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

Submitted via E-Mail to e-ORI@dol.gov

Re: Comments on ERISA Electronic Disclosure Request for Information (RIN 1210-AB50)

Thank you for this opportunity to comment on the electronic delivery rules under ERISA in response to the Department of Labor's (the "Department's" or "DOL's") Request for Information Regarding Electronic Disclosures by Employee Benefit Plans. 76 Fed. Reg. 19285 (April 7, 2011). We are filing these comments on behalf of a diverse segment of Groom Law Group clients, including Fortune 500 employers sponsoring pension, health, and welfare plans, trade associations, consulting firms, and health plan providers and administrators.

Delivery of required notices – paper and electronic - under the myriad rules that apply to employee benefit plans today has been an ever-increasing area of confusion and concern. Our clients are finding that more and more employees are requesting that documents be furnished electronically, so they are accessed more quickly, stored and transported more easily, and readily searchable. While our clients appreciate that some employees may continue to request paper copies, many are frustrated that they are forced to spend money that could be used to pay for benefits merely to send paper notices to many participants who do not really want them. As employers and service providers try to navigate the increased regulatory environment that governs employee benefit plans – including the huge challenges of health care reform – we recommend that the Department overhaul its electronic disclosure rules based on the following three principles:

- **Flexibility** – The rules should provide plan sponsors and administrators with maximum flexibility to fashion electronic delivery rules that best fit their participant/retiree populations, work patterns, and communication preferences and to reflect evolving technologies.

- **Safe Harbors** – The rules should provide reasonable safe harbors, along the lines of the options already provided by the Internal Revenue Service – that do not require affirmative consent or "actual receipt" to establish compliance.

- **Uniformity** – The rules should be as uniform as possible for both pension and welfare plans and for all of the notices and other documents required for each type of plan.

We provide our specific comments below.

1. Need for Flexibility to Meet Varying Work Forces and Populations

Recommendation: The rules should provide plan sponsors and administrators with maximum flexibility to fashion electronic delivery rules that best fit their participant/retiree populations, work patterns, and communication preferences and to reflect evolving technologies.

Analysis: We respectfully submit that the Department's current rules allowing electronic delivery (without first obtaining consent) are too limited. Under these rules, recipients must have access to electronic documents at their workstations, or "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 information system is an "integral part of those duties." 29 CFR § 2520.104b-1(c)(2)(i).

The above standard is increasingly becoming the exception rather than the rule – but that does not mean that participants do not make regular use of electronic means at some point in the performance of their duties. For example, participants may check in every day online, or perhaps report their time, sales, or other data on a regular basis online. Even with such a diverse workforce, employers are able to reach these workers electronically to give them other job-related information, such as changes in leave policies, information about the company's performance, discounts on company products, charitable initiatives, etc. Employees know to look to these online resources for company information, even if the employee does not have a regular "workstation."

The clients we represent are in the retail, computer technology, banking, airline, health care, and rural telecommunications industries. All of these industries have varied work patterns and multiple business locations. Nevertheless, all these clients want the

ability to send ERISA-required notices and other communications to their workers using electronic methods to the maximum extent possible.

We understand that plan participants also are asking that notices and documents be furnished electronically. While the clients joining this letter all provide paper documents upon request, these clients report that the number actually requesting paper copies is low. It is much more common for a participant to save an electronic document for when they need to access it or "pull up" the document online when needed. Clients report that, where participants call to make a request, it usually is for an electronic copy to be emailed to them or to find out the web address for the document. The participant doesn't want to store a paper copy or wait for the paper copy to be mailed. They prefer immediate, searchable access to the document.

We found that clients are responding to these participant demands by posting documents on their Intranet sites, where other company information and procedures are found and employees know to look for them there, as well as by creating "smart phone" applications, which employees can take with them wherever they are. While paper may be a fall-back for some participants, a rapidly growing number of participants are expecting electronic access and simply do not want paper. Employers report that, after distributing hard copies of summary plan descriptions, they often find them in the trashcan (one employer has resorted to going through the trash to rescue thrown out SPDs so that it can at least recycle them). As employees demand greater technology, plan sponsors and administrators want the flexibility to be able to use the cost savings of fewer paper notices to make plan notices and documents as accessible as they can be to everyone, in a variety of mediums.

2. Need For Reasonable Safe Harbors

Recommendation: The Department should adopt alternatives to affirmative consent, as permitted under E-SIGN and as adopted by the Internal Revenue Service ("IRS") in its electronic delivery rules governing benefit plan notices under the Internal Revenue Code, and as allowed by DOL itself for pension benefit statements.

