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VIA E-MAIL: e-ORI@dol.gov

June 6, 2011

**Re: Comments in Response to the Department of Labor's Request For  
Information Regarding Electronic Disclosure by Employee Benefit Plans**

**RIN 1210-AB50**

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

Ladies and Gentlemen:

We are submitting this letter in response to the request by the Department of Labor (the "**Department**") for information on the rules regarding the electronic distribution of employee benefit plan information under the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**").

Given the exponential increase in internet usage and web access by the general U.S. population over the past ten years, we commend the Department's effort to revise and update its electronic disclosure rule. We would like the Department to consider issuing additional guidance in connection with the electronic delivery of proxy materials relating to annual shareholder meetings. Public companies are required by federal securities laws to provide various disclosure and other materials to shareholders in connection with soliciting proxies for shareholder votes or director elections and other matters submitted for shareholder approval. Rule 428 under the Securities Act of 1933, as amended, obligates employers to send all shareholder communications to plan participants. The terms of many plans and section 404(c) of ERISA give plan participants the right to direct the trustee's vote. Participants in a company-sponsored 401(k) or employee stock ownership plan stock fund often receive voting instructions forms from the plan trustee, which request participants to instruct how the trustee should mark its proxy in respect of shares allocated to the participants' account. Complications, however, have arisen in meeting securities law and ERISA obligations in the case of defined contribution plans with employer stock funds because the regulations under the Securities and Exchange Commission ("**SEC**") and the

Department differ. Trying to satisfy both regimes through one electronic vehicle is either costly or unfeasible as public companies do not want to risk the loss of ERISA section 404(c) protection. We therefore ask the Department to issue guidance that the distribution of proxy materials to plan participants using the SEC's "Notice and Access Model" or rules, which are as close as possible to the SEC's rules, would satisfy the Department's standards for the electronic distribution of plan information.

## **I. Regulatory Regimes**

### **A. SEC E- Proxy Distribution Rules**

In July 2007, the SEC amended the proxy distribution rules to permit a public company to provide proxy materials to shareholders through an optional "Notice and Access Model".<sup>1</sup> Rather than providing hard copies of the proxy materials, a company electing to use the Notice and Access Model must, among other requirements: (1) post its proxy materials on a web site, (2) provide instructions on how to access the proxy card for voting purposes, and (3) send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 calendar days before the annual meeting date. The Notice of Internet Availability must conform to specified criteria set forth in the SEC rules. It must identify the website, provide specific information about the upcoming shareholders meeting, and include a list of materials that are available. While proxy materials are electronically delivered under this option, issuers must deliver proxy materials in hard copy to any shareholder upon request. By switching from hardcopy to electronic, the Notice and Access Model provides corporate issuers opportunities to save money on printing and postage costs. According to Broadridge Financial Services, Inc., the savings have been over \$200 million annually for corporate issuers who have elected to use the Notice and Access Model.<sup>2</sup> In addition, the decrease in paper delivery supports corporate "green" initiatives while ensuring faster delivery of proxy materials to shareholders.

### **B. ERISA Section 404(c) and E-Proxy Compliance**

Compliance with the Notice and Access Model, however, does not satisfy the requirements for electronic delivery of materials under the Department's standards for participants in ERISA-covered plans that hold employer securities, such as 401(k) and employee stock ownership plans. Section 404(c) of ERISA permits plan sponsors to transfer to participants the responsibility and liability for selecting investment options if the participant directs the investment of his or her account and the plan otherwise satisfies the requirements of the section 404(c) regulations.<sup>3</sup> If company stock is offered, participants must be given the information provided to general shareholders. A company can either provide a hard copy set of all documents to participants or if the company wishes to deliver documents electronically, in order to continue to receive ERISA section 404(c) protection, it must meet the terms and conditions of the Department's electronic delivery requirements. The Department's electronic delivery rules permit electronic delivery to two categories of recipients. The first category consists of participants who

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<sup>1</sup> 72 F.R. 4148.

<sup>2</sup> [www.shareholderforum.com/e-mtg/Library/20101108\\_SEC-Broadridge.pdf](http://www.shareholderforum.com/e-mtg/Library/20101108_SEC-Broadridge.pdf), "Memorandum from the Office of Commissioner Luis A. Aguilar," November 8, 2010.

