

COMMENT LETTER

September 25, 2018

ICI Letter to DOL Regarding Default Electronic Delivery of ERISA-Required Notices (pdf)

September 25, 2018 The Honorable Preston Rutledge Assistant Secretary US Department of Labor Employee Benefits Security Administration 200 Constitution Avenue NW Washington, DC 20210 Re: Electronic Delivery of Disclosure for Workplace Retirement Plans Dear Mr. Rutledge: On behalf of the Investment Company Institute¹ and the American Retirement Association,² we are following up on the meeting we had with you and staff on June 7 to discuss the benefits of electronic delivery and to review with you the 2018 update to the 2011 study, “Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery.”³ As we discussed, the 2011 study and 2018 Update provide overwhelming evidence that the time has come to provide retirement plan sponsors the flexibility to establish electronic delivery as the default method for communicating with participants and delivering plan information. Doing so will serve to encourage plan participants and beneficiaries to make greater use of the benefits that electronic modes of communication provide. It is encouraging in this regard that President Trump has now issued a directive that the Department explore, in consultation with the 1 The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$22.4 trillion in the United States, serving more than 100 million US shareholders, and US\$7.3 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC. 2 The American Retirement Association is a national organization of more than 20,000 retirement plan and benefits professionals that serves as the educator, voice, and advocate for the employer-based retirement system. ARA members are administrators, actuaries, advisors, attorneys, accountants, and other financial services professionals who provide consulting and administrative services for qualified retirement plans. 3 For the 2018 Update, see Peter Swire and DeBrae Kennedy-Mayo, 2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery; available at <http://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-D-C-Plans-002.pdf>. The Honorable Preston Rutledge September 25, 2018 Page 2 of 14 Department of Treasury, “the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and

burdens.”⁴ During our meeting, you and your team raised several questions pertinent to the Department’s further consideration of the issue. More specifically: • Whether the Department has the requisite authority to make electronic delivery the default method for communicating with participants and delivering plan information; • Whether default electronic delivery satisfies ERISA’s requirement for “furnishing” certain documents; • Whether an annual notice by postcard should be sent to enrolled participants not taking advantage of electronic delivery to ensure that participants are aware of the ability to request disclosures and other plan communications; • Whether evidence shows that participants are more likely to read material that is electronically delivered than material delivered in paper format; and • Whether the rate of access to high-speed internet in rural areas is relevant to a determination regarding the use of electronic delivery as a default method of communicating plan information and required notices. Executive Summary As discussed in more detail below, the Department has broad authority to issue regulations to interpret ERISA, including specifying how statutorily-required notices may be delivered. Default electronic delivery, which the Department already permits under certain conditions, satisfies ERISA’s requirement to furnish certain notices to participants and beneficiaries. To ensure that all participants are aware of the ability to request paper disclosures, participants not currently taking advantage of the plan’s website or other forms of electronic communication should be sent an annual postcard notifying them of their ability to elect paper delivery and where they can access material online. For those participants currently making use of the plan’s website features or on-line communications, online notification is the best way to ensure that they continue to receive notices and other disclosures. Increasing the use of electronic forms of communication and engagement can positively impact participants. Evidence shows that those who avail

⁴ See Executive Order on Strengthening Retirement Security in America, issued on August 31, 2018 and available at

<https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-retirement-security-america/>. The Executive Order directs the Department to complete a review of actions that could be taken to make retirement plan required disclosures more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries. For additional suggestions on enhancing the effectiveness of required disclosures, see letter from David M. Abbey and Shannon N. Salinas to Larry Good, Executive Secretary, ERISA Advisory Council, US Department of Labor (August 18, 2017), available at

<https://www.ici.org/pdf/30844a.pdf>. The Honorable Preston Rutledge September 25, 2018 Page 3 of 14 themselves of such features are more likely to take positive actions such as increasing their contributions. While we agree the Department should be mindful of internet access considerations, for rural Americans, the rate of access to broadband internet is not relevant for a number of reasons, including that : (a) access to broadband internet or high-speed mobile LTE services is nearly universal, regardless of urban or rural location; (b) US adults report high rates of internet use, across urban and rural locations; (c) working US adults—the segment of the population participating in workplace plans—have even higher rates of internet use; and (d) high-speed or broadband internet is not necessary for downloading and viewing DC plan disclosures. Finally, of course, under any proposal to be considered, every participant will have the right to opt to receive notices in paper. 1. The Department has the authority to establish electronic delivery as the default delivery method for participant communication. Regarding your question whether the Department has authority, without any new legislation, to issue guidance allowing electronic delivery as the default method for delivering disclosure, the Department’s authority is clear.⁵ While there may be advantages to legislation (the primary advantage being a single standard for all disclosures under the jurisdiction of the Department, IRS and PBGC⁶), legislation is not

