

GROOM LAW GROUP

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Hon. Preston Rutledge
Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210

**Re: Proposed Regulation on Electronic Disclosure
RIN 1210-AB90**

Dear Assistant Secretary Rutledge:

Groom Law Group, Chartered, is providing the comments described in this letter on behalf of a group of companies (the “Group”), each of which is a major provider of recordkeeping and administrative services to employer-sponsored retirement plans subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We write to provide comments on the U.S. Department of Labor’s (“DOL’s”) proposed safe harbor for the electronic delivery of participant and beneficiary disclosures, *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 84 Fed. Reg. 56894 (Oct. 23, 2019) (the “Proposed Rule”).

Each of the recordkeepers in the group is involved in the delivery of disclosures required by ERISA and the Internal Revenue Code (“Code”) to retirement plan participants and beneficiaries. While each member’s specific disclosure responsibilities are established by the recordkeeping agreement entered with the client plan, each of the recordkeepers has a role in distributing required disclosures to plan participants and beneficiaries, typically as directed by the plan sponsor. As a practical matter, it is common in the retirement plan recordkeeping industry for a plan sponsor to rely on its recordkeeper to maintain the systems and procedures necessary to demonstrate the sponsor’s compliance with ERISA’s disclosure delivery rules. Based on the collective experience of our members, the Group believes it is uniquely qualified to comment on DOL’s modernized electronic delivery standards.

On the whole, the Group believes the DOL did a very good job in developing the Proposed Rule and that the new safe harbor represents a dramatic improvement over existing disclosure delivery methods. The DOL did a commendable job with the complicated task of modernizing DOL’s existing electronic delivery rules, incorporating flexibility so as not to stifle

technological innovation over time, while also providing important protections for plan participants and beneficiaries. The Group also believes that the Proposed Rule goes a long way toward satisfying the policy objectives outlined in Executive Order 13847 (the “Executive Order”) to improve the effectiveness of disclosures and reduce their associated costs for employers.¹ Nonetheless, we believe there are several technical improvements that could be made to the Proposed Rule that would incorporate additional flexibility, increase access to required disclosures, as well as clarify the contours of the new safe harbor.

I. Use of Smartphone or Mobile Device “Apps” for Furnishing Disclosures.

As written, the Proposed Rule contemplates posting required disclosures on an “internet website” while a contemporaneous notice of the document’s availability is sent to an “electronic address.” The rule is clear that an email address or a cell phone number can be used as the electronic address for purposes of distributing notices of internet availability to the participant. What is not as clear is whether the Proposed Rule would permit notices of internet availability to be delivered to a participant through smartphone and other mobile applications (commonly referred to as “apps”), and whether the required disclosures themselves may be posted and viewed through these internet-based mobile applications. We believe the Department should make explicit that the use of internet-based mobile device applications may be used both for delivery of the notices of internet availability as well as for the posting of required disclosures.

The use and development of mobile device applications has dramatically increased over the last decade in step with the saturation of smartphones among American workers. Statistics indicate that today 81% of American workers rely on and carry a smartphone on a daily basis.² With the proliferation of smartphones, the use of mobile device applications is dramatically increasing and changing the way that Americans receive information, including information critical to their financial health. Statistics regarding the use of banking applications, used by Americans to check bank balances and engage in routine banking transactions such as depositing checks and transferring funds between accounts, is helpful in considering how these applications may be used by retirement plans. Recent statistics show that banking applications are one of the most widely used type of smartphone app, trailing behind social media and weather applications. A survey conducted in 2017 by the Federal Reserve indicated that 61% of U.S. adults with a bank account had used a mobile device to check either a bank balance or a transaction.³ A similar survey conducted by the FDIC in 2015 indicated that a similar percentage, about 50%,

¹ Executive Order 13847, 83 Fed. Reg. 45321 (Sept. 6, 2019).

² See Pew Research Center Mobile Fact Sheet dated June 12, 2019, available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>

³ Federal Reserve Survey of Household Economics and Decisionmaking, discussed in detail at <https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm>.

