



November 22, 2019

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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

Dear Sir or Madam:

This firm is legal counsel to over 50 single and multiemployer pension plans. We write on behalf of the firm to comment on the proposed regulation creating a new safe harbor for the use of electronic media to furnish certain information to participants and beneficiaries of plans subject to ERISA.

Many of our client pension funds spend significant amounts of plan assets and staff time to meet the reporting and disclosure requirements of ERISA. Accordingly, many of our client pension funds are eager to be able to take advantage of the proposed safe harbor as a means to reduce printing and postage costs and to communicate more effectively with the increasing number of participants and beneficiaries who prefer to receive documents electronically. Nevertheless, our clients recognize that there are also participants and beneficiaries who prefer to receive paper copies and have a right to do so. Those of our clients that support the adoption of the proposed rule do not seek to make it more difficult for participants to obtain required disclosures. Rather, they seek to save the costs now incurred in paper disclosures to those participants who prefer to receive notices electronically, e.g., because such disclosures do not need to be filed and retained for future reference.

In submitting these comments, we are not speaking on behalf of any particular client or all of our clients. We are aware, however, that many of our clients greatly appreciate this effort by the Department to reduce administrative costs for pension plans and to update the Department's regulations to reflect the ability of organizations to use electronic media to make a wealth of information available online. These comments, accordingly, are brought from a position of support for the concept of the proposed rule, but we would also like to bring to the Department's

attention several concerns with the proposed regulation arising out of our clients' experience with electronic disclosure.

1. Definition of Covered Individuals

First, under the definition of "Covered Individual" at proposed § 2520.104b-31(b), only "a participant, beneficiary, or other individual entitled to covered documents who, *as a condition of employment*, at the commencement of plan participation, *or otherwise*, provides the employer, plan sponsor, or administrator with an electronic address" (emphasis added) is eligible to obtain plan documents through the proposed electronic regime. Multiemployer plans are sponsored by employers and employee organizations and have no ability to impose conditions of employment on plan participants. We understand the phrase "or otherwise" as an alternative to "as a condition of employment" such that multiemployer plans would be included in the safe harbor to the extent of participants and others having provided an electronic address to the plan sponsor. The Fund requests that the Department confirm that the safe harbor includes multiemployer pension plans and other entities that do not have the ability to establish conditions of employment.

2. Obtaining Electronic Addresses

Second, many of our client funds primarily cover employees in the building and construction industry where people may change employers frequently; accordingly, the funds' participants do not typically or necessarily have an e-mail address provided at their place of employment that is useful to the fund as a permanent e-mail address. Some of our client pension funds have received personal email addresses for participants but only to a relatively small extent. This relative lack of electronic addresses will limit, at least in the short term, the usefulness of the proposed safe harbor to our client funds.

We anticipate, however, that our pension fund clients would seek means of requesting and obtaining the personal e-mail or other electronic addresses of participants and beneficiaries so as to increase the possibility of realizing cost savings from the new safe harbor. We believe that the reasonable costs incurred in such efforts to obtain email addresses and "smartphone" numbers on a voluntary basis would be reasonable plan expenses when balancing the potential savings in printing and postage against the increased potential to reach participants and beneficiaries in a more convenient and "user-friendly" manner.

In that regard, and among other means of requesting electronic addresses, we believe our client funds would like to consider sending the initial notification of default electronic delivery and right to opt out ("Initial Notification") described in the proposed rule to all participants and beneficiaries and including in it a request to provide a pension plan with an electronic address. Pension funds would thereafter treat anyone for whom a fund did not already have -- or did not receive in response to the Initial Notification -- an electronic address as having opted out of default electronic delivery (in addition to anyone who affirmatively opted out). We would appreciate clarification from the Department that a request to provide the pension fund with an electronic address for this purpose would be permissible content to include in the Initial Notification.

3. Text Messages

Third, we suggest that the final regulation provide a short version of the notice of internet availability to be used when that notice is provided by text message with a link to the more complete version of the notice, which could be provided on the fund's website. For example, perhaps a text message notice could simply include the content described in (d)(3)(ii), (iii), and (iv) with the remaining paragraphs to be included in a notice that comes up on the webpage when the person follows the link provided in the text message. It would also be helpful if the Department provided model language for (d)(iii) that would be both brief and sufficient.

4. Comments on 2002 Safe Harbor

a. Consent Challenge re Documents on Website

Fourth, we would like to make some comments on the 2002 safe harbor for disclosure through electronic media at 29 CFR § 2520.104b-1(c), as the Notice of Proposed Rulemaking invited commenters to do. *See* 84 FR 56894 at 56908 (Oct. 23, 2019). For the same cost-saving and efficiency reasons discussed above with regard to the new proposed safe harbor, our clients appreciate being able to use the 2002 safe harbor to provide disclosures upon request to those participants and beneficiaries and others who consent to receive such disclosures through electronic media. The affirmative consent requirement poses a difficulty, however, with regard to documents that the funds seek to provide on their websites.

It is a benefit to the funds to make a number of frequently-requested documents available on their websites because many people simply go to the website directly and do not submit a request to the fund office. Moreover, some of the frequently requested documents are difficult to attach to e-mails due to their size. Thus, the availability of documents on the website reduces administrative burden on the funds of responding to document requests and reduces the costs of printing and postage that the funds would incur if they had to mail out paper versions of all the documents that are instead viewed on the website. Where no request is submitted to the fund, and an individual simply goes to the website directly, there is no concern about obtaining affirmative consent to receive documents through electronic media.