necessary. The Department generally has jurisdiction over all disclosure required by Title I of ERISA.⁷ As described below, the specific statutory authority for regulating delivery of notices varies by provision—where the statute requires disclosure but is silent regarding method, where the statute requires disclosure and specifies delivery methods, and where the Department requires disclosure not required by ERISA. (1) General authority for ERISA disclosure For most ERISA-required disclosure falling under the Department’s jurisdiction, the statute simply requires that a disclosure be “furnished” or “provided” to the participant or beneficiary, without specifying any delivery method. The summary plan description (SPD), summary of material modifications (SMM), summary annual report (SAR), and qualified default investment 5 The Department’s authority to issue regulations to interpret ERISA is broad, and under *Chevron*, the Department is entitled to deference in interpreting the statute which it administers. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). The breadth of this authority is illustrated, for example, by the Department’s creation of new disclosure requirements under its 404a-5, 408b-2, and 404c-1 regulations. 6 While agency coordination is normally an important goal, our priority is improved electronic delivery rules from the Department, and we suggest that the Department move forward with a regulatory project to accomplish this as soon as possible. The Department’s rule on electronic delivery is more onerous than IRS’s, and therefore, the Department’s rule is our primary focus. 7 See Reorganization Plan No. 4 of 1978, which clarified how authority is divided between DOL and the Department of the Treasury, transferring the authority to interpret certain provisions of title I of ERISA that have parallel language in the Internal Revenue Code from the Secretary of Labor to the Secretary of the Treasury. The Honorable Preston Rutledge September 25, 2018 Page 4 of 14 alternative (QDIA) notice⁸ fall under this category. Where delivery options are not specified, the Department’s general interpretive authority applies. Section 505 of ERISA gives the Department broad authority to issue such regulations it “finds necessary or appropriate to carry out the provisions of [Title I of ERISA].” Guidance on how plans can satisfy ERISA’s disclosure requirements has always been an area subject to the Department’s interpretive guidance. In 1997, although the Department and Treasury already had the authority to issue guidance regarding the delivery methods for notices, Congress directed both agencies to issue new guidance consistent with its directive that such delivery methods should benefit from technological improvements. The Taxpayer Relief Act of 1997 directed both agencies to issue guidance designed to “interpret the notice, election, consent, disclosure, and time requirements (and related recordkeeping requirements) under [ERISA and the Code] as applied to the use of new technologies by plan sponsors and administrators while maintaining the protection of the rights of participants and beneficiaries.”⁹ As reflected in the legislative history, Congress’s purpose was to direct the Department to revisit its rules in light of changing technologies, rather than to provide the Department with authority it did not already have. The directive therefore represents a general policy directive by Congress that the ERISA disclosure requirements should adapt to changing technologies.¹⁰ In response to Congress’ directive, the Department issued a final rule in 2002, providing a safe harbor for disclosure by electronic media.¹¹ In crafting the 2002 regulation, the Department took into account provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN) relating to consumer disclosure and consent with regard to electronic communications. Under E-SIGN, when a statute or regulation requires information to be provided or made available to a consumer in writing, the consumer must affirmatively consent to receive the information electronically. E-SIGN also authorizes an agency to exempt certain categories from the affirmative consent requirement if it is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. Under the Department’s 2002 safe harbor, plan administrators are deemed to satisfy the disclosure obligation using electronic media if the participant affirmatively consents in

