INVESTMENT COMPANY INSTITUTE

AMERICAN BENEFITS COUNCIL

June 2, 2008

By Fax and Hand Delivery

G. Christopher Cosby
Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, NW
Washington, DC 20210

Re: Affirmative Consent to Electronic Delivery of ERISA Disclosures — Comment on Extension of Information Collection Request; Recommendation to Revise DOL Electronic Media Rules

Dear Mr. Cosby:

The Investment Company Institute and the American Benefits Council submit this letter in response to the Department of Labor's request for comments on a proposed extension of the deadline for an information collection request ("ICR"). The ICR asked for information on the utility and cost of the affirmative consent condition to electronic delivery of ERISA mandated disclosures.[1] We commend the Department for recognizing that more current information is necessary to determine the economic impact of the affirmative consent requirement and its continued viability. We recommend replacing the affirmative consent requirement with effective but less costly alternatives that would facilitate wider use of electronic delivery while allowing participants and beneficiaries to request to receive communications in paper. We strongly recommend that the Department review all aspects of its 2002 electronic media regulation, including costs, in light of changes in accessibility to the Internet by the U.S. population.

The Investment Company Institute is the national association of U.S. investment companies (including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts), which manage more than half of 401(k) assets and assets of other defined contribution plans. Mutual fund firms and their affiliates also serve as recordkeepers and other service providers to 401(k) and other defined contribution plans.

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[1] 73 Fed. Reg. 18001 (Apr. 2, 2008).

The American Benefits Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

In 2002, the Department established a safe harbor for plans that wish to use electronic media to satisfy disclosure obligations under Title I of ERISA.[2] To fall within the safe harbor, a plan administrator has to satisfy the "affirmative consent" requirement for a participant, beneficiary or other person entitled to documents who does not have access to the employer's or plan sponsor's electronic information system as an integral part of his or her employment duties. Prior to consenting, a participant or beneficiary must 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. When it finalized the regulation in 2002, the Department made assumptions in estimating the cost of establishing and maintaining the affirmative consent process and asked for information on the costs and utility of this requirement.[3] Now, the Department has proposed to extend the deadline for comments.

We appreciate the Department's continued efforts to review its electronic media regulation and evaluate the costs of specific requirements, including the affirmative consent requirement described above. How ERISA information is delivered is important. Unfortunately, it remains difficult to assess the costs of the affirmative consent requirement because of its lack of use. One large plan sponsor has told the Council that it estimates the initial cost for a setting up the affirmative consent process would be approximately $500,000. A service provider member estimates that annual maintenance costs would exceed $40,000 for a large plan sponsor.

Based on our members' comments, many employers are discouraged from using the affirmative consent process to provide electronic delivery because it is cumbersome (*e.g.*, plans must distribute consent forms, then wait until a participant returns a consent form) and produces a poor response rate (*e.g.*, participants do not return forms). A large recordkeeper indicated to us that while it has email addresses on file for 82 percent of plan participants, only 3 percent of participants have given affirmative consent to website-only delivery of benefit statements. As a result, plans and recordkeepers continue to provide ERISA disclosures for participants and beneficiaries through non-electronic media, which is less efficient, more expensive and less timely than electronic media as a means of delivery. For a

[2] 67 Fed. Reg. 17264 (Apr. 9, 2002).

[3] 67 Fed. Reg. 17264, 17273.

large plan sponsor, the annual postage costs to mail paper copies of prospectuses to participants that fail to give affirmative consent may exceed $250,000. A large recordkeeper estimates that the average cost of providing a benefit statement by mail is around $2.87 per year per participant.

In addition to higher costs, non-electronic media delivery also lacks mechanisms — such as embedded links in an email or a web site — that provide participants and beneficiaries with a convenient means to review other plan-related information at the time they get a plan communication.