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had used a mobile device to check a balance or to verify a transaction.⁴ These and other surveys show that the use of mobile applications in personal banking continues to grow consistent with the growth in the use of smartphones and the number of banks offering mobile applications to their customers. Based upon these statistics, the Group is of the view that plan participants will use retirement plan applications developed by plan sponsors and plan service providers to assess retirement plan disclosures and as such the safe harbor should clearly state that such applications may be used as a means of delivering ERISA-required notices and documents.

Section (b) of the Proposed Rule defines the term “covered individual” in relevant part as –

a participant, beneficiary, or other individual entitled to covered documents who ... provides the employer, plan sponsor, or administrator (or an appropriate designee) with an electronic address, such as an email address or internet-connected mobile computing device (e.g., “smartphone”) number. Alternatively, if an electronic address is assigned by the employer to an employee for this purpose, the employee is treated as if he or she provided the electronic address.

We recognize that the Proposed Rule uses the terms “email address” and “device number” merely as examples of permitted “electronic addresses” and this suggests that the term “electronic address” could be interpreted more broadly to include other types of electronic access that may not technically qualify as an “email address” or device “number.” However, we believe that the new safe harbor should explicitly authorize disclosures to be made through a participant’s or beneficiary’s voluntary access of a mobile device application maintained for purposes of providing required disclosures in connection with an employee benefit plan.

In addition, we ask the DOL to confirm that the term “internet website” on which required disclosures may be posted is intended to be a generic term, and that other electronic technologies that rely on the internet such as mobile device applications are included within the Proposed Rule as a medium on which required disclosures may be posted and reviewed. We believe this confirmation by the DOL could lead to the development of smartphone and mobile device applications through which participants and beneficiaries can interact with their employee benefit plans and could substantially improve the effectiveness of and access to disclosure generally. We note that the DOL’s participant disclosure rules (at 29 C.F.R. § 2550.404a-5) resulted in the vast majority of ERISA-covered 401(k) plans maintaining a website on which designated investment information is housed and accessed by participants. We believe that explicitly permitting mobile device applications to be used for electronic disclosure purposes under ERISA would similarly usher in a new era in the development of these applications for use

⁴ FDIC Survey of Consumers' Use of Mobile Financial Services, discussed at <https://www.federalreserve.gov/econres/notes/feds-notes/mobile-banking-a-closer-look-at-survey-measures-20180327.htm>.

by retirement plans, potentially resulting in more effective and creative disclosure solutions than can be envisioned today.

II. Retain Field Assistance Bulletin 2006-03 for Pension Benefit Statement Information.

In a footnote to the preamble, DOL announced that the Proposed Rule would supersede the special rule memorialized in Field Assistance Bulletin (“FAB”) 2006-03 (“FAB 06-03”) permitting pension benefit statement information to be delivered through a secure continuous access website.⁵ This rule allows pension benefit statement information to be provided on such a website subject to the requirements to provide an initial notice describing the delivery method and rights to request and receive paper copies, and an annual notice thereafter. The Group believes that eliminating the current website delivery rule for section 105 benefit statement information will result in excessive administrative costs, is inconsistent with ERISA, and is contrary to the Executive Order’s directive to expand the use of electronic disclosure as much as possible.

Since FAB 06-03 was issued, the use of continuous access websites has become a very common method of delivery of pension benefit statement information for 401(k) plans in particular. Many of the Group’s members rely on this method in order to deliver pension benefit statement information. In the Group’s experience, very few participants opt out of website delivery, and the method of delivery is successful and widely utilized by participants.

FAB 06-03 saves plan sponsors and plans millions of dollars that would otherwise be spent on printing and mailing quarterly statements. If this method of delivery is eliminated when the Proposed Rule is issued in final form, plan sponsors and their recordkeepers that currently rely on the continuous access website rule of the FAB 06-03 will be required to mail hard copies of quarterly benefit statements to plan participants for whom the employer does not have (or does not provide) an electronic address. Thus, the transition from relying on FAB 06-03 to the new safe harbor will result in a substantial new expense for plans that is directly associated with implementing the new final rule. Moreover, many plan participants have been receiving pension benefit statement information through a website ever since the Pension Protection Act of 2006 (“PPA”) first began to require plans to automatically furnish that information. These participants would not expect to receive a pension benefit statement in paper form, and therefore receiving pension statements through the mail would not be effective for them and would likely be overlooked.

