WELLS FARGO

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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

RE: RIN 1210-AB50, Request for Information Regarding Electronic Disclosure by Employee Benefit Plans

Ladies and Gentlemen:

Wells Fargo & Company ("Wells Fargo") appreciates the opportunity to respond to the request for information from the Department of Labor ("Department") concerning electronic disclosure by employee benefit plans as published in the *Federal Register* on April 7, 2011.

Wells Fargo is a financial services company that provides a number of trust, recordkeeping, administrative, and investment services to retirement plans covered by ERISA, as well as individual retirement accounts ("IRAs").[1] Wells Fargo holds over $284 billion in IRA assets, $244 billion in institutional retirement plan assets, $290 billion in custody assets, and provides services for over 3.6 million retirement plan participants, making Wells Fargo the 5th largest IRA provider and 6th largest institutional retirement plan recordkeeper (based on assets) in the United States.[2] Wells Fargo also provides a broad array of clearing, brokerage, and other investment and transaction-related services to ERISA-covered plans and IRAs.[3] As such, offering employee benefit plan materials electronically is an increasingly important consideration not only for Wells Fargo but also a great number of the customers to whom we provide financial services.[4]

Information technology has changed dramatically since the Department adopted its current standards for the electronic distribution of plan disclosures in 2002. More plan participants[5] than ever have access to the internet and use it to conduct all types of personal business including banking and financial services transactions. With these technology changes, the manner in which employee benefit plan participants want to receive their employee

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[1] Any reference to an IRA should be taken to also apply to Education Savings Accounts, Health Savings Accounts, and similar tax-deferred accounts subject to Internal Revenue Code §4975, but frequently not subject to ERISA.
[2] Source: Cerulli Associates (based on 1Q10 assets), September 2010. Sources: PLANSPONSOR Magazine (based on sales), July 2010; and Cerulli Associates, July 2010.
[3] Wells Fargo is a financial services company employing almost 280,000 team members. Its businesses include Wells Fargo Funds Management, which serves as the investment adviser to the Wells Fargo Advantage Funds, with over $252 billion in assets under management across fourteen different share classes, each with its own arrangement for the payment of distribution costs and related shareholder services. Wells Fargo's broker dealer subsidiaries include Wells Fargo Advisors, LLC ("WFA"), which administers almost $1.2 trillion in client assets through 15,236 full-service financial advisors in 1,100 branch offices in all 50 states and 5,900 licensed financial specialists in 6,610 retail bank branches in 39 states, and HD Vest Financial Services with 5,100 independent advisors. WFA also includes First Clearing LLC, which provides clearing services to 107 correspondent clients and WFA.
[4] Wells Fargo is providing this letter in its capacity as a plan service provider. Wells Fargo will be providing a separate response to the Department's RFI in its capacity as a plan sponsor.
[5] Any reference to a participant or participants should be deemed to include a beneficiary or beneficiaries.

benefit plan information has also changed. The topic of electronic delivery of employee benefit materials is very timely and important. Wells Fargo commends the Department for providing this opportunity for stakeholders to share their experience, knowledge, and preferences in the area of electronic delivery. Our response consists of our overall recommendations followed by our replies to some of the specific questions contained in the RFI.

The guiding principle for Wells Fargo is that plan participants should be able to receive their employee benefit plan statements and communications in the manner which is most convenient and useful for them. A 2010 study showed that 81% of surveyed participants had an interest in electronic delivery of plan information.[6] The convenience of electronic delivery combined with the reduced risk of mail fraud and identity theft associated with lost or stolen papers are strong incentives for many people to move to electronic delivery and storage for their financial records and communications. Further, electronic delivery is a more cost effective way to distribute large volumes of information to millions of recipients, and it reduces the amount of paper generated which is beneficial for the environment.

Wells Fargo's Recommendations

Eliminate Current Constraints to Broaden Usage of Electronic Delivery

Despite the advantages and increasing demand for electronic delivery, the current electronic disclosure safe harbor is a deterrent for many plan sponsors when considering whether or not to utilize electronic delivery for their plans. Our experience is that this is primarily due to the difficulty of meeting two of the safe harbor requirements: (1) Participants' access to their employer's computer system must be an integral part of their duties; and (2) Affirmative consent to electronic delivery is necessary for participants who either do not have access to their employer's computer system or that access is not an integral part of their duties.

Wells Fargo recommends eliminating the above two constraints in order to make it easier for plan sponsors to offer electronic delivery of information to all plan participants, while at the same time providing a reasonable opportunity for participants to choose paper delivery if they prefer it.

Adopt More Flexible Electronic Delivery Standards

Wells Fargo recommends that the Department revise its regulations, safe harbors, or both to allow a model where electronic delivery is the primary (i.e., default) method of plan communications for all participants, regardless of the participant's employment status or the degree of access to the employer's computer system. Participants with an email address (employer-provided or personal) on file with the plan service provider would receive an email that notifies them when a required plan disclosure is available on a continuous-access website and provides either a link to the website or instructions on how to access the website. Participants who wish to view in paper format would follow an opt-out process to request a paper version of such document(s).

