WageWorks®

1100 Park Place
San Mateo, CA 94403

PHONE: 650-577-5200
TOLL-FREE: 888-990-5099
FAX: 650-577-5201

www.wageworks.com

June 3, 2011

Sent via email to E-ORI@dol.gov

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

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

Thank you for the 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). WageWorks, Inc. is a third-party administrator of employee benefit plans, specifically limited to enrollment and eligibility services, Health Care and Dependent Care Flexible Spending Accounts, Health Savings Accounts, Transit and Parking benefits, and self-funded, defined contribution Health Reimbursement Arrangements. Our clients include more than 4,500 employers, ranging from small businesses to Fortune 500 employers, as well as several federal, state and local agencies.

Delivery of required notices – paper and electronic – create a substantial burden for employers due to the rapid pace with which technology and employee expectations have evolved regarding the need for electronic delivery of notices. Overwhelmingly, our clients and their employees request that documents be furnished electronically so that the documents can be accessed more quickly and stored and referenced more easily. Additionally, electronic documents that are accessed online assure that participants and their covered dependents are accessing the most current information. Paper copies are often outdated. While we continue to receive some requests for paper copies, it is the exception, rather than the rule. As such, the costly burden of providing paper notices becomes a drain of time, money and resources for WageWorks, our clients and the participant.

Accordingly, we would appreciate electronic disclosure rules that provide:

- **Consistency** – The rules should be consistent as possible for all employee benefit plans and for all notices and other documents required under each type of plan.
- **Maximum Flexibility** – The rules should provide us with flexibility to tailor electronic delivery rules that best fit our clients' participant/retiree populations, work patterns and communication preferences, and that also reflect evolving technologies, such as mobile platforms and mobile applications.
- **Safe Harbors** – The rules should provide reasonable safe harbors, much like the options already provided by the Internal Revenue Service – and the safe harbors should not require affirmative consent or "actual receipt" to qualify under the safe harbors.

We provide our specific comments below.

1. **Need For Consistency** – Consistent rules should be adopted for all employee benefit plan notices among all agencies with enforcement authority.

A number of different federal and state agencies govern employee benefit plan operations. 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, whereas the DOL considers whether or not the participant uses a computer as part of his or her regular employment. Keeping track of numerous requirements and having various notices comply with different rules is time-consuming, expensive and inefficient.

Under the Affordable Care Act, we've been encouraged by the excellent job done by the DOL, IRS, and HHS in working together to reconcile notice requirements and the issuance of "tri-agency" guidance. 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 (or even require) electronic documents to be delivered without a consent requirement, as long as they are available on paper upon request, while other states require affirmative consent or "waiver" of paper documents. Still others simply provide that documents must be "delivered" without further explanation. Whatever rule is adopted, plans and service providers are simply seeking one set of consistent standards that govern all plan-related notices.

2. **Need for Flexibility to Meet Varying Needs** – Maximum flexibility should be provided to design electronic delivery rules that best fit our clients' participant/retiree populations, work patterns and communication preferences, and to reflect evolving technologies, including smartphone applications and mobile platforms. In fact, it is estimated that as of 2009, 73.8% of American homes had access to the internet, according to the US Census Bureau and the Pew Internet Home Broadband Study.

Unfortunately, the Department's current rules that allow for electronic delivery (without first obtaining consent) are too restrictive. 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;" additionally, access to the employer's information system must be an "integral part of those duties." 29 CFR § 2520.104b-1(c)(2)(i).

This standard is increasingly the exception rather than the rule – today most participants 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. Employers reach workers electronically to give them all types of job-related information, such as changes in leave policies, information about the company's performance, discounts on company products, charitable initiatives, etc. Employees know that they can use these online resources to obtain company information, even if the employee does not have a regular "workstation." In fact, the proliferation of smart phones means that employees are more often than not connected to electronic resources — in ways that were not imagined when the electronic disclosure rules were first put in place.

