

July 25, 2011

Office of Regulations and Interpretation  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave., N.W., Room N-5655  
Washington, D.C. 20210

**Re: Electronic Disclosure by Employee Benefit Plans RFI (RIN 1210 – AB50)**

Dear Assistant Secretary Borzi:

We are writing to comment on the Department of Labor's Request for Information (RFI) regarding electronic disclosure by employee benefit plans published in the Federal Register on April 7, 2011, appearing at pages 19285 – 90.

HighRoads works with the world's largest employers to help them manage their health, welfare and retirement benefit plans. We help our clients to gain complete control over their health care costs and compliance. With our technology-enabled consulting, employers have on-line access to benefit plan information and pricing, competitive benchmarks, and complete benefit supply chain management. We have automated HR processes for more than 100 of FORTUNE 100 employers. All of our clients operate employee benefit plans that are regulated by ERISA; as a result, we and our clients have a keen interest in the Labor Department's standards relating to employee benefit regulation.

At the outset, we would like to commend the Labor Department for issuing this RFI. The standards for electronic distribution by employee benefit plans are nearly a decade old and do not reflect the explosion in the use of technology by America's workers today. The guidance was written before the development of alternative means of accessing the Internet, such as smart phones and electronic tablets, and it was written before the advent of social networking sites such as Facebook, Twitter, and LinkedIn. Because America's workers have multiple means of accessing information electronically that did not exist in 2002, it is imperative that the standards put in place nearly a decade ago be revised to reflect the new face of technology in the American workforce.

Although we will respond in more detail to the questions posed in the RFI, our overarching comment relates to the need to reverse the presumption in the 2002 guidance relating to electronic distribution.<sup>1</sup> Under the safe harbor, electronic distribution is permissible only for an employee who has the ability to access documents furnished in electronic format at any location where he or she is reasonably expected to perform his or her duties. For all other employees, electronic distribution is only permitted where the employee has affirmatively elected to receive plan documents electronically.

We believe that the explosion in technology and alternative means of accessing the Internet referred to above dictate a different policy. Our clients strongly recommend that the presumption be reversed, so that an

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<sup>1</sup> On April 9, 2002, the Department of Labor revised 29 C.F.R. § 2520.104b-1 to establish a "safe harbor" for the use of electronic media to satisfy the plan furnishing requirements of ERISA. See 67 Fed. Reg. 17264 (Apr. 9, 2002).

employee would have to affirmatively elect to receive plan documents on paper.<sup>2</sup> In our specific comments below, we provide more information about how employee rights could be protected under such a new paradigm.

We now turn to a response to the questions posed in the RFI.

### **Questions 1 – 8: Access and Usage Questions**

Our clients have not specifically surveyed their employees regarding their access to the Internet at their duty stations or at home. Nevertheless, the data cited by the Department of Labor at 76 Fed. Reg. 19285 from the U.S. Census Bureau Current Population Survey demonstrates why a shift in the presumption from an opt-in to an opt-out method of electronic distribution is appropriate. As cited by the Department, the Census Bureau survey found that 76.7% of households in the United States have access to the Internet from some location, and that 111.7 of 139.1 million private sector workers, or 80%, have access to the Internet from some location. Of the 27.4 million workers remaining, 10.6 million, or 38.7%, reside in a household with access to the Internet. Thus, a total of 87.9% of private sector workers have access to the Internet from some location. We have no reason to believe that our clients' workforce would be any different. Because of the broad number of American workers who have access to means of accessing information via the Internet, it is appropriate to switch to an opt-out method of electronic distribution.

### **Questions 9 – 16: General Questions**

The Department's current electronic distribution safe harbor should be revised. It should be revised because the current safe harbor does not adequately reflect the growth in technology over the last 10 years. The current presumption for paper distribution for some workers is actually less safe, less reliable and more prone to security breaches than electronic distribution. In addition, electronic formats for plan documents increase their user-friendliness as participants can usually search a particular term or topic to quickly find what they need.

Moreover, paper distribution of plan documents is more harmful to the environment because of the consumption of paper and because of the environmental risks of disposing of printing chemicals and materials. Due to the soaring costs of paper and ink<sup>3</sup> and a 19% increase in postage costs since 2002, the cost of paper distribution represents a substantial financial hit to our clients' operations as well as to trusts for the benefit plans. Plan documents are usually quite substantial in terms of number of pages, and they are frequently thrown away once changes are made and they are no longer up-to-date. Revising the current safe harbor away from the presumption for paper distribution will also align with the increasing number of corporations that are seeking to reduce their carbon footprint.

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<sup>2</sup> Although it is not the subject of this RFI, we strongly agree with the comments filed by the Chamber of Commerce regarding the number of notices required under ERISA. Our clients tell us repeatedly that the number of required notices has the effect of so inundating employees with marginally relevant information that it creates a real risk that an employee will simply ignore notices. This would be especially unfortunate in light of the enactment of the Affordable Care Act, which is going to require, and has required, the provision of notices with extremely important information to employees regarding their health benefits. Therefore, we would support an initiative by the Department of Labor to reduce the number of required notices.

<sup>3</sup> For example, 2011 alone saw 8-10% increases in the cost of ink, in part due to soaring petroleum prices.

As described above, the safe harbor should be revised to permit an employer to opt for electronic distribution of plan materials to all workers, unless a worker has requested paper copies of plan materials. Thus, under this methodology, a worker would be given an opportunity at the start of employment to opt out of electronic distribution of employee benefit materials. Moreover, an employee who did not opt out could choose at any time during the course of his or her employment to switch to paper distribution at no charge.

We agree with other commenters that the methodology described above should apply to all employee benefit notices, regardless of whether they are pension or welfare benefit notices and regardless of whether the recipient is a current worker or a retiree.<sup>4</sup>

As discussed above, we believe that the employer should make the decision whether to provide plan documents electronically.

### **Questions 17 – 24: Technical Questions**

We have addressed many of the technical questions in our other answers above. With respect to question 24 (maintaining accurate email contact information), we would merely note, as have other commenters, that there is no difference between ensuring the accuracy of an email address list and the accuracy of a physical mailing address list. On separation from employment, an employee can be asked for a personal email address in the same way that an employee is asked for his or her residential address on separation from employment.

We appreciate the opportunity to respond to this RFI, and we would be pleased to answer any questions that you may have.

Sincerely,

/s Michael Byers

Michael Byers  
Chief Executive Officer

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<sup>4</sup> As the Department points out, some notices are time-sensitive, such as election of COBRA continuation coverage. See question 21. That fact does not change our recommendations, as the risks of non-receipt of this information also arise if the information is delivered via paper.