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## DOL PROPOSES NEW ELECTRONIC DELIVERY RULE FOR RETIREMENT PLAN NOTICES

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Retirement plans would have a new safe harbor method for electronic delivery of participant notices, under [proposed regulations](#) from the Department of Labor (DOL). Plan administrators could make disclosures required under Title I of ERISA available on a website, after providing initial notice to participants and beneficiaries about how to access the documents. Participants still could request paper copies of specific documents or completely opt out of electronic delivery. The proposal would not apply to welfare plans. Comments on the proposal — and responses to a request for information (RFI) on improving the effectiveness of ERISA disclosures — are due Nov. 22.

### NEW ELECTRONIC DELIVERY SAFE HARBOR PROPOSED

The proposal responds to a 2018 [executive order](#) (EO 13847) that directed DOL and the Treasury Department to consider ways to reduce the regulatory burdens on retirement plan sponsors. The order instructed the agencies to look for ways to improve the effectiveness and reduce the costs of plan disclosures, potentially by expanding electronic delivery.

The new safe harbor would allow plan administrators to use a “notice and access” framework for making disclosures to participants and beneficiaries available electronically. Administrators could post required disclosures on a website and inform participants with an electronic “notice of internet availability.” The safe harbor could be used for any retirement plan disclosure required by Title I of ERISA, except for documents furnished only on request, which would continue to be provided on paper. (For details on notices and documents covered by ERISA Title I, see DOL’s [Reporting and Disclosure Guide for Employee Benefit Plans](#).)

Employers could choose which disclosures (if any) to make using the safe harbor and could continue providing paper documents for any or all disclosures. Participants could opt out of electronic delivery or request a paper version of a particular disclosure.

### **Current Safe Harbor Still Available**

DOL first made an e-delivery safe harbor for ERISA retirement plan disclosures available in [2002 regulations](#). The 2002 safe harbor applies only for participants who can effectively access electronic documents at work, as well as participants and beneficiaries who have affirmatively consented to receive disclosures electronically. The proposal would not change any aspect of the 2002 safe harbor, which would remain available going forward.

### **KEY FEATURES OF NEW E-DELIVERY SAFE HARBOR**

The DOL proposal includes certain prerequisites for use of the new e-delivery safe harbor; specifies the timing, content and delivery methods for electronic notices; permits combining certain disclosures into a single notice; and sets standards for the website that will house required disclosures.

#### **Electronic Address Required**

The safe harbor could be used only for “covered individuals” — participants and beneficiaries for whom the employer, sponsor or plan administrator has an electronic address. Examples of acceptable electronic addresses include personal and work email addresses and smartphone numbers.

DOL would give plan administrators flexibility when satisfying this requirement. For example, employers could obtain the address from new-hire applications, plan enrollment paperwork or information provided by the employee when registering to access plan information online. Employers could also assign an address to employees.

In general, the proposal doesn't limit the type of device a participant or beneficiary must have to be covered by the safe harbor. Laptops, tablets and smartphones with internet access are all acceptable. (In the preamble, however, DOL suggests employer-provided smartphones should come with a data plan if the employer intends to use the smartphone number as the employee's electronic address.) DOL aims to avoid requiring use of a particular device or technology that may become outdated in the future.

**Severance from employment.** The proposal would allow plan administrators to continue using the safe harbor after employees leave employment with the plan sponsor. The administrator would need to “take measures reasonably calculated” to ensure the continued accuracy of the terminated employee's electronic address or to obtain a new electronic address.

**Invalid electronic addresses.** The e-delivery system must alert the plan administrator to an invalid electronic address. Once aware of a bad electronic address (for example, when an email is returned as undeliverable), the administrator must promptly fix the problem by sending the notice to a secondary electronic address on file or obtaining a new electronic address. Other approaches may be acceptable, depending on the particular facts and circumstances of a failed delivery. If the problem is not promptly fixed, the plan administrator must furnish a paper version of the document as soon as reasonably practicable. Paper delivery would remain in effect until the administrator obtains a valid electronic address.

