DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2520

RIN 1210–AA71

Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of final rulemaking.

SUMMARY: This document contains final 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 the maintenance and retention of employee benefit plan records in electronic form. The rules establish a safe harbor pursuant to which all pension and welfare benefit plans covered by Title I of ERISA may use electronic media to satisfy disclosure obligations under Title I of ERISA. The rules also provide standards concerning the use of electronic media in the maintenance and retention of records required by sections 107 and 209 of ERISA. The rules affect employee pension and welfare benefit plans, including group health plans, plan sponsors, administrators and fiduciaries, and plan participants and beneficiaries.

DATES: *Effective Date:* These regulations are effective October 9, 2002.

Applicability Date: The requirements of § 2520.107–1 apply as of the first day of the first plan year beginning on or after October 9, 2002.

FOR FURTHER INFORMATION CONTACT: Katherine D. Lewis, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC, 20210, (202) 693–8523 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Background

Pursuant to section 1510(a) of the Taxpayer Relief Act of 1997 (TRA '97) [1] and in recognition of a need generally to update the rules governing the distribution of disclosure materials by employee benefit plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act), the Department of Labor, on January 28, 1999, published a notice of proposed rulemaking and a request for public comments on electronic disclosure and recordkeeping issues (64 FR 4506). In general, that notice contained a proposal to expand the electronic disclosure safe harbor applicable to group health plans, at § 2520.104b–1(c), to all pension and welfare benefit plans covered by Title I of ERISA.[2] The proposal also would expand the disclosure documents covered by the safe harbor to include, in addition to summary plan descriptions (SPDs) and related disclosures, the distribution of summary annual reports (SARs). In addition, the notice contained proposed standards applicable to the use of electronic media, including electronic storage and automated data processing systems, for the maintenance and retention of records required by sections 107 and 209 of ERISA. As with the interim rule for group health plans, the Department indicated in the preamble to the proposal that the safe harbor was not intended to represent the exclusive means by which the requirements of § 2520.104b–1 may be satisfied using electronic media. Rather, electronic disclosures meeting the conditions of the safe harbor would be deemed to satisfy the disclosure requirements under § 2520.104b–1.

The following is an overview of the public comments received on the proposed and interim rules and the changes in the final regulations made in response to the comments.

B. Disclosure Through Electronic Media—29 CFR 2520.104b–1(c)

As proposed, the availability of the safe harbor was limited to participants who have effective access to electronically furnished documents at their work place. Most of the commenters supported broadening the scope of the safe harbor to encompass disclosures to individuals (i.e., both participants and beneficiaries) beyond worksite locations and expanding the covered disclosures to include all documents required to be disclosed under Title I of ERISA, rather than just SPDs and related documents and SARs.

Expand Safe Harbor To Include Distributions to Participants and Beneficiaries Outside the Workplace

Most of the commenters supported expanding the safe harbor to permit the electronic delivery of documents to places other than worksite locations when a participant or beneficiary voluntarily elects to have documents furnished by such means. A number of these commenters suggested that any such electronic notice should include a reminder to participants and beneficiaries of the need to apprise the plan administrator of any changes that may affect the receipt of the disclosures (e.g., a change in e-mail address). One commenter indicated that, if electronic distributions beyond the worksite are permitted at the election of participants and beneficiaries, participants and beneficiaries should be afforded the opportunity to change their election at any time. Another commenter argued that electronic distributions beyond worksite locations should not be included in the safe harbor because plan sponsors have no means of determining whether participants and beneficiaries have the electronic technology necessary for receiving such information.

The Department is persuaded that where participants and beneficiaries have access to electronic information systems beyond the workplace (e.g., Internet-based systems) that will, as determined by the participant or beneficiary, provide an acceptable means by which to access plan information, neither plans nor participants and beneficiaries should be discouraged from utilizing such systems for plan-related communications. Accordingly, the Department has modified and expanded the safe harbor to encompass electronic delivery of plan information beyond the workplace to participants, beneficiaries and other persons entitled to disclosures under Title I of ERISA where, as discussed below, certain conditions designed to protect participants, beneficiaries and such other persons are satisfied. Because the proposal was limited to the furnishing of information electronically to individuals at worksite locations, the proposed safe harbor necessarily applied only to disclosures furnished to participants. With the expansion of the safe harbor to include the electronic distribution of documents beyond worksite locations, the Department sees

[1] Section 1510(a) of the TRA '97 directs the Secretary of Labor and the Secretary of the Treasury to issue guidance designed to interpret the notice, election, consent, disclosure, time requirements, and related recordkeeping requirements of ERISA and the Internal Revenue Code, respectively, as applied to the use of new technologies by sponsors and administrators of retirement plans. Pub. L. 105–34, enacted August 5, 1997.

[2] The safe harbor was established in an interim rule for group health plans published in the **Federal Register** on April 8, 1997 (62 FR 16979). The Department received five comments on the interim rule that addressed electronic disclosure issues. The proposed and interim rules are being finalized concurrently in this document to facilitate consideration of the full range of issues raised by public comments.

no basis for continuing to limit the safe harbor to participants.

As revised, the safe harbor applies to communications through electronic media with two categories of individuals (described in paragraph (c)(2) of § 2520.104b–1). The first category of individuals is participants who, similar to the proposed safe harbor, 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 of individuals is participants, beneficiaries and other persons entitled to plan disclosures under Title I of ERISA who consent to receiving documents electronically. A discussion of comments received and the application of the regulation to each of these categories follows.

The provisions governing the first category of individuals have been modified from the proposal in two respects. As indicated by the foregoing description, the Department has eliminated use of the term ''worksite,'' but has retained the general concept. In this regard, the revised language—''any location where a participant is reasonably expected to perform his or her duties as an employee''—is intended to make clear that the safe harbor extends to employees who work at home or who may be on travel, provided that they have ready access to the employer's information system.

Some commenters recommended eliminating the requirement that access to the employer's or plan sponsor's information system be an integral part of the participant's duties. The commenters argued that the availability of a computer kiosk in a common area at a participant's workplace should be sufficient to satisfy the access requirement. The Department disagrees. As stated in the proposal, the Department believes that the actual location of an employee's work is less important than the employee being expected to regularly access the employer's electronic information system and, therefore, more likely to receive timely communication of plan information. The Department has long held the view that, where documents are required to be furnished to participants, it is not acceptable merely to make the documents available in a location frequented by participants. See § 2520.104b–1(b). The Department believes that, even where a participant is otherwise provided notice of the availability of a document, requiring participants to physically seek out the documents in common areas of the workplace will be a disincentive for participants to obtain and review important information affecting their rights, benefits, and obligations under their plan. Accordingly, while the use of electronic information systems in common areas of the workplace may be an appropriate means by which to make plan information available for inspection, as a supplemental method of disclosure, or as a way to access additional non-mandated materials, it is not an appropriate means by which to deliver documents required to be furnished to participants.

