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By Electronic Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Participant Fee Disclosure Project
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Proposed Participant Disclosure Rule

Ladies and Gentlemen:

Groom Law Group, Chtd. represents a number of financial institutions and administrative services providers that offer a variety of products and services to employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The members of this group (the "Groom Comment Group" or "Group") also sponsor one or more ERISA-covered plans, including individual account, participant-directed plans. This letter represents the comments of the Group on the proposed Participant Disclosure Rule (the "Proposal") published by the Department of Labor (the "Department") on July 23, 2008. 73 Fed. Reg. 43014 (Jul. 23, 2008). We appreciate this opportunity to file comments on behalf of the Group and commend the Department for all of the hard work that went into the preparation of the Proposal.

Group members are extremely knowledgeable about the services provided to plans, the disclosures made to participants in participant-directed individual account plans, and the very significant effects that the Department's Proposal will have on the employee benefits community, including plan fiduciaries, plan participants, and plan service providers. We would be happy to meet with the Department to discuss the concerns of the Group in greater detail.

Summary of the Comments

The Group appreciates the effort expended by the Department in attempting to develop a uniform participant disclosure rule governing all participant-directed individual account plans. In particular, we applaud the Department's recognition that participants would find neither necessary nor useful a detailed breakdown of administrative charges by service or service provider, or a breakdown of the investment-related fees. The Group encourages the Department to retain these aspects of the Proposal.

Our additional comments include the following:

General

- The Department should acknowledge that the disclosure duty articulated in the Proposal is new.

- The final regulation should be provided in the form of a "safe harbor." We ask the Department to make clear that it will deem a plan fiduciary complying with the final rules to have satisfied any disclosure obligations that exist under sections 404(a)(1)(A) and (B) of ERISA, but the Department should also confirm that it is possible for a plan fiduciary to satisfy any such requirements by means other than through disclosure of the specific items included in the Proposal.

- The Department should provide that the only circumstances under which ERISA section 404(a)(1)(A) or (B) may be deemed to impose disclosure obligations beyond those specified in the Proposal would be those circumstances under which the plan fiduciary providing the disclosure actually knows that the information that he or she is providing is materially misleading.

- The Department should clarify the scope of the "relief" available to a plan fiduciary who provides adequate disclosures to plan participants.

- The final regulation should be effective January 1, 2010, rather than January 1, 2009.

Annual Disclosure Requirement

- The final regulation should shield both plan fiduciaries and service providers from liability for their reasonable good faith reliance on investment-related information furnished to them by others.

- The Department should provide guidance on when the first annual disclosure should be made to existing plan participants.

- With respect to immediate eligibility plans, the Department should provide a "grace period" on the requirement to provide certain information to plan participants on or before the date of plan eligibility.

Update Requirement

- The final regulation should allow plan fiduciaries flexibility in determining when to provide updated plan-related information to participants.

Administrative Expenses

- The final regulation should provide plan fiduciaries with flexibility in reporting the dollar amount of administrative expenses charged to participant accounts during the preceding quarter.

- The final regulation should clarify that the requirement to provide a description of the plan administrative services for which a participant's account is charged need not be limited to only those services actually provided during the quarter.

Performance Data

- The final regulation should allow plan fiduciaries flexibility in providing information to participants regarding investment returns.

- The Department should provide guidance on the requirement to provide return information "measured as of the end of the applicable calendar year."

- The Department should provide additional guidance to fiduciaries in determining the extent to which certain investment options have "fixed" returns for purposes of the Proposal.

Benchmarks

- The Department should provide guidance on appropriate benchmarks, in particular, for a fund that invests in both stocks and bonds, and a company stock fund.

- The Department should consider allowing the plan fiduciary to compare the performance of an investment option to the performance of other similar funds.

Comments

I. General

A. The Department should acknowledge that the disclosure duty articulated in the Proposal is new.

The Proposal represents the first time the Department has specifically asserted that ERISA sections 404(a)(1)(A) and (B) place an affirmative obligation on plan fiduciaries to disclose information to participants in certain types of plans. The preamble to the Proposal states, "The Department believes, as an interpretive matter, that ERISA section 404(a)(1)(A) and (B) impose on fiduciaries of all participant-directed individual account plans a duty to furnish

participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner." Proposal at 43015.

