use of microfilm and microfiche for storing employee benefit plan records. The Department previously addressed this issue in an information letter to Gregg M. Goodman from Robert J. Doyle (August 23, 1983). The letter stated that, in the absence of regulations providing otherwise, the retention of microfilm, microfiche or similar reproduction of records, in lieu of original records, would not violate the provisions of sections 107 or 209 provided certain conditions were met.

creates, maintains, retains or prepares the plan's records, and keeps physical custody of those records, the statutory requirements relating to such records remain with the administrator, and the administrator must make such agreements and arrangements with the service provider as are necessary to ensure that the records are properly maintained and retained.⁶

Furthermore, it is the Department's view that persons subject to recordkeeping obligations under section 107 and section 209 of ERISA would, pursuant to Department's investigative authority under section 504 of ERISA, be required to provide the Department, upon request, with the necessary equipment and resources (including software, hardware and personnel) as would be needed for inspection, examination and conversion of electronic records into legible and readable paper copy or other usable form acceptable to the Department. Similarly, such persons would be required to have the capability of converting electronic records into usable form, including, at a minimum, paper copy, as may be necessary to satisfy reporting, disclosure and other obligations under Title I of ERISA.

C. Effective Date and Good Faith Compliance

In accordance with section 1510 of TRA 97, final regulations issued in connection with this proposal will be effective no earlier than the first plan year beginning at least six months after the issuance of such final regulations. In the absence of final regulations or other guidance on using electronic media for purposes of complying with ERISA's Title I disclosure and recordkeeping requirements, it is the Department's view that good faith compliance with the standards set forth in these proposed regulations will, with respect to the disclosure and recordkeeping requirements specifically addressed in the proposed regulations, constitute compliance with a reasonable interpretation of 29 CFR 2520.104b-1 and ERISA sections 107 and 209. The interim rule pertaining to electronic disclosures continues to be effective for group health plans.

D. Request for Public Comments on Electronic Disclosure and Recordkeeping Issues

In requiring guidance to be issued on the use of new technologies, section 1510(a) of TRA 97 specifically references guidance regarding notice, election, consent, disclosure, time

⁶See Advisory Opinion 84-19A (April 26, 1984).

requirements, and related recordkeeping requirements. Some requirements in these areas occur only under the Internal Revenue Code or relate to sections of Title I of ERISA over which the Internal Revenue Service has regulatory authority pursuant to Reorganization Plan No. 4 of 1978.⁷ With respect to ERISA provisions under the Department's authority, the Department is continuing to evaluate what guidance relating to new technologies is appropriate for pension and welfare benefit plans covered by Title I of ERISA. To aid in these efforts, the Department is interested in obtaining views and comments from the benefit plan community on new technology issues where the Department's guidance may be useful. Specifically, the Department invites information and comments on the following:

1. Should the standards proposed herein regarding use of electronic media be expanded to other plan disclosures (e.g., individual benefit statements, COBRA notices upon a "qualifying event," or notices concerning qualified domestic relations orders or qualified medical child support orders), and if so, to which disclosures or types of disclosures, and under what conditions to safeguard the rights of participants and beneficiaries?

2. Do time-sensitive disclosures, such as notices that activate the running of time periods for participants to take actions, require additional safeguards, and if so, what safeguards?

3. Under what circumstances would it be appropriate for electronic media to be used for communications at places other than worksites? For example, should participants who are on paid leave or retired be permitted to elect that electronic disclosures be made to them at home or elsewhere? Should spouses and other beneficiaries, such as alternate payees under qualified domestic relations orders (QDROs) or qualified child medical support orders (QCMSOs), be permitted to elect that disclosures be made to them by electronic means? Should such elections be required to be renewed periodically? If so, how often and by what means?

4. The Department also requests comments on the use of, and standards for, electronic media (i) for making materials described in ERISA § 104(b)(2) available for examination by plan participants and beneficiaries; and (ii) for responding to requests by participants and beneficiaries for copies

of materials described in ERISA § 104(b)(4) and § 2520.104b-1(b)(2).

5. Is guidance on the use of electronic media needed under any other provisions of Title I of ERISA?

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether the regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. The Department has determined that this regulatory action is not significant within the meaning of the Executive Order.