Second, the Department has eliminated the requirement that participants have the opportunity to readily convert furnished documents from electronic form to paper form free of charge. A number of commenters questioned the need for this requirement if participants have the ability to obtain paper versions of electronically furnished documents. Commenters also raised questions as to the application of this requirement when employees are on travel or worksite locations where printers are not readily available. The Department is persuaded that this requirement is not necessary where participants have the right to request and obtain paper versions of the electronically furnished documents.[3]

The second category of individuals to whom documents may be furnished electronically under the expanded safe harbor is participants, beneficiaries and other persons entitled to disclosure documents under Title I who consent to receive such documents electronically. See § 2520.104b–1(c)(2)(ii). The furnishing of documents to this category of individuals assumes the furnishing of documents electronically beyond the workplace and, therefore, the utilization of electronic information systems beyond the control of the plan or plan sponsor. For this reason, the safe harbor establishes conditions that are intended to ensure the adequacy of the information system for the individuals to whom disclosures will be made electronically. The established conditions take into account both suggestions of the commenters and provisions of the Electronic Signatures in Global and National Commerce Act (the E–SIGN Act) relating to consumer disclosure and consent with regard to electronic communications.[4]

As expanded, the safe harbor conditions electronic communications beyond the workplace on the individual to whom disclosure is being made affirmatively consenting to receive documents electronically. In the case of documents to be furnished through the Internet or other electronic communication network, the individual must, in addition to providing an address for the receipt of documents electronically, consent or confirm consent electronically in a manner that reasonably demonstrates the individual's ability to access information in the electronic form that will be used. Such confirmation will not only ensure the compatibility of the hardware and software of the individual and the plan, but will also serve to evidence that the administrator has taken appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt, as required by paragraph (c)(1)(i)(A). See § 2520.104b–1(c)(2)(ii)(B). The requirement for an e-mail address and electronic confirmation would not apply where the means of electronic communication is via CD, DVD or similar media not dependent on electronic transmission of the documents to the participant or beneficiary. See § 2520.104b–1(c)(2)(ii)(A)

As noted earlier, making electronic information systems available in common areas of the workplace (e.g., computer kiosks) is not, in the Department's view, a permissible means by which to deliver documents required to be furnished to participants.

In an effort to ensure that all parties understand the nature of, and requirements for, such communications, reliance on the safe harbor also is conditioned on the individual being provided, prior to his or her consent, a clear and conspicuous statement containing certain specified information. The statement must identify the documents or categories of documents to which the consent would apply; explain that consent may be withdrawn at any time without charge; describe procedures for withdrawing

[3] If a document is required by the Act, or regulations issued thereunder, to be furnished without charge to participants and beneficiaries, plan administrators availing themselves of the safe harbor must furnish to participants and beneficiaries without charge a paper version of any such document transmitted electronically. On the other hand, if an administrator is permitted to impose a reasonable charge for a document, the administrator may impose a reasonable charge for furnishing a paper version of the document under this safe harbor (§ 252.104b–1(c)). Also see: 29 CFR 2520.104b–30.

[4] Pub. L. 106–229, 114 Stat. 464 (2000) (codified at 15 U.S.C. 7001 et seq.)

consent or updating address or other information; explain the right of the individual to request and obtain a paper version of the electronically furnished document(s), including whether the paper version will be provided free of charge; and identify any software and hardware requirements to access and retain the identified documents to be provided electronically. The Department believes that the foregoing will provide participants and beneficiaries with the basic information necessary to make an informed decision about receiving documents electronically.

The Department recognizes that there may be additional information that administrators believe should or must be communicated in conjunction with this disclosure, including, as suggested by commenters, an explanation of the importance of keeping the plan or plan sponsor apprised of changes that may affect the communication of plan information. The requirements for a clear and conspicuous statement are not intended to limit the ability of plan administrators to include information, in addition to that required, they believe is important to participants and beneficiaries, but rather to ensure that the communicated information is both brought to the attention of the electing individual and set forth in a reasonably understandable manner.

Recognizing that there may be system or other changes that may affect the electronic furnishing of documents, the safe harbor requires that where there are changes in hardware or software that may create a material risk that an individual will not be able to access documents electronically, the individual must be provided a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents, as well as the right to withdraw consent without charge. Following notice of the hardware or software changes and the right to withdraw consent, the individual must again affirmatively consent to receive documents electronically. This condition is intended to afford participants and beneficiaries the opportunity to fully assess and reconfirm the compatibility of the system changes with their ability to access and retain documents.

Expand Scope of Safe Harbor To Cover Other Disclosures

As proposed, the safe harbor covered the distribution of SPDs, summaries of changes to the SPD and summary annual reports. Many commenters requested that the scope of the safe harbor for electronic disclosures be expanded in the final regulation to include additional disclosures required under Title I of ERISA. The commenters specifically identified: individual benefit statements under section 105(c) of ERISA; investment-related information required to be provided to participants and beneficiaries in the case of plan fiduciaries seeking to be covered by section 404(c) of ERISA; COBRA notifications under sections 606 of ERISA; qualified domestic relations order (QDRO) notifications under section 206(d)(3) of ERISA; qualified medical child support order (QMCSO) notifications under section 609 of ERISA; information concerning participant loans under section 408(b)(1) of ERISA; and information required to be furnished or made available for inspection under sections 104(b)(2) and 104(b)(4) of ERISA in response to a request from a participant or beneficiary.

