June 6, 2011

Silicon Valley Employers Forum
221 Main Street, Suite 1500
San Francisco, CA 94105

RE: Department of Labor (DOL) Electronic Disclosure by Employee Benefits Plans Request for Information (RFI)

The Silicon Valley Employers Forum (SVEF) was founded in 1994 as a means by which Silicon Valley-based employers could pool their collective intelligence regarding corporate benefits. SVEF strives to provide value to our members by moderating costs, improving quality for employees and their families and increasing efficiencies of benefits administration through the adoption of technological solutions. Our member companies cover approximately 925,000 lives in the United States and spend almost $3.5 billion on healthcare annually.

An SVEF DOL Task Force, a subset of employer members, drafted comments provided here. A full list of our membership is provided at the end of the document.

Responses to Request for Information

Access and Usage Questions

2. On average, 95% of active employees within each member organization have access to and are required to utilize a computer for their job duties. These "participants" under ERISA are covered under the first category of the Safe Harbor amendment regarding use of electronic media to satisfy the general furnishing requirements under Title I of ERISA.

However, active employees only make up about 45% of the individuals requiring certain notifications under ERISA. "Beneficiaries" under ERISA, including employees' dependents, former employees and employees out on leaves of absence fall into the second category of the Safe Harbor amendment. Currently, most of these individuals receive paper communications regarding ERISA notifications.

3. & 4. SVEF members furnish either some or all disclosures required under ERISA electronically to participants. Since many pension benefit notifications are required to be provided to participants **and** beneficiaries, all of our members provide those notifications via paper to guarantee compliance. Only few provide them through both electronic and paper means. Welfare disclosures under ERISA are more often targeted at participants, so most members provide some or all welfare benefit communications, particularly the Summary Annual Report, Summary Plan Description and Summary Material Modifications, through electronic communications only. A few provide these communications by both electronic and paper means.

5. There are several ways our members communicate with participants and beneficiaries electronically. The most common method is by emailing participants with a link to a continuous access website within the company's intranet for participants to review notifications and

information. Other ways our members communicate include emailing participants with document attachments, emailing links to documents for downloading, and emailing notices with the information provided within the body of the email.

6. Our members' employee populations are considered to have high technological literacy, and our member companies are considered leading edge adopters of electronic media. Even with these motivations, our members struggle to fulfill the legal requirements surrounding use of electronic disclosures. These issues are related to the Safe Harbor amendment as well as the definitions used to define the two categories in which individuals fall under the Safe Harbor amendment. See comments to Questions 9 and 10 for proposed solutions to these issues.

General Questions

9. The current electronic disclosure Safe Harbor positively impacts our member companies' ability to utilize electronic communications, as noted earlier. SVEF members would like to see the Safe Harbor amendment adjusted to better accommodate a greater proportion of individuals, specifically the beneficiary population, by eliminating the affirmative consent requirement. Also, the conditions required to fulfill the Safe Harbor amendment should be updated to align more fully with today's growing use of electronic media.

10. It is recommended by our membership that the Safe Harbor amendment be updated in the following ways:

a. **The regulations should state that use of employer-provided email addresses to deliver electronic disclosures fulfill an employer's obligation to ensure receipt, without need to adopt additional verification methods.**

   Currently, the regulations do not explicitly support the use of work email addresses solely as a valid way to confirm receipt. Additional work must be done in order to ensure compliance, such as unique login identification and return receipt requests. However, as noted earlier, our member employee populations predominately utilize computers and all employees have employer-assigned email addresses. These addresses are constantly monitored and updated through internal processes and are verified as active. The additional steps to ensure receipt when it is reasonable to assume that employees in fact receive these notices through their work emails are unnecessarily burdensome. In fact, we believe that any employee, working in any industry, that is assigned a company-hosted email address should be assumed to fit within the first category of the Safe Harbor amendment.

b. **The regulations should establish the use of "last known email address" for non-work email addresses to demonstrate a good faith effort by the employer to fulfill its obligations to ensure receipt to all participants and beneficiaries.**

   Most of our members currently do not have processes in place to obtain accurate and reliable non-work email addresses for participants and beneficiaries such as dependents, former employees and employees out on leaves of absences. However, members would be more prone to collect email addresses of this population if standards similar to those regarding mailed paper communications were adopted. When the last known address is used and notification sent through first-class mail, the employer is

considered to have made a good faith effort to notify the participant and/or beneficiary. If the regulations adopted a similar stance with last known email addresses, whereas use of this address would show a good faith effort to notify, then members would feel freer to utilize electronic communications.