Paperwork Reduction Act

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Pension and Welfare Benefits Administration is soliciting comments concerning the two information collection requests (ICRs) which would be affected by the proposal with respect to the use of electronic communications and recordkeeping by employee benefit plans. Copies of the ICRs may be

obtained by contacting the office listed in the addressee section of this notice.

The Department has submitted the information collections which would be revised by these proposals to OMB for review in accordance with 44 U.S.C. 3507(d). The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Pension and Welfare Benefits Administration. Although comments may be submitted through March 29, 1999, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration.

Addresses (PRA 95): Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N-5647, Washington, DC 20210. Telephone: (202) 219-4782; Fax: (202) 219-4745. These are not toll-free numbers.

The ICRs affected by this proposal are included in the disclosures required under ERISA to be made to participants and beneficiaries of employee pension and welfare plans, including the Summary Plan Description (SPD) and Summary of Material Modifications (SMM), and the Summary Annual Report (SAR). The SPD and SMM requirements are included in a single ICR for purposes of approval under PRA 95. Although the use of electronic media to satisfy disclosure requirements was not precluded by existing regulations,

⁷ 43 FR 47713, October 17, 1978, effective December 31, 1978.

and was in fact specifically addressed in the interim disclosure rule under HIPAA, the Department has not previously estimated the degree to which electronic media may be used for this purpose.

The burden reductions estimated to result from the use of electronic media for required disclosure purposes are based upon cost and hour burdens for the Department's existing ICRs for the SPD/SMM and SAR as adjusted for the numbers of plans and participants assumed to have access to the necessary electronic resources to send and receive the disclosures, and the number of plan sponsors assumed to choose to make use of their electronic resources to make required disclosures to plan participants.

This analysis does not address the provisions of the proposal which relate to electronic recordkeeping because the proposal is not intended to define or address the types of records required to be maintained, or the period of time for which records must be maintained. Instead, the proposal is intended to describe certain minimum electronic recordkeeping standards which are believed to be consistent with reasonable and prudent business practices.

The Department is not aware of any data source which would directly identify the ERISA plan sponsors who either use or will use electronic media for required disclosures, and the number of participants in those plans with access to electronic media. Therefore, estimates have been developed using information concerning the likely prerequisites for the use of electronic disclosure by ERISA plan administrators.

These prerequisites would likely include the use of electronic media by employers, access to electronic media and electronic mail or Internet/Intranet applications by employees in the course of their work, employer sponsorship of a pension and/or welfare plan, and a determination by the employer or plan administrator that disclosure through electronic media would be either cost effective or beneficial in some other way that would outweigh cost concerns. Another indicator of the likelihood of the use of electronic disclosures might be the employer's existing use of electronic media for general communication with employees.

The Department sought information concerning the use of electronic technologies in the workplace and for communication with employees. Data published in the 1997 Current Population Survey (CPS) indicates that approximately 50 percent of employees

have access to computers at work, and that somewhat smaller percentages of employees use electronic mail or the Internet at work. No information was found to indicate how these rates may differ in relation to firm size. However, it is assumed that access rates are somewhat lower in smaller firms and higher in larger firms.

Two recent surveys offer data concerning companies' use of information technologies. According to a 1997/1998 survey conducted by Watson Wyatt Worldwide⁸, 59 percent of respondent companies currently use electronic technologies for corporate communications, and an additional 34 percent plan to do so in the next year. Twenty-two percent of the survey respondents reported that they currently use electronic technologies for benefits enrollment, retirement and savings plans, with another 53 percent planning to do so in the next year. This survey also indicated that 82 percent of respondents' U.S. employees made use of desktop computers, and 50 percent of the respondents' employees had access to Internet applications. A survey conducted by Sedgwick Noble Lowndes⁹ indicates that 92 percent of respondents either use or anticipate using the Internet, with primary uses being electronic mail and distribution of information. Of the 59 percent of respondents indicating utilization of Intranet technology, 53 percent indicated the primary use would be providing general information to employees.

It is not known how the employee groups considered in these sources compare to the participants of ERISA-covered pension and welfare plans. However, for purposes of this analysis, access to and use of electronic media by participants is assumed to resemble that of employees at large. As a result, it is assumed that 50 percent of all plan participants, and beneficiaries (35 percent in plans with fewer than 100 participants, and 65 percent in plans with 100 or more participants) would potentially have access to electronic disclosures.