The Department is persuaded that, with safeguards to protect the confidentiality of personal information, the safe harbor should be expanded to include the transmittal of all documents required to be furnished or made available under Title I of ERISA and the regulations issued thereunder that are within the jurisdiction of the Department of Labor.[5] In this regard, the Department believes that the general standard applicable to the distribution of documents under § 2520.104b–1(b)—requiring plan administrators to use measures reasonably calculated to ensure actual receipt—would appear generally applicable to documents required to be distributed under Title I. The Department notes that when § 2520.104b–1 was originally adopted in 1977, the primary disclosure documents under Title I were set forth in Part 1 of Title I. Since that time, the statute has been amended to incorporate disclosure and notice requirements relating to qualified domestic relations orders under Part 2, qualified medical child support orders under Part 6, continuation coverage rights under Part 6, and creditable coverage and related disclosures under Part 7 of Title I, and the Department has adopted regulations under section 404(c), among others. The general application of the standards under § 2520.104b–1 was most recently recognized by the Department in the revised claims procedure regulations adopted on November 21, 2000. In those regulations, the Department specifically referenced the applicability of the electronic distribution safe harbor standards set forth in paragraph (c) of § 2520.104b–1 to benefit determinations.[6] For these reasons, the Department believes it is appropriate to amend § 2520.104b–1 to apply to disclosures under Title I generally, rather than limiting its application to disclosures of SPDs and related disclosures and SARs. In this regard, the Department is making conforming amendments to paragraphs (a) and (b) of § 2520.104b–1 to accommodate the extension of the safe harbor to Title I disclosures generally, as well as clarify that the provisions of the regulation, including the safe harbor, do not extend to disclosures within the jurisdiction of the Department of the Treasury.

The Department wishes to note that, while the scope of § 2520.104b–1 is being expanded to encompass the distribution of plan disclosures to participants, beneficiaries, and certain other individuals under Title I, the distribution standards of revised § 2520.104b–1 do not alter any requirements otherwise applicable to specific disclosures, such as the party to whom the disclosure must be made, the content of the disclosure, or the timing of the disclosure. The Department also notes that the standards of revised § 2520.104b–1 are limited to plan disclosures under Title I of ERISA and do not govern other communications under Title I, for example, communications from participants or beneficiaries (such as spousal consents), or between plan administrators and employers or other plan sponsors.

Currently, the manner in which applicants may notify interested persons of the pendency of a proposed exemption from ERISA's prohibited transaction provisions, including the use of electronic media, is determined on a case-by-case basis under 29 CFR 2570.43. The Department is considering the applicability of the safe harbor provided by this rule to that notice requirement. In this regard, the Department invites interested parties to submit comments and views concerning the application of the safe harbor to such notifications. Comments should be addressed to the Office of Exemption

[5] The Department notes that § 2510.104b–1, including the provisions of the safe harbor, do not extend to certain disclosures required under provisions of Part 2 or Part 3 of the Act over which the Department of the Treasury has regulatory and interpretative authority pursuant to Reorganization Plan No. 4 of 1978. A new paragraph (e) has been added to the final regulation to note this limitation. Plan administrators and others should refer to regulations and guidance issued by the Department of the Treasury for information on the use of electronic communication technologies to satisfy disclosure obligations within its jurisdiction.

[6] *See* 29 CFR 2560.503–1(g)(1), providing that electronic notifications of benefit determinations must comply with the requirements of § 2520.104b–1(c)(1).

Determinations, Room N–5649, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; Attention: ''Electronic Notice to Interested Persons.'' Comments should be submitted by June 30, 2002. The Department expects to complete its consideration of this issue no later than December 31, 2002.

Recognizing that certain information required to be disclosed under Title I, such as individual benefit and claims information, may be confidential in nature, the Department is amending the general standards of the safe harbor, at paragraph (c)(1)(i), to require that, with respect to disclosures that relate to individuals and their accounts and benefits, the administrator must take appropriate and necessary measures to ensure that the system for furnishing such information protects the confidentiality of the information, such as by incorporating into the system measures designed to preclude unauthorized receipt of, or access to, the information by individuals other than the individual for whom the information is intended. The Department is not prepared at this time, however, to express any view as to the adequacy of any particular method designed to protect confidentiality, such as the use of PINs or passwords.

General Obligations of Administrator

The general obligations of a plan administrator with respect to the distribution of documents electronically under the safe harbor are set forth in paragraph (c)(1) of § 2520.104b–1. As proposed, the administrator is required to take appropriate and necessary measures to ensure that the system for furnishing documents results in actual receipt of transmitted information and documents. The proposal included the following examples of such measures: using return-receipt electronic mail features; or conducting periodic reviews or surveys to confirm receipt of transmitted information. See § 2520.104b–1(c)(1)(i). Some commenters asked whether this requirement was intended to impose a standard for ensuring electronic disclosures are received that is stricter than the standard that applies to other methods of delivery. Another commenter asked the Department to add electronic systems that notify the sender of ''undelivered'' e-mails as an example in the regulation. Other commenters requested that the safe harbor be limited to electronic communications that the plan administrator could prove were actually received by the participant.

It is the Department's view that the standard for furnishing materials under § 2520.104b–1 should not be stricter for electronic disclosures than for other methods of delivery. Rather, the safe harbor criteria are intended to extend the application of the general standards of § 2520.104b–1(b) to electronically distributed documents. For example, utilization of mail delivery, whether first, second or third class, for distribution of documents anticipates the sender (i.e., the plan administrator) being apprised of address changes or non-delivery of the mailed documents. This condition is being adopted essentially as proposed, except that, as discussed above, the paragraph has been amended to require protection of personal information and, as suggested by one commenter, an example of ''notice of undelivered electronic mail'' has been added to paragraph (c)(1)(i) of § 2520.104b–1.

Another general condition for reliance on the safe harbor is that electronically delivered documents are prepared and furnished in a manner consistent with the applicable style, format, and content requirements. See § 2520.104b–1(c)(1)(ii). A few commenters asked that the Department clarify whether differences in format between a paper version and an electronic version of SPDs are permitted so long as the content, form, style and other requirements applicable to SPDs are satisfied. Another commenter noted that the proposal indicated that participants and beneficiaries had a right to request paper ''copies'' of electronic disclosures, and expressed concern that the use of interactive technologies, multimedia presentations and hyperlinks in electronic disclosures would be severely limited if the safe harbor required paper and electronic documents to be identical. Neither the safe harbor nor the content, style and format requirements applicable to disclosures under the Act preclude the use of interactive technologies, multimedia components or hyperlinks to related materials in electronic disclosures. Moreover, the Department recognizes that electronic disclosures and paper versions of the required disclosure documents may differ. In the Department's view, the requirements of the safe harbor will be satisfied where the electronic and paper versions of a disclosure document, albeit different, each satisfy the style, format and content requirements applicable to the specific document when viewed independently. Paragraph (c)(1)(ii) has been only slightly modified to take into account that § 2520.104b–1 is being expanded to encompass disclosures under Title I generally.