In 2000, the Department issued a Request for Information regarding fiduciary disclosure obligations (the "2000 RFI").[1] In the 2000 RFI, the Department stated, "section 404 [of ERISA] does not specifically articulate a duty regarding disclosure of information to participants and beneficiaries." As recently as April 2008, the Department stated that the general fiduciary duty of prudence and loyalty under section 404 of ERISA "may, depending on the facts and circumstances of the case," require the disclosure of certain information to a participant in a participant-directed individual account plan. Amended Brief of the Secretary of Labor, Elaine L. Chao, as Amicus Curiae in Support of Plaintiffs-Appellants, *Hecker v. Deere & Co.*, No. 07-3605 (7th Cir. April 4, 2008). Even in this very recent *amicus* brief, the Department did not say that ERISA section 404 *necessarily* requires the disclosure of <u>any</u> information to plan participants.

While we understand that the Department's interpretation of section 404 may evolve, we are concerned that the Proposal does not make clear that the Department's interpretation of sections 404(a)(1)(A) and (B) as generally requiring the disclosure of certain information to plan participants represents a departure from the Department's prior public interpretation of section 404. We are particularly concerned with the Department's statement in the preamble to the Proposal that plans that complied with the section 404(c) disclosure rules, prior to the effective date of the Proposal, would have typically satisfied the "requirements" of sections 404(a)(1)(A) and (B). Proposal at 43015. This statement could be read to imply that disclosure to plan participants of the types of information described in the Proposal has always been required by sections 404(a)(1)(A) and (B). We believe that the Department should avoid such an implication, whether intended or not, when the Department did not previously publicly interpret sections 404(a)(1)(A) and (B) as generally requiring a disclosure of any information to plan participants, much less as detailed a disclosure as is contained in the Proposal.

B. The final regulation should be provided in the form of a "safe harbor." We ask the Department to make clear that it will deem a plan fiduciary complying with the final rules to have satisfied any disclosure obligations that exist under sections 404(a)(1)(A) and (B) of ERISA, but the Department should also confirm that it is possible for a plan fiduciary to satisfy any such requirements by means other than through disclosure of the specific items included in the Proposal.

The Proposal appears to contemplate that a fiduciary <u>must</u> provide the specific disclosures described in the Proposal in order to have met its legal obligations under ERISA section 404(a)(1)(A) and (B) to disclose information to participants to enable them to exercise

[1] 65 Fed. Reg. 55858 (Sept. 14, 2000).

their rights to direct their accounts. The Proposal makes clear, however, that fiduciaries need not use the form of the comparative chart provided by the Department in the Proposal. Thus, the substance of the disclosures is mandatory, but the form of the disclosures is a "safe harbor."

Specifically, section (a) of the Proposal describes the disclosure duty which the Department has determined apply to plan fiduciaries of individual account participant directed plans. In section (b), the Proposal provides that plan fiduciary "must" disclose to plan participants the information described in sections (c) and (d) of the Proposal. Section (b) also provides that compliance with paragraphs (c) and (d) of this Proposal "*will satisfy* the duty to make the regular and periodic disclosures" contained in section (a) of the Proposal. Sections (c) and (d) of the Proposal contain specific information to be disclosed. Section (e) of the Proposal discusses the form in which information may be provided and references the model comparative chart which *may* be used to satisfy the requirement to provide certain elements of the required disclosure in a comparative format. In the preamble to the Proposal, the Department makes clear that the model notice is merely a safe harbor. That is, fiduciaries choosing to use the model notice will be deemed to have satisfied the requirement to provide certain information in a comparative format, but that fiduciaries choosing to present the information in a different comparative format can still satisfy the substantive requirement. Proposal at 43018.

We ask that the Department clarify or revise section (b) of the Proposal. Specifically, we ask that section (b) provide simply that a plan fiduciary who complies with sections (c) and (d) will satisfy the disclosure duty identified by the Department, and that, depending upon the facts and circumstances, a plan fiduciary may satisfy the disclosure duty identified by the Department in section (a) by means other than those described in sections (c) and (d) of the Proposal.

