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

Ladies and Gentlemen:

Wells Fargo & Company (“Wells Fargo”) is pleased to respond to the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans issued by the Department of Labor (the “Department”) in the *Federal Register* on April 7, 2011 (the “RFI”). Wells Fargo is providing this response letter solely in its capacity as plan sponsor of ERISA-covered employee benefit plans for employees of Wells Fargo.¹ Currently, Wells Fargo employs approximately 280,000 individuals, known as Wells Fargo’s “team members.” Wells Fargo sponsors a number of employee benefit plans, including a participant-directed individual account 401(k) plan for eligible team members, employee welfare benefit plans for eligible team members and their eligible dependents, and a plan providing welfare benefits to eligible retirees and their eligible dependents.

Wells Fargo supports the Department’s efforts to explore how to expand and modify its current electronic disclosure standards for participant communications in light of the developments in technology since the time the safe harbor provided by 29 C.F.R. § 2520.104b-1(c) (the “Safe Harbor”) was adopted nearly a decade ago. The Department has correctly recognized the benefits of electronic communication in related contexts, such as the recently implemented electronic filing and availability of Form 5500 filings. As described in more detail below, Wells Fargo strongly supports revising the Safe Harbor to provide more flexibility for employee benefit plans and plan administrators to utilize electronic disclosure when providing plan communications to participants.²

¹ As a diversified financial services company, Wells Fargo also provides services to unaffiliated employee pension benefit plans. Wells Fargo is providing a separate response to the RFI in its capacity as a service provider to unaffiliated employee pension benefit plans.

² All references to a participant or participants in this response letter should be deemed to include both employee benefit plan participants and beneficiaries.

Electronic disclosure provides multiple benefits to employee benefit plans and participants. First, electronic disclosure provides significant cost savings to plans over printing and mailing expenses for paper disclosures, as described in more detail below. In addition, electronic availability of plan materials via email or a continuous access website allows participants to access the materials at any time from any location where there is Internet access. Electronic materials also allow participants to utilize text searching capabilities that are not otherwise available with paper materials and provide individuals with visual impairments the ability to employ computer software to assist in reading the materials. Finally, electronic communications are more environmentally-friendly and help conserve resources.³

This response letter is organized into three sections each of which addresses related questions raised by the RFI. We have included footnotes to indicate where this response letter provides information on specific questions from the RFI. The first section provides an overview of ways in which Wells Fargo currently utilizes electronic disclosure in connection with its employee benefit plans and challenges faced under the current Safe Harbor. The second section describes ways the Department should modify the Safe Harbor to provide additional flexibility for plan administrators to distribute ERISA disclosures electronically. The final section responds to the Department's questions regarding the development of a uniform disclosure requirement for employee benefit plans.

1. **Overview of Current Utilization of Electronic Disclosure for Participant Communications.**⁴

Wells Fargo in its capacity as plan sponsor is not in a position to provide information on the overall percentage of employee benefit plans that utilize electronic disclosure for some or all participants. However, we can provide information on ways Wells Fargo's own employee benefit plans currently utilize electronic disclosure and the challenges posed under the current Safe Harbor.

As a general matter, the methods Wells Fargo's employee benefit plans use to provide electronic disclosures are structured to comply with the Safe Harbor. Accordingly, the extent to which electronic disclosure is utilized differs depending on whether the participants at issue are employees. In practice, the Safe Harbor's distinction between employees and non-employees is the most significant impediment to increasing the use of electronic media, as discussed in more detail below. While the Department has noted that the Safe Harbor is not the exclusive means of using electronic media to satisfy the disclosure requirements under ERISA, following the conditions of the safe harbor provides important assurances that the ERISA delivery requirements have been satisfied.

Use of Electronic Disclosure for Employees. For employees, the Safe Harbor permits participant communications to be distributed electronically without a participant's affirmative

³ This paragraph responds to Question 25 of the RFI.

⁴ This section generally responds to Questions 3 through 7 of the RFI, unless otherwise specifically noted.

consent, provided certain conditions are met. In this regard, the Safe Harbor requires the participant to have the ability to effectively access the documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee, and access to the employer's electronic information system must be an integral part of the participant's duties as an employee. Thus, electronic disclosure without affirmative consent is only permitted for participants who are employees.