Paragraph (c)(1)(iii) of the proposal further conditions reliance on the safe harbor on each participant being provided notice of the documents being furnished electronically, the significance of the documents and the participant's right to request and receive a paper version free-of-charge. Paragraph (c)(1)(iii) served to require that, upon request, individuals are furnished paper versions of the electronically furnished documents. While a number of commenters supported the ''notice of furnished documents'' condition, one commenter suggested that the Department permit such notices to be included as part of regular mailings or e-mails (e.g., with account statements) annually. The required notice is intended to bring to the attention of participants and beneficiaries at the time of the electronic disclosure that they have been furnished important plan information. The Department believes that merely furnishing a general notice on a periodic basis would not accomplish this goal. For purposes of the safe harbor, therefore, the Department believes that the timing of the notice must be governed by the time frame applicable to the required disclosure, and paragraph (c)(1)(iii) has been modified to make this clear. Nothing in the safe harbor, however, is intended to preclude the furnishing of the required notice with other information relating to the plan or plan sponsor. In such cases, however, care should be taken to ensure that the required notifications are sufficiently conspicuous to alert participants and beneficiaries to electronically furnished documents. The Department has also clarified that the requirement that the notice apprise each participant and beneficiary of the significance of the document being provided electronically applies only where the significance of the document may not be reasonably evident from the transmittal, such as where it is an attachment to an e-mail.

The Department received several comments suggesting that there is unneeded redundancy in the requirement that participants have the ability at the workplace to readily convert furnished documents from electronic form to paper form free of charge, when they must also be advised of and afforded the opportunity to obtain paper versions of the furnished documents from the plan administrator free of charge. As discussed earlier, that requirement has been eliminated from the safe harbor. For a variety of reasons (e.g., malfunctioning hardware or

software, readability, portability), however, documents furnished in electronic form may not accommodate the needs of every participant or beneficiary on every occasion. Accordingly, the Department continues to believe that the ability of participants and beneficiaries to receive paper versions of electronically furnished documents is important to ensuring adequate disclosure to participants and beneficiaries. The Department, therefore, has retained the requirement to make paper versions of electronically furnished documents available to participants and beneficiaries.[7]

Because the scope of the safe harbor, and § 2520.104b–1, have been expanded to encompass all Title I disclosures generally, the safe harbor has been modified to eliminate the requirement that paper versions of documents always be furnished free-of-charge. As noted above, however, if a document is required by the Act, or regulations issued thereunder, to be furnished without charge to participants and beneficiaries, plan administrators availing themselves of the safe harbor must furnish to participants and beneficiaries without charge a paper version of any such document transmitted electronically. On the other hand, if an administrator is permitted to impose a reasonable charge for a document, the administrator may impose a reasonable charge for furnishing a paper version of the document under the safe harbor.

Miscellaneous Issues Involving the Use of Electronic Media

Two commenters asked the Department to clarify whether the safe harbor would apply to disclosures of plan information maintained in a separate section of a company's website that is easily accessible from its home page with access generally restricted to employees and others by password and PIN requirements. The Department believes that using a company's website as a method of providing information is similar to using an insert to a company publication, which is cited in the general standard in 29 CFR 2520.104b–1(b) as an acceptable method of ''furnishing'' disclosures within the meaning of the regulation provided the distribution list for the periodical is comprehensive and up-to-date and a prominent notice appears on the front page of the publication advising readers that the publication contains important information about rights under the plan. A plan administrator relying on such website disclosure must still satisfy all the conditions of the safe harbor. For example, participants and beneficiaries would have to be notified of the availability of the particular disclosure document and its significance by sending written or electronic notice, as described in § 2520.104b–1(c)(1)(iii), directing them to the document on the website, and the administrator would still be required to take appropriate and necessary measures to ensure the website system for furnishing documents results in actual receipt, e.g., the website homepage should contain a prominent link to the website sections that contain information about the plan, the website should include directions on how to obtain a replacement for a lost or forgotten password to the extent one is needed, and disclosure documents should remain on the website for a reasonable period of time after participants and beneficiaries are notified of their availability.

Another commenter asked whether documents could be furnished on a magnetic disk or CD–ROM. The regulation does not categorize particular electronic media as either permissible or impermissible methods through which required disclosures may be provided as long as the conditions of the safe harbor are met. For example, as noted above, under the safe harbor, participants and beneficiaries must be provided with a notice in accordance with § 2520.104b–1(c)(1)(iii) apprising them 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 or beneficiary's right to request and receive a paper version of each such document. The purpose of the notice requirement is to ensure that participants and beneficiaries who receive an electronic disclosure will be put on notice that the communication contains important information relating to their plan or to their rights and obligations under the plan. Thus, a plan administrator could provide a participant with a CD–ROM containing the plan's SPD, for example, so long as the CD–ROM was accompanied by a paper notice or was clearly labeled to provide the notification required by § 2520.104b–1(c)(1)(iii) and the other conditions in the safe harbor were satisfied.

C. Electronic Recordkeeping—29 CFR 2520.107–1

Proposed regulation 29 CFR 2520.107–1 provided 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. Only a few comments were submitted regarding the recordkeeping provisions in proposal, and, in general, they asked for relatively minor clarifications of certain provisions in the proposal. Accordingly, the final rule being adopted herein is essentially unchanged from the proposal.

In General

The final rule 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).[8]

[7] As discussed earlier with regard to the application of style, format and content requirements, paper documents are not required to be duplicates of the electronically furnished document. In an effort to further clarify this point, the term ''paper version'' has been substituted for ''paper copy'' in § 2520.104b–1(c)(1)(iii).

[8] The 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 regulation does not specifically address the use of microfilm and microfiche for storing employee benefit plan

The final rule also provides that the electronic recordkeeping system may not be subject to any agreement or restriction that would, directly or indirectly, compromise a person's ability to comply with any reporting and disclosure requirement or any or other obligation under Title I of ERISA. In addition, the final rule provides guidance on when original paper records may be discarded after they have been transferred to electronic media.

The Department again emphasizes what it stated in the preamble to the notice of proposed rulemaking 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 creates, maintains, retains or prepares the plan's records, or 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.[9]

Furthermore, it is the Department's view that persons subject to recordkeeping obligations under section 107 and section 209 of ERISA would, pursuant to the 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.

This final rule is consistent with the goals of the E-SIGN Act and is designed to facilitate voluntary use of electronic records while ensuring continued accuracy, integrity and accessibility of employee benefit plan information and records required to be kept by law. The requirements of the final rule are justified by the importance of the employee benefit plan records involved, are substantially equivalent to the requirements imposed on records that are not electronic records, will not impose unreasonable costs on the acceptance and use of electronic records, and do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records.