Several of the Group’s members wish to emphasize the importance of allowing the notice of continuous access to be delivered in paper form under FAB 06-03. In this regard, FAB 06-03 permits pension benefit statement information to be posted on a continuous access website as long as the participant is provided a separate notice, initially and annually thereafter, that notifies

⁵ See 84 Fed. Reg. at 56900, n. 60.

them of the delivery method and the right to request paper copies. FAB 06-03 states that the separate notice of website availability can be furnished “in any manner that a pension benefit statement could be furnished” under FAB 06-03. Several of the Group members currently provide this notice of availability in paper form, and wish to continue to send notices of availability in paper form. This delivery method has worked successfully for over a decade and should be retained in order to avoid implementation costs and disruption for participants as well as sponsors and service providers.

The Group urges the DOL to leave in place the existing rule established by FAB 06-03 solely for purposes of delivering pension benefit statements under section 105 of ERISA, and to codify the “continuous access website” rule within the final safe harbor developed by DOL. In this regard, there is a separate statutory authorization for the use of electronic delivery in connection with section 105 pension benefit statements. Under section 105(a)(2)(A)(iv) of ERISA, pension benefit statements under section 105 “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.” This provision of ERISA, added by the PPA, is a broad authorization from Congress to deliver pension benefit statements in electronic form that is separate from and more flexible than the more general requirement to deliver ERISA disclosures through a method “reasonably calculated to ensure actual receipt” under 29 C.F.R. 2520.104b-1(b). The Group believes that this statutory authorization to use electronic delivery under section 105(a)(2)(A)(iv) authorizes the DOL to articulate a separate and more flexible website delivery standard specifically for section 105 benefit statement information within the final rule.

III. QDIA Notice Delivery.

Under existing DOL guidance, QDIA notices can be combined with auto-enrollment notices required under the Code into a single document.⁶ This is an important exception to the general rule that QDIA notices may not be combined with other notices required under ERISA in order to enhance their effectiveness.⁷ In addition, under current DOL guidance, QDIA notices may be distributed through reliance on either the IRS and Treasury Department’s safe harbor regulation for electronic disclosure or the DOL’s existing electronic delivery safe harbor rule.⁸

In our experience, most 401(k) plans that offer an automatic enrollment feature combine the auto-enrollment notice with the QDIA notice. In our view, the ability to combine these two notices into a single document is critical to the effectiveness of both disclosures. Although the two disclosures serve different legal purposes, both notices describe the same plan feature – the plan’s auto enrollment provisions. The Group believes that participants would not as easily

⁶ See FAB 2008-03, Q8 (Apr. 29, 2008); *Default Investment Alternatives under Individual Account Plans, Final Rule*, 72 Fed. Reg. 60452, 60454-55 (Oct. 24, 2007).

⁷ *Id.*

⁸ See FAB 2008-03, Q7.

understand the financial and retirement savings implications of the plan's auto enrollment feature if the notices were provided in two separate documents.

In a footnote within the preamble to the Proposed Rule, the DOL announced without explanation that the Proposed Rule would supersede the special rule for QDIA notices that allows them to be distributed under the IRS and Treasury Department's electronic delivery safe harbor. It is not clear whether DOL intended to also eliminate the special rule that permits QDIA notices to be combined with auto enrollment notices.

First, the Group urges the DOL to confirm that QDIA notices may still be combined with auto enrollment notices following the effective date of the final safe harbor rule. This is so that plan sponsors and providers that have been heretofore combining these notices into a single document may continue to do so and will not be required to bifurcate these disclosures. We believe the ability to combine these two disclosures is critical to communicating the retirement savings implications of the plan's auto enrollment rules.

