

DOL Finalizes Safe Harbor Regulation for Retirement Plan Electronic Disclosures

PUBLISHED: May 29, 2020

The Department of Labor (“DOL”) published a [final rule in the Federal Register](#) on May 27th that establishes a new electronic disclosure safe harbor. This rule, “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” (“Rule”), provides an additional safe harbor for the furnishing of pension plan information and disclosures to participants, beneficiaries and alternate payees. The DOL Rule responds to Trump Administration Executive Order 13847 [Strengthening Retirement Security in America](#) and finalizes the **October 23, 2019 proposed rule**. DOL estimates that over the next decade the Rule will save approximately \$3.2 billion in net costs for retirement plans by eliminating significant materials, printing, and mailing costs associated with furnishing printed disclosures. The Rule will be effective on July 27th, 60 days after it is published in the Federal Register. Below, we outline key takeaways, identify changes from the proposed rule, summarize the Rule and share our observations about some of its key elements.

Key Takeaways

Overall, the Rule could greatly expand electronic delivery of retirement plan notices. Importantly, the Rule would allow plans to use mobile applications to deliver notices and disclosures, possibly paving the way for greater overall plan engagement by retirement plan participants. Nevertheless, the Rule is not without its challenges, and it remains to be seen whether the administrative demands of the Rule will outweigh its usefulness for the majority of plans. Importantly, the Rule brings an end to the ability to provide pension benefit statement information via a “continuous access website,” as permitted under Field Assistance Bulletin 2006-03 (“FAB 2006-03”), likely resulting in fewer participants receiving their pension benefit statements

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

[Michael Del Conte](#)
mdelconte@groom.com
(202) 861-6657

[Elizabeth Dold](#)
edold@groom.com
(202) 861-5406

[Jennifer Eller](#)
jeller@groom.com
(202) 861-6604

[Ellen Goodwin](#)
egoodwin@groom.com
(202) 861-6630

[Allison Itami](#)
aitami@groom.com
(202) 861-0159

electronically. DOL also eliminated the ability to rely on either the DOL's or the IRS' electronic delivery rules for qualified default investment alternative notices. As with the proposal, DOL limited the new safe harbor to retirement plan documents and information thereby excluding employee welfare benefit plans and their related notices (e.g., COBRA Notices and notices of adverse benefit determinations for group health and disability plans). Finally, during the COVID-19 emergency, plans have "good faith" relief allowing notices to be provided through email, text messaging and continuous access website. See EBSA Disaster Relief Notice 2020-01. Given the breadth of this relief, it is likely that many plans will choose not to rely on the new Rule until after the announced end of the COVID-19 emergency.

Changes from the Proposal

Changes from the proposal include:

- Rather than limiting the safe harbor to website links, the Rule permits plan email or texts to attach documents (e.g., in PDF form).
- The Rule specifically allows for the use of mobile apps and other technologies beyond email.
- The requirement that plan fiduciaries undertake additional diligence to update contact information for participants who leave employment is limited to employer-provided addresses.
- Rather than allowing plans to take down superseded documents, the Rule requires all documents to remain available on a website until the later of one year or the time the document is superseded. The initial notice of availability provided to participants must include a caution regarding this one-year retention period.
- Quarterly statements cannot be provided via a single annual notice of internet availability, and must be disclosed with an individual notice of internet availability each quarter.

Groom was able to ask DOL several questions on DOL's roll-out call that provided additional clarity to certain provisions. We have incorporated DOL's responses into the provision descriptions below and have highlighted the improvements over the existing safe harbor.

Summary of the Rule and Observations

The new safe harbor relies on a "notice and access" approach. In this regard, the Rule provides a pathway for plan fiduciaries to satisfy document and notice delivery obligations by posting required disclosures on a website while also delivering an electronic notice of availability. In a departure from the prior DOL safe harbor, the Rule imposes no requirements on plan fiduciaries to analyze whether individual participants interact with an electronic system as a function of their job; nor does it impose any specific requirements that participants affirmatively consent to electronic delivery.