The difficulty under the safe harbor arises when the person doesn't go to the website initially and instead contacts the fund office with a request for documents that are available on the fund's website. Once a requester is advised that the documents are available through the website if the requester consents to receive them that way, the requester generally simply goes to the website himself or herself and doesn't bother to provide the affirmative consent to the fund. Then, the fund is left with having to incur the burden and expense of providing paper versions by mail, to someone who already received the documents from the website, due to the fund not having received the requester's affirmative consent to receive them electronically.

Funds have experimented with how to obtain consent via the website, but, as a practical matter, any efforts to condition the ability to view documents on the website on a viewer's provision of affirmative consent to receive the documents through that means makes it more difficult for people to access documents on the website. That is particularly the case if the funds have to track who

gave consent and to retain a record of that consent, which requires funds to impose an individual log-in requirement that limits access to the documents.

Accordingly, we request that the Department modify the 2002 safe harbor to provide that, if a person requests documents that are available on a fund's website and (1) the fund provides the notice required in the safe harbor at (c)(2)(ii)(C), including without limitation the information that the requester has the right to request a paper version of the requested documents; (2) which notice indicates that the requested documents are available on the fund's website and provides a correct URL for locating the requested documents there; and (3) the fund receives confirmation that the notice was received by the requester, then, the fund can treat the lack of further communication from the requester as consent to receive the requested documents through the website and does not have to incur the expense of providing a paper version that the requester neither requested nor wants.

b. Revision Needed to Paragraph (b)(2)

Additionally, we suggest that the Department modify 29 CFR § 2520.104b-1 to clarify that the safe harbor's reach is not limited by 29 CFR § 2520.104b-1(b)(2) to exclude materials furnished upon request pursuant to ERISA § 104(b)(4) as further explained below.

Paragraph of 29 CFR § 2520.104b-1(c)(1) states that

Except as otherwise provided by applicable law, rule or regulation, the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy the requirements of paragraph (b)(1) of this section with respect to an individual described in paragraph (c)(2) if [it meets the requirements of the safe harbor set forth below].

That language does not specifically exclude from the exceptions generally referenced at the beginning paragraph (b)(2) of that section, which states that

For purposes of section 104(b)(4) of the Act, materials furnished upon written request shall be mailed to an address provided by the requesting participant or beneficiary or personally delivered to the participant or beneficiary.

This could lead one to conclude that the documents required to be provided upon request under ERISA § 104(b)(4), such as summary plan descriptions, summary annual reports, collective bargaining agreements, trust agreements, and other instruments under which the plan is established or operated, are required to be mailed or personally delivered and cannot be provided through electronic media under the 2002 safe harbor.

Such a reading would be inconsistent with the Preamble to the 2002 rule, 67 FR 17264-01 (Apr. 9, 2002), however. The Preamble makes clear at page 17266 that the 2002 safe harbor is specifically intended to make it possible for participants and beneficiaries to receive summary plan descriptions as well as all disclosures under Title I of ERISA through electronic media where the requirements of the safe harbor are satisfied. Accordingly, we suggest that paragraph (b)(2) be

modified to acknowledge that disclosure through electronic media under sub-section (c) is acceptable, such as the following:

For purposes of section 104(b)(4) of the Act, materials furnished upon written request shall be mailed to an address provided by the requesting participant or beneficiary, or personally delivered to the participant or beneficiary, or disclosed to the participant or beneficiary through electronic media pursuant to sub-section (c) of this section.

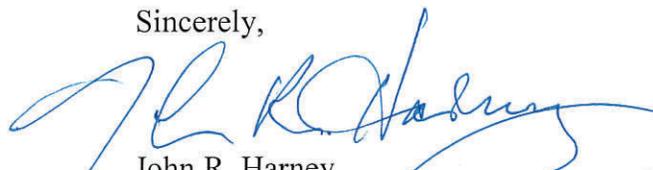
5. Emerging Technologies

Finally, our clients have told us that some of their younger participants suggest that the fund consider creating an “app” whereby individuals can access their benefit documents and information through their smartphones. We respectfully request that the Department consider the possibilities of emerging technologies and provide additional guidance that will permit pension plans to use these emerging technologies to reach participants and beneficiaries with useful information in “real time.”

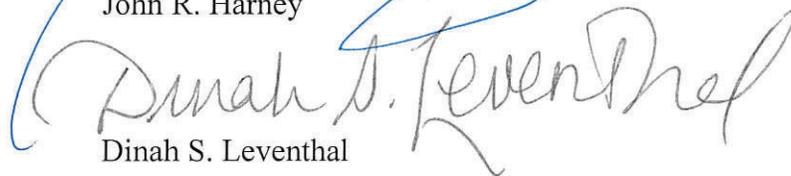
6. Conclusion

We welcome the Department’s effort to streamline the delivery of important disclosures to participants and beneficiaries of ERISA pension plans. At this time when many multiemployer plans face significant challenges, the ability to realize administrative cost savings and efficiencies available through current and perhaps future technologies will enable these plans to meet the reporting and disclosure responsibilities envisioned by Congress back in 1974 in a more efficient manner. We urge the Department to consider these comments and create a final regulation that will help plans meet this very important need.

Sincerely,



John R. Harney



Dinah S. Leventhal