



November 21, 2019

Department of Labor
200 Constitution Avenue
Washington, DC 20210
Submitted electronically via the Federal eRulemaking portal

RE: RIN 1210-AB90, Electronic Disclosure by Employee Benefit Plans

Dear Sir or Madam:

Thank you for this opportunity to provide comment on your proposed rule addressing Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA (Proposed Rule). Empower serves more than 38,000 retirement plans and 9.2 million participants in plans of all sizes. Our stated mission is to help American workers prepare for a successful retirement, and the primary tool we use to deliver on that mission is our participant website. We commend the Proposed Rule for many reasons, but the primary benefits we see are that it's what participants want and also steers them to their plan website, where they can engage in robust and personalized planning for retirement.

Our research has shown that the majority of participants prefer to receive plan information in electronic form rather than paper.¹ In a study we conducted among 1,000 plan participants on preferred methods for receiving plan information, the majority of participants in all age categories (21-64) preferred electronic communication over paper. While we agree with maintaining a delivery system that supports both paper and electronic delivery, it makes sense to have the default method be the method preferred by the majority of plan participants.

We also strongly support the "notice and access" approach. When participants access information on their plan website, they have the opportunity for an enhanced communication experience as well as the ability to take immediate action to improve their retirement readiness. Participants can add personalized data, experiment with using different assumptions, and take actions such as increasing savings or diversifying investments. As noted in the Proposed Rule, research has shown that participants who use electronic delivery have higher deferral rates than those who use paper.² Data we've collected from our own system also shows a correlation between website visits and improved retirement readiness.³

Notice Consolidation

We support the Department's efforts to consolidate multiple annual notices into a single disclosure document. We believe participants are more likely to read documents that are consolidated into one comprehensive communication versus separate notifications.

The Department sought comment on whether a principles-based rule might be preferable to the approach it took of listing specific documents that can be consolidated. We believe that, while the list contained in the Proposed



Rule is helpful, the Final Rule should add principles-based criteria that could apply to other disclosures — including both those required under current law as well as disclosures that may be required in the future. Those principles might include factors such as timing (anything required annually), recipients (participants and beneficiaries), and whether or not a specific action is being solicited. By way of example, the Proposed Rule allows the investment chart required to be disclosed under ERISA regulation 404(a)-5 to be consolidated but does not permit other annual disclosures required by that rule, such as plan-related information or an explanation of plan fees, to be included in the consolidated notice. A principles-based approach would resolve that issue. Also, it is highly likely that, as ERISA plans and their regulatory structure continue to evolve, there will be new disclosures added in the future that would be appropriate to include in the annual consolidated notice. Adding a principles-based standard would avoid the need to engage in separate rulemaking each time a new annual disclosure is required.

We also encourage the Department to work with the Department of Treasury to coordinate both the “notice and access” approach generally and the consolidation of required notices into a unified approach. It is not relevant to plan participants which agency is requiring a disclosure, and it is confusing to have different delivery methods for different disclosures. This problem is particularly acute in situations in which annual notices required under the Internal Revenue Code or under Treasury regulations are combined with Department of Labor notices because they address similar topics (for example, combining the Eligible Automatic Contribution Arrangement notice required under Treas. Reg. § 1.414(w)-1(b)(3) with the Qualified Default Investment Alternative (QDIA) notice required under DOL Reg. § 2550.404c-5(d)). Failure to coordinate with the Treasury will inevitably lead to a disjointed and confusing experience for plan participants.

We also suggest that Prop. Rul. 2520.104b-31 (d)(4)(iii) be amended in two ways. The first is to allow Treasury disclosures provided as part of an annual disclosure package to be included in the notice of availability for consolidated annual disclosures. The second is that, to the extent there is more than one required disclosure posted on the participant website at the same time, the rule should allow more than one disclosure document to be included in a notice of availability. We do not see any benefit to participants of having multiple e-mails sent at the same time and believe it would improve the participant experience to receive a single notification.

Model Notices

The Department sought comment on whether it would be helpful for it to provide model notices for either the initial paper notification of the plan’s intent to default to electronic delivery or the electronic notices alerting participants to the fact that a new required disclosure is available on the participant website. We believe a model notice would be helpful for the initial paper notification since the content would be consistent for all plans choosing to use the new safe harbor. We do not believe model notices would be helpful for the subsequent electronic alerts since there are likely to be variables in plan design or other plan features that it would be difficult to incorporate into a model notice. It would be helpful, however, to have more guidance on how to satisfy the requirement under Prop. Rul. 2520.104b-31(d)(3)(ii) to provide a “brief description of the covered document.” This guidance could be either a description of the kinds of information to include or exclude or a sample disclosure.



Opt-out Process

We agree with the Department that it is critical to protect the rights of plan participants who prefer to receive plan information in paper form rather than electronically. We know that, while the majority of people are comfortable with receiving information electronically and tend to prefer it, there is still a segment of the population that prefers paper or does not have effective access to electronic communications. The Proposed Rule requires that a notice of the right to choose to receive paper disclosures be delivered in paper and reinforces that with the requirement to provide an “opt to paper” notice in every subsequent notice of availability. We believe this approach strikes the right balance to help ensure those who prefer paper disclosures will receive them.

