FACT SHEET
ELECTRONIC DISCLOSURE SAFE HARBOR FOR RETIREMENT PLANS

Overview

The U.S. Department of Labor (Department) announced a final rule on May 21, 2020 that will allow employers to post retirement plan disclosures online or deliver them to workers by email, as a default. Enhancing the ability of employers to furnish retirement plan disclosures electronically will reduce administrative expenses for job creators and make the disclosures more readily accessible and useful for America's workers.

Economic & Other Benefits

Over the next decade the rule will save approximately $3.2 billion in net costs for retirement plans covered by the Employee Retirement Income Security Act of 1974 (ERISA) – plans that rely on the rule will be able to eliminate significant materials, printing, and mailing costs associated with furnishing printed disclosures.

Furthermore, in the short term, this rule will immediately assist employers and the retirement plan industry as they face a number of economic challenges due to the 2019 coronavirus (COVID-19) National Emergency, as well as logistical and other impediments to compliance with ERISA's disclosure requirements.

Employers who sponsor retirement plans now have additional ways to disclose information, which will benefit workers and retirees by enhancing the availability and effectiveness of communications about their retirement savings.

Workers will be able to decide how they would like to receive their retirement plan information, and they can change their mind at any time.

Background Information

There are approximately 700,000 retirement plans covered by ERISA. These plans cover approximately 137 million participants.

ERISA-covered retirement plans must furnish multiple disclosures each year to participants and beneficiaries. The exact number of disclosures per year depends on the specific type of retirement plan, its features, and in some cases the plan's funding status.

Delivery methods for ERISA disclosures must be reasonably calculated to ensure that workers actually receive the disclosures. To deliver disclosures electronically, plan administrators, until now, could use a regulatory safe harbor established by the Department in 2002. *See* 29 CFR 2520.104b-1(c).

As technology has evolved and improved, stakeholders have criticized the effectiveness of the 2002 safe harbor, characterizing some of its conditions as difficult to satisfy sometimes, hindering broader use of electronic delivery.

President's Executive Order

On August 31, 2018, the President issued Executive Order 13847, entitled Strengthening Retirement Security in America. The Order directed the Department to review whether regulatory or other actions could be taken to make retirement plan disclosures more understandable and useful for participants and beneficiaries and to focus on reducing the costs and burdens that retirement plan disclosures impose on employers and others responsible for their production and distribution. The Order specifically emphasized that this review shall include an exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of the disclosures and to reduce their associated costs and burdens.

Internet Availability

- A 2019 survey found that 90 percent of U.S. adults use the internet, representing a substantial increase from 2000 when 52 percent of U.S. adults reported using the internet.[1]

- A 2018 study concluded that 93 percent of households owning defined contribution accounts had access to, and used, the internet in 2016.[2]

- A 2017 survey by the U.S. Census Bureau found that 87 percent of the United States population lives in a home with a broadband internet subscription.[3]

Proposed Rule

In October 2019, the Department published a proposed regulation with a solicitation for public comment. The preamble to the proposal also contained a Request for Information to explore whether and how any additional changes to ERISA's general disclosure framework, focusing on design, delivery, and content, may be made to further improve the effectiveness of ERISA disclosures. In response, the Department received 467 written responses from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers, and employee benefit plan and participant representatives.

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[1] Pew Research Center, "10% of Americans don't use the internet. Who are they?" (Apr. 22, 2019).
[2] Peter Swire and DeBrae Kennedy-May, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery – 2018 Update," (April 2018).
[3] "Types of Internet Subscriptions by Selected Characteristics," U.S. Census Bureau American Community Survey 1-Year Estimates (Table S2802) (2017).

New Voluntary Safe Harbor

The final rule establishes a new, voluntary safe harbor for retirement plan administrators who want to use electronic media, as a default, to furnish covered documents to covered individuals, rather than sending potentially large volumes of paper documents through the mail.

The new safe harbor permits the following two optional methods for electronic delivery:

- *Website Posting*. Plan administrators may post covered documents on a website if appropriate notification of internet availability is furnished to the electronic addresses of covered individuals.

- *Email Delivery*. Alternatively, plan administrators may send covered documents directly to the electronic addresses of covered individuals, with the covered documents either in the body of the email or as an attachment to the email.

Retirement plan administrators who comply with the safe harbor will satisfy their statutory duty under ERISA to furnish covered documents to covered individuals.

Scope

- The safe harbor is limited to retirement plan disclosures.

- A plan administrator may use this safe harbor only for “covered individuals.” To be a covered person, the individual must be entitled under ERISA to receive covered documents and must have a valid electronic address (e.g., email address or smart phone number).

- The safe harbor adopted today does not supersede the 2002 safe harbor; the 2002 safe harbor remains in place as another option for plan administrators.

Protections for Plan Participants

The new safe harbor includes a variety of protections for covered individuals, including:

- *Right to Paper.* Covered individuals can request paper copies of specific documents, or globally opt out of electronic delivery entirely, at any time, free of charge.

- *Initial Notification*. Covered individuals must be furnished an initial notification, on paper, that the way they currently receive retirement plan disclosures (e.g., paper delivery in the US mail) is changing. The notice must inform them of the new electronic delivery method, the electronic address that will be used, and the right to opt out if they prefer paper disclosures, among other things. The notice must be given to them before the plan may use the new safe harbor.

- *Notifications of Internet Availability*. Covered individuals generally must be furnished a notice of internet availability (NOIA) each time a new covered document is made available for review on the internet website.
    - To avoid “notice overload,” the final rule permits an annual NOIA to include information about multiple covered documents, instead of multiple NOIAs throughout the year.
    - The NOIA must briefly describe or identify the covered document that is being posted online, include an address or hyperlink to the website, and inform the covered individual of the right to request paper copies or to opt out of electronic delivery altogether.
    - The NOIA must be concise, understandable, and contain only specified information.
- *Website Retention*. Covered documents must remain on an internet website until superseded by a subsequent version, but in no event for less than one year.
- *System Check for Invalid Electronic Addresses*. Plan administrators must ensure that the electronic delivery system is designed to alert them if a participant’s electronic address is invalid or inoperable. In that case, the administrator must attempt to promptly cure the problem, or treat the participant as opting out of electronic delivery.
- *System Check at Termination of Employment*. When someone leaves their job, the plan administrator must take steps to ensure the continued accuracy and operability of the person’s employer-provided electronic address.

Effective Date & Immediate Availability

The new safe harbor is effective 60 days after its publication in the Federal Register. However, the Department, as an enforcement policy, will not take any enforcement action against a plan administrator that relies on this safe harbor before that date. The Department’s decision to provide this non-enforcement policy supports the Federal government’s broader effort to respond to COVID-19. The Department understands the far-reaching effects of COVID-19, and the non-enforcement policy provides flexibility and may reduce administrative burden on employers and pension plan service providers during this unprecedented time.