April 17, 2012

The Honorable Phyllis C. Borzi
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: E-Disclosures for ERISA Plans

Dear Assistant Secretary Borzi:

AARP writes to express our views concerning the subject of electronic disclosures raised in a March 27, 2012 letter that the Department of Labor received from various industry groups expressing dissatisfaction with the Department’s recent guidance on electronic disclosures and urging the Department to adopt different guidance that favors electronic disclosures as the default for required disclosures under Title I of ERISA. That letter suggests an across-the-board default that goes beyond the current safe harbor, without any standards at all regarding how the statutory rights of participants to receive information in paper form would be preserved. Contrary to these groups, AARP believes that the Department should reject these suggestions for the unfettered and indiscriminate use of electronic disclosures because that approach would, as a practical matter, exclude a substantial block of current plan participants from the benefits of disclosures. If these suggestions were adopted, they would, for some individuals, amount to no disclosures at all.

In AARP’s most recent comments to the Department of Labor in response to its Request for Information (RFI) on electronic disclosure (attached), AARP supported expansion of the current standards under ERISA for the request and distribution of required disclosures and wider use of electronic means to distribute employee benefit plan disclosures, notices, and other plan documents. We acknowledged that the number of individuals who are comfortable and literate with this technology will continue to increase. However, we also recognized that any changes to the electronic disclosure regulations must balance competing interests and take into account that there will continue to be legitimate preferences, and a legitimate role, for easily accessible written disclosures for the foreseeable future. The rationale for these preferences can range from individuals knowing they miss important e-mails due to the amount of e-mail traffic they receive to desiring not to read long, complicated documents on a computer screen to problems with home computers and software.

For several reasons, AARP supports the balance that the Department of Labor has recently struck in its guidance between favoring electronic disclosures where possible and preserving consumer choice over plan communications preferences. First, in so doing, the Department has taken into account demographic groups which may not have ready access to computers and personal electronic devices, and/or are not literate or savvy about the use of these devices. These groups include lower wage workers, workers with lower educational...

In its guidance, the Department has also struck a balance concerning those individuals who have no current ties to the workplace -- retirees, deferred vested participants, alternate payees, and COBRA recipients -- requiring affirmative consent to electronic disclosure. The broad brush proposed in the March 27 letter ignores these differences in the relevant circumstances of impacted individuals. As a result, these individuals would be at risk of impairment to their participant or beneficiary rights, which could materially increase the risk of harm to them and undermine their economic security.

Second, even those who have access to and feel comfortable with computers may not automatically want to receive pension plan information electronically. Although the March 27 letter claims that electronic communication “is the norm,” a telling statistic is an EBRI study that showed that only a minority of workers and retirees feel very comfortable using online technologies to perform various tasks related to financial management. *The 2012 Retirement Confidence Survey: EBRI Issue Brief, No. 369 at 21-22*. This is consistent with a Pew study that found that less than half of Americans of any age said they get financial information online. See *Generations 2010* at 2, 10, 13, 15 (Dec. 2010), http://pewInternet.org/-/media/Files/Reports/2010/IP_Generations_and_Tech10.pdf. In two surveys concerning 401(k) fees, AARP found that paper materials were the most widely desired vehicle for receiving fee-related information, regardless of age. See *401(k) Participants’ Awareness and Understanding of Fees* at 7, 34, (June 2007), http://assets.aarp.org/rgcenter/econ/401k_fees.pdf. Moreover, demographic groups more likely to prefer receipt of information about fees by mail included (1) persons over age 50; (2) women; (3) persons with high school and lower educational attainment; and (4) persons with household income of less than $50,000. See *Comparison of 401(k) Participants’ Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* (September 2008), http://assets.aarp.org/rgcenter/econ/fee_disclosure.pdf. These are important findings given that Department’s fee disclosure regulation will become effective this year. In fact, given the importance of fee disclosures on account balances, and therefore the retirement income security of participants, AARP would urge DOL to require that all fee disclosures be provided both electronically and in written form to all participants, unless the participant affirmatively elects only electronic disclosures.

Of particular importance to AARP is how the first contact with the plan participant is handled. Initial information about eligibility, benefits, and right to disclosures should be in written form, although nothing should prevent plans from also providing that information in electronic form as well. Participants should also have an opportunity from the beginning to express a preference for how they want to receive important documents. Moreover, because potential employees do not have an “official” employment relationship with a prospective employer, they are not privy to an employer’s website providing access to the employer’s proprietary
information concerning its benefit package. Under the March 27 letter's proposal, employees would not be able to review pertinent benefit information until their first day on the job when they are required to make their benefit elections. This is plainly inadequate for those employees who wish to make considered, informed decisions concerning their benefit elections.

The issue of electronic delivery is not as simple as the March 27 letter suggests. Indeed, the letter's failure to address potential privacy, confidentiality and security issues is troubling, especially given the recent report from the ERISA Advisory Council on Privacy and Security Issues Affecting Employee Benefit Plans, http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html#section6. Equally important, the letter also ignores any corresponding responsibilities of plans and service providers to adhere to any reasonable standards of participant protection in the definition and administration of participant elections for either paper or electronic delivery. For instance, participants should never be charged for electing paper disclosures or for changing their preferences between electronic and paper. Plans should be prohibited from requiring participants to follow unduly burdensome procedures, such as having to write a letter, in order to elect paper. And, plans should be required to provide disclosures and ensure receipt by participants and beneficiaries of the disclosures in a timely fashion. There are other issues that should be addressed in order to ensure that participants and beneficiaries receive timely, necessary disclosures in a format that they will use, but we mention these few in order to point up the deficiencies inherent in the March 27 letter, and to urge attention to important principles as a basis for development of electronic disclosure procedures. It appears to AARP that the proponents of expansion of the practice have unfortunately failed to take this approach.

AARP's position on participant disclosures stems from our concern about respect for the fundamental principle of ERISA, which is to protect the retirement security of participants and beneficiaries. Ensuring participants' receipt of complete, accurate, understandable, meaningful and timely information, in a manner in which they are able to process and preserve the information, will assist them in making informed decisions and potentially enhance their retirement security. The potential adverse consequences that may flow from a participant's failure to actually receive or review electronic disclosures in a timely fashion counsel against the Department's issuance of guidance without a thorough review and an open dialogue concerning the issues surrounding electronic disclosure. Instead, AARP believes that the Department of Labor should continue its review through its RFI process so that it can balance the important disclosure rights of participants and beneficiaries with the wishes of both the financial industry and participants to minimize compliance costs.

Sincerely,

David Certner
Legislative Counsel &
Legislative Policy Director
Government Affairs
cc: The Honorable J. Mark Iwry  
Senior Advisor to the Secretary and  
   Deputy Assistant Secretary for Retirement and Health Policy  
Department of the Treasury  

The Honorable Cass R. Sunstein  
Administrator, Office of Information and Regulatory Affairs  

Michael L. Davis  
Deputy Assistant Secretary, Employee Benefits Security Administration  
U.S. Department of Labor  

Attachment: AARP Comments on DOL RFI Electronic Disclosure. pdf