The Rule establishes a framework that identifies "covered individuals" to whom "covered documents" may be provided electronically, as long as additional requirements of the safe harbor are met. We describe this new safe harbor below, including our observations.

GROOM

- Covered Individuals. The Rule defines a “covered individual” as a participant, beneficiary, or other individual entitled to covered documents (discussed below), and who provides the employer, plan sponsor, plan fiduciary (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 employer assigns an electronic address to an employee, the employee is treated as if he or she provided the electronic address.

GROOM INSIGHT. The term “covered individual” broadly includes any participant, beneficiary or alternate payee, regardless of employment status, who has provided an electronic address to the employer, sponsor or fiduciary. Unlike the proposal, the Rule makes clear that an employer-assigned electronic address must be used for other employment purposes and cannot be assigned solely for purposes of providing documents under the safe harbor. The Rule’s preamble also makes clear that DOL does not believe that a plan could use electronic addresses that have been gathered by third-party locator services.

- Covered Documents. “Covered documents” are defined as any document that the plan administrator is required to furnish participants and beneficiaries under Title I of ERISA, except for any document that must be furnished upon request.

GROOM INSIGHT. Welfare plan related documents are not covered by this safe harbor. Documents furnished upon request that are not covered by the Rule include plan documents, trust agreements, Form 5500s and other documents provided pursuant to ERISA section 104(b)(4).

- Initial Notice of Internet Availability. Before relying on the safe harbor for any covered individual, the plan must provide a paper notice. This requirement applies both to existing participants and any employees that become eligible after the plan begins using the Rule. This initial notice must explain that covered documents will be provided electronically to an electronic address, identify the specific electronic address to be used for the individual, include any instructions to access the documents, include a notice that materials may not be available for more than a year or, if later, after the posted document has been superseded by a subsequent version of the document, and an explanation of the rights to request a paper version of any document and the right to opt out of electronic delivery globally. This paper notice is required both before a plan fiduciary begins to rely on the safe harbor (after its effective date), and when employees are newly hired over time.

GROOM

GROOM INSIGHT. In the Rule, DOL clarified that this initial notice must be provided in paper form, regardless of whether the plan is currently relying on DOL's current electronic safe harbor. New in the Rule is a requirement that the initial notice of internet availability include the email address or smartphone number that the plan will use as the primary method of delivery. This requirement could make the notice more difficult and expensive for plans, as each notice must contain another individualized field. Helpfully, the Rule's preamble confirms that the initial notice of internet availability does not need to be a standalone document. When asked, DOL staff indicated that the notice could contain multiple electronic addresses, and could note that if an initial delivery to the primary address is unsuccessful, that the notice will be delivered to the secondary electronic address. In the proposal, DOL provided an explanation of what it means for a document to be calculated to be understood by the average plan participant, stating that a notice that uses short sentences, everyday words, active voice, avoids double negatives and has a Flesch Reading Ease test score of at least 60 would satisfy this requirement. The final Rule encourages plan fiduciaries to ensure that distributed information can be understood by an average plan participant, but does not require a certain Flesch Reading Ease score.

- Annual Notice of Internet Availability. Multiple documents can be announced in a single annual notice, subject to a special rule. For these purposes annual means within fourteen months of a previously provided combined annual notice. The special rule may only be used for:
 - a summary plan description,
 - covered documents or information that must be furnished annually,
 - any other covered document authorized by the Secretary of Labor, and
 - any applicable notice required by the Code if authorized by the Secretary of the Treasury.

The annual notice is subject to similar content requirements as the initial "Notice of Internet Availability." If documents are not subject to the special rule, a separate annual notice must be provided.

GROOM INSIGHT. The Rule excludes some of the documents that had been listed in the proposal as subject to the special combined notice rule. These documents include SMMs and quarterly benefit statements within the meaning of section 105(a)(1)(A)(i) of ERISA. Participants must now receive an individual notice of internet availability when these documents are furnished through a website.