### **Notice of Internet Availability**

Plan administrators would have to furnish a notice of internet availability to each covered individual when a disclosure is newly available on the administrator's website.

**Timing.** The notice of internet availability would be due at the same time the disclosure is due. For example, a plan administrator must provide a summary of material modifications (SMM) to participants within 210 days after the close of the plan year in which a plan's terms were significantly changed. Plan administrators that want to post the SMM on a website would have to provide the notice of internet availability — and make the SMM available on the website — by that deadline. However, a special timing rule applies if the administrator provides a combined notice of internet availability (see Combining Notices of Internet Availability below).

**Content.** The notice of internet availability must include the following information:

- A prominent statement (such as a title, legend or subject line) that reads, "Disclosure About Your Retirement Plan"
- A statement that reads, "Important information about your retirement plan is available at the website address below. Please review this information."
- A brief description of the document explaining its importance
- A website address that's sufficiently specific to provide ready access to the document (e.g., a link directly to the document or a login page for the site where the document can be found)
- 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 do so
- A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to do so
- A telephone number to contact the plan administrator or other designated plan representative

**Form and manner of providing notice.** The notice must:

- Be sent to the individual's electronic address
- Contain only the required content, though pictures, logos or similar design elements may be included, as long as the design is not inaccurate or misleading and the required content is clear
- Be furnished separately from any other ERISA documents or disclosures provided to the individual, unless the exception for combined notices (discussed below) applies
- Be written in a manner calculated to be understood by the average plan participant

**Standard for ‘easily understood.’** The requirement to have notices written in a manner meant to be easily understood by the average plan participant is standard for ERISA disclosures. However, the proposal goes on to specify that “[a] notice that uses short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60 satisfies the understandability standard.” It’s unclear if DOL expects plan administrators to actually confirm notices result in a Flesch Reading Ease score of at least 60 (which could add unwanted administrative complexity).

**Model notice possible.** In the preamble, DOL says it will consider issuing a model notice of internet availability. The proposal asks commenters to submit a sample model notice for DOL’s consideration, along with any reasons why a model notice would be helpful.

### **Combining Notices of Internet Availability**

A plan administrator generally must provide a separate notice of internet availability for each required disclosure. But plan administrators could furnish a single combined notice for all or some of the following documents, which DOL considers the most common and recurring participant disclosures:

- Summary plan descriptions (SPDs)
- SMMs
- Summary annual reports
- Annual funding notices
- Investment-related disclosures (identifying information, performance data, benchmarks, fee information, etc.) under [29 CFR § 2550.404a-5\(d\)](#)
- Qualified default investment alternative notices
- Pension benefit statements

**Timing of combined notice.** Covered individuals would have to receive a combined notice of internet availability once per plan year. The plan administrator would have 14 months after the date of the prior plan year’s combined notice to provide a new one. However, a combined notice would not change the deadline for making a disclosure available on the website. That deadline would remain the due date for furnishing the document by law.

**Combined notice not allowed for other disclosures.** The proposal would not allow a combined notice of internet availability for any disclosures besides the ones listed above. DOL believes that a combined notice of internet availability for those disclosures is appropriate because they generally are triggered by the passage of time, rather than a particular event. DOL believes a combined notice would be inappropriate for event-specific disclosures or other contingent or irregular disclosures triggered by an individual transaction or change in plan status, since these disclosures might require timely action by a participant or beneficiary.

For example, participants who receive notice of a blackout period may want to change their investment directions before the blackout.