In addition, the Group asks the DOL to confirm either (a) that QDIA notices that are combined with auto enrollment notices may still be delivered in compliance with the IRS and Treasury Department's e-disclosure safe harbor in lieu of in compliance with the DOL Proposed Rule, or (b) that the IRS and Treasury Department would view compliance with the DOL's Proposed Rule as consistent with the electronic disclosure safe harbor requirements under 26 C.F.R. 1.401(a)-21 (specifically the requirements that relate to providing notices in a manner through which participants have "the effective ability to access" the disclosure). The Group believes that the above confirmations from DOL are necessary in order to support the continued provision of QDIA and auto enrollment notices required under the Code as a single consolidated notice. Without the above confirmation, a plan administrator could potentially be required to send a single document via two different delivery methods to a single plan participant in order to satisfy both the DOL and IRS/Treasury Department's delivery standards.

IV. Delivery of Attachments Directly to the Provided Electronic Address.

The "notice and access" framework of the Proposed Rule contemplates posting disclosures on an "internet website" while a contemporaneous notice of the document's availability is delivered to an electronic address generally provided by the participant. In its current form, this framework appears to require a plan (or the plan's sponsor) to have an "internet website" in the first place in order to rely on the safe harbor. In this regard, the Proposed Rule as written does not encompass sending the document itself directly to the electronic address, for example, as an attachment (*e.g.*, a PDF) to an email or text message.

Many plan sponsors and recordkeepers that currently distribute disclosures electronically furnish the disclosure as an attachment to an email (typically in PDF format). The Group asks

that the DOL confirm that this method of delivery is permissible under the Proposed Rule to the extent consistent with the plan administrator's obligation to protect confidential information.⁹

This would accomplish several objectives that the Group believes are consistent with the DOL's goals as well as the Executive Order. First, this would eliminate the threshold requirement that a plan establish a website in order to rely on the safe harbor. This would be particularly helpful for defined benefit as well as non-participant-directed defined contribution plans that do not currently maintain a website.¹⁰ Permitting these plans to send disclosures through an attachment to an email or text message will save the plan sponsor the administrative costs and burdens associated with establishing and monitoring a website, or hiring and monitoring a service provider to do that work. In addition, permitting documents to be distributed via an attachment to an email (or text message) would allow those plan sponsors who have been utilizing this method of disclosure to continue to rely on that practice without disruption or undue burden. This will save significant transition costs in the event these sponsors and recordkeepers determine to rely on the new safe harbor when it is effective in final form. Finally, this method of delivery is arguably equally as effective as posting the document on a website for some participants. In order for website posting to be effective, the participant must not only read and understand the notice of internet availability, but must also take the additional step of accessing the plan's website, potentially through a separate device than the device used to retrieve the availability notice. The Group believes that sending required disclosures as an attachment to an email is at least as effective as website posting for many participants, and therefore should be explicitly authorized under the new safe harbor.

V. Notices of Internet Availability

Under section (c)(4)(i) the Proposed Rule, notices of internet availability are required to be sent electronically to the electronic address provided pursuant to the definition of "covered individual."

⁹ We recognize that certain disclosures may raise confidentiality concerns if delivered as an attachment to an email (such as ERISA section 105 benefit statements). However, other required disclosures do not raise confidentiality concerns (for example, SPDs, SARs, SMMs, mapping and QDIA notices) and should be appropriate for distributing as an attachment to an email or text message.

¹⁰ In this regard, the DOL's participant disclosure rules currently require participant-directed individual account plans to have a website in order to provide specific information regarding the plan's designated investment alternatives. As a result, we believe that the vast majority of participant-directed 401(k) plans already have and actively maintain a website on which to post documents in connection with the Proposed Rule. In contrast, defined benefit plans and non-participant directed individual account plans are not required to and do not commonly maintain websites of their own. These plans would have to create one in order to rely on the Proposed Rule.