We urge the Department to reevaluate the need for the substantially stricter electronic delivery requirement (*i.e.*, affirmative consent) for participants and beneficiaries who do not use the employer's or plan sponsor's electronic information system as an integral part of their employment duties. Use of the Internet has become virtually universal among a significant majority of 401(k) participants. Participants under 60 constituted 91 percent of active 401(k) participants at the end of 2006.[4] In these age groups, access to an Internet-enabled PC at home is generally above 80 percent, based on Nielsen ratings (as of May 2008).[5,6] While individuals in their 60s have lower home-based Internet access numbers than younger age groups (68 percent in 2008 for the 55+ plus segment based on Nielsen ratings), Internet access and use among this group has grown significantly in recent years. An Institute study reports that Internet access by the 55+ age group has been growing at a fast pace (from 8 percent in 1997 to 64 percent in 2005).[7] In addition, participants in all age groups without home-based Internet access may nevertheless be active Internet users. Virtually every public library (99.1 percent) now offers free public access to the Internet.[8] Our members indicate to us that more and more plan transactions are being done on-line. One large recordkeeper reported to us that in 2007 about 75

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[4] *See* Holden, VanDerhei, Alonso, and Copeland, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2006*, ICI Perspective, vol. 13, no. 1, fig. 4 and EBRI Issue Brief, no. 308, Investment Company Institute and Employee Benefit Research Institute, August 2007, available at http://www.ici.org/pdf/per13-01.pdf. The 2006 EBRI/ICI database contains 53,931 401(k) plans with $1.228 trillion in assets and 20.0 million participants.

[5] *See* Nielsen On-Line, *Industry Vertical News on Internet Penetration* (May 2008), available at http://www.nielsen-netratings.com/resources.jsp?section=btn_filter&nav=5.

[6] These research numbers are generally consistent with ICI research on the Internet usage. In 2006, more than nine in ten households that own mutual funds report Internet access (*see* ICI, *2008 Investment Company Fact Book, 48th Edition*, available at http://www.icifactbook.org/). Among households owning mutual funds headed by individuals 65 or older, 69 percent report Internet access in 2006 (*see* ICI *Fact Book*, fig. 6.12).

[7] *See* West and Leonard-Chambers, *Mutual Fund Shareholders' Use of the Internet*, 2005, ICI Fundamentals, vol. 15, no. 2 (Feb. 2006).

[8] *See Executive Brief, The State of Technology and Funding in U.S. Public Libraries in 2007*, at *5, available at http://www.ala.org/ala/ors/plftas/executivebrief.pdf.

percent of investment changes by participants were made on-line over the plan participant website, compared with about 25 percent of changes made by phone.[9]

In response to these fundamental changes in Internet use, we recommend that the Department consider alternatives to the affirmative consent requirement that will be protective of a participant's rights but less cumbersome to administer. For example, providing advance notice to a participant and the right to opt out is used in many other important aspects of ERISA plan administration, including in connection with default investments under automatic contribution arrangements.[10] The Department also permitted this type of negative consent process for e-delivery in Field Assistance Bulletin 2006-03 (Dec. 20, 2006), which permits plans, until further guidance, to furnish benefit statement information to participants by posting it on a secure website, subject to an advance notice to participants (to be followed by an annual notice thereafter) and a participant's right to opt for a paper copy.[11] The FAB's alternative saves significant outlays of paper, postage and other costs while providing participants complete and timely information and the right to request paper disclosures, if so desired. We believe the approach of combining an advance notice to participants with a right to opt for a paper copy reaches the right result.

We applaud the Department for reflecting the changing environment in the FAB's approach to electronic delivery of participant benefit statements. We also are encouraged by the report recently issued by the ERISA Advisory Council's Working Group on Participant Benefit Statements, which supports the adoption of more flexible rules for the electronic delivery of mandated disclosures. In our view, the Department should re-open the 2002 electronic media regulation for a full review, including developing a workable rule for electronic delivery of all documents that replaces the affirmative consent requirement with a more usable standard.

[9] In fact, in 2007, 84 percent of all participant contacts with the recordkeeper were made via the participant website.

[10] *See* ERISA § 404(c)(5) (Default investment arrangements) and the implementing regulation in 29 C.F.R. § 2550.404c-5 (Fiduciary relief for investments in qualified default investment alternatives).

[11] The FAB also allows plans to furnish benefit statements by using the IRS electronic delivery rules.

We would welcome the opportunity to discuss these comments. Please feel free to contact Mary Podesta (202-326-5826) or Anna Driggs (202-218-3573) at the Institute or Jan Jacobson at the Council (202-289-6700).

Sincerely,

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cc: Bradford P. Campbell, Assistant Secretary of Labor for EBSA
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