We encourage the Department to amend Prop. Rul. 2520.104b-31(f)(2) such that administrators are not required to offer the option of receiving some future documents in paper form and others electronically. Recordkeeping systems generally apply an “all or nothing” approach to paper versus electronic delivery of retirement plan disclosures, so there would be a significant cost to offering document-by-document elections. This would be particularly challenging in the context of breaking out annual consolidated disclosures. We believe the proposed regulation’s “global opt out” and the content standards in Prop. Rul. 2520.104b-31((c)(3) (printable electronic documents) adequately safeguard the ability of participants and beneficiaries to view and store individual documents in their preferred form.

Monitoring

The Department sought comment on whether administrators should be required to monitor participant activity in response to electronic disclosures to determine whether participants accessed and opened such documents. We believe such a requirement would be inconsistent with the ERISA statute and interpretive guidance that requires using a method of delivery “reasonably calculated to ensure actual receipt,”⁴ not confirmation that the material was opened or read. Monitoring whether a document is accessed is not required for documents sent in paper form, and, while it may be more feasible to monitor documents delivered electronically, the delivery method should not change the administrator’s legal obligation. The reality is that many participants ignore disclosures regardless of how they are delivered, and it is unreasonable and inconsistent with ERISA’s disclosure rules to expect employers to monitor and change participant behavior.

Maintenance of Documents

Section 2520.104b-31(e)(2)(ii) requires that documents delivered in reliance on the new safe harbor remain available on the website until superseded by a subsequent version. We have two recommendations for edits to this section.

The first is to amend it to deal with disclosures for which there is no subsequent version, such as a blackout notice as required by DOL Reg. 2520.101-3(a). Our recommendation is that the Department set a defined length of time (for example one year, or the 14-month time period allowed for consolidated notices) for maintenance of documents that do not have a subsequent version.



The second is to allow administrators flexibility to maintain documents that may still be relevant even though superseded. This could be accomplished by clearly making the maintenance rule a minimum standard.

Terminated Employees

The Proposed Rule requires administrators to proactively verify the accuracy of electronic addresses for terminated employees (Prop. Rul. 2520.104b-31(h)). As a practical matter, unless the electronic address being used is a work-related electronic address assigned by the employer, the terminated employee's electronic address will likely not be impacted by termination. If the electronic address being used becomes inoperable upon the employee's termination, the requirements under Prop. Rul. 2520.104b-31(f)(4) regarding invalid or inoperable electronic addresses seem to address the issue. For this reason, we recommend that the special rule for severance from employment under Prop. Rul. 2520.104b-31(h) be removed from the Final Rule.

Change in Service Providers

The Proposed Rule raises some potential unique issues with respect to tracking and transferring prior participant notices and elections when a plan transfers to a new service provider. Because such data may not be easily transferable between providers and recordkeeping systems, we recommend flexibility in a Final Rule that would allow plan administrators upon a change in service providers to either continue relying on the prior recordkeeper's data or:

1. Default all participants to electronic delivery regardless of a prior election by sending a new Initial Notice of Default Electronic Delivery (Prop. Rul. 2520.104b-31(g)), or
2. Automatically switch all participants to paper delivery of required disclosures.

We note that the Department provided similar flexibility for a change in service provider with respect to default participant investment elections in the preamble to the Qualified Default Investment Alternative (QDIA) regulations. Many plan administrators "reset" or default all participants to their plan's QDIA upon a change in service providers by sending a new QDIA notice to participants in advance of the change.

Response to Unforeseeable Interruptions in Access

We commend the Department for explicitly recognizing that there are times when access to a participant website may be temporarily unavailable due to circumstances beyond the control of the administrator. We believe the Proposed Rule's requirements that the administrators have reasonable procedures in place to avoid such incidents and take prompt action to correct them when they occur provides appropriate and effective protections for plan participants.



Technical Neutrality

The Department sought comment on whether it should make the rule more flexible to accommodate mobile applications or other technologies in addition to websites. We support such an expansion of the rule and suggest that language in the Receiving Electronic Statements to Improve Retiree Savings Act, H.R. 4610, might be incorporated to accomplish this objective. That language allows any electronic form to be used as long as the system:

1. Is designed to result in effective access to the document.
2. In the case of a posted document, provides notice of the posting.
3. Is reasonably calculated to ensure actual receipt.
4. Protects the confidentiality of personal information.

The Department and the industry have been struggling for over a decade with developing the right approach to electronic disclosures, and during this time the world of technology has changed in significant ways. The pace of technology is not likely to slow down in the foreseeable future, and it is difficult to predict what upcoming changes will look like. We believe the right approach is to incorporate a flexible standard that protects the rights of participants without barring access to future technologies that might improve the effectiveness of disclosures and/or reduce costs.