Destruction of Paper Records After Converting to Electronic Form

One commenter asked the Department to clarify the proposal regarding destruction of originals. The proposal provided that original records generally may be discarded once such records are transferred to an electronic recordkeeping system that complies with the above described electronic media and record maintenance requirements, but included an exception under which original records may not be discarded if they have legal significance as original records such that an electronic record would not constitute a duplicate record. The commenter urged that the term ''legal significance'' be dropped because it could be interpreted as applying to many documents and records. The commenter also suggested that the examples in the proposal (notarized documents, insurance contracts, stock certificates, and documents executed under seal) would require plans to keep paper copies where electronic reproductions were sufficient.

On review, the Department has determined that the ''legal significance as an original'' component in the proposal may have been confusing because it was essentially redundant to the condition that the electronic record be usable as a duplicate original. Accordingly, the ''legal significance'' component has been eliminated and the exception has been clarified to provide that original paper records may be disposed of any time after they are transferred to an electronic recordkeeping system that complies with the requirements of § 2520.107–1, unless the resulting electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law.

Miscellaneous Comments Regarding Matters Outside the Scope of This Rulemaking

One commenter asked the Department to provide guidance on the types of records that must be retained for purposes of sections 107 and 209. As the Department explained in the preamble to the proposed regulation, the purpose of this rulemaking is not 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. Accordingly, the Department is not making any changes in the proposal in response to that comment because that issue is outside the scope of this rulemaking.

Another commenter asked the Department to explain whether the standards in the safe harbor regarding ''back-up'' electronic records and off-site storage apply when records are maintained in paper form. It is the view of the Department that, regardless of whether records are held in paper or electronic form, the appropriate plan fiduciary or fiduciaries should establish and implement adequate records management practices. What is ''adequate'' may vary depending on the recordkeeping system involved and the different risks of loss or destruction to which the records or recordkeeping medium may be exposed. Nonetheless, regardless of the medium used to keep records, the loss or destruction of records required to be retained by sections 107 and 209 does not discharge the persons required to retain such records from their statutory duties under sections 107 and 209 with regard to the purposes for which such records are required to be retained under those sections. Whether lost or destroyed records can, or should be, reconstructed and whether the persons responsible for the retention of records are, or should be, personally liable for the cost incurred in connection with the reconstruction of records is necessarily dependent on the facts and circumstances of each case.

D. Effective Date and Applicability Dates

The effective date of these regulations is October 9, 2002. There is no special applicability date for the amendments of § 2520.104b–1, and, accordingly, those amendments apply as of the effective date stated above. The requirements of

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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 section 107 or 209 provided certain conditions were met.

[9] See Advisory Opinion 84–19A (April 26, 1984).

§ 2520.107–1, concerning maintenance and retention of employee benefit plan records in electronic form, are applicable as of the first day of the first plan year beginning on or after October 9, 2002. The preamble accompanying the Proposed Rules set forth the Department's view that, 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, good faith compliance with the standards set forth in the Proposed Rules would, with respect to the disclosure and recordkeeping requirements specifically addressed therein, constitute compliance with a reasonable interpretation of 29 CFR 2520.104b–1 and ERISA sections 107 and 209. The preamble also made clear that the interim rule pertaining to electronic disclosures continued to be in effect for group health plans during the pendency of the proposal. The final regulations being promulgated in this rulemaking will, upon becoming applicable, supersede and replace the interim rule for group health plans and the good faith compliance provision in the proposal.

E. Economic Impact of Electronic Technologies Regulation

Summary

These final rules expand the safe harbor for electronic provision of ERISA disclosure documents to include both more documents and more delivery locations. As a result of these final rules, plans will be in a position to make greater use of electronic technologies when providing required disclosures to participants and beneficiaries. Wider use of such technologies will produce two distinct economic benefits. One benefit will be financial savings arising from the elimination of materials, printing, and mailing costs associated with provision of printed disclosures. The other will be improved timeliness, quality and accessibility of information that will flow from instant, on-line availability and information access tools such as hot-links and search queries.

The net savings produced by moving from printed to electronic disclosures under this regulation will be approximately $66 million in the first year, the Department estimates. This net figure includes a total of $74 million in annually recurring gross savings from the elimination of materials, printing, and mailing costs. This gross savings is partly offset in the first year by an $8 million cost incurred to obtain affected participants' consent to accept electronic delivery of disclosures outside the workplace. No other new costs were attributed to the adoption of new technologies, reflecting the Department's expectations that (1) master copies of printed versions of disclosures typically are maintained in electronic form or can be easily converted to such form, (2) that plan sponsors will provide disclosures via electronic media and infrastructure that already exist for purposes other than the provision of ERISA disclosures, and (3) that the cost to transmit disclosures electronically is negligible.

Most of the $74 million in gross savings is attributable to expected electronic provision of SPDs and SMMs, and SARs to participants outside the workplace. These applications of new technologies are expected to save $34 million and $32 million, respectively. SPDs/SMMs can be large documents, so electronic provision can eliminate substantial printing, materials, and mailing costs. SPDs/SMMs and SARs are also some of the most widely distributed ERISA disclosure documents, thus offering significant potential for the reduction of distribution costs.

Not included in the $74 million gross savings estimate is an additional $65 million in savings from the electronic provision of SPDs/SMMs and SARs to participants at the workplace that were authorized by the safe harbor provision of the proposed regulation.[10] Savings arising from them are not being attributed to this final regulation. Also not included is any savings from the adoption of electronic recordkeeping. The Department believes that the final regulation's standards for electronic recordkeeping are consistent with reasonable and prudent business practices that are already widely followed, and therefore are unlikely to substantially change recordkeeping costs.

The Department's estimates reflect its expectations about the degree to which disclosures will be provided electronically under the final regulation. Approximately 21 percent of participants currently have appropriate access to electronic media at their work places, and another 38 percent have such access at home, the Department estimates. For purposes of these estimates, the Department assumed that a large majority of plans will adopt new technologies, and approximately three-fourths of participants with access to electronic media only at home will consent to receive electronic disclosures. The Department included in its savings estimates only disclosures that are directed at participants and include no information specific to individuals, reasoning that such disclosures might be the first to which new technologies are applied. In combination, these assumptions suggest that the printing, materials and mailing costs associated with relevant ERISA disclosures will be reduced by approximately 14 percent in the first year in connection with this final regulation (or 27 percent in connection with the proposed and final regulations together). The electronic provision of ERISA disclosures and the corresponding amount of savings is likely to grow in the future, as participants' access to, and comfort with, electronic media both at work and at home increases, as plans' use of such media expands, and as some sponsors apply new technologies more broadly to disclosures to beneficiaries or former participants or to disclosures that include information specific to individuals.