We think that a plan fiduciary's need for flexibility extends beyond the format the fiduciary selects to provide a mandated set of information. While for many plans the approach to disclosure outlined in the Proposal may be optimal, we submit that will not be the case for every plan. For example, where the vast majority of plan participants do not have access to the internet, a plan fiduciary could reasonably determine that providing paper copies of certain materials is a better method of informing participants about the plan than a web site address that participants will never see. It is hard to see how participant needs would be served by requiring a fiduciary to provide extraneous information. Similarly, a plan fiduciary may determine that participants would benefit from the inclusion of a statement within the disclosure materials explaining that the returns of a market index with which a particular plan investment option is compared does not reflect any deductions for fees or expenses, and noting that it is not possible to invest directly in a market index. These statements are not required by the Proposal. However, a plan fiduciary could reasonably determine to include such statements in a participant disclosure document. Fiduciaries will be reluctant to innovate in any way, however, if they are concerned that they will be found liable for participant losses merely because they adopted a disclosure approach more specifically tailored to the needs of their particular plan participants than the Department's standard approach.

C. The Department should provide that the only circumstances under which ERISA section 404(a)(1)(A) or (B) may be deemed to impose disclosure obligations beyond those specified in the Proposal would be those circumstances under which the plan fiduciary providing the disclosure actually knows that the information that he or she is providing is materially misleading.

While the Group does not believe that each of the Proposal's disclosure elements should be deemed necessary in every instance or for every plan, the Group does believe that substantial compliance with the Proposal should be sufficient to satisfy the plan fiduciary's disclosure obligations under section 404 of ERISA. Certainly, plan fiduciaries who meet the requirements of the final regulation should not be subjected to uncertainty about their compliance with this disclosure duty.

In footnote 8 to the preamble to the Proposal, the Department states that in "extraordinary situations" complying with the disclosure requirements of the Proposal may not satisfy the disclosure obligations imposed by ERISA's general fiduciary standards. Proposal at 43018. To the extent that the Department intended the footnote to provide that nothing in the Proposal should be interpreted to alter the proposition that plan fiduciaries acting as such may not lie to plan participants, the Group agrees with that settled legal proposition. We are concerned, however, that the statement could create uncertainty as to the scope of relief available under the Proposal. Such uncertainty would invite costly litigation. We therefore ask the Department to provide that the only circumstances under which ERISA section 404(a)(1)(A) or (B) may be deemed to impose disclosure obligations beyond those specified in the Proposal would be those circumstances under which the plan fiduciary providing the disclosure knows that the information that he or she is providing is materially misleading.

D. The Department should clarify the scope of the "relief" available to a plan fiduciary who provides adequate disclosures to plan participants.

The Department should explain the "relief" available to a plan fiduciary who properly selects and monitors plan investment options and complies with the disclosure requirements of the Proposal. We ask the Department to take the position that such a fiduciary is relieved from liability for any loss, including investment loss, resulting from a participant's investment in a plan investment option.

In the Proposal, the Department has confirmed its position that proper disclosures to plan participants does not relieve a plan fiduciary from his or her duty to prudently select and monitor plan investment options. The logical extension of this position is that a plan fiduciary should be liable only for losses resulting from the specific basis for a finding that the fiduciary acted imprudently. For example, we ask the Department to confirm that if a plan fiduciary's selection of a fund as a plan investment option is imprudent only because of that fund's high fees, section

404(c) or the Proposal would not relieve the fiduciary from liability for the fund's excessive fees, but the plan fiduciary would not be liable for the fund's investment performance.

E. The final regulation should be effective no earlier than January 1, 2010.

Making the Proposal effective for plan years beginning on or after January 1, 2009 is unrealistic. It is not reasonable to expect plan fiduciaries and service providers to start modifying their agreements and systems to comply with new regulatory requirements until they know what the new requirements are – i.e., until the Proposal is finalized. Once the Proposal is finalized, sufficient time is necessary to actually make any changes to agreements and systems to accommodate the new requirements. These changes must be made in addition to the changes that must be made to comply with the requirements of new Form 5500 Schedule C. Given these considerations, the Group believes that the earliest possible date by which plan fiduciaries could be expected to comply with the new participant disclosure requirements is January 1, 2010, assuming that the Proposal is finalized by the end of 2008.

