

**MEMO# 32022**

October 24, 2019

# **DOL Proposes New Safe Harbor for e-Delivery of ERISA Disclosures, Issues RFI on Enhancing Effectiveness of ERISA-Required Disclosures**

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October 24, 2019 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Proposes New Safe Harbor for e-Delivery of ERISA Disclosures, Issues RFI on Enhancing Effectiveness of ERISA-Required Disclosures

The Department of Labor has published a proposed regulation on electronic delivery for ERISA plan notices and disclosures.<sup>[1]</sup> The proposal 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. In conjunction with the proposed rulemaking, DOL includes a request for information "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."<sup>[2]</sup>

Comments on both the proposal and the RFI are due by November 22, 2019.

## **Background: ICI's Recent Advocacy and the 2018 Executive Order**

ICI has for several years been urging DOL to modernize its electronic delivery rules—issued in 2002--and allow employers to use electronic delivery as the default delivery for ERISA notices and disclosures. In 2018, ICI and the American Retirement Association (ARA) commissioned a 2018 update to a 2011 white paper, which found that there were compelling reasons to shift the default method to electronic delivery for DC plan participants.<sup>[3]</sup> ICI and ARA met with DOL to discuss the findings in the updated white paper and provided a follow-up letter to respond to questions raised by DOL staff in the meeting.<sup>[4]</sup>

On August 31, 2018, the President issued Executive Order 13847.<sup>[5]</sup> Among other directives, the Executive Order directed DOL, in conjunction with the Department of Treasury, to review within one year regulatory measures that could make retirement plan disclosures "more understandable and useful for participants and beneficiaries, while also

reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution.” The Executive Order specified that this review should include exploration of the potential for broader use of electronic delivery.

In September, ICI along with seven other trade associations representing plan sponsors and service providers, sent a letter to DOL, urging DOL to expedite and prioritize the publication of proposed regulations consistent with the Executive Order.[\[6\]](#) The letter suggested that DOL could immediately propose regulations to expand the use of electronic delivery, while simultaneously issuing a RFI on ways to make the content of retirement plan disclosures and notices more understandable and useful for retirement savers.

## **New Safe Harbor Under the Proposed Rule**

DOL’s new proposal would create a new additional safe harbor, using a “notice and access” structure, under which retirement plans may use electronic delivery as the default for notices sent to participants. The proposal leaves in place DOL’s existing 2002 rule on electronic delivery but would supersede certain other guidance on electronic delivery that DOL has issued to apply to certain specific required notices.[\[7\]](#) Retirement plans that decide to use electronic delivery would have the option to (1) use the 2002 safe harbor, (2) use the new safe harbor, or (3) use the 2002 safe harbor for certain participants and the new safe harbor for other participants within the same plan.

## **Covered Individuals**

The proposal includes a definition of “covered individuals,” to whom disclosures can be made under the safe harbor. 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. The definition also includes an employee to whom the employer has assigned an email address.

DOL includes special rules that apply to former employees. When an employee terminates employment, the plan 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.[\[8\]](#)

## **Covered Documents**

The safe harbor could be used to deliver 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.[\[9\]](#) A plan may choose to use the new safe harbor for only certain notices and not others.

The proposal does not apply to health and welfare plans, although DOL plans to consider this point in the future. As support for this decision, DOL notes that the Executive Order only focused on retirement plan disclosures.[\[10\]](#) The proposal also does not apply to disclosures that fall under the IRS’s jurisdiction.

## **Right to Receive Paper Documents and to Opt Out of Electronic Delivery**

Under the safe harbor, a covered individual always has the right to receive upon request a paper copy free-of-charge of any disclosure provided under the safe harbor. Further, a covered individual must have the right to opt out of electronic delivery and receive paper

versions of some or all of the covered documents.

