

MEMO# 32478

May 21, 2020

DOL Finalizes New Safe Harbor for Electronic Delivery of ERISA Disclosures

[32478]

May 21, 2020 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Finalizes New Safe Harbor for Electronic Delivery of ERISA Disclosures

Today, the Department of Labor (DOL) published a final rule on electronic delivery for ERISA plan notices and disclosures.[\[1\]](#) The final rule leaves in place DOL's existing 2002 rule on electronic delivery and adds a new alternative safe harbor that may be used by ERISA retirement plans. The final rule is substantially similar to DOL's proposed rule, for which ICI voiced strong support and encouragement for DOL to finalize without delay.[\[2\]](#)

The final rule is scheduled to be published in the Federal Register on May 27 and will be effective and applicable 60 days after publication.[\[3\]](#) DOL also provides that, as an enforcement policy, it will not take any enforcement action against a plan administrator that relies on this safe harbor before that date.[\[4\]](#)

Overview of New Safe Harbor

The final rule is largely unchanged from the proposed rule.[\[5\]](#) Like the proposal, the final rule creates a new additional safe harbor, under which retirement plans may use electronic delivery as the default for notices sent to participants. The final rule leaves in place DOL's existing 2002 rule on electronic delivery but will eventually supersede certain other guidance on electronic delivery that DOL has issued to apply to certain specific required notices.

The new safe harbor is applicable to the delivery of "covered documents" to "covered individuals." Covered documents include any document that ERISA requires to be delivered to a retirement plan participant, with the exception of any document required to be furnished only upon request.[\[6\]](#) Covered individuals include any participant, beneficiary, or other individual who has provided the employer or plan administrator with an email address or an "internet-connected mobile-computing device" (e.g., a smartphone) number.[\[7\]](#) It also includes an employee to whom the employer has assigned an email address.

Changes from Proposal

While the substance of the new safe harbor is unchanged from the proposal, DOL did make a number of changes to address the comments it received.

Simplifies Right to Opt Out of Electronic Delivery.

Covered individuals always have the right to receive upon request a paper copy free-of-charge of any disclosure provided under the safe harbor and the right to opt out of electronic delivery.^[8] The proposal would have allowed individuals to opt out of electronic delivery for some or all covered documents, appearing to require plans to allow individuals to maintain different elections on a document-by-document basis. Our comment letter noted that this requirement would make administration of the safe harbor much more complex and we urged DOL to simplify this section. DOL was persuaded by the argument, and the final rule retains the requirement to permit a global opt-out from electronic delivery.

Requires inclusion of additional information in initial notice.

As in the proposal, before a plan may begin sending disclosures in reliance on the new safe harbor, the plan must provide a one-time paper notice to each individual to alert the individual that the covered documents will be provided electronically.^[9] The final rule, like the proposal, requires this initial notice to include (1) a statement of the right to request a paper version free of charge, and the right to opt out of electronic delivery and (2) an explanation of how to exercise these rights. In a change from the proposal, the final rule also requires the initial notice to include identification of the electronic address that will be used for the individual; any instructions necessary to access the covered documents; and a cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document. This section of the final rule also specifies that the initial notice must be written in a manner calculated to be understood by the average plan participant.

Refines list of covered documents to be identified in annual notice.

As with the proposal, covered individuals generally must be furnished a notice of internet availability (NOIA) each time a new covered document is made available for review on the internet website.^[10] And, to avoid “notice overload,” an annual NOIA can include information about multiple covered documents, instead of multiple NOIAs throughout the year.^[11] Unlike the proposal, however, the final rule no longer permits an annual NOIA to cover quarterly benefit statements due to the concern that a single annual notice may be insufficient to adequately alert covered individuals as to the availability of subsequent benefit statements furnished later in that same year.

Requires that covered documents be maintained on website until superseded and at least one year.

The proposal required that a covered document provided using the safe harbor must remain available on the website until it is superseded by a subsequent version of the document. Many commenters suggest that a different standard is needed for documents that technically do not become superseded by a subsequent version but that instead cease to have continued relevance to participants (e.g., a blackout notice). DOL addressed this concern in the final rule by providing that a covered document must remain available on the website until it is superseded by a subsequent version of the covered document, if

applicable, but in no event less than one year after the date the covered document is made available on the website.[\[12\]](#)

Allows email of covered documents.