Analysis: The federal E-SIGN legislation enacted over 10 years ago generally provides that electronic records have the same legal effect as paper. E-SIGN generally requires that, when a statute, regulation, or other rule of law requires that information be provided to a consumer in writing, the consumer must "affirmatively consent" to receive the information electronically in a manner that reasonably demonstrates the consumer's ability to access the information in electronic form. 15 USC § 7001(c). However, E-SIGN allows an agency to exempt a specified category or type of record from the affirmative consent requirement "if necessary to eliminate a substantial burden on electronic commerce that will not increase the material risk of harm to consumers." 15 USC § 7004(d).

In 2006, the IRS issued final regulations regarding electronic disclosure of notices and consents for employee benefit plans under the Internal Revenue Code. 26 CFR § 1.401(a)-21. The 2006 IRS rule replaced prior piecemeal rules that allowed electronic delivery of notices only in selected areas. Significantly, the IRS rules apply to notices affecting a wide variety of benefit plans, including both ERISA and non-ERISA arrangements such as –

- qualified retirement plans,
- accident and health plans,
- cafeteria plans,
- educational assistance plans,
- health savings accounts, and
- individual retirement plans.

Under one alternative method, the IRS rules generally require a person's affirmative consent to receive electronic notice, in a manner that demonstrates the individual can access the electronic medium being used. The plan must provide notice of the right to receive a paper copy upon request, the right to withdraw consent, the scope of the consent, and any hardware/software requirements. 26 CFR § 1.401(a)-21(b).

Under a second alternative method, the IRS rules include an "exemption" from the consent requirements that are intended to satisfy the agency exception under E-SIGN, including that the method not increase the material risk of harm to consumers. Specifically, affirmative consent is not required if: (1) the recipient has the effective ability to access the electronic medium being used, and (2) at the time the applicable notice is provided, the recipient is advised that he may request a paper copy at no charge (and the paper copy is provided). 26 CFR § 1.401(a)-21(c). This more flexible alternative was provided by Treasury/IRS –

> based on the judgment that, if the consumer consent method were the only method available to satisfy the requirements for providing an applicable notice through the use of an electronic medium, it would impose a substantial burden on electronic commerce with respect to retirement plans, employee benefit arrangements, and individual retirement plans, and that the requirements and safeguards . . . provide a less burdensome method without increasing the material risk of harm to recipients.

71 Fed. Reg. 61877, 61881 (Oct. 20, 2006).

In the same year, the Pension Protection Act ("PPA") amended ERISA section 105 to require plans to furnish pension benefit statements at least once a quarter to participants who direct their investments (generally once a year for other participants). While these statements would be a required disclosure under Title I of ERISA, and thus subject to the general delivery requirements, DOL Field Assistance Bulletin ("FAB") 2006-03 states that it would view the furnishing of these statements in accordance with the IRS disclosure rules as good faith compliance with the delivery rule.

In addition, the DOL FAB says that, with regard to plans that provide participants "continuous access" to benefits statements through a secure website –

> the Department will view the availability of pension benefits statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105.

The notice must be furnished "in any manner that a pension benefit statement could be furnished under this Bulletin."

We note that the above approach closely resembles the method the Securities and Exchange Commission ("SEC") has adopted for providing proxy materials to shareholders of public companies. Under the SEC rules, companies may post the proxy materials on an Internet website and give shareholders notice of their availability and the right to request a paper copy at no charge. SEC Rel. No. 34-55146, 72 Fed. Reg. 4147 (Jan. 29, 2007).

The Department should expand the electronic delivery safe harbor to include the same methods permitted under FAB 2006-03 so that the procedures allowed in the FAB extend to other ERISA disclosures. This framework, which provides a reasonable and workable alternative to affirmative consent (or looking to an employee's worksite location) already is in place for other required notices, so DOL can feel comfortable that it is a tested approach that provides flexibility to plans, while also protecting the interests of participants who may still request a paper copy.

3. Need For Uniformity

Recommendation: Adopt uniform rules for all employee benefit plan notices, regardless of which agency has enforcement authority.

