

November 22, 2019

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: Default Electronic Disclosure by Employee Benefit Plans under ERISA, RIN 1210-AB90

Ladies and Gentlemen:

The American Bankers Association¹ (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on the proposed rule (Proposal) that would establish an additional safe harbor for the use of electronic media by employee benefit plans as a means to provide information to participants and beneficiaries of plans (collectively, retirement savers) that are subject to the Employee Retirement Income Security Act of 1974 (ERISA).² If adopted, the Proposal would allow plan administrators and other responsible parties to make available to retirement savers certain disclosures and notices electronically on a website, rather than providing such disclosures by paper delivery. In their role as plan fiduciary, plan administrator, or other capacity under ERISA, a number of our member banks are charged with providing these disclosures to retirement savers. A plan administrator's reliance on the proposed safe harbor is subject to specified conditions, including the retirement saver's right to opt out of receiving electronic delivery. The Proposal also includes a Request for Information (RFI) that solicits public input on whether and how additional changes to ERISA's general disclosure framework may be made to improve the effectiveness of ERISA disclosures.³

We commend the Department on its efforts to modernize its regulations on electronic delivery. The Proposal, if finalized as currently written, would provide what we have long advocated: electronic delivery as the default method of delivery, making retirement plan disclosures and notices more efficient and useful for retirement savers and less burdensome and costly for banks and other retirement services industry providers. The Proposal further is drafted in a

¹ The American Bankers Association is the voice of the nation's \$18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard more than \$14 trillion in deposits, and extend more than \$10 trillion in loans. Learn more at www.aba.com.

² See U.S. Department of Labor, Default Electronic Disclosure by Employee Benefit Plans Under ERISA, 84 *Fed. Reg.* 56,894 (2019). The current electronic disclosure safe harbor is part of the Department's broader regulations on delivery standards for ERISA disclosures. See 29 C.F.R. Part 2520.104b-1 (2019) (general delivery requirements), 104b-1(c) (safe harbor for the use of electronic media).

³ See *id.*

technologically neutral manner, which should provide sufficient flexibility for the development and adoption of future innovations in electronic delivery of plan documents to retirement savers.

Although the Proposal generally provides sufficient compliance guidance and certainty, we believe that the Proposal would benefit from several revisions that would help clarify and tailor the safe harbor's purposes and requirements. We identify and describe these revisions below, together with recommended language. We also respond below to certain questions posed by the RFI, which we believe will help the Department lay the groundwork for continued sound regulation of the content and delivery of ERISA disclosures and notices.

I. Background.

ERISA and Department regulations provide general standards for the manner and method of delivery of information to retirement savers under Title I of ERISA. Plan administrators are required to use delivery methods that are “reasonably calculated to ensure actual receipt” of information by retirement savers.⁴ The Department's current disclosure regulation includes a safe harbor that authorizes a plan administrator to use electronic media to furnish information to retirement savers. In order to rely on the electronic delivery safe harbor, several conditions must be satisfied. For instance, the plan administrator must take actions to ensure the actual receipt of transmitted information while protecting the confidentiality of personal information relating to the retirement saver's accounts and benefits. Moreover, the electronically delivered documents must be prepared in a manner that is consistent with the style, format, and content requirements applicable to the particular document. Retirement savers also must be provided with a notice of the right to receive and obtain a paper version of the document.

Some of the safe harbor's conditions, however, are especially onerous for plan administrators. Specifically, the safe harbor applies only to two categories of individual recipients. The first category covers those retirement savers who have the ability to access documents furnished electronically (*e.g.*, by e-mail or through access to an Internet website) “at any location where the [retirement saver] is reasonably expected to perform his or her duties as an employee,” and “[w]ith respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties.”⁵ The Department refers to the persons in this category as those “wired at work.”⁶

The second category covers those retirement savers who do not fit within the first category but who affirmatively consent to receive documents electronically. For such retirement savers, the plan administrator is required to ensure that such person has affirmatively consented, in electronic or non-electronic form, to receiving documents through electronic media and has not withdrawn such consent.⁷ Additional requirements are imposed to ensure that the retirement saver knowingly has consented to electronic delivery, has continuous access to retrieve and retain these documents, and has been given the right to opt out of electronic delivery at any

⁴ 29 C.F.R. § 2520.104b-1(b).

⁵ 29 C.F.R. § 2520.104b-1(c)(2)(i)(A) & (B).

⁶ See 84 *Fed. Reg.* at 56,894.