We also ask the Department to provide guidance on whether all disclosures made on or after the first day of the first plan year subject to the final regulation would be subject to the final regulation's requirements, regardless of whether the information being disclosed relates to a plan year to which the requirements of the final regulation apply. For example, we ask the Department to provide guidance on whether a quarterly statement for the last quarter of the 2009 plan year, which would be mailed out in the first quarter of the 2010 plan year, would be subject to the requirements of the final regulation if the final regulation is effective for plan years that begin on or after January 1, 2010.

II. Annual Disclosure Requirement

A. The final regulation should shield both plan fiduciaries and service providers from liability for their reasonable and good faith reliance on investment-related information furnished to them by others.

While we strongly agree with the Department's view, expressed in footnote 7 to the preamble to the Proposal (Proposal at 43018), that plan fiduciaries shall not be liable for their reasonable and good faith reliance on investment-related information furnished to them by service providers, we believe that this important view should be stated in the text of the regulation, instead of in the preamble. We also believe that a similar relief should be provided to service providers, in light of the fact that service providers often merely collect information from several sources before providing the information to the plan fiduciary. Accordingly, we ask the Department to provide in the text of the final regulation that both plan fiduciaries and service providers shall not be liable for their reasonable and good faith reliance on investment-related information furnished to them by others.

B. The Department should provide guidance on how the requirement to provide certain information "[o]n or before the date of plan eligibility and at least annually thereafter" relates to plan participants existing before the first date of the first plan year for which the Proposal would become applicable.

The requirement to provide certain information "[o]n or before the date of plan eligibility and at least annually thereafter" cannot, strictly speaking, be satisfied with respect to plan participants existing before the first date of the first plan year for which the Proposal would become applicable. We ask the Department to provide guidance on when the first "annual" disclosure should be made to existing participants. We recommend that plan fiduciaries should be allowed to provide the first annual disclosure to such participants at any time before the end of the first plan year for which the Proposal becomes applicable.

C. With respect to immediate eligibility plans, the Department should provide a "grace period" on the requirement to provide certain information to plan participants on or before the date of plan eligibility.

With respect to participants becoming eligible in immediate eligibility plans with either immediate entry or entry shortly after eligibility, we believe that plan fiduciaries should be allowed to provide the first annual disclosure to such participants within a short period, perhaps thirty days, after a participant enters the plan. We believe that this "grace period" is necessary in light of the fact that in many companies, personnel in the benefits department are not immediately made aware of each employee hiring.

III. Updated Information Requirement

A. The final regulation should allow plan fiduciaries flexibility in determining when to provide updated plan-related information to participants.

We ask the Department to confirm that the requirement to provide updated information to participants within thirty days of the adoption of "any material change to the information" only applies to the plan-related information described in paragraph (c)(1)(i) of the Proposal.

In addition, we ask the Department to clarify what it means by the "date of adoption." In the preamble to the Proposal, the Department states that the Proposal, "by referencing the 'date of adoption,' . . . will increase the likelihood that participants and beneficiaries will be provided notification of material changes in advance of the changes becoming effective . . . ." Proposal at 43015. It appears from this statement that the "date of adoption" refers to the date when a change to the plan, to become effective sometime later, is given final approval. We believe that the distinction between the "date of adoption" and the effective date of the change should be made clear in the final regulation.

We are concerned that requiring a material change to the plan to be disclosed to participants within thirty days of the "date of adoption" may not be in the best interest of the participants in all cases. For example, if a company were to approve a material change to the plan six months before the change is to go into effect, we believe that a notice of the change sent within thirty days of the "date of adoption" may not be as useful to participants as a notice sent closer to the effective date of the change.

We are also concerned about the Department's use of the "date of adoption" from a more fundamental perspective. Strictly speaking, there would not be any material change to the "plan-related information" provided to participants until the plan-related information becomes materially incorrect. To illustrate, there would not be any change to the description of a plan's investment options until the effective date of a change in the plan's investment options. For this reason, we urge the Department to consider adopting a simple rule that participants must be provided with a notice of any material change to the plan-related information described in paragraph (c)(1)(i) within thirty days of the previously provided plan-related information becoming materially incorrect.