For Wells Fargo's team members who meet these conditions and have a Wells Fargo provided email address, the disclosures required under Title I of ERISA are generally provided electronically via the Wells Fargo email address. These disclosures include any summary plan descriptions, summary of material modifications, benefit statements, and QDIA notices. The email apprises the participant of the significance of the disclosure document and the right to request a paper copy by calling the plan's service center. The email generally contains a link directly to the disclosure document or to the plan's continuous access website where the disclosure document is maintained rather than including an attachment. To view materials containing a participant's confidential information electronically, the participant must sign on to the plan's continuous access website using a unique user name and a password established by the participant. This step ensures that confidentiality of the participant's information is maintained. Team members who do not meet these conditions or are on a leave of absence are tracked separately, and the materials are furnished in paper form.

In addition, summary plan descriptions for both pension and welfare plans may be furnished by providing participants with a CD-ROM that includes an electronic version of the summary plan description. The CD-ROM is packaged in a paper sleeve that apprises the participant of the significance of the disclosure document and the right to request a paper copy by calling the plan's service center. The paper sleeve also describes the hardware and software requirements for accessing and retaining the documents stored on the CD-ROM. Based on data for the current plan year, the production cost for a CD-ROM is approximately 90% less than the production cost for a paper summary plan description in the case of Wells Fargo's welfare benefit plan for team members (for a savings of approximately \$60,000 for every 10,000 summary plan descriptions produced, plus additional savings in connection with mailing cost). For Wells Fargo's 401(k) plan, the combined production and mailing cost for a CD-ROM is over 25% less than production and mailing cost for a paper summary plan descriptions (for a savings of approximately \$5,000 for every 10,000 summary plan descriptions produced).⁵

Use of Electronic Disclosure for Non-Employees. Where a participant is not a current employee, the Safe Harbor provides that the participant's affirmative consent is required in order for electronic disclosures to satisfy the safe harbor. With the exception of the distribution of plan materials via CD-ROM,⁶ the consent must be obtained or confirmed in a

⁵ This paragraph responds to Question 25 of the RFI.

⁶ See Use of Electronic Communication; Final Rule, 67 Fed. Reg. 17,264, 17,265 (Apr. 9, 2002) (clarifying that electronic confirmation of consent does not apply where the means of electronic communication is via CD, DVD, or similar media that is not dependent on electronic transmission (*i.e.*, is mailed to participants)).

manner that provides a reasonable demonstration that the participant can access the electronic communication in the form that it will be provided. As a result of the affirmative consent condition, the electronic disclosures that the Wells Fargo employee benefit plans utilize are more limited in the context of participants and beneficiaries who are not employees (*e.g.*, deferred vested participants for pension benefit plans, and COBRA qualified beneficiaries and retirees for welfare benefit plans).

We believe, the Safe Harbor's affirmative consent requirement for non-employees is the most significant impediment for Wells Fargo's employee benefit plans to increase the use of electronic media to provide disclosures to participants who are not employees.⁷ Tracking which participants and beneficiaries have provided affirmative consent can be administratively difficult, particularly where the consent must be obtained or confirmed in a manner that provides a reasonable demonstration that the participant can access the electronic communication in the form that it will be provided. The next section of this response letter provides suggestions for revisions to the Safe Harbor that would provide additional flexibility for the use of electronic disclosure by employee benefit plans and plan administrators.

2. **The Department Should Revise the Safe Harbor To Provide More Flexibility for Electronic Disclosure.**⁸

The Department's Safe Harbor ought to be revised to provide more flexibility to employee benefit plans in utilizing electronic disclosures so that employee benefit plans and participants can have the benefits associated with electronic disclosure, while providing participants who prefer paper disclosures an opportunity to request a paper version. Below, we have described several ways that the safe harbor ought to be revised to provide this additional flexibility.⁹

Affirmative Consent Should Not Be Required for Non-Employees. As we noted above, the Safe Harbor's affirmative consent requirement for non-employees is the most significant impediment for Wells Fargo's employee benefit plans to increase the use of electronic media to provide disclosures to participants who are not employees. Accordingly, the most important revision we believe the Department could make to the Safe Harbor would be expanding the ability to provide disclosures to non-employees without first obtaining affirmative consent. For example, the Internal Revenue Service ("IRS") has promulgated electronic disclosure regulations applicable to employee benefit plans that provide more flexibility in the context of non-employees. While the IRS regulation includes a consent

⁷ This paragraph responds to Question 19 of the RFI.

