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

RE: RIN 1210–AB90, Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA

Dear Sir or Madam:

The Transamerica companies (“Transamerica”)¹ are pleased to provide comments in response to the proposed rule issued by the Department of Labor (the Department) establishing a new, additional safe harbor for the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries of plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The proposed rule was published in the Federal Register on October 23, 2019 and is referenced above.

Transamerica is focused on helping customers achieve financial security. Transamerica products and services help people protect against financial risk, build financial security and create successful retirements. Transamerica designs customized retirement plan solutions for both for-profit and non-profit businesses nationwide, and provides recordkeeping services for over 29,000 plans that, collectively, include over 8 million participants and represent over \$200 billion in plan assets.²

We wholeheartedly applaud the Department’s efforts in drafting this proposed rule, which we

¹ Transamerica markets life insurance, annuities, retirement plans, and supplemental health insurance, as well as mutual funds and related investment products. Transamerica products and services are designed to help Americans protect against financial risk, build financial security and create meaningful retirements. Currently, Transamerica is among the ten largest distributors in the U.S. of variable annuities. Transamerica provides services and products through life insurance agents, broker-dealers, banks, wholesalers, and direct marketing channels as well as through the workplace. Transamerica has over 256,000 licensed producers in the United States. In 2016, Transamerica paid \$6.9 billion in benefits to its policyholders.

² As of December 31, 2018.

believe would provide plan sponsors with useful guidance on the electronic delivery of required disclosures under ERISA. When finalized, the rule will provide significant cost savings to plan sponsors while improving the efficiency and effectiveness of notice delivery to plan participants. Our comments, below, are intended to help further improve a well thought out rule.

I. Summary of Proposed Rule

The proposed rule provides a safe harbor for delivering required notices under ERISA to participants and beneficiaries via electronic media using an “opt out” rather than an “opt in” approach. The proposed regulations do not change the Department’s electronic delivery standards initially established in 2002, but recognize that technology, and participants’ access to it, has improved substantially since that time. The Department believes the proposed rule will reduce an employer’s costs and burdens in furnishing ERISA required disclosures, and will increase the timeliness and accessibility of the information that is disclosed to participants and beneficiaries. This safe harbor delivery method is applicable to all required benefit plan disclosures under ERISA (“covered documents”).

The alternative “opt out” safe harbor method of disclosure provided in the proposed rule is based on a “notice and access” structure, utilizing a “continuous access” website. To use this method:

- Employers must obtain a valid email address or smartphone number (“electronic address”) from each participant and/or beneficiary to whom covered documents will be delivered electronically. The employer may use electronic work email addresses assigned to active employees. If using an electronic work email address, the employer must take steps to obtain a valid electronic address from the participant at termination of employment in order to continue e-delivery of notices to that participant.
- Participants and beneficiaries must receive an initial notice in paper format informing them that some or all covered documents will be furnished electronically; they have the right to request and obtain a paper version of a covered document, free of charge, and how to make such a request; and they have the right to opt out of receiving covered documents electronically, and how to exercise that right.
- Participants and beneficiaries must receive an electronic notice of internet availability for each covered document at the time the covered document is made available on the continuous access website. Notices for covered documents that are required solely as a function of time may be combined in one annual notice.
- The notice of internet availability must contain a title 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 covered document, the website address (or link/hyperlink) where the covered document is available; a statement of the right and method to request and obtain a paper copy of the covered document, free of charge; a statement of the right and method to opt out of receiving covered documents electronically; and the plan administrator’s contact information.
- The employer must monitor delivery to the electronic addresses being used for this purpose and cure any delivery failures to an invalid or inoperable email address in order to continue delivering notices electronically under this safe harbor (e.g., take reasonable steps to obtain an updated email address). If a valid or operable electronic address cannot be obtained for an individual, that individual is treated as having opted out of receiving covered documents electronically.

- Participants or beneficiaries who affirmatively opt out, or are deemed to have opted out of e-delivery, must affirmatively consent to e-delivery going forward.
- The disclosure notices must be available on a secure website portal that prominently displays the disclosure after log-on and allows the participant to search for the disclosure. The disclosure must remain available on the website until it is superseded.

II. Comments

Amendments to § 2520.104b-1(c); FAB 2006-03.

Transamerica does not believe that a technical amendment to the current safe harbor is necessary; we are, however, concerned that the new safe harbor would, if finalized as is, supersede the “relevant portions”³ of Field Assistance Bulletin (FAB) 2006-03, upon which a significant number of plan sponsors rely for delivery of pension benefit statements. For example, during a brief period of just over a year, Transamerica rolled out electronic delivery of pension benefit statements in accordance with FAB 2006-03, for more than 9,500 plans covering over 1 million participants.⁴ If the currently permissible method for electronic delivery of pension benefit statements under FAB 2006-03 were superseded, it would cause undue hardship to all plan sponsors who currently rely on this useful guidance. We ask the Department to clarify that, inasmuch as the proposed rule represents an *additional* safe harbor delivery method, it does not serve to supersede the currently permissible method for electronic delivery of pension benefit statements under FAB 2006-03 and to further clarify which “relevant portions” of the FAB are in fact superseded.