The final regulation is also expected to improve the timeliness, quality and accessibility of information for participants and beneficiaries. Timeliness will improve as delays attributable to printing and mailing are eliminated. In addition, the frequency with which SPDs are updated to reflect changes may increase as the cost to provide updated copies falls. The quality and accessibility of information may improve along many dimensions. Information access tools such as hot-links and search queries may help participants retrieve desired information from SPDs and other documents. Multi-media enhancements may present information in ways some participants find more accessible, comprehensible or appealing. The value of these benefits cannot be specifically quantified.

Basis for Savings Estimates

As a result of this final regulation, plans will be in a position to make greater use of electronic technologies when providing required disclosures to participants and beneficiaries. Wider use of such technologies will produce financial savings by eliminating some of the materials, printing, and mailing costs normally associated with provision of printed disclosures. As noted above, the Department estimates that net savings produced by moving from printed to electronic disclosures under this regulation will be approximately $66 million in the first year.

[10] See footnote 13 and accompanying text, infra, for a discussion of the difference between this $65 million estimate and the estimated saavings in the preamble to the proposal.

The Department's estimates of financial savings from the final regulation are grounded in its separate estimates of the cost to provide relevant ERISA disclosures in printed form. For purposes of compliance with the Paperwork Reduction Act, the Department maintains estimates of the cost to prepare and distribute such disclosures. Preparation costs generally include the cost to develop the content and format of the disclosure, while distribution costs generally include the materials, printing and mailing cost incurred to provide the disclosures to participants and beneficiaries as required.

The Department's estimates assume that preparation costs will be unchanged by the final regulation. This assumption reflects the Department's belief that master copies of printed versions of disclosures typically are maintained in electronic form or can be easily converted to such form. Some plan sponsors may elect to develop new formats and content for electronic disclosures. New formats and content might include interactive interfaces that involve hot-links, text search capabilities, and/or multimedia presentations, all of which might improve the timeliness, quality and accessibility of information for participants. However, the final regulation does not require the development of formats or content beyond that which satisfies disclosure requirements in printed form.

The Department's estimates assume that electronic provision of disclosures eliminates the distribution cost otherwise associated with the provision of printed disclosures. This assumption reflects the Department's expectation that (1) plan sponsors will provide disclosures via electronic media and infrastructure that exist for purposes other than the provision of ERISA disclosures and (2) that the cost to electronically transmit disclosures is therefore negligible.

Having adopted these assumptions, the Department estimated the amount of gross savings as a function of the degree to which disclosures will be provided electronically under the final regulation. This in turn is a function of participant access to electronic media, plan sponsor adoption of new technologies, the application of those technologies to particular disclosures, and the degree to which participants and beneficiaries will consent to receive disclosures electronically at home. The Department considered each of these in turn.

Based on a Census Bureau household survey published in 2001[11] on computer use and a separate 1999 Census Bureau household survey on pension and health benefit plan participation,[12] the Department estimates that approximately 21 percent of participants have appropriate access to electronic media at their work places, and another 38 percent have such access at home. The pension and health coverage rates from the 1999 survey were applied to the computer use rates industry-by-industry to account for the likelihood that computer use is higher among plan participants and especially among large plan participants, because such participants are concentrated in certain industries.

The Department assumed that a large majority of plans with participants who have access to electronic media (or their service providers) will adopt new technologies as a means to provide at least some relevant ERISA disclosures. This may be especially true of large plans, which account for the lion's share of participants. Pension plans with 1,000 or more participants included nearly three-fourth of all participants in 1997. Similar data are not available for welfare plans. The Department also assumed that plan sponsors (or their service providers) would be more inclined to provide disclosures electronically at work than outside the workplace, because communication at the workplace might be viewed as more reliable and the final regulation requires no consent from participants before implementation of such disclosures. Specifically, the Department assumed that plans covering 90 percent of participants with access to electronic media at work would distribute disclosures electronically at work, and that plans covering two-thirds of participants with access only at home would offer the opportunity for receiving disclosures electronically outside the work place, and so seek consent.

The Department assumed that plans would distribute electronically only those disclosures that are directed at participants, and not those directed at beneficiaries or former participants or beneficiaries. It seems likely that plans might view their electronic links to participants and active employees as more reliable than those to beneficiaries or former participants or beneficiaries and, because beneficiaries and former participants and beneficiaries are not active employees, they will not have access to electronic media at the workplace. Therefore, for example, the Department assumed that sponsors who adopt new technologies will electronically distribute SPDs/SMMs, SARs, ERISA Section 404(c)-related disclosures, and ERISA Section 701-related notices of special enrollment rights and preexisting condition exclusions, but not ERISA Section 701-related certificates of prior coverage or Section 606-related notices of COBRA continuation rights.

Moreover, the Department conservatively assumed that plans would distribute electronically only disclosures that contain no potentially sensitive information specific to individuals, which might raise privacy concerns. For example, the Department did not assume that plans would electronically distribute notices and disclosures pertaining to individual claims for benefits or qualified domestic relations orders.

These assumptions are intended to address what the Department estimates as the likely impact of the final rules based on existing practices in the current environment. Such assumptions should not be interpreted as bearing on actions specifically permitted under the final rules. To the extent that plans do provide electronic disclosures to former participants or beneficiaries or do electronically distribute disclosures containing sensitive, individual-specific information as permitted by the final rules, then the overall incidence of electronic distribution and the corresponding savings will be larger than the Department estimates.

The Department assumed that three-fourths of participants with access to electronic media only at home, and who are offered the opportunity to consent to receive disclosures outside the workplace, would actually consent. It seems reasonable to assume that a substantial majority would so consent, given the Department's forgoing assumption that only disclosures that do not contain sensitive, individual-specific information would be distributed electronically.

Finally, the Department assumed that the marginal cost of distributing a disclosure to an individual is equal to the average cost of distributing it to all relevant individuals. This assumption seems reasonable given that the large plan sponsors and service providers who provide most disclosures provide very large numbers of them. The assumption implies that the cost of distributing a particular disclosure is a linear function of the number of

[11] ''Home Computers and Internet Use in the United States: August 2000,'' U.S. Census Bureau Current Population Reports (September, 2001).

[12] Contingent Work Supplement to the February, 1999 Current Populations Survey, U.S. Census Bureau.

individuals receiving it, so the cost of distributing a disclosure will decrease proportionately with the share of individuals to whom it is distributed electronically rather than in printed form.