accordance with the safe harbor procedures. Alternatively, the safe harbor is met if the participant can effectively access electronic documents where the participant is an employee, and if using the employer's electronic information system is an integral part of the employee's duties. This alternative to 8 ERISA section 404(a)(5)(B) requires that each participant or beneficiary "receives" the QDIA notice. The Department has interpreted this statutory language as consistent with a requirement to "furnish" the notice. See DOL Regulation section 2550.404c-5(c)(3). 9 Section 1510(a), Pub. L. 105-34, enacted August 5, 1997. 10 See "General Explanation of Tax Legislation Enacted in 1997 (s-23-97)," Joint Committee on Taxation, December 17, 1997; available at https://www.jct.gov/publications.html?func=download&id=1215&chk=1215&no_html=1. 11 DOL Regulation section 2520.104b-1(c). The Honorable Preston Rutledge September 25, 2018 Page 5 of 14 affirmative consent represented the Department's balancing of the burdens on e-commerce and risk of harm to participants. Since 2002, the world has become much more tied to the internet through both wired and mobile devices. Providers of recordkeeping services for plans have of course responded to these changes and now build communications functionality to fit mobile phones and tablets in addition to desktops and laptops. In 2011, the Department issued a request for information regarding electronic delivery, and the Department asked whether the safe harbor's affirmative consent provisions constitute an impediment to electronic delivery and whether eliminating the requirement would increase a material risk of harm to participants and beneficiaries.¹² A number of commenters, including ICI and ASPPA, provided support for the position that E-SIGN is not a barrier to eliminating the affirmative consent requirement.¹³ The Department's safe harbor already requires that a plan take appropriate measures to ensure that the plan's document delivery system fosters actual receipt and protects confidentiality of personal information. This requirement, combined with a requirement to allow plan participants to easily opt out of electronic delivery, is sufficient to protect the interests of all plan participants in a plan using electronic delivery. As shown by the 2018 Update, the evidence in support of this position has grown even stronger over the intervening time period. Other federal agencies have modernized their communication methodologies. For example, many years ago, the IRS stopped automatically mailing tax forms and instructions needed for filing, due to the rise in e-filing and the ability to access forms online. Now, the IRS mails paper forms only upon request. Similarly, the Social Security Administration now delivers its statements electronically for most people.¹⁴ Most recently, the Securities and Exchange Commission (SEC) finalized a similar action regarding the delivery of shareholder reports. SEC's rule 30e-3 creates an optional "notice and access" method for delivering shareholder reports. With this new option, a fund may deliver its shareholder reports by sending investors a paper notice of each report's availability online by mail. Investors who prefer to receive the full report in paper may—at any time—request a paper report free of charge. In the preamble, SEC expresses its belief that in addition to the benefit of cost reduction, "the rule may facilitate investor review of periodic information by increasing its overall accessibility."¹⁵ As discussed in 12 See question 19 of Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (April 7, 2011). 13 See letter from Mary S. Podesta to Office of Regulations and Interpretations, Employee Benefits Security Administration, US Department of Labor (June 6, 2011), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00041.pdf>. See also Response to Request for Information Regarding Electronic Disclosure by Employee Benefit Plans from Brian H. Graff (June 6, 2011), available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00051.pdf>. 14 SSA mails paper statements only to those who meet three criteria—they are at least age 60, they are not yet receiving

benefits and they do not have a my Social Security account. See Doug Walker, “Finding Value—and my Social Security—in light of Budget Cuts,” Social Security Matters (January 9, 2017), available at <https://blog.ssa.gov/finding-value-and-my-social-security-in-light-of-budget-cuts/#more-225>

2. 15 83 Fed. Reg. 29158 (June 22, 2018). We recognize that SEC’s statutory authority is different than the Department’s. However, SEC’s analysis that with certain protections in place, investors will not only not be harmed by changing the default, but they will likely be benefited, is relevant to the Department’s analysis. We also note the The Honorable Preston Rutledge September 25, 2018 Page 6 of 14 greater detail below, the change we are requesting from the Department would have similar benefits for plan participants, improving the effectiveness of ERISA disclosures, as we have explained previously.¹⁶ (2) Authority specific to certain notices For certain ERISA-required disclosure under the Department’s jurisdiction, Congress dictated permissible delivery to include electronic delivery. Notices in this category include pension benefit statements, blackout notices, and notice of the right to divest employer securities. For example, Congress specified the methods for the delivery of periodic benefit statements with the enactment of the Pension Protection Act of 2006 (PPA). ERISA section 105(a)(2)(A)(iv) states that pension benefit statements “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.” The Joint Committee on Taxation explained “[Benefit statements] may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the recipient. For example, regulations could permit current benefit statements to be provided on a continuous basis through a secure plan website for a participant or beneficiary who has access to the website.” In response to this PPA provision, the Department issued guidance with a separate standard for delivering benefit statements electronically.¹⁷ PPA also added section 101(m) to ERISA, requiring a notice of the right to divest employer securities.¹⁸ This notice “may be delivered in written, electronic, or other appropriate form to the extent that such form is reasonably accessible to the recipient.” Similarly, in 2002, when Congress added ERISA section 101(i), requiring the provision of blackout notices, it specified that the notice “shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.”¹⁹ While Congress explicitly identified specific notices in the statute cited above, nothing in Title I of ERISA limits the Congressionally-directed approaches to such notices. Rather, the statutory language implicitly recognizes Congress’ acceptance of electronic delivery as an appropriate form of furnishing information. similarity in population. Ninety-four percent of households owning mutual funds have access to the internet; 93 percent of households owning DC plans have internet access. 16 See letter from Paul Schott Stevens to Preston Rutledge, Assistant Secretary, Employee Benefits Security Administration, US Department of Labor (January 23, 2018) available at <https://www.ici.org/pdf/31058a.pdf>; see also letter from David M. Abbey and Shannon N. Salinas to Larry Good, Executive Secretary, ERISA Advisory Council, US Department of Labor (August 18, 2017), available at <https://www.ici.org/pdf/30844a.pdf>. 17 DOL Field Assistance Bulletin No. 2006-03. 18 ERISA section 101(m), as added by section 507 of the PPA. 19 ERISA section 101(i)(2)(D), as added by section 306 of the Sarbanes-Oxley Act of 2002. The Honorable Preston Rutledge September 25, 2018 Page 7 of 14 (3) Disclosure required by the Department rather than by statute Finally, there are other notices that the Department has interpreted ERISA to require, but for which there is no statutory requirement to furnish. For example, the Department has interpreted ERISA section 404 to require fiduciaries to provide plan participants with disclosure detailing the fees under the plan. Because there is no statutory requirement to furnish such information, the Department has leeway in determining how to deliver the notice.²⁰ This standard also applies for example, when the Department requires a notice to be delivered in connection