⁸ This section generally responds to Questions 9 through 15 of the RFI, unless otherwise specifically noted.

⁹ We recognize that some of the challenges that Wells Fargo's employee benefit plans face under the Safe Harbor may be different from the challenges faced by other employee benefit plans. Accordingly, we would encourage the Department to revise the Safe Harbor to provide as much flexibility as possible for different employee benefit plans to utilize electronic disclosures.

approach similar to the current Safe Harbor, electronic disclosure is also permitted without affirmative consent, so long as the participant has the effective ability to access the electronic medium used to provide the electronic disclosure and the participant is advised of the ability to request and receive a paper version.¹⁰

Revising the Safe Harbor to adopt the effective ability to access standard utilized by the IRS regulation would provide helpful flexibility for plan administrators who wish to utilize electronic disclosure, particularly with respect to non-employees, and the Department should revise the Safe Harbor to adopt this standard.¹¹ However, the Department should not impose criteria that unnecessarily constrain which participants would be deemed to meet the effective ability to access standard. For example, while the Department might conclude that a participant who has an email address would meet this standard, the Department should not conclude that a participant who does not have an email address would automatically fail to meet the standard. A participant could still have the effective ability to access plan materials in other electronic formats, such as materials posted on a plan's website or plan materials in a CD-ROM format, even if the participant does not have his or her own email address.

Continuous Access Websites Should Be Encouraged in Conjunction with a Negative Consent Approach to Disclosure.¹² The Department should revise the Safe Harbor to permit plan administrators more flexibility to leverage continuous access websites in providing disclosures to participants.¹³ The Department has already recognized the benefits of maintaining disclosures through the use of continuous access websites in connection with the final participant-level disclosure regulation issued last October and the distribution of participant benefit statements.¹⁴ The Department should adopt a negative consent approach based on the current distribution methods permitted under Field Assistance Bulletin 2006-03 with respect to pension benefit statements that are provided through a secure plan website.

¹⁰ See 26 C.F.R. § 1.401(a)-21.

¹¹ The Department has already provided guidance that compliance with the IRS regulation will be deemed to satisfy the ERISA delivery requirements in limited circumstances. See, e.g., Field Assistance Bulletin 2008-03 (Apr. 29, 2008) ("The preamble to the QDIA regulation provides the Department's view that 'plans that wish to use electronic means by which to satisfy their notice requirements may rely on either guidance issued by the Department of Labor at 29 C.F.R. § 2520.104b-1(c) or the guidance issued by the Department of Treasury and Internal Revenue Service at 26 C.F.R. § 1.401(a)-21 relating to use of electronic media.'"); Field Assistance Bulletin 2006-03 (Dec. 20, 2006) ("For purposes of section 105 of ERISA, the Department, pending further guidance and a review of the provisions of section 2520.104b-1(c), will view the furnishing of pension benefit statements in accordance with the provisions of section 1.401(a)-21, as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries.").

¹² This sub-section generally addresses Questions 14, 15, 17, and 19 of the RFI.

¹³ The Department should not require the use of a continuous access website, however, since such an approach might not be feasible for all employee benefit plans.

¹⁴ See 29 C.F.R. § 2550.404a-5(d)(1)(v); Field Assistance Bulletin 2006-03 (Dec. 20, 2006).

Under the approach provided by FAB 2006-03, plans may provide participants with continuous access to benefit statement information through a secure website so long as participants are furnished notification that explains the availability of the required benefit statement and how it may be accessed. The notification can be in electronic or paper form and must apprise participants of their right to obtain a paper version of the benefit statement at no charge.