We also ask the Department to provide examples of "material changes" that would trigger the requirement to provide updated information.

IV. Administrative Expenses

A. The final regulation should provide plan fiduciaries with flexibility in reporting the dollar amount of administrative expenses charged to participant accounts during the preceding quarter.

The Proposal requires that each plan participant receive a quarterly disclosure statement containing the dollar amount actually charged to the participant's account during the preceding quarter for administrative services. As the Department is aware, plans and administrative services providers operate under a variety of compensation arrangements. In some cases, the costs of administrative services are included as part of the fee paid to an investment provider. In other cases, investment providers share fees (typically in the form of 12b-1 fees, shareholder servicing fees, administrative services fees, sub-transfer agency fees or other similar fees) with affiliated or unaffiliated administrative services providers. Some administrative services providers who receive revenue sharing take the amount of revenue sharing received into account in setting the amount they charge directly to the plan for administrative services. Others set a direct charge to plan participants and allocate revenue sharing to an "ERISA budget" to pay plan expenses, or simply rebate the revenue sharing amounts back to the plan, and ultimately, to participant accounts.

The Group requests that the final regulation allow plan fiduciaries the necessary flexibility in making quarterly disclosures of amounts charged to each participant's account to accommodate each of these standard types of arrangements, and those that have yet to be

invented. For instance, the Department should make clear that plan fiduciaries can "net" administrative charges against amounts rebated to plans, and can report just the net charges to the plan participants.

While the Group urges the Department to take a flexible approach in the final regulation, we do not believe that the Department should require any additional break-out of information to participants (e.g., a specific description of the amount of investment fees ultimately paid to a plan service provider, whether affiliated or unaffiliated with the investment provider). Unlike the recently finalized reporting rules governing the Form 5500 and the proposed 408(b)(2) disclosure rules that are designed to provide plan fiduciaries with information necessary to evaluate the arrangements between the plan and the service provider, the goal of the final regulation should be to provide each participant with information that will enable him or her to understand the total cost that he or she is bearing for participating in the plan. Participants will not generally be using the information they receive on a quarterly statement to comparison shop among service providers. Rather, they will simply have a better picture of the costs associated with administering an ERISA plan. Plan participants receive a significant set of services that are often unavailable at a comparable price to individual investors in the retail marketplace. Participants should not expect to receive these services for free.

B. The final regulation should clarify that the requirement to provide a description of plan administrative services for which a participant's account is charged, need not be limited to only those services actually provided during the quarter.

Paragraph (c)(2)(ii) requires a plan fiduciary to provide a participant with the dollar amount actually charged during the preceding quarter to the participant's account for administrative services and a description of the services provided to the participant for such amount. In the preamble to the Proposal, the Department states that "[a]n identification of the total administrative fees and expenses assessed during the quarter, with, for example, an indication that the charges for plan administrative expenses include legal, accounting, and recordkeeping costs to the plan, would be sufficient." Proposal at 43016. We ask the Department to provide that the description of the services need not be specific for each quarter. For example, if a plan generally incurs legal costs, the plan fiduciary should be allowed to state that the administrative fees charged to the participant's account in any given quarter includes legal costs, regardless of whether the plan actually incurred any legal costs in that particular quarter.

C. The final regulation should clarify that the requirement to provide a description of the individual services for which a participant's account is charged, need not be limited to only those services actually provided to that participant during the quarter.

Paragraph (c)(3)(ii) of the Proposal requires a plan fiduciary to provide a participant with the dollar amount actually charged during the preceding quarter to the participant's account for individual services and a description of the services provided to the participant for such amount. We ask the Department to provide that the description of the services need not be specific to each participant. We believe that providing a participant with a description of the individual services available under the plan would adequately apprise the participant of what the charges are for because the participant would know what individual services were provided to him or her during the preceding quarter. We believe that such a disclosure with a notice that the participant could inquire about the actual services provided to him or her during the preceding quarter would adequately protect the interests of the participant.

V. Performance Data

A. The Department should allow plan fiduciaries flexibility in providing information to participants regarding investment returns.

We ask the Department to clarify what "if available" means with respect to the requirement to provide return information on a 1-year, 5-year, and 10-year basis. In particular, we ask the Department to provide guidance on situations where a fund changed its name, for example, due to a merger between fund management companies.