with a prohibited transaction exemption (PTE). The Department has the greatest flexibility in these circumstances because there is no statutory requirement to deliver the notice. Just as the Department has authority to create a notice requirement, it has authority to specify how that notice should be delivered to participants. While the basis for the Department's authority varies slightly across these three categories, the outcome is the same. The Department has broad authority to specify how notices may be delivered, including by electronic delivery as the default.

2. Default electronic delivery satisfies ERISA requirement to "furnish" documents. The meaning of the term furnish is subject to the Department's interpretive discretion. According to the Oxford dictionary, furnish means to "Supply someone with (something); give (something) to someone." There is nothing intrinsic to the word furnish that suggests a physical hard copy over electronic. In fact, in many contexts furnishing information can signify relaying information orally. To furnish is essentially the same as to provide. As illustrated in our response to question 1 above, the Department has always exercised its interpretive discretion to construe the term "furnish," and it has done so in light of available technology. The Department's original 1977 regulation permitted disclosures to be "furnished" through multiple means, including in-person, through a company newsletter, or through the US mail (means that were not specified in ERISA).²¹ Where material is required to be furnished, the Department explains, "the plan administrator shall use measures reasonably calculated to ensure actual receipt" and the material "must be sent by a method or methods of delivery likely to result in full distribution."²² Furnishing documents by electronic delivery as the default satisfies this standard. Other agencies too have determined that a disclosure can be "furnished" through electronic means. The Federal Thrift Investment Board regulations provide that the requirement to "furnish" 20 The Department provided a separate standard for delivery of fee disclosure to participants in Technical Release No. 2011-03R. 21 42 Fed. Reg. 37186 (July 19, 1977). 22 DOL regulation section 2520.104b-1(b). The Department specifies that acceptable methods include in-hand delivery to an employee at his or her worksite, distribution by mail, and including as a special insert in a periodical distributed to employees. Merely placing copies of the material in a location frequented by participants is not acceptable. The Honorable Preston Rutledge September 25, 2018 Page 8 of 14 the information" is satisfied by "making it available on the [Thrift Savings Plan (TSP)] Web site" by default, with an option to request a paper copy.²³ The TSP's move from paper to electronic disclosure was made because the Federal Thrift Investment Board determined it to be the most cost effective option.²⁴ In addition, the SEC has interpreted the requirement to "furnish" a disclosure to be met when information is sent through email with electronic attachments.²⁵ Courts analyzing the meaning of "furnishing" documents have reached a similar conclusion.²⁶ In *Brown v. Owens Corning Inv. Review Committee*, 622 F.3d 564 (6th Cir. 2010), for example, the plaintiff employees argued that the plan fiduciaries breached their duties by continuing to offer Owens Corning company stock in the 401(k) plan. In determining whether the statute of limitations had passed, the Sixth Circuit considered whether the participants had received SPDs, which notified participants that the Investment Review Committee was the party responsible for managing the company stock fund. Owens Corning's practice was to notify salaried employees that the SPDs were available on the company's internet website. The court explained "we see no material distinction between being directly handed plan documents and being given instructions on how to access them."