<sup>3</sup> 29 CFR § 2520.104b-1(c).

have the ability to access electronic documents at their regular place of work and have access to the employer's or plan sponsor's information system as an integral part of his or her duties.<sup>4</sup> Administrators must use measures reasonably calculated to ensure actual receipt of the documents and protect the confidentiality of information that relates to individuals and their accounts. Administrators must also provide notice to participants of the significance of the document. Paper versions of electronically furnished documents must continue to be made available upon request. The second category of individuals must affirmatively consent to receive documents electronically.<sup>5</sup> Consent to electronic delivery requires the employee be provided a clear and conspicuous statement indicating: (1) consent can be withdrawn at any time without charge; (2) the procedures for withdrawing consent and updating other contact information (3) any hardware or software needed to access and retain necessary documents; (4) the participant has the right to obtain the notice by paper without charge; and (5) the types of documents to which the consent will apply.

## **II. Comments**

### **A. Issue Guidance that the Distribution of Proxy Materials Using the SEC's Notice and Access Model Will Satisfy the Department's Standards for Electronic Distribution of Plan Information**

Because the regulations under the SEC and the Department differ and because the Department's rules are much harder to satisfy, companies have had to bifurcate the method of delivering proxy materials between plan participants and other shareholders. Companies first need to adopt a process to differentiate between shareholders and plan participants. While they may make proxy materials available to their shareholders electronically in accordance with the Notice and Access Model, they need to develop a separate process of sending hard copies of proxy materials to plan participants. As a result, in addition to the environmental costs, companies and plans are burdened with printing and distribution costs to comply with the Department's document delivery requirements. It is difficult to come up with an explanation as to why, in this instance, plan participants should be treated differently than the wider shareholder base. We note that the Department's Request for Information asks commenters to consider the SEC's Notice and Access Model. Especially, in the case of delivering proxy materials, we urge the Department to consider adopting the Notice and Access Model or a model as close as possible to the SEC's rules so that companies and plans may be able to use a uniform standard in delivering proxy materials to participants and shareholders and may fully realize the cost savings that were intended by the SEC's Notice and Access Model.

### **B. Actual Receipt Should Be Changed to Reasonable Access**

The Department should make "reasonably accessible" the standard for the provision of proxy materials in accordance with ERISA section 404(c) and the regulations thereunder. The SEC's Notice and Access Model is a modified "access equals delivery" model adopted in 2007 after extensive consideration and proposals for the adoption and subsequent amendment of rules

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<sup>4</sup> See 29 CFR § 2520.104b-1(c)(2)(i).

<sup>5</sup> See 29 CFR § 2520.104b-1(c)(2)(ii)(A).

regarding the appropriate method of electronic delivery under the federal securities laws.<sup>6</sup> ERISA's current electronic delivery rule, which requires that the method of distribution be "reasonably calculated to ensure actual receipt," was adopted in 1977, a time when the internet was in its infancy and there was no concept of widespread electronic delivery. Today, electronic and web-based delivery of documents and information is mainstream and embraced in both the private and the public sectors across the full breadth of the population. From 2000 to 2010, the number of Americans who use the internet grew by 75% with over 77 percent of Americans using the internet by the end of 2010.<sup>7</sup> In recognition of the growth of electronic media, the Department in 2006 embraced the "reasonably accessible" approach when providing that notice of availability of benefit statements under a defined benefit pension plan could be provided in "written, electronic or other appropriate form to the extent such form is reasonably accessible to the participant."<sup>8</sup>

Other regulators are also citing the growth of the internet and electronic media in their shift to electronic delivery of information and documents. For example, the Internal Revenue Service announced in 2010 that it will no longer send taxpayers paper income tax packages because of the growth of web-based information and filing as well as its need to reduce costs.<sup>9</sup> Taxpayers who previously relied on hardcopy forms, schedules and instructions to prepare their tax returns were sent a postcard explaining their options for obtaining 2011 forms through various on-line free and/or paid preparation services or through the taxpayer's local post office, library or local Taxpayer Assistance Centers. Citing improved security as well as potential savings over the next decade, the federal government announced that by the end of March 2013 it will discontinue sending paper checks from Social Security, Veteran's Affairs and other federal benefit programs.<sup>10</sup> Social Security disability and other federal benefit program recipients who do not have on-line banking can elect to receive a pre-paid debit card but the default option will be electronic banking for all but those who are age 90 or older.

