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November 22, 2019

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: Electronic Disclosure by Employee Benefit Plans
RIN 1210-AB90

Dear Sir or Madam:

This letter is submitted on behalf of the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). The letter comments on the Department of Labor's proposed regulation which would create a new, additional safe harbor for the use of electronic media by employee benefits plans to furnish information to participants and beneficiaries of plans subject to ERISA (the "Proposed Safe Harbor").

As recognized by the Department, creating an alternative method of disclosure through electronic media would benefit ERISA plans because it should reduce plan costs and increase the timeliness and accuracy of the information disclosed. However, the Fund submits that multiemployer pension plans will not be able to take full advantage of the Proposed Safe Harbor unless certain modifications are made to the proposed rule. Thus, the Fund requests the following changes:

1. The Proposed Safe Harbor should explicitly state that plan administrators can rely on electronic addresses provided by employers;
2. Electronic addresses that are not corrected by the participant or beneficiary after notice should be deemed to have been "provided by the participant or beneficiary"; and
3. The Initial Notification requirement under the proposed rule should be waived for plans that previously provided the notice within one year of the effective date of the Proposed Safe Harbor.

BACKGROUND INFORMATION ON THE FUND

The Fund is a multiemployer pension plan which primarily covers employees represented by the International Brotherhood of Teamsters. The Fund has approximately 1,250 participating employers and 385,000 participants and beneficiaries. Due to its size, the Fund incurs significant costs to comply with ERISA's disclosure requirements. For example, in 2019, the Fund issued its annual funding notice to all its participants and beneficiaries. Since the Fund could not take advantage of the existing electronic delivery safe harbor for various reasons, the Fund incurred approximately \$120,000 in costs to mail the funding notice. Additionally, when the Fund most recently furnished its Summary Plan Description in 2018, the Fund incurred approximately \$230,000 in costs.

COMMENTS ON THE PROPOSED SAFE HARBOR

I. The Proposed Safe Harbor Should Explicitly State that the Plan Administrator Can Rely on Electronic Addresses Provided by the Employer.

As drafted, the Proposed Safe Harbor states, in pertinent part, as follows:

(b) *Covered individual.* For purposes of this section, a covered individual is a participant, beneficiary, or other individual entitled to covered documents and who, as a condition of employment, at commencement of plan participation, or otherwise, provides the employer, plan sponsor, or administrator (or an appropriate designee of any of the foregoing) with an electronic address, such as an email address or internet-connected mobile-computing-device (e.g., "smartphone") number.

29 CFR § 2520.104b-31(b) (as proposed). Under the proposed rule, a participant or beneficiary who provides the employer, plan sponsor or administrator with an electronic address is a "covered individual." While a single employer plan can easily obtain an electronic address from the participant, the Fund's experience is that it is difficult for multiemployer plans to obtain the same information directly from the participant or beneficiary.

In some instances, the Fund has been able to obtain an individual's electronic address from his or her employer. However, the proposed rule does not explicitly state whether a plan administrator can rely on an electronic address that is provided by the employer to the plan administrator. If the proposed rule allows plan administrators to use employer-provided addresses, the proposed rule should explicitly state that so multiemployer plans can take advantage of the Proposed Safe Harbor and be assured that they are in compliance with the rule.

If the proposed rule was not intended to allow plan administrators to use employer-provided addresses, the rule should be modified to allow the use of such addresses. Under the Proposed Safe Harbor, an electronic address that is provided by a participant or beneficiary to the employer is enough to deem the individual a "covered individual." If a plan administrator receives that same information from the employer (rather than directly from the participant or beneficiary),

there is no reason why the address should be deemed less reliable for purposes of the Proposed Safe Harbor. Further, the proposed rule has safeguards to protect individuals from the use of invalid electronic addresses. For example, under § 2520.104b-31(f)(4) (as proposed), the system for furnishing the notice of internet availability must be designed to alert the administrator of a covered individual's invalid or inoperable electronic address. If the administrator is unable to cure the problem by obtaining a correct address, the administrator is required to treat that individual as if he or she had elected to opt out of electronic delivery. *Id.* Since the participant or beneficiary will be protected even if an electronic address turns out to be invalid, the proposed rule should allow plan administrators to use employer-provided addresses.

II. Electronic Addresses that Are Not Corrected After Notice to the Participant or Beneficiary Should Be Deemed to Have Been “Provided by the Participant or Beneficiary.”

As mentioned above, the Fund's experience with its participants and beneficiaries is that they do not directly provide the Fund with their electronic addresses. Nonetheless, the Fund has been able to obtain electronic addresses for many of its participants and beneficiaries through various sources. Unfortunately, in most instances, the source of the address is not recorded in the Fund's databases. This presents a major problem since the proposed rule states that the electronic address must be provided by the participant or beneficiary. 29 CFR § 2520.104b-31(b) (as proposed). Yet, the Fund believes many of the addresses are reliable. To give just two examples, addresses recently provided to the Fund by the local union representing the participant or by an agent handling the participant's finances pursuant to a written Power of Attorney are likely more reliable than an address provided directly by the participant 4 years ago that was never updated.

Furthermore, Department of Labor Field Assistance Bulletin 2014-01 affirmatively requires fiduciaries of terminating defined contribution plans to locate addresses for missing participants using free electronic search tools such as “Internet search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries and social media.” FAB 2014-01 also suggests that the duties of prudence and loyalty might, in certain circumstances, require the use of “commercial locator services, credit reporting agencies, information brokers, investigation databases and analogous services.” If these address tools are deemed by the Department to be sufficiently reliable for use when distributing an account balance, they should also be deemed sufficiently reliable for use when distributing required notices.

As part of its plan to take advantage of the Proposed Safe Harbor, the Fund will likely issue a notice to its participants and beneficiaries and request that they provide their electronic addresses. However, based on the Fund's experience, that strategy will not be completely effective because many individuals will not take the time to provide their electronic addresses. Accordingly, where the Fund already has an electronic address on file for a participant or beneficiary, the Fund would like to include the address in its notice to the individual and advise that the electronic address will be assumed to be correct unless he or she contacts the Fund to correct the address. If an individual does not contact the Fund in response to the notice, the electronic addresses that are not corrected should be deemed to have been provided by the participant or beneficiary for purposes of § 2520.104b-31(b) (as proposed).

Again, as discussed above, the proposed rule has safeguards to protect against the use of invalid electronic addresses. Thus, even if an address turns out to be incorrect, an individual's right to receive the ERISA mandated disclosures will be fully protected.

III. The Initial Notification Requirement Should Be Waived for Plans that Previously Provided the Notice Within One Year of the Effective Date of the Proposed Safe Harbor.

The Department has proposed that the new rule will be effective 60 days following publication of the final rule in the Federal Register and will be applicable to plans on the first day of the first calendar year following the publication of the final rule. 29 CFR § 2520.104b-31(k) (as proposed). The Fund is anxious to take advantage of the Proposed Safe Harbor as soon as possible. Thus, it would like to issue the Initial Notification required under § 2520.104b-31(g) (as proposed) early next year so that it can begin issuing the disclosures electronically as soon as possible. Accordingly, the Fund requests that the final rule provide that an employee benefit plan will not have to re-comply with the Initial Notification requirement under § 2520.104b-31(g) with respect to those individuals who had previously received the Initial Notification from the plan within one year of the effective date.

Very truly yours,



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Deputy General Counsel

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