The Group asks the DOL to modify the new safe harbor to allow flexibility to accommodate multiple delivery methods for notices of internet availability. In this regard, under FAB 06-03, notices sent to participant to apprise them of the use of a continuous access website for pension benefit statement information may be delivered by paper, via electronic delivery or by “any other method” permitted by FAB 06-03. Similarly, the Group asks the DOL to permit the delivery of notices of internet availability in paper form or in any other form that would satisfy ERISA.

VI. Initial Notice of Default Electronic Delivery.

Under the Proposed Rule, the plan administrator or recordkeeper must distribute an initial notice of default electronic delivery and the right to opt out to each participant when it first begins to rely on the new safe harbor. This notice must be delivered at the time the plan administrator begins to rely on the new safe harbor and to new hires who become eligible to join the plan over time. As proposed, this notice is required to be delivered *in paper form*, even if the employer otherwise relies on DOL’s existing electronic delivery safe harbor.

Similar to Comment V. above, the Group believes that there should be flexibility in the method of delivery used for these initial notices of default electronic delivery. Delivering this initial notice in paper form to each participant and beneficiary will be costly for employers and plans. In addition, many plan administrators currently rely on DOL’s current electronic delivery safe harbor and have done so for many years. As a result, these plan administrators have a pattern and practice of relying on electronic disclosure; and their appropriate participants expect to receive important information about their benefit plans electronically, and not in paper. The Group believes that there is a significant risk that participants who otherwise currently receive disclosures electronically from the plan will not receive or review initial notices distributed in paper form because this method of delivery is simply not used by their plan’s administrator. The Group asks DOL to permit this initial notice to be provided electronically to the extent that the employer currently relies on DOL’s current electronic delivery safe harbor for specific participants and beneficiaries.

VII. Severance from Employment.

Under section (h) of the Proposed Rule, the plan administrator is required to take steps to ensure the continued accuracy of an electronic address when an employee severs from employment. DOL should confirm that if an employee has voluntarily provided a personal email or other electronic address, whether at the commencement of employment or otherwise, the employer is not required to take additional steps to confirm the accuracy of that personal email or other electronic address when the employee severs from employment. Moreover, DOL should confirm that where an employer has provided an electronic address to the participant or beneficiary for purposes of compliance with the Proposed Rule that does not expire when an employee severs from employment, the employer is not required to take additional steps to

confirm the validity of the address when the employee later terminates employment. For example, some employers may want to assign email addresses that are not controlled by the employer and would not become invalid by reason of a termination (*e.g.*, gmail addresses). DOL should confirm that where an electronic address assigned by the employer is not dependent or contingent on employment status, or where an electronic address is provided voluntarily by the employee (*i.e.*, through an employment application), the employer need not take steps to confirm the validity of the address upon termination.

Also, as a corollary to Comment I. above, to the extent that notices of internet availability and required disclosures are provided through a smartphone or other mobile device application, DOL should confirm that the plan administrator need not take specific steps to confirm the accuracy of the participant's electronic address following a severance from employment where the participant's continued access to the application does not depend upon employment status and is not affected by the severance from service.

VIII. Participant Disclosures under 404a-5 Regulations.

Section (i) of the Proposed Rule permits certain mandatory disclosures that are provided on a recurring basis to be announced in a single notice of internet availability provided on a generally annual basis. Comparative charts that provide fee and performance information about the plan's designated investment alternatives¹¹ are included as one of the disclosures that can be announced in a single notice of internet availability provided once within a 14-month period.

In our experience, the vast majority of 401(k) plans that the Group members work with, regardless of size, combine the comparative designated investment alternative information with "general plan" and "administrative and individual expenses information" into a single document for purposes of satisfying the DOL's 404a-5 participant disclosure rules. The complete document may be a dozen or more pages in length depending on the number of designated investment alternatives, but it is almost always distributed to participants as a single document provided annually.

