

Report on Default Electronic Disclosure by Employee Pension Benefit Plans Under Employee Retirement Income Security Act

Introduction

This report comprises the response of the Employee Benefits Security Administration of the U.S. Department of Labor (Department) regarding the impact of the Department’s new electronic disclosure safe harbor regulation, titled “Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA.” This report is in response to the following language from the explanatory statement that accompanied the Consolidated Appropriations Act of 2021 (Pub. L. 116-260) (Act):

The agreement requests a report not later than 1 year after enactment of this Act assessing the impact of the rule (85 FR 31884) on individuals residing in rural and remote areas, seniors, and other populations that either lack access to web-based communications or who may only have access through public means. (166 Cong. Rec. H8619 (daily ed. Dec. 21, 2020)).

Background

On May 27, 2020, the Department published in the Federal Register (85 FR 31884) a new, additional safe harbor regulation, codified at 29 CFR 2520.104b-31, for employee benefit plan administrators to use electronic media, as a default, to furnish information to participants and beneficiaries of retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The regulation allows plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that certain disclosures are available on a website, or to furnish disclosures via email. Individuals who prefer to receive disclosures on paper can request paper copies of disclosures and opt out of electronic delivery entirely. The final rule was effective on July 27, 2020.

Response

Our preliminary assessment is that the subject regulation is unlikely to have any negative impact on the populations identified in the explanatory statement because of the regulation’s specific safeguards against such impacts. The regulation only permits electronic delivery by default to individuals that actually have internet access – that is, an employee must have either provided the employer with an email address or a web-based mobile number, or been assigned an electronic address by the employer for business reasons other than receiving ERISA disclosures. If an employee’s email address or web-based mobile number becomes invalid or inoperable, the plan administrator can no longer rely on the regulation to send disclosures to that person electronically, unless the problem is fixed. Thus, the safe harbor regulation does not apply to individuals that lack access to web-based communications. In addition, the regulation includes the critical condition that individuals who prefer to receive disclosures on paper can request paper copies of disclosures and opt out of electronic delivery entirely, at any time, and

free of charge. The Department designed these fundamental conditions of the safe harbor specifically to protect the populations identified in the explanatory statement.

Both the development of the subject regulation and our preliminary assessment in this report reflect our consideration of current data on internet access in the United States. A Pew Research Center survey conducted in early 2021, for example, found that only seven percent of U.S. adults *do not* use the internet.¹ The U.S. Census Bureau found that, in 2019, 86.4 percent of U.S. households had a broadband internet subscription.² A 2018 study concluded that 93 percent of households owning defined contribution retirement accounts had access to, and used, the internet in 2016.³ Similarly, a 2015 survey of retirement plan participants' online habits indicated that 99 percent reported having internet access at home or at work, and 88 percent of respondents reported accessing the internet on a daily basis.⁴ Although the Department does not collect data on internet access as part of its ordinary oversight activities, the Department does monitor trends in internet access as new data become available from other sources.

In addition, the Department believes that it would be premature and uninformative to attempt to conduct an assessment of the impact of the subject safe harbor regulation at the present time, because any impact cannot be isolated from other temporary sub-regulatory guidance that separately allows plan administrators to use different electronic methodologies to furnish required ERISA disclosures. For example, Field Assistance Bulletin 2006-03 (Dec. 20, 2006) allows plan administrators who meet specified criteria to provide continuous website access to pension benefits statement information required by ERISA section 105. Similarly, Field Assistance Bulletin 2008-03, Q&A 7 (Oct. 2007), which provides supplementary interpretive guidance on the Department's qualified default investment alternative regulation (29 CFR 2550.404c-5), allows plan administrators who want to send required QDIA notices electronically to rely on either the Department's 2002 safe harbor or the regulations issued by the Department

¹ Pew Research Center, "7% of Americans don't use the internet. Who are they?" (Apr. 2, 2021), survey of U.S. adults conducted Jan. 25-Feb.8, 2021, available at <https://pewrsr.ch/2GrhLUj>. The survey found that several demographic groups reported a greater percentage of adults that do not use the internet than the overall finding: 25 percent of adults over age 65 and 10 percent of adults residing in rural areas. See also Pew Research Center, "Some digital divides persist between rural, urban and suburban America" (Aug. 19, 2021), available at <https://pewrsr.ch/3k5aU6J>. The Jan. 25-Feb.8, 2021 survey found that 72 percent of rural Americans have broadband at home compared with 79 percent of suburban and 77 percent of urban Americans. Further, 80 percent of rural Americans report using the internet on a daily basis compared with 88 percent of those in urban areas. Rural communities have made significant gains, however, with rural home broadband increasing by 9 percent since 2016. The recently passed Infrastructure Investment and Jobs Act (Pub. L. 117-58) provided funding for broadband expansion programs targeting underserved households and communities, as did the Consolidated Appropriations Act of 2021 (Pub. L. 116-260) and Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136).

² "Types of Computers and Internet Subscriptions" Table S2801, American Community Survey, U.S. Census Bureau (2019).

³ Peter Swire and DeBrae Kennedy-May, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery—2018 Update," p. 19 (April 2018). See also Investment Company Institute, "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2021," ICI Research Perspective (October 2021), Vol. 27, 11. In 2021, 95% of households owning mutual funds had internet access.

⁴ 2015 Telephone Survey Conducted by Greenwald & Associates for the SPARK Institute. Improving Outcomes with Electronic Delivery of Retirement Plan Documents, Quantria Strategies, (June 2015), available at https://www.sparkinstitute.org/contentfiles/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

of the Treasury and the Internal Revenue Service at 26 CFR 1.401(a)–21 relating to use of electronic media. The Department also issued temporary relief in response to the COVID pandemic that allows plan administrators flexibility in the use of electronic disclosures.⁵ This sub-regulatory guidance predates the effective date of the safe harbor regulation, and the Department understands that many plans intend to rely on that guidance until it expires, as opposed to the subject safe harbor regulation.

⁵ Most of this sub-regulatory guidance expires in January of 2022, but the Department’s COVID-19 has some rolling applicability beyond that date based on an announced end of the COVID-19 National Emergency. See EBSA Disaster Relief Notice 2020-01, available at www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01.pdf.