This number is further reduced based on the number of employers or plan sponsors considered likely to make use of electronic disclosures, based on assessments of the potential cost effectiveness and business value of electronic disclosure. Electronic communication with employees is

generally perceived to have positive business value due to increased speed, convenience, and ease of use. Costs may in many cases be reduced in direct proportion to the reduction of handling, mailing, and materials costs. Added costs would typically arise from time required to prepare and monitor the receipt of electronic mail messages, time to prepare and make documents available for viewing and downloading at a specific Internet or Intranet site, and investment in system development and equipment.

System development and equipment costs have not been assessed here because it is assumed that participant disclosures will be made by plan administrators in settings in which equipment and electronic communication is already in use. The Watson Wyatt and Sedgwick Noble Lowndes surveys appear to support the conclusion that a primary purpose of system development is general communication with employees.

Electronic distribution of the SAR is estimated to be cost effective in many cases because a large proportion of the total cost and hour burden for the SAR comes from materials, mailing, and handling. Mailing and handling costs of the 235,000,000 SARs estimated to be distributed each year could be significantly reduced, while the added cost to make what is typically a one page document available electronically would be minimal. Given this potential for cost effectiveness, and the rates of use of electronic communication by respondents to the surveys cited, it is assumed that plan administrators for 50 percent of participants with access to electronic media will distribute their SARs electronically. The same assumption is made for electronic disclosure of the SMM, although it is part of a separate ICR.

This burden estimate for the SAR takes into consideration the fact that some participants of those plans will not have appropriate access to electronic media, and some will either prefer paper-based SARs or request paper-based SARs in addition to the electronic version. The estimate also includes the added costs of monitoring the receipt of electronic communications by participants.

The electronic disclosure of the SPD is considered to be somewhat less cost effective, and as a result, somewhat less likely to be implemented by plan administrators. Although improvements in speed of delivery and ease of use could be accomplished by electronic distribution of the SPD and related or incorporated documents, such as group health plan provider directories, these

⁸ "Forging Global Links Through Web Technology, A Survey Report on Human Resources and the Web," Watson Wyatt Worldwide, 1998.

⁹ "Employee Benefits Minisurvey," Sedgwick Noble Lowndes, September, 1998.

are commonly lengthy documents which would be more time-consuming to prepare for electronic access through electronic mail, Internet, or Intranet. These materials are also frequently used away from the worksite by family members other than the employee, which may prevent the electronic version from eliminating the need for a paper-based version. While there may be significant value in making the SPD available electronically, the effort to produce the electronic version may not result in replacement of the paper-based version or significant aggregate cost reductions. Therefore, for purposes of this analysis it is assumed that 10 percent of participants with the potential to receive or gain access to

SPDs electronically will actually receive only an electronic version. The Department believes that use of electronic technology for the distribution of SPDs can be expected to increase significantly in the future as plan administrators seek opportunities to make increasing and more cost effective use of electronic technologies in other areas of plan administration. The Department requests comments concerning plans' current and anticipated use of electronic technology for distribution of the SPD.

The estimates of burden hour and cost savings derived from these assumptions are shown below. It is assumed that these savings will be recognized immediately, due either to the good

faith compliance described in this preamble, or to the existing use of electronic media by plan sponsors. The Department requests comments on each of the assumptions used in this analysis.

Type of Review: Revision of currently approved collections of information.

Agency: Pension and Welfare Benefits Administration.

Titles: Summary Plan Description Requirements under ERISA (SMM/SPD); ERISA Summary Annual Report (SAR) Requirement.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Other information:

| | SMM/SPD | SAR |
|-----------------------------------------------|--------------|---------------|
| OMB Number | 1210-0039 | 1210-0040 |
| Frequency of Response | On occasion | Annually |
| Respondents | 2,027,293 | 817,000 |
| Responses: ¹⁰ . | | |
| 1999 | 52,115,000 | 235,000,000 |
| 2000 | 160,703,000 | 235,000,000 |
| Estimated Burden Hour Reduction: | | |
| 1999 | 68,867 | 560,043 |
| 2000 | 172,735 | |
| Estimated Total Burden Hours: | | |
| 1999 | 746,983 | 1,369,577 |
| 2000 | 1,928,889 | 1,369,577 |
| Estimated Annual Cost Reduction: | | |
| 1999 | \$3,611,969 | 16,350,000 |
| 2000 | \$8,249,376 | |
| Estimated Total Annual Costs: ¹¹ . | | |
| 1999 | \$99,898,165 | \$111,375,000 |
| 2000 | 216,316,365 | 111,375,000 |