Extending this approach to all plan communications would provide additional flexibility for plan administrators to utilize electronic disclosure while providing participants the ability to obtain a paper version on request. Providing access to plan disclosures through a continuous access website would also assist with potential difficulties with hardware and software requirements, as well as email filters, since current Web browsers generally have the capability to access documents in common electronic formats (*e.g.*, PDF format). The continuous access website can also function as a library of plan communications that would be easily accessible to participants from any location where there is Internet access. With the rise of so-called “cloud computing,” individuals are now accustomed to storing information on Internet servers rather than their own computer, including anything from family photographs to an individual’s professional contacts. Use of a continuous access website to make plan disclosures available reflects this concept.¹⁵

This approach would be particularly helpful for non-employee participants, who are currently governed by the affirmative consent requirements of the Safe Harbor. To be most helpful for employee benefit plans and plan administrators, the Department should leave flexibility for plan administrators to require participants to request paper versions of employee benefit plan disclosures on a document-by-document basis. In this regard, requiring an employee benefit plan administrator to allow participants to opt out of all electronic disclosures on a going-forward basis could result in administrative tracking difficulties similar to those under the current affirmative consent approach. Requiring participants who prefer paper versions to request them on a document-by-document basis strikes an appropriate balance given the increasing cost of producing and mailing plan communications and the wide availability of Internet access.

As long as participants and beneficiaries may request a paper copy of plan disclosure materials, printing costs would not effectively be transferred from plans to participants when information is furnished electronically.¹⁶ While some participants may choose to print materials furnished electronically from their home computers, it would be the participant making that decision. The costs an individual participant may incur in printing plan materials from his or her home computer would also be outweighed by the participant’s ability to immediately access the plan information in electronic form and utilize text searching capabilities that would not otherwise be possible with paper materials. As a result,

¹⁵ This paragraph responds to Questions 18 and 22 of the RFI.

¹⁶ This paragraph responds to Question 25 of the RFI.

the participant may only decide to print a discrete section of a summary plan description rather than the entire document.¹⁷

Distributions Via CD-ROM Should Not Require Affirmative Consent. In combination with the suggested changes described above, the Department should revise the Safe Harbor to expressly permit employee benefit plans to provide materials to all participants via CD-ROM without obtaining affirmative consent. As indicated in Section 1 of this response letter, providing plan materials via CD-ROM is a more cost-effective approach for large employee benefit plans, particularly for summary plan descriptions, which are often a hundred pages or more in length for welfare benefit plans that offer a selection of different benefit options.

In order to allow participants to request a paper copy of the summary plan description, the revised safe harbor could provide that the CD-ROM must be accompanied by information that apprises participants of the significance of the disclosure document and the right to request a paper copy by calling or emailing a designated person or service center. The packaging could also describe the hardware and software requirements for accessing and retaining the documents stored on the CD-ROM. These safeguards would strike an appropriate balance for participants who prefer to receive paper disclosures.

Both Email Links and Attachments Should Be Permitted.¹⁸ The Department should not favor one form of email delivery over another. Whether an email link or attachment is the most effective form of disclosure may differ depending on the circumstances, and plan administrators should have flexibility to determine which approach to use. For example, lengthy disclosures that take up more electronic file space could overburden participant email accounts, and might therefore be most efficiently distributed via an email with a link to a continuous access website where the disclosure is housed.

Both forms of email distribution are likely to be secure, because a participant would be required to sign on to his or her email account to receive the information. Where a link to the plan's continuous access website is the method of distribution, an additional layer of security would apply since the participant would likely be required to sign on to the website as well. Neither email distribution method is preferable to the other with respect to the participant's receipt, review, and retention of the disclosure, particularly where the document can be saved to the participant's computer or printed, and the participant is advised of his or her ability to request a paper copy of the disclosure in the email communication.

¹⁷ The Department has also previously concluded that “[c]learly, plans may pay those expenses attendant to compliance with ERISA’s disclosure requirements (e.g., furnishing and distributing summary plan descriptions, summary annual reports and individual benefit statements provided in response to individual requests).” Department of Labor, Guidance on *Settlor v. Plan Expenses*, available at http://www.dol.gov/ebsa/regs/AOs/settlor_guidance.html. To the extent expenses attendant to printing and distributing plan communications could otherwise be paid by the plan, participants effectively already bear these costs indirectly.

¹⁸ This sub-section responds to Question 29 of the RFI.