In addition to the use of a “notice and access” structure for delivery of required notices, the final rule includes a new provision allowing plan administrators to furnish covered documents directly to covered individuals using email, incorporating the document either as an attachment to the email or into the body of the email itself.[\[13\]](#) In this case, instead of furnishing a notice of internet availability, the plan administrator must send an email that:

- Includes the covered document in the body of the email or as an attachment;
- Includes a subject line that reads: “Disclosure About Your Retirement Plan”;
- Identifies or briefly describes the covered document (if the covered document is an attachment) and includes a statement of the right to receive a paper copy of the covered document, a statement of the right to opt out of electronic delivery, and a telephone number to contact the administrator or other designated representative of the plan; and
- Complies with the readability standard (written in a manner calculated to be understood by the average plan participant).

The email must be sent no later than the date on which the covered document must be furnished and the covered document itself must be:

- Written in a manner reasonably calculated to be understood by the average plan participant;
- Presented in a widely-available format or formats that are suitable to be read online, printed clearly on paper, and permanently retained in an electronic format that satisfies these requirements; and
- Searchable electronically by numbers, letters, or words.

Plan administrators using this option must: (i) Take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual; and (ii) Comply with the requirements relating to: providing copies of paper documents and the right to opt out of electronic delivery, the initial notification of default electronic delivery (except for the cautionary statement), and the special rule for severance from employment.

Narrows requirements upon severance of employment.

DOL includes special rules that apply to former employees.[\[14\]](#) The proposal provided that when an employee terminates employment, the plan administrator must take measures reasonably calculated to ensure the continued adequacy of the individual’s email address or must obtain a new email address that will allow the individual to continue to receive communications under the safe harbor. In our comment letter, we suggested that this provision is not necessary for employees who have provided a personal email address that is being used for the safe harbor. DOL agreed with this comment. The final rule modifies this requirement to clarify that it only applies when the plan is using an email address that has been assigned to the individual by the employer.

Permits the use of mobile applications, texting, and other internet-based

mechanisms.

The final rule more clearly states that plan administrators can use mobile applications in the delivery of required ERISA disclosures.[\[15\]](#) Thus, for purposes of the safe harbor, the term “website” means an internet website, or other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.

Preserves 2002 electronic delivery safe harbor.

The final rule does not substantively change the 2002 safe harbor,[\[16\]](#) which is intended to be available to give plan administrators additional flexibility with the rule in selecting the electronic delivery method that works best for the plan and its participants and beneficiaries. Certain non-substantive conforming amendments were made to the 2002 safe harbor to facilitate the new safe harbor. For example, the preamble notes that a cross reference was added to the new safe harbor in paragraph (f) of § 2520.104b-1 to improve regulatory clarity.

Eliminates readability standard for NOIA.

In the proposal, DOL had included a requirement that the NOIA must be written in a manner calculated to be understood by the average plan participant and then listed a number of factors that would satisfy the readability standard (e.g., language that results in a Flesch Reading Ease test score of at least 60). In our comment letter, we recommend that DOL instead only apply the same principle-based readability standard that applies generally to ERISA-required notices, that is, that it must be written in a manner calculated to be understood by the average plan participant. DOL agreed and made this change in the final rule.[\[17\]](#)

Allows FAB 2006-03, FAB 2008-03, and Technical Release 2011-03R to continue to be effective for 18 months.

In the proposal, DOL indicated that the new safe harbor would supersede the relevant portions of Field Assistance Bulletin (FAB) 2006-03 (which provides special rules for electronic delivery of participant benefit statements), FAB 2008-03 (which provides special rules for the use of electronic delivery to satisfy the QDIA notice requirements), and Technical Release 2011-03R (which provides special rules for electronic delivery of participant-level fee disclosure notices under DOL’s 404a-5 regulations).[\[18\]](#)

In our comment letter, we urged DOL to retain the existing guidance. We noted that there was particular concern regarding the elimination of FAB 2006-03, because a large number of plans rely on this FAB to provide pension benefit statements and its elimination would result in administrative burdens and increased transition costs. We asked that, at a minimum, DOL include a substantial transition period to allow sufficient time for the systems changes that would be needed if the guidance is rescinded.

DOL declined to retain this existing guidance on a permanent basis, noting that it prefers a uniform regulatory standard, rather than different standards in a variety of subregulatory guidance, which have not benefited from the notice and comment process.