General comments on the proposed “notice and access” disclosure framework.

Transamerica believes that the notice and access disclosure framework is a viable approach for all plan sizes, and that small plans are not without website access. All of the more than 29,000 plans for which Transamerica provides administrative and recordkeeping services are provided with a participant website. Furthermore, we have no reason to believe that Transamerica is in any way unique among recordkeepers in this regard. In addition, a website, and in particular a website such as Transamerica provides that requires a participant to “log in” to access information, provides a secure means of delivering notices that contain personal information electronically. We do not believe that small plans, or their participants, are in any way disadvantaged by the proposed notice and access disclosure framework.

Other internet-based mechanisms.

Transamerica encourages the Department to modify the proposal as needed to be as inclusive of other internet-based mechanisms as possible (such as multimedia messaging and mobile applications), but without being so explicit as to inhibit innovation in the delivery of required disclosures, provided in all cases that those means of electronic delivery are sufficiently protective of plan participants. We further encourage the Department to craft a final rule that will not require frequent amendments to

³ See footnote 60 to the proposed rule.

⁴ This groups of plans and participants represents approximately 8,800 “mid-market” plans (i.e., plans with less than \$50 million in assets), covering more than 358,000 participants and 731 “large market” plans (i.e., plans with more than \$50 million in assets), covering more than 770,000 participants.

stay current and applicable as technological enhancements and developments continue in this area.

Consultation with the Treasury Department.

Transamerica believes that, because plan sponsors often bundle IRS and Department notices, it would benefit plans sponsors to receive confirmation from the Treasury Department that delivery under the Department's final rule will also satisfy the requirements of § 26 CFR 1.401(a)-21(c).

Scope of covered documents.

Transamerica believes that the scope of covered documents (i.e., all information required to be furnished to participants and beneficiaries of employee benefit plans subject to ERISA) is appropriate, and that the notice and access disclosure framework is suitable for any such required disclosure.

14-month period to comply with the annual notice of internet availability requirement.

Transamerica is strongly supportive of the 14-month delivery window for the annual notice of internet availability. It will eliminate "creep" in timing of the notice, is consistent with the delivery window for the annual 404a-5 participant fee disclosure notice, and will be conceptually and operationally familiar to plan sponsors.

Secure log-in procedures.

Participant websites requiring log-in, as a matter of course, provide participants with instructions on how to securely receive or recover their log-in information. Consequently, Transamerica does not see a need to expand the content of the notice of internet availability itself to include that additional information. Alternatively, if the Department concludes that this should be addressed in the notice of internet availability, we would recommend use of a generic reference that all plan sponsors could use without excessive website-specific customization, along the lines of, "If you need to receive or recover your website log-in information, instructions for doing so are provided [on the website]."

Content of "brief description."

Transamerica agrees with the Department that "brief description" of a covered document should communicate key information about the document's importance without becoming a technical summary of the content of the underlying disclosure. As such, we would recommend that a "brief description" of the covered document could be generally contained within one or two sentences.

Notice of internet availability – adequacy of content.

Transamerica believes that the general content of the notice of internet availability, as currently proposed, should adequately serve its intended purpose. Inclusion of a toll-free number may be relevant to the extent a participant would need to call that number to receive a paper copy or to opt out of electronic delivery; as noted in the "Secure log-in procedures," specific or detailed information regarding password reset features would not likely need to be described in the notice.

Merits of a model notice of internet availability.

Transamerica believes that the itemized description of the required content for a notice of internet availability under paragraph (d)(3) of the proposed rule provides a clear content roadmap; a model

notice is unlikely to provide any greater degree of clarity.

Relevance of superseded or expired documents.

Continuing to display covered documents that have been superseded or lack relevance because they have expired could create unnecessary confusion for participants accessing the website; however, the Department correctly observes that there may be times when a superseded or expired document may still be relevant to a covered individual's claims or rights under the plan. This could be addressed by either directing the participant to the plan administrator (or its designee) for questions regarding superseded or expired documents or by archiving superseded or expired documents on the website.

Transamerica believes it would be beneficial for plan sponsors if the final rule clarify that a covered document must remain available on the website until superseded by reason of a subsequent version of the covered document *or* until it ceases to have continued relevance to covered individuals. Transamerica believes that plan sponsors would be better served by having these types of notices described categorically rather than expressly, noting that a blackout notice could be provided as an example of such notices.

Confidentiality of personal information.

