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June 6, 2011

Ms. Phyllis C. Borzi
Assistant Secretary
U.S. Department of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: E-Disclosure RFI
RIN 1210-AB50

Dear Ms. Borzi:

We are submitting this letter in response to the solicitation by the Department of Labor (the "Department") of comments on the request for information regarding the Department's current rules on electronic distribution of employee benefit plan information for plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), contained in the Request for Information Regarding Electronic Disclosure by Employee Benefits Plans (RIN 1210-AB50) published in the Federal Register on April 7, 2011 (the "RFI").

We support and commend the Department for revisiting the existing rules, which were last revised in 2002, in light of the significant changes in technology and the public's use of electronic media in the intervening almost 10 years. We are submitting comments in respect of certain requests for comments made by the Department in the RFI. The numbered paragraphs in bold below correspond to the number of the question in the RFI.

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

Yes. We believe that in the almost 10 years since the existing rules were promulgated by the Department, the public's access to and use of electronic media as a method of information dissemination has exploded and far exceeded the landscape that the Department envisioned in 2002. Today, individuals have access to the Internet at work, at home and even on-the-go through mobile devices and electronic dissemination of information has become widely accepted and mainstream for the

public. Given this environment, we believe it is appropriate for the Department to revisit its electronic disclosure rules to reflect the significant developments since 2002. As the RFI noted, a number of U.S. government agencies, including the Internal Revenue Service and the Securities and Exchange Commission have in the past several years updated their regulations to reflect the widespread acceptance of electronic dissemination of information, including electronic disclosure of proxy materials and prospectuses under federal securities laws. In particular, the SEC's rules permitting electronic delivery as the default method for prospectuses and proxy materials, without the need to seek individual consent, reflects the SEC's recognition that electronic media as a channel of information dissemination has become sufficiently established and provides the public with easier and timelier access to important information than more traditional methods. Electronic information also provides additional benefits over paper documents, such as being more environmentally friendly and having the ability to search documents for specific information.

As discussed in further detail below, in certain instances the Department's safe harbor rules impede the ability of our clients to make full use of the flexibility to distribute information required under the securities laws to plan participants electronically because the Department's rules are more restrictive than the SEC's rules would permit.

**10. If the safe harbor should be revised, how should it be revised?**

We believe that at the very least, the Department's safe harbor rules should be harmonized with the SEC's rules regarding electronic delivery of proxy materials (the "E-Proxy rules") and enable companies to take full advantage of the benefits of the E-Proxy rules. Under the SEC's E-proxy rules, companies may furnish proxy materials (*i.e.*, proxy statement, annual report to shareholders and proxy card) to shareholders electronically by posting them on an Internet site and providing shareholders with notice of the availability of the proxy materials. Paper copies of the proxy materials must be provided at no charge to shareholders who request them and shareholders may opt out of the electronic delivery method for distributions of proxy materials. As discussed further in our comment to Question 19 below, we believe that the Department's current safe harbor rules, in particular the affirmative consent requirement for electronic delivery, do not reflect the current environment on the access and use of electronic media and impose an unnecessary barrier to the efficient and cost-effective delivery of important information and it is time for the Department to update the rules. Therefore, we suggest that at the very least the safe harbor rules be revised to permit electronic delivery of proxy materials as a default method consistent with the SEC's E-Proxy rules, subject to the ability of individuals to request paper copies of the materials at no charge upon request or to opt out of electronic

delivery for distributions of proxy materials. These suggested revisions to the Department's safe harbor rules should come as no surprise to plan participants and beneficiaries as the SEC's E-Proxy rules have now been in place for several years and would be familiar to many, if not most, participants and beneficiaries.

**15. Who, as between plan sponsors and participants, should decide whether disclosures are furnished electronically? For example, should participants have to opt into or out of electronic disclosures?**

With respect to proxy materials, we believe that plan sponsors should determine whether proxy materials are furnished electronically, subject to the ability of participants to opt out of electronic delivery, in the same manner that under the E-Proxy rules companies determine whether to use the notice and electronic access method, subject to their shareholders' ability to opt out.

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

Recognizing that not all individuals are equally comfortable with electronic media and that some individuals simply prefer to have paper copies of information, we believe that the participants and beneficiaries should always have the right to receive paper copies of the disclosures at no charge upon request or to notify the plan sponsor that they elect to opt out of the default electronic delivery method and want paper only disclosures until otherwise notified.

**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.**

Each year around proxy season, we receive numerous inquiries from our public company clients regarding the interplay between the Department's electronic disclosure safe harbor and the SEC's E-Proxy rules. The affirmative consent requirement has been the most significant impediment in connection with the dissemination of proxy materials by our public company clients who have employer stock funds as part of their defined contribution plans qualified under Section 404(c) of ERISA. In order to satisfy the Section 404(c) requirements, the sponsoring company must comply with the Department's safe harbor rules for electronic delivery

of proxy materials, including the affirmative consent requirement. Because of the administrative burden of obtaining such affirmative consents, in particular with respect to former employees or retirees, many of our public company clients who have elected to use electronic delivery as permitted by the E-Proxy rules for their proxy materials must use a bifurcated delivery method, where the general population of shareholders receive materials electronically under the E-Proxy rules but mainly 404(c) plan participants receive paper copies of proxy materials. This results in unnecessary cost and expense for our clients who must bear the additional printing and mailing costs for such paper materials, as well as the additional logistical and administrative burden of having to provide for two separate methods of delivery. In fact, it may also result in the odd situation where a plan participant who is also a shareholder outside the 404(c) plan receives proxy materials electronically with respect to his or her non-plan shares, while receiving paper copies of proxy materials with respect to his or her plan shares.

We believe that, as demonstrated by the successful implementation of the SEC's E-Proxy rules, electronic delivery of proxy materials provides an efficient and cost-effective method for dissemination of important information, and since 2002, electronic delivery has become sufficiently widely accepted to provide sufficient comfort that using electronic delivery as the default method would not diminish the ability of participants and beneficiaries to receive important plan information or increase a material risk of harm to them.

**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?**

Our clients frequently consult with us regarding compliance with overlapping and sometimes inconsistent rules from different laws and government agencies. As highlighted by our comments regarding the electronic delivery of proxy materials, we strongly believe that plans and plan sponsors would benefit significantly from consistency and harmonization across the electronic disclosure rules applicable to them in the form of lower compliance costs and administrative burden.

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We appreciate the opportunity to comment on the RFI, and would be happy to discuss any questions the Department or its staff may have with respect to our comments. Any such questions may be directed to Edward P. Smith (212-408-5371), Marjorie M. Glover (212-408-1016) or Sey-Hyo Lee (212-408-5122).

Very truly yours,

Chadbourne & Parke LLP

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