3. Annual postcard notice to participants not enrolled in electronic delivery ensures participants are aware of disclosures and other plan communications. Your staff asked whether plans should mail postcards to alert participants of the right to elect to receive notices in paper. Of course, it is important that participants be made aware of their ability to access plan communications and other information online and the ability to request paper copies free of charge. For participants who already use a plan's website or

communicate with the plan by email (or other electronic means), such notification is best provided online. In this respect, a participant who uses electronic communication as his or her primary source of accessing information is likely to ignore mailed disclosures. Because providers can track participants' online activity, e.g., the initial website registration to enable online access, login frequency, and other online actions (i.e., checking their account balance, changing investment elections, or changing contribution levels), they are in the best position to provide information to the plan's fiduciaries. In this way, they can determine what form of communication is most accessible to a given participant. For participants who are already engaged with the plan online, it makes sense that notifications regarding the availability of documents should be provided online, in accordance with how they are already communicating with the plan. For other 23 5 C.F.R. section 1640.6. 24 68 Fed. Reg. 74450 (Dec. 23, 2003). The Department did not comment on this regulation. Id. 25 Securities and Exchange Commission, Securities Act Rules, Questions and Answers of General Applicability, Question 256.11, available at <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (interpreting 17 C.F.R. 230.502(b)). 26 When faced with the question of whether documents have been furnished under ERISA, courts have provided deference to the Department's regulation. In *Thomas v. Cigna Group Insurance, et. al.* No. 09-CV-5029 (E.D NY March 2, 2015), the plaintiff sought to recover life insurance benefits and the court evaluated whether an SPD was properly furnished to a decedent employee. Other than noting that the requirement to furnish is more than to simply make available, the court's analysis consisted of determining whether the standard in the Department's 2002 safe harbor had been met. The Honorable Preston Rutledge September 25, 2018 Page 9 of 14 participants not taking advantage of the plan's website and other forms of electronic communication, an annual postcard will be the best way to ensure that they receive this information. 4. Evidence shows that participants are more likely to take action in response to materials provided electronically. When recordkeepers and other retirement plan service providers use paper delivery, they cannot know if a given participant actually opens or reads the materials. In contrast, when participants engage with their plans through electronic portals, the provider can track when a document is opened, how the participant navigates through the document and any linked documents or other materials, and the total time of engagement. The tracking data show that participants are more likely to take action in response to materials provided electronically. For example, there is ample evidence that those who interact with the plan online save at higher rates and tend to be more engaged. According to Fidelity, participants who have provided an email address to the plan save 72 percent more than participants without an email address on file, and are three times more likely to be "on plan" with their saving and investing.²⁷ They are 12 times more likely to go to the plan website to review an account, make changes, or explore a tool or educational content; they are four times more likely to use support tools; and they are twice as likely to attend an educational workshop, compared with participants who do not engage digitally. Similarly, T. Rowe Price's data show that the average balance for participants who in 2017 were engaged online was \$119,000 compared with the \$49,000 average balance for participants who were not engaged online. T. Rowe Price's data also show that 8.8 percent of participants engaged online in 2017 had a discretionary deferral increase compared with 0.8 percent of participants who were not engaged online.²⁸ Similarly, Empower's analysis of millions of defined contribution (DC) plan participants finds that online interaction improves outcomes.²⁹ Specifically, DC plan participants that engaged with 27 The On Plan Indicator is Fidelity's metric to help employers determine if their employees are saving enough and investing appropriately with respect to equities for their age. This indicator tracks the percentage of employees saving a total of 10 percent or more and who are invested with an age-based equity allocation. 28 For purposes of this analysis, T. Rowe Price defined