### **Website Standards**

The plan administrator would be responsible for establishing and maintaining a website for disclosures. (The proposal requires providing disclosures on a website, but DOL has asked for comments on whether to allow other internet-based mechanisms, such as mobile apps or messaging services.) The administrator could retain third-party service providers for this purpose, but would have fiduciary responsibility for selecting and monitoring the service providers. The administrator would have to ensure documents are:

- Available by the ERISA deadline for furnishing the document
- Available until superseded by a later version
- Presented in a manner calculated to be understood by the average plan participant (subject to the same standard that applies to the notice of internet availability)
- Available in a widely used format suitable for reading online and printing clearly on paper
- Searchable electronically by numbers, letters or words so participants can quickly find information about specific issues
- Available in a widely used format that allows the document to be permanently retained electronically

**Protecting participant data.** The administrator must take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual.

**Technology mishaps.** The proposal recognizes that unforeseeable technology problems could make the website temporarily unavailable. When this occurs, the plan administrator will not violate its disclosure obligations if it has reasonable procedures in place to comply with the safe harbor and takes prompt action to make the documents available as soon as practicable after the administrator knows (or reasonably should know) that the documents are temporarily unavailable.

### **Transition and Protected Rights**

Before relying on the new safe harbor, a plan administrator would have to send all participants and beneficiaries — even participants already receiving electronic disclosures under the current safe harbor — an initial paper notice explaining the new e-delivery method. The initial notice must explain that some or all disclosures will be furnished electronically and inform participants about their right to request to receive covered documents on paper and how to do so.

**Right to request paper copies or opt out of e-delivery.** Plan administrators would need to have reasonable procedures for participants and beneficiaries to obtain paper copies of covered disclosures and to opt out of electronic delivery. The administrator would have to supply paper copies of all future documents to participants who opt out unless and until they elect e-delivery. The administrator would need

to provide only one paper copy of a disclosure free of charge, unless plan terms or other ERISA rules require otherwise.

### EFFECTIVE AND APPLICABILITY DATES

The proposal distinguishes between the effective date and applicability date of the safe harbor once finalized. The safe harbor will take effect 60 days after the final rule is published in the Federal Register. However, DOL wants to make the safe harbor available to employee benefit plans as soon as possible, so the agency is making the safe harbor applicable on the first day of the first calendar year after the final rule is published in the Federal Register. DOL has requested comments on whether the applicability date should be sooner or later than what the proposal would provide.

The distinction between the effective and applicability dates — as well as DOL’s reasoning for drawing it — is somewhat confusing, since the applicability date could end up being much later than the effective date. For example, if the final rules are published in the Federal Register on July 1, 2020, the rules would be effective on Aug. 31, 2020, but employers couldn’t start using the new safe harbor until Jan. 1, 2021. (The proposal doesn’t say plans can rely on it until DOL issues final rules, so this peculiar applicability date could significantly delay use of the new safe harbor, contrary to DOL’s stated intent.)

### REQUESTS FOR COMMENTS AND OTHER INFORMATION

DOL invites input on all facets of the proposal and singles out several specific issues throughout the preamble to the proposal. Commenters are free to express their views on the specific provisions of the safe harbor, as well as any other relevant issues.

The proposal includes an expansive RFI on additional measures DOL could take in the future — either as part of finalizing the proposal or in separate guidance — to improve the effectiveness of ERISA disclosures, especially with respect to their design and content. The request includes a lengthy list of wide-ranging questions on broad topics, such as how to measure a disclosure’s effectiveness, and specific issues, such as whether using a larger font might affect a participant’s comprehension. Although the proposal doesn’t apply to welfare plans, DOL welcomes responses to these questions for both retirement and welfare plans.

### RELATED RESOURCES

- [Proposed Regulations on Electronic Delivery of Retirement Plan Disclosures](#) (DOL, Oct. 23, 2019)
- [Executive Order 13847: Strengthening Retirement Security in America](#) (White House, Aug. 31, 2018)
- [Mandated Disclosure for Retirement Plans — Enhancing Effectiveness for Participants and Sponsors](#) (ERISA Advisory Council, Nov. 17, 2017)
- [Reporting and Disclosure Guide for Employee Benefit Plans](#) (DOL, September 2017)

- [Final Rules: Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans](#) (DOL, April 9, 2002)

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