Analysis: Employee benefit plans are governed by a number of federal and state agencies. Pension plans must comply with notice requirements from the IRS, DOL, SEC, and Pension Benefit Guaranty Corporation ("PBGC"). Health plans must comply with requirements from the IRS, DOL, and the Department of Health and Human Services ("HHS"). All of these agencies and specific laws have their own requirements regarding electronic delivery. For example, the IRS rules look to whether a participant has the effective ability to access the electronic document, not whether the participant uses a computer as part of regular employment. It is time consuming, expensive, and inefficient for plan administrators to track these numerous requirements and design each notice to comply with a different rule.

Under the Affordable Care Act, the three agencies responsible for insurance market reform, DOL, IRS, and HHS, have done an exemplary job working together to reconcile requirements and issue "tri-agency" guidance. The three agencies have had a Memorandum of Understanding ("MOU") in place since 1999 with respect to HIPAA enforcement that requires them to coordinate policies relating to the shared provisions of HIPAA to avoid duplication of efforts. 64 Fed. Reg. 70164 (Dec. 15, 1999). There should be similar coordination among the federal agencies that govern all of the notice requirements imposed on employee benefit plans.

Similarly, many states have their own laws regarding electronic delivery of insurance notices or certificates. For example, some states allow electronic documents to be delivered without a consent requirement, as long as they are available on paper upon request. Other states require affirmative consent or "waiver" of paper documents. Still others simply say documents must be "delivered" without further explanation. Whatever rule is adopted, plans and service providers simply are seeking one set of standards that govern all plan-related notices.

4. Two Additional Comments and Concerns

A. Claims Determinations Should Not Be Limited To Safe Harbor

The DOL claims procedure regulations specify that an employee benefit plan may issue an adverse benefit determination in electronic form only if the communication satisfies the safe harbor under the ERISA delivery rules. 29 CFR § 2560.503-1(g)(1); (j)(1). Thus, claims determination notices are subject to a stricter rule than other notices required under Title I of ERISA, which may be issued under ERISA's general rule that delivery be made in a manner "reasonably calculated to ensure actual receipt." There are many ways that employee benefit plans are able to provide claims determination notices, such as online and in real-time, so plans should not be limited to the safe harbor. In addition, online claims denials may be more confidential. While any household member may inadvertently open a sealed envelope addressed to a claimant, only the claimant

knows his password. Plans want the ability to be able to provide these important, time-sensitive notices in additional media, as consumers demand.

B. ERISA's General Delivery Rule Should be Retained, But the "Actual Receipt" Standard Should be Updated

While we strongly urge the DOL to adopt a new or more flexible safe harbor for electronic delivery, it should retain the general rule that plans use a delivery method "reasonably calculated " to ensure actual receipt. The wide variety of types of disclosures and types of workforces may mean that the safe harbor is not practical for all situations, so plans still should be able to fall back on the general ERISA requirement that the plan's delivery procedures be reasonably designed to reach participants. This general rule gives plans the flexibility to adapt communications methods as technology changes, as participants needs change, and as workforces change.

We ask, however, that the requirement that procedures be designed to "ensure actual receipt" should be updated in light of today's current technological environment. This language was adopted in 1977, well before the regulators envisioned the use of online or electronic notice. This type of standard does not fit with today's technology, when a plan only may be able to verify that a participant has "reasonable access" to an electronic notice (it is not clear how a plan would know whether an individual "received" a notice that is posted online, for example). Indeed, more recent statutes that allow electronic delivery have adopted the "reasonable access" standard. *See, e.g.,* Sarbanes-Oxley Act at ERISA § 101(i)(2)(D) ("The [blackout period notices] shall be in writing, except that such notice may be in electronic or other form to the extent that such form is *reasonably accessible* to the recipient."); Pension Protection Act at ERISA § 105(a)(2)(A)(iv) ("A Pension benefit statement . . . may be delivered in written, electronic, or other appropriate form to the extent such form is *reasonably accessible* to the participant or beneficiary.").

Conclusion

As technology has rapidly changed, sponsors and administrators of employee benefit plans are seeking new and creative ways to keep up with employee demands, make documents and notices as accessible as possible, and save money. President Obama recognized this need for flexibility in Executive Order 13563, which directs federal agencies to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends" and "to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." Employee benefit plans want the flexibility to design delivery methods specific to the particular notices they are providing and the unique workforces to which they are providing them, while striving to keep pace with evolving technology. We ask the Department to assist in the endeavor to be innovative and responsive, while being mindful of the interests of participants and beneficiaries.

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We hope these comments are helpful. Please contact us if you have comments or questions.

Sincerely,

Louis T. Mazawey

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