GROOM

- Website Standards. The plan fiduciary is required to ensure the existence of the website that is being used to post the covered documents, and to ensure that the website meets certain minimum standards. Specifically, the plan fiduciary must take measures reasonably calculated to ensure that:
 - the covered document is available no later than the date it is required to be furnished, the document remains available for at least one year, or, if later, until it is superseded by a subsequent version,
 - the covered document is presented in a manner calculated to be understood by the average plan participant,
 - the document is maintained in a widely-available format (or formats) suitable for viewing online and can be clearly printed on paper and allow for the document to be permanently retained in an electronic format,
 - the covered document is searchable electronically, and
 - the website protects confidential information.

GROOM INSIGHT. One potentially very significant change included in the Rule will allow the use of mobile applications or another “electronic-based information repository, to which covered individuals have been provided reasonable access.” By including this fairly broad definition within the standards set out under the regulation for internet websites, the Rule expanded the ways in which persons entitled to the disclosure and notice documents covered by the regulation may receive them. It is possible that this change will speed the development of mobile applications and other technologies that will enhance participants’ engagement with their defined contribution retirement accounts. These technologies could increase security of participant accounts against losses due to identity theft and could allow for the delivery of additional services, such as investment education or investment advice.

Another potentially significant change is the addition of a requirement that all documents must be available for a year, even where the document has been superseded by a new version. In conversations, the DOL indicated that out-of-date documents could be labeled to make clear that the document is not the current version or placed in a website “archive” for historical documents.

- Alternative method for disclosure through email systems. In a change from the proposal, the Rule permits a plan to furnish a covered document in the body of the email or as an email attachment. Any such email must include:

GROOM

- a subject line that reads “Disclosure about Your Retirement Plan,”
- an identification of the covered document by name, and
- a brief description of the covered document.

GROOM INSIGHT. The direct delivery method is welcome and is likely to provide participants with easy access to documents that do not involve confidentiality concerns without the need to log on to a separate website.

- Right to Request a Paper Version or Opt Out. The plan is required to provide paper versions of covered documents upon specific request, to comply with requests to opt out of electronic disclosure entirely, and to maintain procedures governing these requests. In addition, the system for furnishing a Notice must alert the plan fiduciary of an invalid or inoperable address. The plan fiduciary is required to maintain procedures designed to resolve the invalid address such as by sending the notice to a secondary address, obtaining a new address from the individual, or treating the individual as if they opted out of electronic delivery.

GROOM INSIGHT. The Rule requires that participants be permitted, at any time, to request a paper copy of any notice and, separately, to globally opt out of all electronic delivery. Plan fiduciaries may not unduly inhibit or hamper a participant’s request to opt out or the processing of either request. In response to questioning about these provisions, the DOL agreed that, as long as a global opt-out is *available*, allowing participants to opt out on a more piecemeal basis (e.g., to opt out of e-delivery only for certain types of communications) would not be viewed as unduly hampering or inhibiting the global opt-out right. While it may be that making available a global opt-out right is the initial approach taken by many plans, the DOL’s acknowledgment may be helpful in removing uncertainty about future iterations of electronic delivery technologies.

- Severance from Employment. Where the plan uses an employer-assigned electronic address for electronic delivery, a special rule provides that the plan fiduciary must try to ensure the continued accuracy of the electronic address following a severance from employment, or to obtain a new electronic address to allow the participant to receive covered documents electronically.

GROOM

GROOM INSIGHT. Unlike the proposal, the Rule limits this special rule to situations where the employer has assigned an electronic address to employees for purposes of providing covered notices and other employment-related information. This is a welcome change from the proposal, as many commenters indicated that, for many participants, personal email addresses and smartphone numbers are unlikely to change after severance from employment.