¹⁰The number of respondents and the related cost and hour burdens for the SMM/SPD are estimated to increase in 2000 as a result of Interim Final Rules published on September 9, 1998 (63 FR 48371) and a Notice of Proposed Rulemaking published on September 9, 1998 (63 FR 48376), both of which would amend SPD content requirements.

¹¹ Operating and Maintenance Costs.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. If an agency determines that a proposed rule is likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires

that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities, and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions.

This proposed rule would establish a safe harbor pursuant to which all pension and welfare plans covered under Title I of ERISA may satisfy disclosure obligations described in ERISA section 104(b)(1) and 104(b)(3) using electronic media. It would also establish certain minimum standards for the use of electronic media for maintenance and retention of records required by sections 107 and 209 of ERISA. The proposal would not,

however, require any plan or entity sponsoring a plan to use electronic media for either disclosure or recordkeeping purposes. The rule may, therefore, have no economic impact on plans and sponsors who choose not to make use of electronic media for these purposes.

A marginal expense may be incurred by plans or sponsors that already use electronic media for recordkeeping purposes to conform their procedures to the minimum standards described in this proposal. The Department believes this expense would be limited because the standards proposed are not intended to establish detailed methods of compliance, but rather to describe general performance objectives which are consistent with the reasonable and

prudent business practices already required of ERISA plan fiduciaries. Under the proposal, plans and sponsors would retain the flexibility to make any changes necessary, for example, to ensure the integrity and safety of the records, or to improve indexing and ease of retrieval, in the manner which is most cost effective for them.

On this basis, the undersigned certifies that this rule, if promulgated as proposed, will not have a significant impact on a substantial number of small entities regardless of whether one uses the definition of small entity found in regulations issued by the Small Business Administration (13 CFR 121.201) or one defines small entity, on the basis of section 104(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), as an employee benefit plan with fewer than 100 participants. In the Department's view, this proposed rule will not significantly impact entities in any size category. The Department requests comments on this certification, and seeks additional information from small entities regarding what, if any, special problems they might encounter if the proposal were to be adopted, and what changes, if any, could be made to minimize those problems.

Small Business Regulatory Enforcement Fairness Act

The rule being issued here is subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to Congress and the Comptroller General for review. The rule is not a "major rule" as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this proposed rule does not include any federal mandate that may result in expenditures by State, local, or tribal governments, or the private sector, which may impose an annual burden of \$100 million.

Statutory Authority

This regulation is proposed pursuant to the authority in sections 104(b), 107, 209, and 505 of ERISA (Pub. L. 93-406, 88 Stat. 894, 29 U.S.C. 1027, 1059, 1134, 1135) and under Secretary of Labor's Order No. 1-87, 52 FR 13139, April 21, 1987.

List of Subjects in 29 CFR Part 2520

Accounting, Employee benefit plans, Employee Retirement Income Security Act, Pensions, Reporting and Recordkeeping requirements.

For the reasons set forth above, Part 2520 of Title 29 of the Code of Federal Regulations is amended as follows:

PART 2520—[AMENDED]

1. The authority for Part 2520 is revised to read as follows:

Authority: Secs. 101, 102, 103, 104, 105, 107, 109, 110, 111(b)(2), 111(c), 209, and 505, Pub. L. 93-406, 88 Stat. 840-52, 865, 893 and 894 (29 U.S.C. 1021-1025, 1027, 1029-31, 1059, 1134 and 1135); Secretary of Labor's Order No. 27-74, 13-76, 1-87, and Labor Management Services Administration Order 2-6. Sections 2520.102-3, 2520.104b-1 and 2520.104b-3 also are issued under sec. 101(a), (c) and (g)(4) of Pub. L. 104-191, 110 Stat. 1936, 1939, 1951 and 1955 and, sec. 603 of Pub. L. 104-204, 110 Stat. 2935 (29 U.S.C. 1185 and 1191c). Sections 2520.104b-1 and 2520.107 are also issued under the authority of sec. 1510 of Pub. L. 105-37, 111 Stat. 1114.