“engaged” participants as those who opened T. Rowe Price email concerning a plan recordkept by T. Rowe Price or engaged on T. Rowe Price’s website for its plan clients. The analysis excluded small plans recordkept by a subcontractor, and individuals with recent substantial rollovers into a plan recordkept by T. Rowe Price. A related point is that T. Rowe Price data also show participants, specifically older participants, overwhelmingly affirm a preference for electronic engagement. In a 2016 survey conducted by T. Rowe Price, a substantial number of plan participants in all demographic groups reported a preference for accessing content on electronic platforms as opposed to print or “other.” The preference was held by 88 percent of terminated Baby Boomers, and 87 percent of active Baby Boomers as well as 93 percent of Millennials (for this purpose, individuals were Millennials if they were born between 1981 and 1996, and Baby Boomers if they were born between 1946 and 1964). 29 Empower analyzed six years of historical data, covering the time period from December 2010 through September 2016, including nearly 7 million website visits by over 300,000 participants from 569 retirement plans that are recordkept by Empower. Experience Matters: The Connection Between Personalized Projected Retirement Income and Retirement Readiness, Empower Retirement (2017). The Honorable Preston Rutledge September 25, 2018 Page 10 of 14 the online Empower retirement income calculator often increased their savings rates in their plans, in some cases spurred onward by an analysis of estimated retirement healthcare costs or peer comparisons. We recognize that some e-delivery opponents have asserted that individuals read and retain information better in paper format, but these claims are based on irrelevant and poorly designed studies. For example, one report often cited by electronic delivery opponents was commissioned by the Canada Post (the postal delivery service in Canada). The report focused on direct marketing materials, comparing how individuals respond to advertisements delivered by physical mail, email and direct marketing on Facebook.³⁰ The report asserts that advertisements that were delivered through directly addressed mail tended to be noticed and acted on. There is, however, no data in the report supporting e-delivery opponents’ assertion that direct mail produces more engagement than e-mail. Further, it is inappropriate to draw conclusions regarding how individuals respond to retirement plan disclosures based on how people may react to unsolicited advertisements. In this respect, the report can be better said to support the unsurprising notion that whether the communication is actually directed to the recipient (which plan disclosures would be) is the most important indicator of likely engagement. What consumer testing has shown is that individuals are more likely to read notices that are simple and provide key context up front.³¹ Electronic delivery facilitates this streamlined, “less is more” approach, allowing for a short, simple notice that provides key context up front, which participants will be more likely to read. The click-through/hyperlink nature of the internet allows participants to see exactly the level of information that is right for them. 5. Access to high-speed internet is not relevant to the use of electronic delivery as a default. Internet use is nearly universal. Finally, you asked whether access to highspeed internet in rural areas is relevant to the use of electronic delivery as a default method of delivering required notices. The data show that it is not. The Federal Communications Commission (FCC) tracks access to broadband internet in connection with its directive from Congress to encourage the deployment of broadband to all ³⁰ The Canada Post (the postal delivery service in Canada) issued a report entitled “Breaking Through the Noise,” available at https://www.canadapost.ca/assets/pdf/blogs/CPC_BreakThruNoise_EN1Print_150709.pdf. This report took what they refer to as a qualitative approach, doing an ethnographic examination of how a group of participants sort through physical mail, email and direct marketing on Facebook, with a primary focus on promotional messages. ³¹ See page 14 of Peter P. Swire and Kenesa Ahmad, “Delivering ERISA Disclosure for Defined Contribution Plans—Why the Time has Come to Prefer Electronic Delivery,” submitted to the Department on June 14, 2011 in response to the Department’s request for information (RFI) on

electronic delivery by employee benefit plans, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00074.pdf>. The Honorable Preston Rutledge September 25, 2018 Page 11 of 14 Americans,³² and Pew Research has survey information on US adults' use of the internet. Review of these two data sources reveals four key takeaways: • Access to broadband internet or high-speed mobile LTE services is nearly universal, regardless of urban or rural location; • US adults report high rates of internet use, across urban and rural locations; • Working US adults have even higher rates of internet use; and • High-speed or broadband internet is not necessary for downloading and viewing DC plan disclosures. A. Access to broadband internet or high-speed mobile LTE services is nearly universal, regardless of urban or rural location. In February 2018, the FCC released its 2018 Broadband Deployment Report, which contained information on the US population's broadband and high-speed mobile LTE access (regardless of whether they purchased such service) for year-end 2016. The FCC's definition of high-speed, broadband internet service (or "fixed advanced telecommunications capability"), is fixed-terrestrial access that meets the speed benchmark of 25 megabits per second for downloads and 3 megabits per second for uploads (25 Mbps/3 Mbps).³³ Additionally, they determine availability of mobile LTE with a minimum advertised speed of 5 Mbps/1 Mbps, and also examine access to mobile LTE in areas with a median speed of 10 Mbps/3 Mbps.³⁴ Nearly all of the US population, whether rural or urban,³⁵ has access to advanced communication capability or mobile LTE services (measured by minimum advertised speed of 5 Mbps/1 Mbps), regardless of whether one includes access to satellite services or not.³⁶ Using the FCC's alternate measurement of mobile access—requiring that an area have a median on-the-ground speed of 10 Mbps/3 Mbps—only reduces rural access slightly, to about 90 percent of rural individuals in 2016.³⁷ If satellite service is included, rural access to such high-speed services increases to 93.5 percent.³⁸ 32 See page 2 in the FCC's 2018 Broadband Deployment Report, released February 2, 2018, available at <https://www.fcc.gov/document/fcc-releases-2018-broadband-deployment-report>. The FCC separately considers and tracks fixed advanced telecommunications capability and mobile broadband access. 33 Id. at p. 22. 34 Id. at pp. 22–24. Unlike fixed internet service which the FCC measures using a single speed benchmark, the FCC measures mobile service using multiple data points, given the inherent variability of actual mobile speeds and the available data. FCC achieves a holistic view of mobile services by measuring both a minimum advertised speed (5 Mbps/1 Mbps) and an actual on-the-ground speed (median speed of 10 Mbps/3 Mbps). Id. at p. 11. 35 FCC data indicate that 62.9 million, or only 20 percent of, the US population (322.5 million) lived in rural areas, and 259.6 million, or 80 percent, lived in urban areas in 2016. Id. at Appendix D, p. 58. But, as discussed below, even the relatively small portion of Americans living in rural areas tend to have access to high speed internet. 36 Id. at p. 26. 37 Id. 38 Id. at p. 27. The Honorable Preston Rutledge September 25, 2018 Page 12 of 14 B. US adults report high rates of internet use across urban and rural locations. Pew Research Center finds that, as of January 2018, 89 percent of all US adults report that they use the internet, including 83 percent who report mobile usage.³⁹ Urban and suburban adults had the highest rate of internet use—about nine in 10—and about eight in 10 rural adults reported internet use. When asked about broadband subscriptions at home, 65 percent of American adults have broadband internet service at home, compared with Americans in rural areas having only slightly less at 58 percent. In its analysis of internet use, Pew Research Center also has sought to examine the use of traditional dial-up internet service and the reasons explaining its continued (though extremely rare) use. The Pew Internet Survey data for January 2018 indicate that only 2 percent of all American adults connect to the internet at home via dial-up, with rural, urban, and suburban adults all rarely using dial-up to connect to the internet.⁴⁰ C. Working US