DOL was persuaded that a transition period was appropriate. Therefore, DOL indicates in the preamble that plans may continue to rely on the three pieces of existing guidance for 18 months following the effective date of the final rule.

Recognizes Need for Coordination with IRS and Treasury.

In 2006, the Internal Revenue Service (IRS) issued guidance relating to plans' use of electronic media to furnish notices required under the Internal Revenue Code (the "Code").^[19] In our comment letter, we urged DOL to confirm with the IRS that a plan that meets the standards in DOL's new safe harbor is deemed to meet the "effective ability to access" test in the IRS's guidance on electronic media. DOL confirms in the preamble to the final rule that it provided these comments to the Treasury Department and that the Treasury Department and IRS have indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices.

We will continue to analyze the final rule and provide additional commentary and guidance as appropriate

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endnotes

^[1] The final rule is available at <https://www.federalregister.gov/documents/2020/05/27/2020-10951/default-electronic-disclosure-by-employee-pension-benefit-plans-under-erisa>. A Fact Sheet is available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/electronic-disclosure-safe-harbor-for-retirement-plans>. DOL's News Release is available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200521>.

^[2] For a summary of our comments on the proposal, see ICI Memorandum No. 32062, dated November 25, 2019, available at https://www.ici.org/my_ici/memorandum/memo32062. In 2018, ICI sent a letter to DOL, transmitting a 2018 update to the 2011 white paper, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery." ICI met with DOL and provided an additional follow up letter to answer questions from DOL staff. See ICI Memorandum No. 31186, dated May 1, 2018 available at https://www.ici.org/my_ici/memorandum/memo31186 and ICI Memorandum No. 31411, dated September 27, 2018, available at https://www.ici.org/my_ici/memorandum/memo31411. DOL cites the updated Swire white paper in the preamble to the final rule.

^[3] Note that DOL had proposed to make the new rule effective 60 days after publication and to be applicable to plans on the first day of the first calendar year following publication of the final rule.

^[4] The Department explains that this non-enforcement policy provides flexibility and may reduce administrative burden on employers and pension plan service providers to address the far-reaching effects of COVID-19. Also note that in EBSA Disaster Relief Notice 2020-01, DOL temporarily allows expanded use of electronic delivery, explaining that compliance

with the good faith standard includes “the use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.” See ICI Memorandum No. 32429, dated April 29, 2020, available at https://www.ici.org/my_ici/memorandum/memo32429.

[5] DOL issued the proposed rule in October 2019. For a description of the proposed rule, see ICI Memorandum No. 32022, dated October 24, 2019, available at https://www.ici.org/my_ici/memorandum/memo32022. In conjunction with the proposed rulemaking, DOL included a request for information (RFI) “that explores whether and how any additional changes to ERISA’s general disclosure framework, focusing on design, delivery, and content, may be made to further improve the effectiveness of ERISA disclosures.” In the preamble to the final rule, DOL notes that it “is analyzing responses to the RFI to determine whether regulatory or other action, in addition to today’s final rule on electronic delivery of disclosures, should be taken to further enhance the effectiveness of ERISA’s disclosures.”

[6] Section 2520.104b-31(c). Documents required to be furnished only upon request include, for example, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

[7] Section 2520.104b-31(b).

[8] Section 2520.104b-31(f).

[9] Section 2520.104b-31(g).

[10] Section 2520.104b-31(d).

[11] Section 2520.104b-31(i). The NOIA must briefly describe or identify the covered document that is being posted online, include an address or hyperlink to the website, and inform the covered individual of the right to request paper copies or to opt out of electronic delivery altogether.

[12] Section 2520.104b-31(e).

[13] Section 2520.104b-31(k).

[14] Section 2520.104b-31(h).

[15] Section 2520.104b-31(e)(4).

[16] The 2002 safe harbor is in DOL regulation 29 CFR 2520.104b-1(c), published at 67 Fed. Reg. 17264 (April 9, 2002), available at <https://www.govinfo.gov/content/pkg/FR-2002-04-09/pdf/02-8499.pdf>.

[17] Section 2520.104b-31(d)(4)(iv).

[18] FAB 2006-03 (December 20, 2006) is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2006-03>; FAB 2008-03 (Q&A 7) (April 29, 2008) is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2008-03>; and Technical Release 2011-03R (December 8, 2011) is available at

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/11-03r>.

[19] 26 CFR 1.401(a)-21(e)(1), published at 71 Fed. Reg. 61877 (October 20, 2006).

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