2. Section 2520.104b-1 is amended by revising paragraph (c) to read as follows:

§ 2520.104b-1 Disclosure

* * * * *

(c) *Disclosure through electronic media.* (1) The administrator of an employee benefit plan furnishing documents described in section 104(b)(1) or 104(b)(3) of the Act through electronic media will be deemed to satisfy the requirements of paragraph (b)(1) of this section with respect to participants described in paragraph (c)(2) of this section if:

(i) The administrator takes appropriate and necessary measures to ensure that the system for furnishing documents results in actual receipt by participants of transmitted information and documents (e.g., uses return-receipt electronic mail feature or conducts periodic reviews or surveys to confirm receipt of transmitted information);

(ii) Electronically delivered documents are prepared and furnished in a manner consistent with the applicable style, format and content requirements (See 29 CFR 2520.102-2 through 2520.102-5, and 29 CFR 2520.104b-10);

(iii) Each participant is provided notice, through electronic means or in

writing, apprising the participant of the document(s) to be furnished electronically, the significance of the document (e.g., the document describes changes in the benefits provided by your plan) and the participant's right to request and receive, free of charge, a paper copy of each such document; and (iv) Upon request of any participant, the administrator furnishes, free of charge, a paper copy of any document delivered to the participant through electronic media.

(2) For purposes of paragraph (c)(1) of this section, the furnishing of documents through electronic media satisfies the requirements of paragraph (b)(1) of this section only with respect to participants:

(i) Who have the ability at their worksite to effectively access documents furnished in electronic form; and (ii) Who have the opportunity at their worksite to readily convert furnished documents from electronic form to paper form free of charge.

* * * * *

3. By adding a new subpart G to part 2520 to read as follows:

Subpart G—Recordkeeping Requirements

Sec.

2520.107-1 Use of electronic media for maintenance and retention of records.

Subpart G—Recordkeeping Requirements

§ 2520.107-1 Use of electronic media for maintenance and retention of records.

(a) *Scope and purpose.* Sections 107 and 209 of the Employee Retirement Income Security Act of 1974, as amended (ERISA) contain certain requirements relating to the maintenance of records for reporting and disclosure purposes and for determining the pension benefits to which participants and beneficiaries are or may become entitled. This section provides standards applicable to both pension and welfare plans concerning the use of electronic media for the maintenance and retention of records required to be kept under sections 107 and 209 of ERISA.

(b) *General requirements.* The record maintenance and retention requirements of sections 107 and 209 of ERISA will be satisfied when using electronic media if:

(1) The electronic recordkeeping system has reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form;

(2) The electronic records are maintained in reasonable order and in a safe and accessible place, and in such manner as they may be readily

inspected or examined (for example, the recordkeeping system should be capable of indexing, retaining, preserving, retrieving and reproducing the electronic records);

(3) The electronic records are readily convertible into legible and readable paper copy as may be needed to satisfy reporting and disclosure requirements or any other obligation under Title I of ERISA;

(4) The electronic recordkeeping system is not subject, in whole or in part, to any agreement or restriction that would, directly or indirectly, compromise or limit a person's ability to comply with any reporting and disclosure requirement or any other obligation under Title I of ERISA; and

(5) Adequate records management practices are established and implemented (for example, following procedures for labeling of electronically maintained or retained records,

providing a secure storage environment, creating back-up electronic copies and selecting an off-site storage location, observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records; and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).

(c) *Legibility and readability.* All electronic records must exhibit a high degree of legibility and readability when displayed on a video display terminal and when reproduced in paper form. The term "legibility" means the observer must be able to identify all letters and numerals positively and quickly to the exclusion of all other letters or numerals. The term "readability" means that the observer must be able to recognize a group of

letters or numerals as words or complete numbers.

(d) *Disposal of original paper records.* Original paper records may be disposed of any time after they are transferred to an electronic recordkeeping system that complies with the requirements of this section, except such original records may not be discarded if they have legal significance or inherent value as original records such that an electronic reproduction would not constitute a duplicate record (for example, notarized documents, insurance contracts, stock certificates, and documents executed under seal).

Signed at Washington, DC, this 25th day of January, 1999.

Leslie B. Kramerich,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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