- **Temporary Unavailability of Covered Documents.** A plan fiduciary will not fail to be in compliance with the Rule if covered documents become temporarily unavailable due to unforeseeable events or circumstances beyond the control of the plan fiduciary, provided procedures are in place to ensure the documents are available and the plan fiduciary takes prompt action to cure any unavailability as soon as practicable on becoming aware of the problem.
 - **Effective Date.** The Rule formally applies to disclosures provided beginning on July 27, 2020 (60 days following the Rule's publication date) if its conditions are met. However, the preamble clarifies that DOL is permitting plans to rely on the new Rule immediately through a non-enforcement policy.
-

GROOM INSIGHT. Although the Rule is immediately available, plans would be required to issue a paper initial notice of internet availability in order to begin using the Rule. At the same time, DOL has announced "good faith" relief from participant-level disclosure deadlines provided that the plan fiduciary provides the disclosure as soon as practicable, including through email, text messaging and continuous access website. See EBSA Disaster Relief Notice 2020-01. This "good faith" relief extends until 60 days following the announced end of the COVID-19 emergency. Given that the good faith relief policy specifically envisions electronic disclosure methods without substantive conditions, it might be best to rely on DOL's COVID-19 guidance through the end of the COVID-19 emergency before transitioning to reliance on the new Rule.

- **Intersection with IRS Electronic Delivery Rules.** The IRS issued its own electronic delivery rules in 2006 which permit the use of electronic means to deliver notices required by the Internal Revenue Code generally where the participant either has the ability to effectively access the electronically provided document, or upon affirmative consent. These Code-required notices include auto enrollments notices, safe harbor notices, QJSA and QPSA notices, 204(h), 402(f) and other notices. The DOL's preamble indicated that its rule is intended to "align" in large part

GROOM

with the IRS's electronic delivery rules; however the DOL did not obtain formal IRS confirmation that following the new Rule will satisfy the IRS's electronic delivery standard.

GROOM INSIGHT. Without confirmation that the IRS agrees that the new safe harbor will meet the IRS's "effective ability to access" standard, we are left with two different standards for the use of electronic delivery — one that applies to ERISA-required notices, and a separate standard to Code-required notices. While DOL's preamble indicates that the IRS intends to issue further guidance in this area, it is unclear when that guidance might be issued and what that guidance might entail.

Next Steps/Conclusion

While the new safe harbor permits the use of electronic delivery for a wider range of employees and through a broader range of methods than DOL's existing safe harbor, it comes with ongoing administrative requirements. For example, procedures to administer opt-out requests, follow-up on terminations, and follow-up on undeliverable notices mean that plan fiduciaries or their service providers must do significant work to rely on the new safe harbor. The loss of the virtually condition-free use of continuous access websites to distribute quarterly benefit statements is a significant change for many plans. Ideally, IRS will formally acknowledge DOL's new safe harbor as a means of meeting its own e-delivery standard, but it has not yet done so. In the meantime, plan sponsors and fiduciaries should consider several steps:

- **Retirement plan documents required to be furnished under Title I of ERISA:**
 - Consider relying on good faith e-disclosure option under EBSA Disaster Relief Notice 2020-01 through the end of COVID emergency.
 - Inventory your retirement plan's current reliance on electronic disclosure – including use of a "continuous access website" for quarterly statements and decide how to provide statements after January 2022.
 - Consider whether the plan could comply with requirements to deliver a paper notice of reliance on the safe harbor, follow-up on undeliverable notifications, administer opt-out requests, and follow-up on severances from employment.
- **Welfare plan documents and retirement Plan documents required to be furnished upon request:**
 - Leave in place current procedures for electronic delivery of ERISA disclosures for welfare plans and on-request documents for retirement plans.
- **Documents required to be furnished under the Internal Revenue Code:**

GROOM

- Inventory whether and how your plan relies on electronic disclosure for Code-required disclosures.
- Leave in place current procedures for electronic delivery and look for IRS guidance as to whether compliance with the Rule would satisfy the IRS' "effective ability to access" standard.

GROOM