⁷ 29 C.F.R. § 2520.104b-1(c)(2)(ii).

time.⁸ Further, for both categories of retirement savers, if a change in the hardware or software requirements creates a material risk that the retirement saver will no longer be able to access or retain the electronically furnished documents, then the retirement saver –

- (1) must be provided with a statement of the revised hardware/software requirements for access to, and retention of, electronically supplied documents;
- (2) be given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and
- (3) again consents to the receipt of documents through electronic media.⁹

These prescriptive requirements in practice are unnecessarily onerous and significantly impair the ability of a plan administrator to employ the efficiencies that electronic delivery otherwise would provide. To begin with, an administrator would need to divide the retirement savers individually into “first category” and “second category” retirement savers, and then proceed to obtain affirmative consent from each person in the latter category, an expensive, labor-intensive, and time-consuming process. A plan administrator then would have to track continuously each retirement saver’s ability to receive electronic disclosures. Among other things, this would require the administrator to determine, and then track on an ongoing basis, the employment position and status of a “first category” retirement saver to ensure that electronic access is, and remains, an “integral” part of his or her employment duties. The administrator further would have to track the hardware and software being used for electronic access, and with every hardware or software upgrade or change ensure that retirement savers still can access the documents electronically.

Given these costly, inefficient, and in practice disruptive standards, it is not surprising that the Department’s safe harbor is rarely used or relied upon.¹⁰ Therefore, we commend the Department’s action to update and modernize the electronic delivery disclosure rules, particularly as electronic access and usage rates among retirement savers in the United States approaches near 100%.¹¹

⁸ *Id.*

⁹ 29 C.F.R. § 2520.104b-1(c)(2)(ii)(B).

¹⁰The Department subsequently has issued guidance for the electronic delivery of particular documents and disclosures. These include pension benefit statements, qualified default investment alternative (QDIA) notices, and participant-directed individual account plan disclosures. *See* Field Assistance Bulletin (FAB) 2006-03 (Dec. 20, 2006); FAB 2008-03 (Apr. 29, 2008); Technical Release 2011-03R (Dec. 8, 2011). These Department initiatives, while intended to facilitate the use of electronic disclosure, each contain their own set of prescriptive conditions that diminishes the efficiencies and other benefits of electronic delivery.

¹¹ The Department cites a 2015 survey indicating that 99% of retirement plan participants report having Internet access at home or work, and a 2018 study concluding that 93% of households owning defined contribution accounts in 2016 had access to, and used, the Internet. *See* 84 *Fed. Reg.* at 56,896.

II. The Proposal.

The Department has issued the Proposal (i) in recognition of the continuing technological advances in electronic delivery of information and the widespread availability of broadband Internet access, and (ii) in response to Executive Order 13847, issued on August 31, 2018, which directs the Department to review whether regulatory or other actions could be taken to improve the effectiveness of required notices and disclosures at a reduced cost to employers.¹² The Executive Order directs that within one year of the Executive Order’s date, the Department must determine actions that could be taken through regulation or guidance to make retirement plan disclosures “more understandable and useful for participants and beneficiaries, while also reducing costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution.”¹³

The Proposal creates an additional safe harbor that would allow plan administrators to use electronic delivery of information as the default method of delivery to retirement savers. The new safe harbor adopts a “notice and access” disclosure framework. Under this structure, retirement savers would receive an initial written notice by paper delivery, informing them of Internet availability of one or more documents required under ERISA to be furnished to them. The notice would provide retirement savers the Internet website address where the covered document(s) would be available, together with (i) a right to request and receive a paper version of the document free of charge, and (ii) a right to opt out of receiving documents electronically. The notice must be written in a manner calculated to be understood by the average plan participant. If a retirement saver severs from employment with the employer, the plan administrator must take measures that are reasonably calculated to ensure that it has a retirement saver’s proper e-mail address to continue the electronic receipt of documents. The plan administrator also must ensure that the documents to be provided electronically will be made available on the website and must remain there until superseded by a subsequent version of the same document.¹⁴

We welcome and support the Proposal. As stated by the Department, the Proposal is intended “to reconcile competing policy goals when considering the best framework for delivering ERISA disclosures – a framework that appropriately balances the innovations and reduced costs that may be achieved through enhanced use of electronic communication with suitable safeguards for participants and beneficiaries who may be harmed or disadvantaged by such enhanced use.”¹⁵ It is, therefore, a significant step toward modernizing the manner of delivery of documents to retirement savers while providing much greater clarity and compliance certainty than under the current safe harbor. The Proposal further provides sufficient flexibility for the plan administrator to manage and administer electronic delivery that is cost-effective and promotes efficiency while preserving protections and maintaining choice for retirement savers. If finalized, we believe that there would be enhanced disclosure value to retirement savers through widespread adoption of the Proposal among plan administrators who would make use of these and other benefits afforded to both retirement savers and the retirement services industry.