In combination, these assumptions suggest that the printing, materials and mailing costs associated with relevant ERISA disclosures will be reduced by approximately 14 percent in the first year in connection with this final regulation (or 27 percent in connection with the proposed and final regulations together). This amounts to $66 million in net savings from the final regulation (or $131 million from the proposed and final regulations together).

As noted above, the Department's estimate of $66 million in savings in the first year is a net figure. It includes a total of $74 million in gross annual savings from the elimination of materials, printing, and mailing costs. This gross saving is partly offset in the first year by an $8 million cost incurred to develop appropriate consent materials and procedures and obtain affected participants' consent to accept electronic delivery of disclosures outside the workplace. The final regulation's safe harbor requires plans that wish to distribute disclosures electronically outside the work place to obtain affirmative consent from the affected participants and beneficiaries. To accomplish this, plans or their service providers generally must develop a process for requesting and recording such consent, and then implement the process and thereby obtain or fail to obtain consent from affected participants and beneficiaries.

The Department estimates the cost to develop and implement consent processes at $8 million. The cost to develop the processes and most of the cost to implement them are one-time costs incurred in the first year. Ongoing costs in later years include only the cost of obtaining consent from new or prospective participants and beneficiaries and the cost of maintaining consent records and processing any changes in consent elections. These ongoing tasks are likely to be integrated into the larger process of hiring and enrolling individuals in benefit plans and will add little cost at the margin. Ongoing savings are expected to amount to at least $74 million per year, increasing in the future with increased utilization of electronic disclosure methods.

The electronic provision of ERISA disclosures and the corresponding amount of savings is likely to grow in the future, as participants' access to and comfort with electronic media both at work and at home increases, as plans' use of such media expands, and as some sponsors apply new technologies more broadly to disclosures to beneficiaries or former participants or to disclosures that include information specific to individuals.

The Department's estimates of the savings from the final and proposed regulations are summarized below.

ESTIMATED FINANCIAL SAVINGS ATTRIBUTABLE TO THE FINAL REGULATIONS

[$Millions in First Year]

Selected disclosures	At work	Other location	Total
SPD/SMM	[13] 33.5	34.2	67.7
SAR	[13] 31.7	32.4	64.1
404 (c) Disclosure	3.2	3.1	6.3
Notice of Pre-Existing Condition Exclusions	0.2	0.2	0.5
Special Enrollment	0.2	0.2	0.4
Total Gross Savings	68.8	70.2	139.0
Less SPD/SMM and SAR Savings Attributable to the Proposed Regulation [13]	−65.2		
Consent Cost		−7.7	−7.7
Total Net Savings	3.6	62.5	66.0

[13] These savings are attributable to the proposed regulation and therefore are not included in total savings from the final regulation. The $33.5 million and $31.7 million estimated SPD/SMM and SAR savings differ from those presented in the preamble to the proposed regulation (64 FR 4511). The Department grounded its current estimates in data from recent Census Bureau survey of computer use. These data were not available when the Department published the proposed regulation.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735), the Department must determine whether a regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive 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. It has been determined that these rules are significant within the meaning of section 3(f)(4) of the Executive Order, and are thus subject to OMB review. Discussion of the costs and benefits of this final rule appear above in the summary of the Economic Impact of Electronic Technologies Regulation.

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 information collection request (ICR) incorporated in the final rules relating to use of electronic communication and recordkeeping technologies by employee benefit plans.

Desired Focus of Comments: The Department of Labor has submitted a copy of the proposed information collection to OMB in accordance with 44 U.S.C. 3507(d) of PRA 95 for review of its information collection. 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.

PRA Addresses: A copy of the ICR with applicable supporting statement may be obtained by calling the Department of Labor, Ms. Marlene Howze, at (202) 693–4158, or by email to *Howze-Marlene@dol.gov.* Comments and questions about the ICR should be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, ATTN: Desk Officer for the Pension and Welfare Benefits Administration, Room 10235, 725 17th Street, NW, Washington, DC, 20503 ((202) 395–7316).

Dates: The Department has requested that OMB approve or disapprove the collection of information by June 10, 2002. Comments should be submitted to OMB by May 9, 2002 to ensure their consideration.

The ICR provisions are included at § 2520.104b–1(c). Employee benefit plan administrators will be deemed to satisfy their disclosure obligations when furnishing documents electronically only if a participant who does not have access to the employer's electronic information system in the normal course of his duties, or a beneficiary or other person entitled to documents, has affirmatively consented to receive disclosure documents. Prior to consenting, the participant or beneficiary must also be provided with a clear and conspicuous statement indicating the types of documents to which the consent would apply, that consent may be withdrawn at any time, procedures for withdrawing consent and updating necessary information, the right to obtain a paper copy, and any hardware and software requirements. In the event of a hardware or software change that creates a material risk that the individual will be unable to access or retain documents that were the subject of the initial consent, the individual must be provided with information concerning the revised hardware or software, and an opportunity to withdraw a prior consent.

The Department is unaware of any data source that would directly identify the number of plans that will decide to transmit disclosure documents electronically to a non-work location, and thus be subject to the affirmative consent requirement. The Department has instead made certain assumptions pertaining to the cost to prepare and distribute consent for all employee benefit plans. Plans are expected to incur what is primarily a one-time start-up cost in the development and preparation of materials used to seek and verify consent from participants and beneficiaries.

Our estimates are based on the conservative assumption that most plans will wish to avail themselves of the opportunity to reduce distribution costs if possible, such that most plan sponsors will incur the cost to develop a consent procedure and documentation on behalf of the plan, regardless of the magnitude of savings that can be accomplished in satisfying disclosure obligations through electronic means. The number of separate consent forms designed is then reduced based on other factors considered relevant. Specifically, the total number of plans is reduced to take account of the fact that a sponsor is likely to use either the same or nearly the same form for each plan they sponsor (for example, only one consent form and procedure is assumed to be designed for use by a sponsor's health and pension plan or plans).

It is also assumed that the very large number of small health plans will either not communicate electronically and require consent, or will rely on the relatively small number of group insurance issuers they utilize to design consent forms and procedures. Finally, with the exception of large, self-administered plans, the number of plans is spread over an estimate of the number of third parties that are expected to assist plan sponsors with developing consent materials that conform to the terms of the regulation, in recognition of the economies of scale that can be achieved through the purchase of administrative services. The number of large, self-administered plans is added to arrive at an estimate of about 50,000 separate entities that will develop consent materials.

