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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attention: Electronic Disclosure by Employee Benefit Plans
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW, Washington, DC 20210

**Re: Default Electronic Disclosure by Employee Benefit Plans under ERISA
RIN 1210-AB90**

To Whom It May Concern:

This office represents the National Electrical Benefit Fund (“NEBF”) and the National Electrical Annuity Plan (“NEAP”, together with the NEBF, the “Plans”). These comments are being submitted on the Department of Labor’s (the “Department”) proposed rule (the “Proposed Rule”) and request for information (“RFI”) regarding the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries of plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).

The NEBF is a nationwide multiemployer defined benefit pension fund established by the International Brotherhood of Electrical Workers (“IBEW”) and the National Electrical Contractors Association (“NECA”). It is the third largest multiemployer plan in the country with over 9,000 contributing employers, the vast majority of which work in the electrical construction industry. NEAP, which is administered by NEBF staff, is a nationwide multiemployer defined contribution plan, also jointly sponsored by the IBEW and NECA, and covers primarily outside line electrical workers. As of the end of 2018, the NEBF and NEAP had 593,620 and 117,261 participants and beneficiaries, respectively, although these groups overlap to a large degree.

These comments reflect the Plans’ overall favorable view of the Proposed Rule and provide responses to certain of the multiemployer plan-specific and other select questions raised by the RFI.

I. The Plans Generally Support the Proposed Rule

As a general matter, the Plans strongly support the thrust of the Proposed Rule's optional "notice and access" approach. Over the past decade, the Plans have committed to offering the ability to receive plan documents electronically, not just to achieve material cost savings but also to leverage technology to further their commitment to more meaningful engagement with participants and beneficiaries. The Plans initial step in this regard was to provide participants and beneficiaries the opportunity to obtain certain tax-related documents through an online portal. That effort proved popular with participants, so the Plans sought to also take advantage of the "opt-in" approach of the Department's 2002 safe harbor for ERISA-mandated disclosures. To that end, the Plans' information technology staff developed a self-administered web-based interactive portal ("Portal") to provide ERISA documents, which launched in 2016.

As with the effort to provide paperless tax-based disclosures, the Plans' experience with the Portal has been overwhelmingly positive, and they see the Proposed Rule as an opportunity to bring the product to a much wider group of participants and beneficiaries. The Plans currently have approximately 100,000 individual Portal users, all of whom have provided email and/or smart phone numbers as a means to access the Portal. Of those users, just over 70,000 have provided affirmative consent to receive required documents through the Portal. The Plans believe that the Proposed Rule may offer the chance to default the remaining 30,000 users into the Portal's ERISA electronic disclosure program, a potential increase of almost 43 percent. The Plans also hope that the Proposed Rule would encourage broader acceptance and interest with their paperless system among those participants and beneficiaries who have not yet chosen to interact with the Portal.

Finally, the Plans appreciate that the Proposed Rule takes a flexible approach to technological requirements and methods of delivery so as to permit the Plans to adapt and adjust the Portal (or other future paperless delivery programs) as needs and circumstances change in the future.

Notwithstanding their general support for the Proposed Rule, the Plans believe the Proposed Rule's 30-day timeframe for providing comments is far too short given the number and breadth of issues the preamble and RFI request input on. Thus, the Plans respectfully request that the Proposed Rule's comment period be extended for a minimum of 60 days.

II. Issues Specific to Multiemployer Plans

Section B-(7) of the Proposed Rule's preamble asks what specific impact the proposed special rule dealing with severance of employment may have on multiemployer plans. The section reads as follows:

The Department solicits comments on whether the requirements in paragraph (h) accommodate routine practices of multiemployer pension plans. For example, will the administrator of a multiemployer pension plan typically have knowledge of a covered individual's severance from employment from a contributing employer "at the time" of the individual's severance? Commenters are encouraged to identify whether there are unique circumstances in this setting that warrant modifications or adjustments to the approach taken in paragraph (h) of the proposal, or with respect to any other provision in the safe harbor, (including paragraph (b) permitting the administrator to use an electronic address assigned by an employer).

The Plans do not expect the requirements of paragraph (h) of the Proposed Rule to impede the Plans' routine practices. In the electrical industry, and depending on the branch and the particular jurisdiction, it is common for active participants to move, sometimes quite frequently, among covered employers as markets shift and manpower needs adjust. While some covered employers may provide email addresses to participants for work-related business communications, the Plans' experience is that virtually all participants that interact with the Portal do so with personal Gmail and Yahoo-type accounts that move with them from job to job. In that regard, the Plans estimate that, of their roughly 100,000 Portal users, at least 90% -- and perhaps as high as 96% -- of them have submitted a personal email address for purposes of communication. A variety of factors influence this of course, but the Plans believe the primary driver is the fact that participant-specific retirement benefit information, like financial and health information, is inherently personal, and therefore Portal users typically want to engage with the Plans using personal, non-business-related email addresses. Considering that in the vast majority of cases Portal users have not submitted employer-assigned emails, whether or not the Plans have knowledge of an individual's severance as it occurs should not be relevant.

The Plans also recognize that individuals may change email addresses or addresses may go out of service for whatever reason. To address that issue, the Plans have in place procedures to follow up on messages that may bounce back or demonstrate that an email address may be defunct. One option the Plans are considering implementing independent of the Proposed Rule is giving participants the ability to provide primary and secondary email addresses as well as numbers for SMS communications. Should the Proposed Rule take effect, having multiemployer plans gather secondary email addresses or smart phone numbers would seem to be a valid means to protect against losing electronic contact with participants and beneficiaries and thereby meet the requirements of paragraph (h) of the Proposed Rule.