We have clients in the retail, computer technology, banking, airline, health care and telecommunications industries, all of which have multiple business locations and varying work environments. Our clients, however, want the ability to send ERISA-required notices and other communications to their workers using electronic methods to the maximum extent possible.

In addition, plan participants are asking that notices and documents be furnished electronically. Our clients provide paper documents upon request, however, the number of paper copies actually requested is low. It is much more common for a participant to access a document electronically, rather than by paper, when it's needed. Further, a high percentage of calls that we receive regarding notices are to request that an electronic copy be emailed or to find out the web address for site where the document can be accessed, rather than to request that a paper copy be mailed. Participants prefer AND demand immediate and searchable access to documents pertaining to their benefits.

Most clients are responding to these participant demands by posting documents on their Intranet sites, where other company information and procedures are found and where employees know to look for such information, as well as by creating or releasing their benefit vendors' "smart phone" applications, which employees can use to access information from wherever they are. A rapidly growing number of participants expect electronic access and simply do not want paper, although there is, admittedly, a small percentage of participants that still want paper as an additional record. Hard copies are very difficult to keep updated once in the participants' hands and can actually be detrimental to the participant if relied on absent an updated file copy that may have been misplaced or misfiled by the participant. Our clients are frustrated by the waste produced by the distribution of hard copies of summary plan descriptions, and often find that participants have discarded the documents. As participants demand greater technology and become more technologically savvy, our clients want the ability to match technology advances and have the flexibility to be able to use the cost savings achieved from sending fewer paper notices to make plan notices and documents as accessible as possible to everyone and in a variety of mediums.

3. **Need For Reasonable Safe Harbors** –Alternatives to affirmative consent should be adopted by the Department, 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.

Federal E-SIGN legislation was enacted more than 10 years ago and 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, final regulations were issued by the IRS 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. Most importantly, IRS rules apply to notices affecting a wide variety of benefit plans, including both ERISA and non-ERISA arrangements, including qualified retirement plans, accident and health plans, cafeteria plans, educational assistance plans, health savings accounts and individual retirement plans.

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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 is 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."

The above approach closely resembles the method adopted by the Securities and Exchange Commission ("SEC") 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

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availability and the right to request a paper copy at no charge. SEC Rel. No. 34-55146, 72 Fed. Reg. 4147 (Jan. 29, 2007).

It would be helpful if the Department expanded 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 provides a reasonable and workable alternative to affirmative consent (or looking to an employee's worksite location) and is already in place for other required notices, so the DOL should be 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.

Additional Comments and Concerns

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). As a result, claims determination notices are subject to stricter rules 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." Employee benefit plans are able to provide claims determination notices in many different manners, such as online and in real-time, so plans should not be limited to the safe harbor. In addition, online claims denials may actually be more confidential. While any household member may inadvertently open a sealed envelope addressed to a claimant, only the claimant knows his password to access claims information online. The ability to be able to provide these important and time-sensitive notices in electronic media is critical to address consumer demands and achieve operational efficiency and security.

The "Actual Receipt" Standard should be Updated while ERISA's General Delivery Rule should be Retained

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

However, 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 use of online or electronic notices was envisioned. This standard does not keep pace with today's technology, where a plan may only be able to verify that a participant has "reasonable access" to an electronic notice (e.g., it is not clear how a plan would know whether an individual "received" a notice that is posted online). Indeed, statutes issued more recently allowing 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.").

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Summary

As technology continues to rapidly evolve, we and our clients are seeking new and creative ways to keep up with employee demands, make documents and notices as accessible as possible, as up to date as possible and to save time and money. This need for flexibility was affirmed by President Obama 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." It is critical that employee benefit plans have 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 hope these comments are helpful and would encourage you to contact me if you have comments or questions. I can be reached at 760.509.4656 or by email at jody.dietel@wageworks.com.

Sincerely,

Jody L. Dietel, CFCI
Chief Compliance Officer