About 95% are expected to use service providers, resulting in cost burden, while about 5% are expected to develop consent materials using in-house staff. Resulting hour and cost burden estimates, based on 2 hours at an hourly rate of $72,[14] are shown below. Total costs include minor additions for paper and copying costs.

Type of Review: New.

Agency: Department of Labor, Pension and Welfare Benefits Administration.

Title: Consent to receive employee benefit plan disclosures electronically.

OMB Number: 1210–NEW.

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

Respondents: 50,000.

Frequency of Response: One-time.

Responses: 50,000.

Estimated Total Burden Hours: 5,042.

Total Capital/Start-up Cost: $7,340,000.

Total Annualized Capital/Start-up Cost: $2,447,000.

The Department has not accounted separately for the ongoing cost of maintaining consent materials and providing them to new employees. The ongoing cost associated with maintenance is considered to be minimal for any sponsor once the initial investment in materials and procedures is defrayed. Plan sponsors and administrators who make use of electronic means of disclosure are expected to distribute consent forms in the least costly way available, such as including a photocopy in new employee information packages or along with various other employment forms, resulting in additional burden that is so small as to be considered negligible.

Although the discussion presented here pertains to the consent requirement in the final rule, it should also be noted that the amendment to § 2520.104b–1 and the methodology used to estimate the impact of the amendments offer a basis for adjustments to the burden estimates of a number of other disclosures under Title I of ERISA. In

[14] Based on the Bureau's of Labor Statistics Occupational Employment Survey and Employment Cost Index.

general, § 2520.104b–1 provides implementing guidance on the manner in which the substantive disclosure requirements of Title I of ERISA will be deemed to have been met. These final amendments address the circumstances under which electronic disclosure methods will be deemed to have met substantive disclosure obligations, but they do not alter the substantive disclosure requirements of Title I.

As a result of using electronic disclosure methods, and of meeting the conditions of this ICR involving appropriate consent, the burden of other information collections may be reduced. Information supporting the Department's estimates of those potential burden reductions for disclosures such as information required to be provided under ERISA section 404(c), or Notices of Preexisting Condition Exclusions under Part 7 will be submitted to OMB. Because the underlying terms of those information collections, which are incorporated in existing statutory provisions and regulatory guidance, are unchanged, however, it is the view of the Department that the terms of these information collections have not been modified.

Comments submitted in response to this notice will be considered by OMB in its consideration of the request for approval of the ICR; 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 that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

At the time of publication of the notice of proposed rulemaking, the Pension and Welfare Benefits Administration (PWBA) certified that the proposed rule, if promulgated in final form without material change, would not have a significant impact on a substantial number of small entities regardless of whether that determination was based on the definition of a small entity found in regulations issued by the Small Business Administration (13 CFR 121.201) or on the definition considered appropriate by PWBA as based on section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants. The Department requested comments on its definition and certification, and received none. It is the Department's view that the final rule, including the modifications from the proposal, will not significantly impact entities in any size category. The final rule does not require any plan or other entity to make use of electronic media for either disclosure or recordkeeping purposes. As such, entities may avoid both any marginal cost and any beneficial impacts by simply retaining their existing paper-based methods of compliance with disclosure requirements. Therefore, the undersigned certifies that this final rule will not have a significant impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The rules being issued here are subject to the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and 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 and 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 rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and does not impose an annual burden exceeding $100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this final rule do not alter the fundamental reporting and disclosure requirements provisions of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

This regulation is issued 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

Employee benefit plans, Employee Retirement Income Security Act, Pension plans, Recordkeeping, Welfare plans.

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. Amend section 2520.104b–1 to revise the first sentence of paragraph (a), the first sentence of paragraph (b)(1),

and paragraph (c), and to add a new paragraph (e) to read as follows:

§ 2520.104b–1 Disclosure.

(a) *General disclosure requirements.* The administrator of an employee benefit plan covered by Title I of the Act must disclose certain material, including reports, statements, notices, and other documents, to participants, beneficiaries and other specified individuals. Disclosure under Title I of the Act generally takes three forms.
* * *

(b) *Fulfilling the disclosure obligation.* (1) Except as provided in paragraph (e) of this section, where certain material, including reports, statements, notices and other documents, is required under Title I of the Act, or regulations issued thereunder, to be furnished either by direct operation of law or on individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals. * * *
* * * * * *

(c) *Disclosure through electronic media.* (1) Except as otherwise provided by applicable law, rule or regulation, the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy the requirements of paragraph (b)(1) of this section with respect to an individual described in paragraph (c)(2) if:

(i) The administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents—

(A) Results in actual receipt of transmitted information (e.g., using return-receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of the transmitted information); and

(B) Protects the confidentiality of personal information relating to the individual's accounts and benefits (e.g., incorporating into the system measures designed to preclude unauthorized receipt of or access to such information by individuals other than the individual for whom the information is intended);

(ii) 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;

(iii) 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 (e.g., the attached document describes changes in the benefits provided by your plan) and of the right to request and obtain a paper version of such document; and

(iv) Upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.

(2) Paragraph (c)(1) shall only apply with respect to the following individuals:

(i) A participant who—

(A) Has 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

(B) With respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties; or

(ii) A participant, beneficiary or any other person entitled to documents under Title I of the Act or regulations issued thereunder (including, but not limited to, an ''alternate payee'' within the meaning of section 206(d)(3) of the Act and a ''qualified beneficiary'' within the meaning of section 607(3) of the Act) who—

(A) Except as provided in paragraph (c)(2)(ii) (B) of this section, has affirmatively consented, in electronic or non-electronic form, to receiving documents through electronic media and has not withdrawn such consent;

(B) In the case of documents to be furnished through the Internet or other electronic communication network, has 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 has provided an address for the receipt of electronically furnished documents;

(C) Prior to consenting, is 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; and

(D) Following consent, if a change in hardware or software requirements needed to access or retain electronic documents creates a material risk that the individual will be unable to access or retain electronically furnished documents:

(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 of paragraph (c)(2)(ii)(A) or paragraph (c)(2)(ii)(B) of this section, as applicable, to the receipt of documents through electronic media.
* * * * * *

(e) *Limitations.* This section does not apply to disclosures required under provisions of part 2 and part 3 of the Act over which the Secretary of the Treasury has interpretative and regulatory authority pursuant to Reorganization Plan No. 4 of 1978.

3. Add 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.

§ 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 are 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 or other method of electronic transmission 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 the electronic record would not constitute a duplicate or substitute record under the terms of the plan and applicable federal or state law.

Signed at Washington, D.C., this 3rd day of April, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits, Administration, Department of Labor.

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