Relative to safeguarding the interests of covered individuals, the Plans are in support of the Proposed Rule's approach of enabling covered individuals to request a paper copy of a particular covered document or to opt out of electronic disclosure on a global basis. It should be noted that the Proposed Rule would not permit the Plans to default their entire population of covered individuals into a paperless program. The Plans do not assign email addresses to their participants and, at least at this point, they do not automatically collect email addresses or information for SMS contact. The Plans will only have such information to the extent

individuals have made an affirmative choice to interact with the Portal. As such, to the extent there are concerns that participants and beneficiaries may be unfairly forced to receive required communication electronically as the default method, that problem would not exist for the Plans, and it may not exist for other multiemployer plans either.

Finally, at least at this point in their review, the Plans do not believe that any other aspect of the Proposed Rule would warrant modifications or adjustments specific to the multiemployer plans.

III. Other Select Issues Raised in the RFI

Section D-(2) of the preamble generally requests comments on additional measures the Department might take in the future to improve the effectiveness of ERISA disclosures, with a particular focus on the design and content of such disclosures. Section D-(2) also includes 21 specific questions for consideration.

The Plans wish to provide input on certain select questions of Section D-(2) of the Proposal as set forth below.

16. Well-designed plan websites or internet-connected apps may benefit plan participants by effectively communicating plan information, including by adopting features not possible with paper, such as interactive videos, calculators, and layered design. What common features have plan administrators adopted in their websites or apps that are effective in communicating plan information to participants and attracting to engage in activity with their plan accounts online? What are the benefits of these features, and how do they achieve them? Should any such features be required by regulation?

The Plans believe that providing electronic tools to permit participant-driven self-service is extremely important to increased and more meaningful engagement because of the empowerment it provides to participants. In this regard, among other things, the Plans' Portal allows participants and beneficiaries to view, download or print benefit estimates, account statements, benefit applications, tax forms, and other key plan documents – perhaps even in their financial or tax advisor's office – and to make address changes on demand. The Plans also believe that mobile accessibility is a key feature, and therefore the Portal is designed to offer the capability to perform the above actions using a smart phone or similar device. In addition, the Plans have also found that providing a means to communicate electronically directly with the Plans' administrative staff via a "customer service" tab is also an effective means to increase online interaction with participants.

Relative to the benefits of these features, the Plans' Portal is aimed at providing a frictionless, easy user experience that stresses convenience and security that is available virtually 24 hours a day, seven days a week, every day of the year. Other beneficial aspects are as follows:

- a. the Portal reduces the volume of physical mail, and associated time, cost and delays with the Plans generating such mail;
- b. the Portal reduces the chance that recipients inadvertently dismiss paper-based documents as junk mail;
- c. the Portal allows for increased turnaround time for benefit applications and approvals;
- d. the Plans have received feedback that the Portal has increased satisfaction for participants; and
- e. the Portal allows for the maintenance of more up-to-date and accurate records as a result of self-service (physical address, email, SMS).

Relative to item e., the Plans have data indicating that, since inception of the self-administered Portal in September of 2016, over 19,000 users have used the system to update their address records electronically.

17. As discussed in the regulatory impact analysis (RIA), well-designed plan websites and apps may also be used to provide effective communication of plan information to certain vulnerable populations, such as the visually impaired and non-native English speakers, by adding voice-reader and translation features. How do plan websites and apps currently use these features and how effective are they in enhancing the presentation and use of covered documents by participants with special needs?

The Plans are exploring the U.S. General Services Administration's technical guidance and tools for information and communication technology and electronic content covered by Section 508 of the Rehabilitation Act of 1973, which can be found at the following website: www.section508.gov. The Plans are also considering the voluntary Web Content Accessibility Guidelines Standard 2.1 of the W3C Web Accessibility Initiative for web content, which can be found at: www.w3.org/WAI/standards-guidelines/wcag/.

18. Some plan sponsors and participants have expressed concerns about cybersecurity and privacy when participants access sensitive plan information and engage in financial activity online. To protect against these concerns, how do plan administrators currently assess risks and provide secure online access to their participants? What safeguards are implemented to protect participants, how effective are they, and what improvements could be made to make current systems more secure? What cost considerations are raised by increasing cyber security and privacy protections? Should risk assessments and security measures be required by regulation?

The Plans take cyber security and privacy issues extremely seriously and have a robust program to ensure participants and beneficiaries have a secure online experience when

interacting with the Portal. As part of its cyber security program, the Plans employ a wide range of tools, technology, and managed services, including external penetration testing, web facing application testing and certification, independent third-party attestation (such as SOC) and risk self-assessment methods (such as AICPA and NIST Security Framework), patch management, and data encryption in transit and at rest, among others. The Plans believe these tools should be considered as minimum standards when exposing participant and beneficiary data, though when dealing with financial transactions, the Plans believe appropriate banking standards should govern such transactions, such as the Payment Card Industry Data Security Standard (PCI-DSS). Finally, for purposes of verifying the identity of participants and beneficiaries when logging on as Portal users, the Plans believe it necessary and appropriate at this time to use “2FA” or “Two-Factor” authentication methods that employ device fingerprinting, geolocation, IP and/or device reputation, among others.

IV. Conclusion

In summary, the Plans are committed to electronic delivery of plan information to take advantage of efficiencies, including reduced costs, and increased opportunities for more meaningful engagement with participants and beneficiaries. The Plans generally support the Proposed Rule’s flexible and optional “notice and access” approach because they believe its framework will enhance the Plans’ ability to reach these aims over time as technology evolves.

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The Plans appreciate the opportunity to provide these comments and that hope that their input is helpful. Please do not hesitate to us with any questions or concerns.

Very truly yours,

POTTS-DUPRE, HAWKINS & KRAMER, CHTD.

By: 
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