In situations where a service provider does not have a participant's email address on file, plan sponsors should still be afforded the flexibility to offer required plan disclosures through a continuous-access website. In this case, the plan sponsor should be permitted to determine whether participants are notified in electronic or paper format that a plan disclosure is available on a continuous access website or available in paper format upon request. This approach is based on the Department's Field Assistance Bulletin 2006-03, which states that providing pension

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[6] Source: 2010 Defined Contribution Participant Experience Study, Matthew Greenwald & Associates and Kendall Kay & Company.

benefit statements on a secure website represents good faith compliance with the requirement to furnish benefit statement information provided that participants receive notification of the availability of the statement on a continuous access website, instructions on how to access it, and are informed of their right to request a paper statement. Wells Fargo supports a revised electronic delivery standard that expands the principles contained in FAB 2006-03 to include all required plan disclosures.

The above recommendations provide maximum flexibility for plan sponsors to offer plan information electronically to those who want it, while also protecting the right of participants to receive paper if they prefer.

Move to a Consistent Regulatory Framework
In conjunction with adopting more flexible and expansive regulations, Wells Fargo recommends that the Department work with the Treasury and the SEC to develop a consistent standard for electronic disclosure. This will help the compliance efforts of plan sponsors and service providers by easing the administrative burden associated with overlapping, and sometimes conflicting, electronic disclosure requirements.

Finally, we recommend that future electronic delivery standards be written in a manner that allows plan service providers, plan sponsors, and plan participants to take advantage of future technology advancements without needing to wait until the standard itself can be revised.

Responses to Specific DOL RFI Questions

Following are more specific comments Wells Fargo has on certain questions contained within the Request for Information. To avoid repetitive comments, questions are grouped together in cases where the comment is responsive to more than one question.

Question 5 - What are the most common methods of furnishing information electronically (e.g., e-mail with attachments, continuous access Web site, etc.)?

Wells Fargo furnishes information electronically to participants primarily by sending emails informing participants of documents that are available on a continuous access website. In some cases, the email contains a direct link to a PDF document on the website (typically used for documents that do not contain personally identifiable information, such as a Summary Plan Description). For participant-specific documents like quarterly statements, the email informs participants that a new document is available on the plan's website, and encourages them to log in to the secure website to view the document. Wells Fargo does **not** generally use email attachments to provide information to participants as these can be large documents that may be rejected by certain email systems that limit the size of attachments and may also be rejected by spam filters.

As explained in our overall recommendations, plan sponsors should also have the option to provide plan disclosures in continuous access websites to participants without an email address on file if they are given sufficient notice and provided an opportunity to opt out and request paper format.

Question 6 - What are the most significant impediments to increasing the use of electronic media (e.g., regulatory impediments, lack of interest by participants, lack of interest by plan sponsors, access issues, technological illiteracy, privacy concerns, etc.)? What steps can be taken by employers, and others, to overcome these impediments?

Question 9 - Should the Department's current electronic disclosure safe harbor be revised? If so, why? If not, why not?

Question 10 - If the safe harbor should be revised, how should it be revised? Please be specific.

Question 17- If a plan furnishes disclosures through electronic media, under what circumstances should participants and beneficiaries have a right to opt out and receive only paper disclosures?

Question 19- Some have indicated that the affirmative consent requirement in the Department's current electronic disclosure safe harbor is an impediment to plans that otherwise would elect to use electronic media. How specifically is this requirement an impediment? Should this requirement be eliminated? Is the affirmative consent requirement a substantial burden on electronic commerce? If yes, how? Would eliminating the requirement increase a material risk of harm to participants and beneficiaries? If yes, how? See section 104(d)(1) of E-SIGN.

As stated in our overall recommendations, Wells Fargo's experience is that the most significant impediment to increasing the use of electronic media is the difficulty plan sponsors have meeting the Department's current electronic disclosure safe harbor. The existing safe harbor requires that participants affirmatively consent to electronic disclosure unless they are able to effectively access the documents at work and that access is also an integral part of their duties. These restrictive requirements constrain plan sponsors from offering electronic disclosure for their plan as they are justifiably concerned about their ability to effectively comply with the safe harbor. The result is that a large number of participants who may prefer to receive their plan information electronically are unnecessarily prevented from doing so.

Wells Fargo recommends that the Department eliminate the "integral part of their duties" requirement as part of the safe harbor that has become outdated since it became effective in 2002. Given the tremendous expansion in usage of electronic media through multiple devices (e.g., laptops, smartphones, MP3 players, and tablets), this requirement no longer seems necessary or relevant. Instead, we propose that the Department adopt revised regulations requiring only that the electronic medium used is one that any individual has the effective ability to access — consistent with the current Treasury Department requirement.