### **C. Replace the Affirmative Consent Requirement with a Negative Consent Model**

The SEC's Notice and Access Model adopts a negative consent approach while the Department's current delivery rules require affirmative consent to electronic document delivery for those not currently employed or those employees who do not have access to electronic documents as part of their duties. In light of the continued advancements in, and now widespread use of, web-based communications, the default rule of paper document delivery for proxy material should be changed to a negative consent model with an accompanying notice and option for the participant to elect to receive hard copies of proxy materials.

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<sup>6</sup> 70 F.R. 74598, 74599.

<sup>7</sup> [www.internetworldstats.com/am/us.htm](http://www.internetworldstats.com/am/us.htm).

<sup>8</sup> Pension Protection Act of 2006 (Pub. L. No. 109-280), amending ERISA § 105(a).

<sup>9</sup> Only 8 percent of individuals who filed tax returns in 2010 received tax packages in the mail. The rest either e-filed or used a paid tax professional or software. As of October, 2010, 96 million individual tax returns were e-filed and approximately 20 million paper returns were filed through paid preparers. "Tax Package Mailing to End Following Growth of e-File," [www.irs.gov/individuals/article](http://www.irs.gov/individuals/article), October 27, 2010.

<sup>10</sup> U.S. Dept. of Treasury, Office of Legislation and Public Affairs, Press Release, "U.S. Treasury to "Retire" Paper Checks for New Recipients of Social Security and Other Federal Benefits, Saving Taxpayers \$1 Billion," April 26, 2011.

The Department's Request For Information notes that Executive Order 13563 "reaffirms the importance of achieving regulatory goals through the most innovative and least burdensome tools available." As discussed above, it is clear and undisputed that web-based document delivery, a relatively recent phenomena, is both innovative and economical in comparison to delivery via the U.S. Postal Service. It is also clear that, in this context, the Department's central purpose, protecting the rights and interests of participants and beneficiaries, requires the Department to balance two priorities: an individual's right to adequate disclosure versus the administrative expense for such disclosure that is often borne by the plan participants as a whole. The current affirmative consent model for electronic document delivery favors the former whereas negative consent would serve both. A negative consent model of document delivery for all plan participants, including non-employee participants and those employee participants without workplace access, would result in greater efficiency and substantial savings in plan administration yet would still be protective of those participants who lack access to or facility in navigating the web with a notice and opportunity to elect paper delivery of proxy materials.

The Department itself embraced web-based document and information delivery in the recently finalized rules for Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans.<sup>11</sup> Specifically, the rule requires that a plan provide a website address where participants can receive supplemental and updated information with respect to the principal strategies and attendant risks for each designated investment alternative under the plan. In the preamble to the final regulation, the Department acknowledged that some participants may not have ready access to the web or this information but indicated that the rule also requires participants be furnished information (i.e., notice) about how to request paper copies of the website information.<sup>12</sup> Thus, the Department has, in this instance, adopted a negative consent and a notice and access model.

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For public companies with ERISA section 404(c) plans containing employer stock, the Department's current document delivery requirements are an obstacle for these companies and plans to realize the cost savings that were intended by the SEC's Notice and Access Model. The Department's Request For Information acknowledges the tremendous growth in accessibility of electronic information and the Department has recently embraced a model similar to the Notice and Access Model for the delivery of supplemental information regarding the strategies and associated risks for investment alternatives in participant directed plans. These participants are the very same individuals participating in the very same plans for which public companies would like to rely on the Notice and Access Model for proxy material distribution. It is difficult to understand why a company would, under the Department's regulations, be required to deliver to plan participants via a website information relating to the strategy and risks of investing in an employer stock fund yet not be able to rely on the Notice and Access Model for the delivery of proxy materials to this same population of participants. The Department should provide that the Notice and Access Model is an acceptable standard for furnishing proxy materials to all participants in ERISA-covered plans that hold employer securities.

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<sup>11</sup> 75 F.R. 64910.

<sup>12</sup> 75 F.R. 64910, 64920.

We appreciate the opportunity to participate in this process and would be pleased to discuss our comments or any questions the Department may have with respect to this letter. Any questions about this letter may be directed to Barbara Nims, Ed FitzGerald, Ning Chiu, Erin Cho or Ann Becchina at (212) 450-4000.

Respectfully submitted,

DAVIS POLK & WARDWELL LLP