The Group believes that providing all three pieces of annual participant disclosure information (meaning "general plan information" under 29 C.F.R. 404a-5(c)(1), "administrative and individual fee information" under 29 C.F.R. 404a-5(c)(2) and (c)(3), as well as comparative designated investment alternative information under 29 C.F.R. 404a-5(d)) as a single document significantly enhances the effectiveness of the disclosures. If "general plan information" and "fee information" were required to be provided separately from the comparative investment chart, the Group believes that participants could be inundated with too many disclosures provided simultaneously and the effectiveness of the disclosures would be compromised. And yet the Proposed Rule would require the plan administrator or its recordkeeper to treat these

¹¹ See 29 C.F.R. 2550.404a-5(d).

pieces the same as if they were provided separately, by providing a single annual notice of availability that covers comparative designated investment alternative information in addition to providing additional independent notices of internet availability for “general plan” and “fee information.” The Group believes that providing multiple notices of internet availability is both redundant and burdensome under circumstances where all three pieces of annual 404a-5 information are provided at one time in a single consolidated document.

The Group asks the DOL to permit “general plan” and “administrative and individual fee information” under 29 C.F.R. 404a-5(c)(1), (c)(2)(i)(A), and (c)(3)(i)(A) to be included within the subset of disclosures that are permitted to be announced in a single notice of internet availability provided once per year.

IX. Recordkeeper Transitions.

Plan sponsors will rely in large part on their plan recordkeepers to maintain the lists necessary for the plan administrator to comply with the Proposed Rule. For example, plan recordkeepers will undoubtedly be asked by their plan sponsor customers to keep the list of electronic addresses provided by participants, beneficiaries and other individuals (and assigned by employers) as well as the list of participants who have opted out of electronic delivery. It is becoming more common for plans to more frequently migrate from one recordkeeper to another for a variety of reasons. It would be helpful for DOL to confirm that nothing in the Proposed Rule would disqualify a plan administrator from relying on the safe harbor under circumstances where its recordkeeper transfers these lists (including the list of electronic addresses provided by the plan’s participants, beneficiaries and other individuals as well as the list of opt outs) to a successor or additional recordkeeper hired by the plan sponsor.

X. Opt-Out Requirement.

Section (f)(2) of the Proposed Rule states provides that “Covered individuals must have the right to opt out of electronic delivery and receive only paper versions of *some or all* covered documents” (emphasis added). Section (f)(3) further provides that the plan administrator is required to maintain procedures governing these opt-out elections.

The Group believes that it will be difficult if not impossible for plan administrators and their recordkeepers to administer an opt-out program that allows participants and other individuals the right to opt out of electronic disclosures on a document-by-document basis. We ask the DOL to clarify that an opt-out procedure that allows participants to opt out of receiving all required disclosures through electronic delivery on a global basis will satisfy the Proposed Rule. And, DOL should make clear that plan administrators are not required to establish and maintain an opt-out procedure that allows participants to pick and choose individual disclosures that the participant opts out of receiving electronically. As an example, we ask DOL to clarify that a plan administrator is not required to maintain an opt-out program under which a participant

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may opt out of receiving QDIA notices and SPDs electronically, but at the same time opt-in to electronic delivery for all other required disclosures. We believe this type of granularity on a document-by-document basis within an opt-out procedure would be difficult and costly to administer from a technology standpoint and should not be required.

XI. Effective Date.

As proposed, the new safe harbor would be available to plan administrators and service providers beginning on the first day of the first calendar year after the rule is finalized.

The Group sees no reason to bar relying on the new safe harbor until the beginning of the calendar year following publication of the final rule. Given that the rule takes the form of a safe harbor, we ask the DOL to confirm that plan administrators and service providers may begin to rely on the rule immediately following its publication in final form.

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We thank the Department's staff for all of the work in developing and finalizing the Proposed Rule and for the opportunity to submit these comments. We hope our comments are helpful. We would be happy to discuss these comments with members of the DOL in person or by telephone. Please let Ellen Goodwin, Michael Del Conte or me know if that would be helpful.

Very truly yours,



Stephen M. Saxon

Cc: Jeanne K. Wilson
John J. Canary
Jeffrey Turner