c. **The definition of individuals who fall into the first category under the Safe Harbor amendment should be revised to remove the needs for "access to the employer's or plan sponsor's information system" be an "integral part" of an employee's duties.**

   With the widespread use of email, both at work and personally, the requirement that access to a computer is "integral" to job duties places an undue burden on the employer to prove that an employee falls within the first category of the Safe Harbor amendment.

d. **SVEF agrees with the ERIC recommendations to the Department of Treasury (submitted April 29, 2011 regards Qualified Plans, Group Health Benefits and Executive Compensation) to "allow electronic disclosure without affirmative consent since it is not practical for large employers to obtain, store and administer electronic consent…" for its participants and beneficiaries.**

   As noted earlier, our member populations largely fall within the first category of individuals covered by the Safe Harbor amendment, and by removing the affirmative consent it will relieve the need to continue to use paper or other non-electronic forms of communication for the small portions of the member's populations who fall within the second category under the Safe Harbor amendment (<5% in most cases) and who: 1) have ready access to a computer for access of materials; or 2) can opt to request paper copies of any materials they need via a phone call to the company benefits department.

   Also, by removing the affirmative consent requirement, members would be freer to utilize electronic communications for beneficiaries. It is noted that guidelines on how to communicate effectively with this population would need to be put into place, such as the "last known email address" recommendation stated above.

11. 12. & 13. Different conditions and rules should only apply to two populations, as defined through ERISA, specifically plan participants and plan beneficiaries. Currently, participants are active employees who are either currently, or have the ability to, participate in a benefit plan. Beneficiaries are individuals who are covered through a participant such as dependents, former employees or employees on leaves of absences. No other split with regards to conditions or rules is recommended since further delineation is unnecessary and will become burdensome.

14. As noted in question 5, many of our members utilize email with a link to a continuous access website in order to communicate certain ERISA disclosures to their participants. Therefore, we strongly recommend the DOL explicitly adopt this method as an acceptable form of electronic disclosure. An example of specific regulations could be:

a. Email notices should go to all participants and beneficiaries during the company's open enrollment period to view the important information on the website.
b. When new notices are posted, an email notice should be sent out to participants to view the updates to the page.

c. A notice of right to request a paper copy of the information provided via the website should be posted in a prominent place along with instructions on how to request.

15. We recommended participants and beneficiaries be required to "opt-out" of receiving electronic communications rather than requiring them to "opt-in". Adopting theories of "Behavioral Economics" similar to those supporting the use of defined contribution auto enrollment, it is supposed that employees would be much more likely to provide tacit consent to receive their communications electronically. When recipients are required to actively select electronically receipt, far fewer will choose to do so.

19. As noted above, SVEF agrees with the ERIC recommendations to the Department of Treasury to remove the affirmative consent requirement under the Safe Harbor amendment. Our members who chose not to provide notices electronically to their population cite the affirmative consent requirement as the main reason they do not adopt this method. Employers of all size and industry-types bear a heavy administrative burden to collect, store and constantly update affirmative consent forms. Also, as new legislation is passed and new disclosures required, the need to constantly update the list of disclosures to provide electronically makes the affirmative consent processes administratively unfeasible.

25. One additional benefit to participants and beneficiaries of receiving electronic communications is the ability to save, easily recall and search electronic documents. Some disclosures are lengthy and provide an extensive amount of information, and by providing it electronically these documents can easily be searched for key words and specific information through computer search functions. This can ease participant and beneficiary frustrations when it comes to finding relevant and useful information in a timely manner.

Financially, determining the exact costs associated with providing non-electronic disclosures is difficult because it includes the "direct" cost of paper materials production and distribution as well as the associated "indirect" costs of time for said preparation and dissemination. However, estimates indicate adopting electronic communications would save tens of thousands of dollars for each of our member companies. The value of the function is then additionally limited by the reality that most mailed hard copy materials likely DON'T get read or stored for future use, whereas as stated above, electronic communications have the added value of searchable tools.

30. If one set of electronic disclosure standards were established by the DOL with regards to any benefit plans that fall under IRS or ERISA regulations, it would help alleviate not only the administrative burden of developing different policies and procedures based on benefit plan type, but it would also help eliminate confusion of participants and beneficiaries by standardizing how they will receive communications. As recommended earlier, no separate rules or conditions should exist among the different benefit plan types, but should be developed solely on the participant/beneficiary designation under ERISA.

Thank you for considering our comments. If our members can provide any additional assistance with regards to this RFI, or if there are any questions, please feel free to contact our administrative staff at the address provided above.

Sincerely,

Silicon Valley Employers Forum, DOL Task Force

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