We also encourage the Department to expand the scope of the rule to include documents containing general plan information to be sent via e-mail. While most participant-directed defined contribution plans maintain a website, that is not the case for all ERISA-covered plans. Allowing plans to send a notice of availability to a covered participant with the disclosure attached to an e-mail as a PDF would allow all plan types to utilize the new safe harbor.

Protection of Personal Information

The Department sought comment on whether specific security measures, such as guidelines or best-practice protocols, should be identified to protect personal data. We believe the Department's approach of establishing a general standard consistent with the standard that applies to electronic communications today, as set out in the Proposed Rule, is the right approach.

Multiple approaches are taken by administrators to protect data. For example, while some follow NIST (National Institute of Technology) standards, others follow ISO (International Organization for Standardization) standards and/or obtain an SOC (System and Organization Control) 2 report. Since there are many effective ways to protect data, we do not believe mandating one specific standard or framework would be beneficial.

Data security and privacy on plan websites are top concerns for reasons far beyond the scope of notice delivery. We do not believe it is appropriate to establish prescriptive standards that would have very broad application in the context of a rule that is not primarily focused on data security. For this reason, we believe the general standard contained in the Proposed Rule is the most effective approach to protecting personal data.



Effective and Applicability Date

The Proposed Rule calls for an effective date of 60 days after a Final Rule is published in the Federal Register and an applicability date of the first day of the first calendar year after such publication. We see no reason why the Final Rule should not take effect immediately upon publication, or at least have the applicability date be the same as the effective date. The Rule does not require that any changes be made — it only offers the option to make a change. Unless and until a plan administrator sends out the initial notice of their intent to use the new default procedure, they are not subject to any of its requirements and will be held to current law standards. Given that reality, there is no reason to delay a plan's ability to use the new safe harbor.

We do have a concern, however, about plans that currently rely on FAB 2006-03 for delivery of participant statements. In footnote #60 of the Proposed Rule, the Department states that this guidance, along with other guidance on e-delivery that's been published since the Department's 2002 regulation, will be superseded when the Proposed Rule is published in final form. Many plans rely on FAB 2006-03 for delivery of participant statements and provide the required notification in paper form. Those employers may not have electronic addresses for their employees and may not be interested in using the safe harbor contained in the Proposed Rule. We recommend that the Department either preserve the ability to rely on FAB 2006-03 or allow notices of availability to be sent in paper form. If the Department does not opt to preserve the FAB permanently, we ask for a grace period of one year following publication of a Final Rule so plans have time to implement new procedures.

Comments on the RFI

We remain interested in addressing some of the questions raised in the Request for Information (RFI) published with the Proposed Rule but are unable to fully respond to those comments within the 30-day comment period. We anticipate providing detailed comments to the RFI at a future date.

We do have a general comment on the RFI. Much of it is focused on the question of whether additional regulation is needed to improve the effectiveness of participant disclosures. We do not believe the heart of the problem is lack of regulation. Very few, if any, of the disclosures provided today meet the current legal rule of being written in a manner calculated to be understood by the average plan participant, and that includes disclosures drafted as model disclosures by the Department or by Treasury.

The problem as we see it is that plan fiduciaries are reluctant to prioritize readability and comprehension over technical accuracy due to concerns with audit risk or other liability. Our work with participants has demonstrated that you cannot educate participants without first engaging them, and the technical information in required notices does not tend to be engaging. We believe market forces would result in more understandable participant disclosures if those forces were able to operate in an environment in which plan fiduciaries were less concerned with risk when using more innovative and effective approaches to participant communication. In summary, we believe the Proposed Rule will improve the effectiveness of ERISA plans by allowing default delivery using the method the majority of participants want, increasing utilization of participant websites, and reducing paper and postage costs. We support the Department's protections for participants who want or need to



receive disclosures in paper form as well as the balance the Department has struck in providing other participant protections. We hope you find our comments useful and would welcome the opportunity to provide additional information upon your request.

Sincerely,

A handwritten signature in black ink that reads "Edmund F. Murphy III".

Edmund F. Murphy III
President & Chief Executive Officer
Empower Retirement

1 "Boosting the Effectiveness of Retirement Plan Communications," Empower Institute, January 2019.

2 "Improving Outcomes with Electronic Delivery of Retirement Plan Documents," SPARK Institute, June 2015.

3 Participants who visit the Empower Retirement website see a "Lifetime Income ScoreSM" (LIS), which is a measure of how well they're doing with regard to having adequate savings in retirement. We know that the more often a participant visits the website, the higher their LIS tends to be (e.g., participants who visited once in the last 12 months have an average LIS of 66.91 while those who visited 25 or more times have an average LIS of 80.85). This correlation between engagement in the website and improved outcomes, while not determinative of causation, supports the idea that steering participants to their plan website can have a positive impact on retirement readiness.

4 DOL Reg. 2550.104b-1(b)(1).