¹² See 84 *Fed. Reg.* at 56,896.

¹³ *Id.*

¹⁴ See 29 C.F.R. § 2920.104b-31, 84 *Fed. Reg.* at 56,921-23.

¹⁵ *Id.*

III. Recommended Revisions.

We believe the Proposal as drafted is generally clear and appropriately tailored to permit the use of electronic delivery. The Proposal, however, would benefit from modification in certain areas, as described below. These suggested revisions would sharpen the regulatory refinements and functioning while preserving the Proposal's reforms.

A. Clarify that Electronic Delivery Can Be Used for Any Document Covered under Title 1 of ERISA, even if Such Document Is Furnished upon the Retirement Saver's Request.

The Proposal would cover any retirement plan document that a plan administrator is required to provide to retirement savers under Title 1 of ERISA, "except for any document that must be furnished upon request."¹⁶ The Department, however, has provided no reason or explanation why the proposed safe harbor should not apply also to documents that are furnished only upon request."¹⁷ This is an odd and inefficient result and is inconsistent with the purpose and spirit of facilitating electronic delivery. A retirement saver who requests a document may expect, or desire, such document to be furnished to him or her electronically (*e.g.*, by e-mail) rather than by paper delivery. This would provide the retirement saver with all of the advantages available through such media, such as greater opportunity for expedited delivery, the availability of initial and ongoing electronic accessibility and storage, and the ability to retrieve the electronically delivered document from multiple sources (*e.g.*, home computer, smartphone device). On the other hand, should a retirement saver desire paper delivery, the Proposal already provides that he or she may make that specific request known to the plan administrator.¹⁸ The Proposal, therefore, should include within the term "covered document" *every* document required to be provided to retirement savers, including any document required to be furnished upon request.

B. Simplify a Plan Administrator's Satisfaction of the Safe Harbor Standard on the Manner of Electronic Disclosure by Focusing Written Disclosure Solely on the Flesch Reading Ease Score.

As part of the form and manner of furnishing notice of Internet availability, the Proposal requires a disclosure to be written "in a manner calculated to be understood by the average plan participant."¹⁹ In order to satisfy the Department's self-referenced "understandability standard," the Proposal states that the notice use "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."

We appreciate the Department desiring to add sufficient specificity in order for a plan administrator to determine whether a notice of Internet availability satisfies the proposed new

¹⁶ 29 C.F.R. § 2920.104b-31(c)(1), 84 *Fed. Reg.* at 56,921. Documents that are furnished upon request include bargaining agreements, terminal reports, trust agreements, contracts, and other instruments under which the plan is established or operated. *See* 84 *Fed. Reg.* at 56,901.

¹⁷ 84 *Fed. Reg.* at 56,901.

¹⁸ *See* 29 C.F.R. § 2920.104b-31(f), 84 *Fed. Reg.* at 56,922.

¹⁹ 29 C.F.R. § 2920.104b-31(d)(4)(iv), 84 *Fed. Reg.* at 56,922.

safe harbor. We believe, however, that this proposed requirement is too prescriptive and does not facilitate compliance certainty. For example, it is not clear how many words or particular sentence structure constitutes a “short sentence.” Moreover, what if using the passive, rather than active, voice in a particular instance more clearly communicates a particular disclosure? Should the use of the passive voice still be prohibited? What if avoiding the use of a technical or legal term (which otherwise could be explained in the disclosure) instead engenders ambiguity or confusion?

We believe satisfaction of the safe harbor standard can be achieved by focusing solely on the Flesch Reading Ease test score, which is intended to demonstrate whether the disclosure actually can be understood by the average plan participant, regardless of the number of words or the sentence structure. A Flesch Reading Ease score of 60-70 indicates a disclosure that can be easily understood by 8th- and 9th-grade students (13-15 year-olds).²⁰ Once a disclosure reaches a score of 60, the plan administrator would know with certainty that the disclosure satisfies the safe harbor standard. We recommend, therefore, that the Proposal delete the language “short sentences without double negatives, everyday words rather than technical and legal terminology, active voice,” and retain the words, “language that results in a Flesch Reading Ease test score of at least 60.”