Transamerica agrees with the Department that plan administrators, or their service or investment providers, already have secure systems in place to protect covered individuals' personal information, as is generally required by ERISA section 404. To the extent that this standard is sufficient to protect covered individuals' personally identifiable information and covered documents are encompassed within this standard, the inclusion of more specific security guidelines or best practice protocols within the context of the final rule would not likely be helpful. In addition, by creating a separate standard, the standards may potentially conflict, making it difficult for plan sponsors to comply with both.

Sufficiency of safeguards.

Transamerica believes that the two safeguards provided in the proposed rule, the ability to request a paper copy of any covered document and the ability to globally opt out of electronic delivery, are sufficiently protective of those covered individuals who do not want to receive some or all of the covered documents electronically.

Threshold standard for furnishing covered documents.

Transamerica agrees that, so long as the plan administrator is not alerted to an invalid or inoperable email address, and the other conditions of the proposed safe harbor are satisfied, the plan administrator should be considered to have furnished the pension documents required under Title I of ERISA. If a covered document were to be mailed, there would be no requirement that a covered individual read, understood, or had actual knowledge of the contents of the covered documents. To the extent that a notice is considered "furnished" if the plan administrator is not alerted to an invalid or inoperable email address (and the other conditions of the rule are satisfied), the final rule should not impose a greater standard than would be required if mailing a notice. A standard requiring a covered individual to have read, understood, or had actual knowledge of the contents of the covered documents would serve to chill use of this safe harbor and deter use of electronic delivery, which would defeat the purpose of the establishing the rule.

Merits of a model initial notification.

Transamerica believes that the content requirements for the initial notification are sufficiently straightforward so as to not necessitate the development of a model initial notification.

Issues related to severance from employment.

To the extent a non-work email address (or other non-work personal device or smart phone) is being utilized by a participant or beneficiary under this framework, it is Transamerica's position that severance from employment should not represent a triggering event with respect to the potential invalidity of the email address, and we recommend that the final rule clarify that steps to validate a participant's email address upon severance from employment should be required only in the context of a work-provided email that will become invalid upon severance of employment.

Transamerica would like to further add that it is of the opinion that individuals having a valid post-severance email or cell phone number on file for electronic delivery of covered documents, including participant benefit statements, should substantially reduce the likelihood of such individuals later becoming lost or missing participants, as most people do not typically change their email addresses or even cell phone numbers upon moving. Therefore, Transamerica strongly encourages the Department to craft the final rule in a manner that will make it as easy as possible for employers to continue utilizing the safe harbor under this rule for terminated employees.

Documents subject to an annual notice of availability.

Transamerica believes that it would be more appropriate if the final rule utilizes a principle-based or categorical approach, describing the type or nature of covered documents that may be consolidated (e.g., any covered document that must be furnished solely because of the passage of time), rather than relying on an explicit list of covered documents to which the annual notice of availability would apply. This approach will eliminate the need to amend the rule if, at any time in the future, additional disclosure requirements are established under which the disclosure would conform to the type or nature of covered documents for which a consolidated notice of internet availability may be provided. Transamerica has no objection to a reference in the final rule, by way of example, of the currently enumerated covered documents for which an annual notice may be provided.

Temporary disruptions to website accessibility.

Transamerica agrees that the provisions of paragraph (j) of the rule do fairly balance the reality of temporary disruptions to website accessibility in modern times with the protection of participants and beneficiaries by expecting that administrators act reasonably in preparing for, and reacting to, such disruptions.

Applicability Date.

Transamerica sees no reason to delay the applicability date beyond the effective date of the final rule, and strongly encourages the Department to modify the final rule to make the applicability date and the effective date the same. This will enable plan sponsors who so choose to begin using the safe harbor established under the rule as soon as possible after the rule is finalized. Because use of the safe harbor is optional, doing so does not "force" plan sponsors to use the safe harbor before their website technology (or that of their service provider) includes all of the necessary safeguards, but does allow

plan sponsors to begin using the safe harbor as soon as their website technology is ready.

The E-SIGN Act and costs

Transamerica does not believe that the rule, as proposed, would impose unreasonable costs on the acceptance and use of electronic records, nor does it appear to require or endorse the use of any specific technology. To the extent feasible, Transamerica would encourage the Department to use language that is open enough to be adaptable to future technologies that may not currently exist.

III. Conclusion

Transamerica would like to reiterate that we feel the Department has done a commendable job in its drafting of the proposed rule. As the studies referenced in the preamble to the proposed rule show, almost every employee has an email address, a cell phone, and reliable access to the internet. The proposed rule will more efficiently and effectively allow employers to communicate electronically with their employees in a world that is becoming more digital with each passing day. In addition, valid email addresses and cell phone numbers should enable plan sponsors to stay better connected to their terminated participants, and reduce the number of lost and missing participants over time. We hope our comments will help to make a good rule better.

Sincerely,



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