We also ask the Department to clarify whether a plan fiduciary should provide the return information for the longest available time period (e.g., 9-year) if return information is not available for the time periods specified in the Proposal (e.g., 10-year).

In addition, we ask the Department to take the position that "if available" not only refers to whether the information is obtainable (e.g., whether a fund has been in existence for longer than ten years, such that 10-year return information is available), but also to whether the information has been provided to the plan fiduciary. In this regard, we are concerned that a plan fiduciary may not be able to provide return information to participants until such information has been provided to the plan fiduciary by the fund manager.

B. The Department should provide guidance on the requirement to provide return information "measured as of the end of the applicable calendar year."

The Department should clarify what it means by "applicable calendar year." In particular, the Department should clarify whether the "applicable calendar year" refers to the calendar year immediately preceding the date of the disclosure. If so, we believe that this

requirement would be impossible to satisfy in some situations. For example, if a disclosure must be made on January 2, 2010, it may not be possible for the plan fiduciary to obtain and provide the return data measured from December 31, 2009, a mere two days before the date of the disclosure. We urge the Department to provide guidance in this regard and to consider providing flexibility to the disclosure requirements generally.

In addition, we ask the Department to consider allowing return data to be measured from a date other than the end of the calendar year. We note that return data measured from a date other than the end of the calendar year may be more readily available to plan fiduciaries in some circumstances.

C. The Department should clarify the distinction between investment options for which the return is "not fixed" and investment options for which the return is "fixed."

In the preamble to the Proposal, the Department states that a guaranteed investment contract is an example of an investment option with a "fixed" return. Proposal at 43017. We ask the Department to clarify whether that statement encompasses a guaranteed investment contract with a floating interest rate. If so, we ask the Department to provide guidance on whether disclosing the rate of return as, for example, "LIBOR + 2.0%" would satisfy the disclosure requirements under paragraph (d)(1)(ii) of the Proposal.

VI. Benchmarks

A. The Department should provide guidance on whether a benchmark must be a single market index.

A requirement that a plan investment option must be benchmarked against a single market index would not be reasonable. For example, where a fund, such as a lifestyle fund, invests in both stocks and bonds, we believe the fund should be compared to a benchmark that consists of a weighted average of both a stock market index and a bond market index. We ask the Department to provide guidance in this regard.

B. The final regulation should not require a benchmark to be used for a company stock fund.

We ask the Department to clarify in the final regulation that a company stock fund need not be measured against a benchmark. There is simply no widely recognized benchmark for a company stock fund. In the opinion of the Group, neither a market index nor the price of company stock is an appropriate benchmark. To illustrate, if a company stock fund is unitized and holds a cash component for liquidity purposes, the fund would underperform the company stock when the stock is going up in value. Using the company stock as a benchmark may

incorrectly suggest to participants that the company stock fund is somehow underperforming in periods where the company stock is going up in value.

C. The Department should provide that a plan fiduciary shall not be liable for using the benchmark selected by the fund manager.

In the preamble to the Proposal, the Department states that "[it] expects that most plans will simply identify the performance benchmark already being used for the investment option pursuant to the [Securities Exchange] Commission's prospectus requirements, if applicable." Proposal at 43017. We ask the Department to provide that a plan fiduciary shall not be liable for using the benchmark selected by the fund manager. If the Department is unwilling to do so, we ask the Department to provide guidance on when a plan fiduciary would be required to use a different benchmark than the one selected by the fund manager.

D. The Department should consider allowing a plan fiduciary to use the performance of other similar funds as a benchmark.

The Department should consider, for example, whether a plan fiduciary should be allowed to compare the performance of an actively managed fund offered in the plan to the median return of similar actively managed funds. We believe that allowing plan fiduciaries to compare a fund's performance to the performance of other similar funds may be appropriate, especially where the fund invests in a narrowly defined sector of the market, for which an available market index may not be an appropriate benchmark.

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The Group appreciates the opportunity to comment on this important Proposal. We would be happy to meet with the Department to discuss these comments or to provide additional input as you work to finalize the Proposal.

Best regards,

Stephen M. Saxon

Jennifer E. Eller