C. Reduce the Administrative Burden Created by the Proposal’s Treatment of Invalid or Inoperable Electronic Addresses by Requiring the Retirement Saver to Notify the Plan Administrator of the Retirement Saver’s New Electronic Address.

The Proposal requires that a plan administrator’s system for furnishing a notice of Internet availability be designed to alert the administrator of a retirement saver’s invalid or inoperable electronic address.²¹ If the plan administrator is alerted that a retirement saver’s electronic address has become invalid or inoperable (*e.g.*, whenever a notice of Internet availability sent to that address is returned as undeliverable), then the administrator “must promptly take reasonable steps to cure the problem or treat the retirement saver as if he or she opted out of electronic delivery.”²² In such event, the plan administrator must furnish the retirement saver, as soon as reasonably practicable, a paper version of the covered document identified in the undelivered notice of Internet availability.²³

We believe this proposed requirement would impose a potentially significant burden and cost on plans, since plan administrators would be required to track down the contact information of each retirement saver whose electronic address is unresponsive, due not only to a retirement saver’s change of employment, but also due to (i) electronic mailboxes that are full and cannot accept at that particular time additional electronic messages, (ii) power outages at the retirement saver’s employer, or (iii) employers that change or modify the e-mail addresses of its employees. The Department, therefore, should revise the Proposal to allow the plan administrator to make

²⁰ See www.readabilityformulas.com/flesch-reading-each-readability-formula.php for an explanation of the Flesch Reading Ease formula. See also <https://www.yoast.com/flesch-reading-ease-score>.

²¹ See 29 C.F.R. § 2520.104b-31(f)(4), 84 *Fed. Reg.* at 56,922.

²² *Id.*

²³ See *id.*

multiple, successive attempts at contacting the retirement saver at the same electronic address in the event that a particular message initially is returned as undeliverable. Moreover, in order to reduce the significant delays and costs imposed in such event, the Proposal should permit the plan administrator to include in every notice of Internet availability a statement that retirement savers are required to notify the administrator regarding their new electronic address if they leave their employer or change their e-mail address, or if the e-mail address otherwise is no longer valid or operable. This revision would ensure that retirement savers continually receive timely electronic disclosures, while avoiding the needless diversion of plan resources and escalation of expenses for tracking down missing participants.

D. Include Welfare Benefit Plans within the Proposal in order to Promote Efficiencies and Avoid Duplicative Disclosure Regimes for Retirement Savers.

Although the Proposal covers retirement benefit plans, it excludes from coverage employee welfare benefit plans, such as plans providing disability benefits or group health plans. As the Department points out, welfare plan disclosures “may raise different considerations, such as pre-service claims review and access to emergency and urgent health care.”²⁴ The Department, however, concedes that retirement plans and welfare plans share “similar policy goals, including the reduction of plan administrative costs and improvement of disclosures’ effectiveness.”²⁵ Indeed, Department regulations expressly authorize claims determinations to be provided by “electronic notification.”²⁶ We believe that further efficiencies and cost reductions would be achieved if welfare benefit plans were included within the proposed safe harbor. Excluding welfare plans from the Proposal, on the other hand, would require plan administrators to maintain duplicate disclosure regimes – one for retirement plans and the other for welfare plans – that cover the same set of plan participants and beneficiaries.

We recommend that the Proposal include welfare plans so that plan administrators can take advantage of the efficiencies and cost reductions afforded under the new safe harbor while retirement savers avoid the anomalous result of receiving electronic disclosures for retirement plans and separate paper disclosures for welfare plans. We understand that the Department shares interpretive jurisdiction over many group health plan disclosures with the Department of the Treasury (Treasury) and the Department of Health and Human Services (HHS), and presumably would want to consult with these Departments prior to taking any regulatory action. One possible approach would be to apply the Proposal to welfare plans through adoption of an interim final rule while the Department consults with Treasury and HHS, or simply to include within the Proposal those welfare plan disclosures that are within the Department’s exclusive jurisdiction while conferring with Treasury and HHS on appropriate conditions for disclosures that involve shared jurisdiction. Regardless of the approach selected, we urge the Department to coordinate with Treasury and HHS on an expedited basis to ensure that plan administrators can extend and incorporate the Proposal’s provisions to welfare plans as soon as practicable.

²⁴ 84 *Fed. Reg.* at 56,902.