adults have even higher rates of internet use. Whereas DC plan participants are either working or formerly working,⁴¹ it is more relevant to explore internet use among working adults. ICI tabulations of the Pew Internet Survey data indicate that as of January 2018: 39 See Pew Research Center, “Internet/Broadband Fact Sheet,” (February 8, 2018), available at <http://www.pewinternet.org/fact-sheet/internet-broadband/>. The topline questionnaire from the January 2018 survey is available at http://assets.pewresearch.org/wp-content/uploads/sites/14/2018/04/27165130/PI_2018.04.30_Internet-Good-Bad_TOPLINE.pdf. When considering these data, it is important to note that Pew Research Center uses a significantly different definition of “broadband” than the FCC’s definition. Pew Research Center defines broadband to include DSL, cable, and fiber optic services, citing no speed minimums (in other words, all non-mobile internet access other than traditional dial-up). Because, as evidenced here, policymakers and advocates referring to “broadband” access can associate widely different meanings to the term, it is important to level-set in such policy discussions to understand the precise concern being raised. 40 Id. A 2015 Pew Internet Survey asked individuals not subscribing to broadband at home their reasons for not subscribing to broadband at home. Cost weighed on the minds of many of them: 59 percent of non-broadband users indicated the subscription cost being too expensive as a reason for not subscribing, and 33 percent indicated it was the primary reason. Cost of a computer being too expensive was a reason for non-subscription for 45 percent of non-broadband users, and the main reason for 10 percent. But, interestingly, nearly half (46 percent) of non-broadband users indicated they had other options for internet access outside of home, with 10 percent saying this other access was their primary reason for not subscribing. Another 12 percent said the primary reason they didn’t need a broadband subscription at home was because their smartphone does everything online that they need to do, with 27 percent saying this was a reason for not subscribing. While there is no doubt that dial-up internet is slower than other types of access, the fact that some (although very few) are using dial-up for email and general browsing despite the availability of faster services suggests that even dial-up provides sufficient bandwidth for some. Indeed, the 2015 Pew Internet Survey found that 70 percent of non-broadband users are not interested in having broadband internet service in their homes in the future. See John B. Horrigan and Maeve Duggan, “Barriers to Broadband Adoption,” in Home Broadband 2015 (December 21, 2015); available at <http://www.pewinternet.org/2015/12/21/3-barriers-to-broadband-adoption-cost-is-now-a-substantial-challenge-for-many-non-users/>. 41 DOL Form 5500 data give an approximate view into this: In plan year 2015, 65.3 million out of 80.3 million, or 81 percent of, 401(k) plan participants were active participants. See Table A1. “Number of Pension Plans, Total Participants, Active Participants, Assets, Contributions, and Benefits,” in US Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin: Abstract of 2015 Form 5500 Annual Reports (Data The Honorable Preston Rutledge September 25, 2018 Page 13 of 14 • 95 percent of working US adults report that they use the internet, including 92 percent who report mobile usage.⁴² • Internet use among working adults varied little by region, ranging from 90 percent for rural working adults to 97 percent for urban working adults reporting internet use. • 73 percent of working adults reported broadband internet service at home, varying across a narrow range by identified region—72 percent among working urban adults, 73 percent among working rural adults, and 78 percent among working suburban adults. D. Typical DC plan disclosures and webpages do not require high-speed broadband access. It is well acknowledged by the FCC that many Americans do not need download speeds associated with broadband internet. In its Broadband Speed Guide, the FCC shows the recommended minimum download speed needed for various activities.⁴³ For general web browsing and email, the FCC recommends a minimum download speed of 1 Mbps—far lower than the 25 Mbps necessary to be considered broadband for the FCC’s purposes.⁴⁴ Certain online