Wells Fargo also recommends that the Department should eliminate the affirmative consent requirement and allow electronic delivery to be the default method of delivering communications to all participants. Participants who have an email address on file (employer-provided or personal) with the plan service provider would receive notification that a required plan disclosure is available on a continuous access website. Participants without an email address on file with the plan service provider would receive notification, either in electronic or paper format, that a required plan disclosure is available on a continuous access website. Each approach should be combined with a process that provides an effective opportunity for participants to opt out of electronic delivery if they prefer paper format. Even after being defaulted to electronic delivery, participants should always have the option to elect paper delivery at any time for any plan materials that are available electronically. Opt-out notices could be provided through multiple channels designed to reasonably ensure receipt by the participants including: (1) paper or email notices to existing participants; (2) notices enclosed with enrollment materials for new participants; (3) text messages; and (4) posting the notice continuously on the plan website. We encourage the Department to provide plan sponsors and plan participants the flexibility to determine which methods of receiving notice and accessing plan disclosures are deemed appropriate.

Question 7 - Is there evidence to suggest that any increase in participant and beneficiary access to, and usage of, the Internet and similar electronic media in general equates to an increased desire or willingness

on the part of those participants and beneficiaries to receive employee benefit plan information electronically? If so, what is it?

Industry research indicates a strong interest by participants to receive information electronically. An industry research group conducted a national survey of 1,000 retirement plan participants in the summer of 2010. They asked "How interested are you in being able to receive information about your defined contribution retirement plan through…" The response of "email messages and attachments" was the most popular with 81% of participants interested in it to some degree (30% extremely interested, 30% very interested, and 21% somewhat interested).[7]

Question 8 - Are there any new or evolving technologies that might impact electronic disclosure in the foreseeable future?

The growing use of mobile devices such as laptops, smartphones, MP3 players, and tablets offer participants another convenient way to access the internet and their electronic plan communications in the manner that is most convenient for them.

Question 13 - Should a revised safe harbor have different rules or conditions for different recipients entitled to disclosures (active employees, retirees, COBRA Qualified Beneficiaries, etc.)? If yes, why, and how should the rules or conditions differ?

No. Provided that all participants are given an effective opportunity to opt out of electronic delivery if they prefer to receive paper delivery, there is no need to adopt different requirements for different categories of participants, which would be administratively burdensome.

Question 22 - **Do spam filters and similar measures used by non-workplace (personal) e-mail accounts, pose particular problems that should be taken into consideration?**

Participants should be able to access their plan information from their personal computer (or mobile device) as they have control over their filters for their personal accounts. Software typically notifies users when it blocks a site or email, and prompts them to elect to keep the block or to "allow" access.

Although not specifically asked, there are also potential issues in this area for participants accessing data through their employer's computer system, which often has restrictive filters on websites and email. In this case, plan sponsors need to ensure that their employees have access to the sites of their plan service provider, other sites that host plan or fund material (e.g. fund prospectuses), or both. Plan sponsors also need to assure that they do not block notification emails sent by plan service providers.

Question 24 - What are current practices for ensuring that the e-mail address on file for the participant is the most current e-mail address? For example, what are the current practices for obtaining and updating e-mail addresses of participants who lose their work e-mail address upon cessation of employment or transfer to a job position that does not provide access to an employer provided computer?

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[7] Source: 2010 Defined Contribution Participant Experience Study, Matthew Greenwald & Associates and Kendall Kay & Company.

Currently, Wells Fargo offers participants the ability to provide or update their current email address used for electronic delivery at any time by logging into the continuous access website. When the email address we have on our records for a participant becomes outdated and results in an undeliverable email, we send a letter to the participant at the mailing address we have on file that encourages the participant to provide an updated email address as soon as possible.

Question 25 - What costs and benefits are associated with expanding electronic distribution of required plan disclosures? Do costs and benefits vary across different types of participants, sponsors, plans, or disclosures? Are the printing costs being transferred from plans to plan participants and beneficiaries when information is furnished electronically?

Increased electronic delivery can provide the following benefits: (1) faster, safer, and more convenient delivery of plan materials; (2) lower printing and mailing costs paid by plans; (3) reduced risk of mail fraud and identity theft associated with paper delivery; and (4) environmental benefits associated with less paper being generated.

Wells Fargo does not believe that electronic distribution of required disclosures transfers printing costs from plans to participants. With electronic delivery, disclosures and statements can be archived electronically and viewed by participants instead of printing them. In addition, Wells Fargo stores historical statements securely on a continuous access website for up to 24 months. For a longer archiving period, participants can download the electronic image of their statement from the secure website to their own computer. In addition, participants may request copies of statements older than 24 months from the plan sponsor or service provider within the required retention period. Finally, participants who wish to receive paper copies of their statements may still choose to receive paper copies at no charge.

Question 30 - Employee benefit plans often are subject to more than one applicable disclosure law (e.g., ERISA, Internal Revenue Code) and regulatory agency. To what extent would such employee benefit plans benefit from a single electronic disclosure standard?

Wells Fargo believes that the consistency afforded by a single disclosure standard would help eliminate confusion and enable plan sponsors and service providers to confidently expand the availability of electronic disclosure to participants. We emphasize that if a single disclosure standard is developed, it will move the industry toward making electronic delivery more broadly available to participants. In large part, this can be accomplished by making it easier for plan sponsors to offer electronic delivery by implementing more flexible standards as discussed in this letter.

We hope these comments have been helpful and that the Department will consider them while determining how to update the existing rules around electronic disclosures.

Respectfully submitted,

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