²⁵ *Id.*

²⁶ 29 C.F.R. § 2560.503-1(g)(1) (manner of notification of benefit determination).

IV. Response to RFI.

The Department has included an RFI to the Proposal in order to solicit information from plan sponsors and other interested parties “on additional ways to enhance the usefulness and effectiveness of ERISA disclosures,”²⁷ which may be taken up by the Department for future rulemaking or guidance. We are responding to two of the questions posed in the RFI, as described below.

A. Rather than Requiring More Personalized Disclosures, the Department Should Attempt to Enhance Retirement Saver Engagement Through a Retirement Saver-Designated Webpage on the Department’s Website.

RFI Question #4: *Would more personalized disclosure enhance engagement? If so, how?*

We do not believe that providing more personalized ERISA disclosures would enhance retirement saver engagement. Rather, we believe a Department link to a webpage providing individuals with retirement information and interactive tools would provide the proper means to initiate and build on retirement saver engagement. (See response to Question 15 below.) Moreover, producing more personalized disclosure would involve additional labor and expense to produce and maintain, which in turn would raise the costs of providing disclosures to retirement savers. Retirement savers who require individualized attention or who have questions about the disclosures or retirement account should be encouraged to speak directly with their plan sponsor representative, as provided in the Proposal.²⁸

B. In order to Significantly Increase Retirement Saver Education on Disclosures, and More Generally on Retirement Saving, Investing, and Security, the Department Should Establish on Its Website a Link to an Interactive Webpage that Is Aimed Specifically at, and Tailored to, the Retirement Saver’s Needs and Objectives.

RFI Question #15: *Discuss the role of education in assisting participants and beneficiaries with the often technical and complex subject matter of ERISA disclosures, including investing generally. Should the Department take additional steps or provide further guidance with respect to participant education and, if so, what steps? How would this improve participants’ receipt, understanding, or use of information required to be disclosed? What could or should the Department do to increase engagement on the part of ERISA plan participants?*

We believe that retirement savers would benefit from education on ERISA disclosures as part of a broad initiative to make retirement saving and investing more understandable to retirement savers and the general public. We believe further that the Department can play an active role in engaging retirement investors to learn more about retirement investing, including understanding the objectives and contents of ERISA disclosures.

²⁷ 84 *Fed. Reg.* at 56,897.

²⁸ See 29 C.F.R. § 2920.104b-1(c)(3)(vii), 84 *Fed. Reg.* at 56,922.

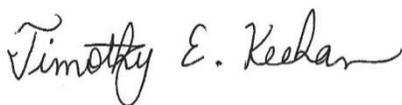
ABA previously has informed the Department how this could operate with respect to educating retirement savers on lifetime income disclosure illustrations.²⁹ Specifically, we stated that “ongoing investor education and participant initiative is the best way to modify retirement savings habits” and that “[retirement savers] may be more likely to manage their retirement savings actively if they initially took steps on their own to determine first how much they have saved for retirement, rather than having to pay for dollar amount figures that are passively handed to them” through a disclosure requirement.³⁰

Among other things, we recommended that the Department make available on its website various retirement tools, such as interactive financial calculators, that can assist retirement savers in determining the various amounts that can be targeted for retirement age. Indeed, “[t]he use of calculators and other online tools would allow for much more than a static, snapshot figure appearing on the pension benefit statement by permitting the [retirement saver] to make multiple real time and projected calculations.”³¹ We concluded that a retirement saver who actively works with Department online calculators would be more likely to employ them repeatedly, thereby producing a much more interactive experience and proactive approach to saving for retirement than merely glancing at a quarterly or annual paper statement.³²

We believe, therefore, that a Department website link to an interactive webpage specifically tailored for the retirement saver could significantly increase retirement saver engagement. The webpage could include multiple links to the subject matter of interest to individuals concerning retirement saving, investing, and security. For instance, a “Disclosures” link could identify each particular disclosure document that is provided to retirement savers and describe briefly and, in plain English, the nature and purpose of each such document. It could also include a glossary of commonly used terms in these disclosures to enhance the disclosure review and comprehension. We would be glad to work with the Department to explore how a Department webpage dedicated to retirement savers would enhance individuals’ retirement experience and increase public awareness of the benefits of saving for retirement.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,



Timothy E. Keehan
Vice President & Senior Counsel

²⁹ See ABA Comment Letter to Joe Canary, Director, Office of Regulations and Interpretations, Employee Security Benefits Administration, U.S. Department of Labor (Aug. 7, 2013).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*