Uniform Rules and Conditions Should Apply to All Plan Communications.¹⁹ As a general matter, the current Safe Harbor does not provide different conditions for different types of employee benefit plans or different types of disclosures. There is no reason to deviate from this approach and impose differing disclosure requirements for different types of employee benefit plans or different types of disclosures. In this regard, while plan administrators might choose, as a practical matter, to continue providing certain time-sensitive disclosures in paper form (*e.g.*, COBRA notices), the Department should not foreclose the possibility that delivery of such materials can be accomplished via electronic disclosure.

As noted above, the Safe Harbor currently distinguishes between participants who are employees and those who are not employees. As also noted above, these distinctions have resulted in barriers to electronic communication with regard to participants who are not employees. While there may have been reasons to justify this distinction when the Safe Harbor was adopted nearly a decade ago, the increased access to the Internet has alleviated the need for such distinctions. We encourage the Department to adopt the modifications to the Safe Harbor described above to provide employee benefit plans and plan administrators more flexibility to utilize electronic disclosure for all participants without having to obtain affirmative consent.

The Safe Harbor Should Remain a Safe Harbor. One aspect of the Safe Harbor that the Department should not change is its status as a safe harbor. As the Department has previously noted in many contexts, "the safe harbor is not the exclusive means by which plan administrators could, in the absence of other guidance, satisfy their obligation to furnish information to participants and beneficiaries."²⁰ Because of the evolving nature of technology, it is critical to retain the safe harbor structure so that employee benefit plan administrators continue to have flexibility to leverage technological developments in new and innovative ways without being concerned about technical regulatory violations.

3. **Employee Benefit Plans Would Benefit from a Uniform Electronic Disclosure Standard.**²¹

As the Department has correctly noted, employee benefit plans are subject to multiple sets of inconsistent disclosure requirements under ERISA, the Internal Revenue Code, and other applicable laws (*e.g.*, the Health Insurance Portability and Accountability Act).²²

¹⁹ This sub-section responds to Questions 11 through 13 of the RFI.

²⁰ See, *e.g.*, Field Assistance Bulletin 2009-3 n.13 (Sept. 8, 2009); *accord* Field Assistance Bulletin 2006-03 (Dec. 20, 2006).

²¹ This section responds to Question 30 of the RFI.

²² For example, while certain notices required under HIPAA may fall within the scope of the Department's current electronic disclosure safe harbor, other materials that must be furnished pursuant to HIPAA would need to meet the more restrictive electronic disclosure standard at 45 C.F.R. § 164.520(c)(3) under which affirmative consent is required. In this respect, the production and distribution costs of HIPAA Privacy Notices in paper form are significant, totaling over \$150,000 in 2010 for HIPAA Privacy Notices distributed to Wells Fargo's team members and COBRA participants.

Adopting a uniform electronic disclosure safe harbor applicable to all employee benefit plan disclosures would greatly assist in the administration of employee benefit plans by allowing a more streamlined disclosure process and minimizing the regulatory uncertainties inherent in complying with multiple disclosure regimes. Accordingly, Wells Fargo would strongly encourage the Department to coordinate with other agencies to craft a uniform electronic disclosure safe harbor that would provide maximum flexibility to employee benefit plan sponsors and plan administrators.

While a uniform electronic disclosure standard would be beneficial, the Department should not delay revising its current safe harbor to provide additional flexibility for employee benefit plans and plan administrators. In this regard, a significant portion of employee benefit plan disclosures, including the more lengthy disclosures, fall within the Department's authority under Title I of ERISA. Enhanced disclosures for participant-directed individual account pension plans will also become effective next year. However, crafting a uniform electronic disclosure standard in the current regulatory environment could be a lengthy process given the regulatory priorities and resource constraints facing federal agencies.

In conjunction with revising its current Safe Harbor, the Department could issue guidance providing that compliance with the IRS's electronic disclosure regulation will be deemed to satisfy the requirements of the Department's safe harbor. As noted above, the Department has already adopted this approach in limited circumstances. Applying this approach more broadly to all disclosures required under Title I of ERISA would provide some additional flexibility to employee benefit plan administrators until a uniform disclosure standard could be implemented.

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Wells Fargo appreciates having the opportunity to comment on the RFI. We hope this response letter has provided useful information to the Department in connection with its efforts to explore how to expand and modify the Safe Harbor in light of the developments in technology since the Safe Harbor's adoption. We look forward to additional guidance from the Department on electronic disclosure in the near future.

Sincerely,



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Wells Fargo & Company