If an email sent to an individual is returned as undeliverable (or the email address is otherwise determined to be invalid or inoperable) and the plan is unable to cure the problem by using a different email address, then the plan must treat the individual as if they had elected to receive paper versions.[\[11\]](#)

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. The notice must 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.[\[12\]](#)

### **Notice of Internet Availability**

DOL describes the proposed safe harbor as a “notice and access” model. Therefore, generally, a plan would furnish a notice by making the document accessible online and by electronically providing a notice to participants and beneficiaries to alert them that the document is available. DOL confirms that nothing in the proposal would change the timing of any notice required under ERISA. Generally, when using the safe harbor, the plan must both (1) send the notice of internet availability and (2) make the document accessible by the date the document is required to be furnished.

DOL does provide an exception to the rules described above by allowing a single combined annual notice of internet availability to be used for multiple documents. A plan may send a consolidated notice to cover any of the following documents:

- Summary plan description;
- Summary of material modifications;
- Summary annual report;
- Annual funding notice;
- Annual participant-level fee disclosure notice under 404a-5(d);
- QDIA notice; and
- Participant benefit statements.

If the plan elects to use a consolidated notice of internet availability, a notice must be sent each plan year and no more than 14 months after date the prior year’s notice was sent. The 14-month requirement is meant to provide flexibility in case the exact date of the notice varies slightly from year to year.

A notice of internet availability must contain the following information:

- A prominent statement, for example as a title, legend, or subject line that reads, “Disclosure About Your Retirement Plan.”
- A statement that: “Important information about your retirement plan is available at the website address below. Please review this information.”
- A brief description of the covered document(s).
- A “sufficiently specific” internet website address where the covered document is available.[\[13\]](#)
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.
- A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right.

- A telephone number to contact the administrator or other designated representative of the plan.

The notice of internet availability must only contain the content listed above (other than pictures, logos or similar design elements) and must be furnished separately from any other materials. The notice must be drafted to be clear and understandable.[\[14\]](#)

### **Standards for Internet Website**

The covered document must remain available on the website until it is superseded by a subsequent version of the document.[\[15\]](#) The posted document must be in a format that (1) can be both read online and printed clearly,[\[16\]](#) (2) is searchable electronically, and (3) allows the individual to permanently save the document (e.g., allows the participant to save it to a personal computer). The plan administrator must take measures reasonably calculated to ensure that the website protects the confidentiality of personal information related to any covered individual.

### **Reasonable Procedures for Compliance**

The proposal includes relief in the event that there are temporary interruptions to the availability of documents on the website, due to reasons beyond the control of the plan administrator. To receive this relief, the administrator must have reasonable procedures in place to prevent such interruptions and must take prompt action as soon as he or she knows or should know that the documents are temporarily unavailable.

### **Effective and Applicability Dates**

DOL proposes to make the new rule effective 60 days after publication of the final regulation and to be applicable to plans on the first day of the first calendar year following publication of the final rule.

### **Request for Information on Effectiveness of ERISA Disclosures**

As noted above, the Executive Order directed DOL to explore ways to enhance the effectiveness of ERISA's disclosures for participants and beneficiaries. DOL acknowledges that the proposed safe harbor will respond to this aspect of the directive[\[17\]](#) but includes the RFI to solicit information and ideas on additional measures to improve the effectiveness of notices, especially the design and content of ERISA disclosures. Accordingly, the RFI section of the document includes 21 additional questions aimed at this goal.[\[18\]](#) The deadline to respond to the RFI is November 22, the same as the deadline for commenting on the proposal.

In 2017, the ERISA Advisory Council examined "Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors." ICI submitted a written statement to the Council which included a number of suggestions on ways to streamline and consolidate existing notices in a way that will focus participants on the key information they need for effective decision making under the plan, while ensuring the availability of more detailed information for further reference.[\[19\]](#) The Council included a number of ICI's suggestions in its final report.[\[20\]](#)

### **Next Steps**

ICI plans to submit comments on the proposal and looks forward to receiving Member input. We will hold a Member call on Wednesday, October 30 at 3:00 pm ET to discuss the

proposal and ICI's comment in response. Please contact me if you would like to participate.