activities—such as streaming videos or movies, video teleconferencing, and gaming—require more bandwidth, and individuals who use the internet for these activities will benefit greatly from having greater broadband access, but the FCC notes that even these activities require far less bandwidth than that provided by high-speed internet.⁴⁵ Rather, the need for bandwidth is primarily a function of the number of internet users simultaneously using the household's internet. Put another way, the greater the number of users in one household who are accessing the internet simultaneously, the greater the bandwidth needed by that household.⁴⁶ The type of webpage accessed also affects download speed. For example, simpler, text-only pages download faster and require less bandwidth than web pages with graphics, animations, or auto-playing videos, but, again, a lack of broadband does not limit internet uses to text-only. Extracted on 7/7/2017; Version 1.0), released February 2018; available at <https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2015.pdf>.⁴² See note 39 supra. Pew Research makes the underlying survey data available for researchers.⁴³ See the FCC's "Broadband Speed Guide," updated February 6, 2018, available at <https://www.fcc.gov/reports-research/guides/broadband-speed-guide>.⁴⁴ We acknowledge that the maximum speed available for dial-up modems is below this recommended 1 Mbps rate (0.056 Mbps). However, as stated above, those who have dial-up are using it for web browsing and email, despite the fact that it will download more slowly. Note that some internet service providers attempt to address this slower speed by offering dial-up accelerators to improve performance using compression and caching techniques. For example, see "What Really Happened to Dial-Up Networking" (May 14, 2018), available at <https://www.lifewire.com/definition-of-dial-up-817779>.⁴⁵ The FCC recommends at least 3–4 Mbps for streaming standard definition videos, 5–8 Mbps for streaming high definition videos, and 4 Mbps for multiplayer online gaming. See the FCC's "Broadband Speed Guide," supra note 43. ⁴⁶ See the FCC's "Household Broadband Guide," updated February 6, 2018, available at <https://www.fcc.gov/research-reports/guides/household-broadband-guide>. The Honorable Preston Rutledge September 25, 2018 Page 14 of 14 pages. Consequently, even those without broadband can access videos or other interactive tools and graphics made available by 401(k) plan service providers on plan websites.⁴⁷ Moreover, the ERISA-required notices now provided in paper for mailed delivery can be provided on websites or through email as simple, relatively short, text-only pages.⁴⁸ These webpages download easily with very little bandwidth. Modernizing the rules to allow default electronic delivery should not be postponed until the access rate, however you define it, reaches 100 percent. Access is now nearly universal. Rather, the Department's concerns are best addressed by ensuring that everyone is aware of their right to opt to receive paper. Therefore, any Department rule should preserve the ability to receive paper notices for any individual who prefers it—whether that preference is due to slow internet access, no internet access, or simply a preference to review documents in paper. We support this ability to receive paper notices. * * * * * The President's Executive Order directs the Department to explore the potential for broader use of electronic delivery as a way to improve the effectiveness of required disclosures. As the Department moves forward to carry out this directive, ICI, ARA, and their members look forward to working closely with you and your colleagues within the Employee Benefits Security Administration (EBSA) in developing appropriate and effective regulatory policies in this area. We would be pleased to support this effort by addressing additional questions you may have or providing further data. Our offices would be happy to discuss this matter further with you or your staff. Sincerely, David M. Abbey Doug Fisher Deputy General Counsel—Retirement Security Director of Retirement Policy Investment Company Institute American Retirement Association cc: Jeanne Klinefelter Wilson, Deputy Assistant Secretary for Policy, EBSA Timothy D. Hauser, Deputy Assistant Secretary for

Program Operations, EBSA Joe Canary, Director of Office of Regulations and Interpretations, EBSA Jeffrey Turner, Deputy Director, Office of Regulations and Interpretations, EBSA US Department of Labor 47 Such tools and graphics can help to increase engagement, which is one compelling reason to drive more participants to provider's plan websites. 48 Most of the ERISA required notices, such as the SAR, QDIA notice, the 404a-5 fee disclosure notice, and the pension benefit statements tend to be one to eight pages in length. Other than a simple pie chart or graph, these are typically text-only documents. The SPD, while equally simple, is typically longer. For a discussion of the types and lengths of disclosures, see Swire and Kennedy-Mayo, *supra* note 3.

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