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#### endnotes

[1] Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 84 Fed. Reg. 56894 (October 23, 2019), *available at* <https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf>. DOL's news release is *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20191022> and its fact sheet is *available at* <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/retirement-plans-electronic-disclosure-safe-harbor-rule>.

[2] *Id.* at page 56894.

[3] See ICI Memorandum No. 31186, dated May 1, 2018, *available at* [https://www.ici.org/my\\_ici/memorandum/memo31186](https://www.ici.org/my_ici/memorandum/memo31186). DOL cites to this white paper at footnotes 14, 95 and 109 of the preamble to the proposal.

[4] See ICI Memorandum No. 31411, dated September 27, 2018, *available at* [https://www.ici.org/my\\_ici/memorandum/memo31411](https://www.ici.org/my_ici/memorandum/memo31411).

[5] "Strengthening Retirement Security in America," 83 Fed. Reg. 45321 (September 6, 2018), *available at* <https://www.govinfo.gov/content/pkg/FR-2018-09-06/pdf/2018-19514.pdf>.

[6] See ICI Memorandum No. 31777, dated May 28, 2019, *available at* [https://www.ici.org/my\\_ici/memorandum/memo31777](https://www.ici.org/my_ici/memorandum/memo31777).

[7] The proposal would supersede the relevant portions of Field Assistance Bulletin (FAB) 2006-03 (December 20, 2006), *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2006-03>, which provides special rules for electronic delivery of participant benefit statements; FAB 2008-03 (Q&A 7) (April 29, 2008), *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2008-03>, which provides special rules for the use of electronic delivery to satisfy the QDIA notice requirements; and Technical Release 2011-03R (December 8, 2011), *available at* <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/technical-releases/11-03r>, which provides special rules for electronic delivery of participant-level fee disclosure notices under DOL's 404a-5 regulations.

[8] In the preamble, DOL notes that this step may protect against these individuals becoming missing participants, a concern on which DOL has paid particular focus in recent years. 84 Fed. Reg. at 56906.

[9] 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.

[10] 84 Fed. Reg. at 56902.

[11] The system for delivering the notice of internet availability must be designed to alert the plan administrator when an individual's email address becomes invalid.

[12] In the preamble, DOL asks whether a model notice would be useful. 84 Fed. Reg. at 56906.

[13] The website address is "sufficiently specific" if it links directly to the covered document or if it links to a login page, after which there is a prominent link to the covered document.

[14] The proposal specifies that the notices should use short sentences without double negatives, using everyday words, in "language that results in a Flesch Reading Ease test score of at least 60." DOL asks in the preamble whether additional guidelines or a model notice would be useful. 84 Fed. Reg. at 56903 and 56904.

[15] In the preamble, DOL requests comments on whether it should address the category of documents that technically do not become superseded by a subsequent version but may cease to have continued relevance to participants. 84 Fed. Reg. at 56904.

[16] In the preamble, DOL asks whether anything additional is needed to ensure that documents are presented effectively on a mobile device, for a "hand-held-device only individual."

[17] Specifically, DOL notes that "A notice and access framework also facilitates, among other things, interactivity, just-in-time notifications, layered or nested information, word and number searching, engagement monitoring, anytime or anywhere access, and potentially improved visuals, tutorials, assistive technology for those with disabilities, and translation software. These features may be used to improve participants' and beneficiaries' disclosure experiences." See page 56908

[18] The questions can be found on pages 56909 and 56910.

[19] See ICI Memorandum No. 30844, dated August 18, 2017, *available at* [https://www.ici.org/my\\_ici/memorandum/memo30844](https://www.ici.org/my_ici/memorandum/memo30844).

[20] The Council's final report on this topic is *available at* <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf>.