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Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

Re: EBSA RIN 1210-AB90
Default Electronic Disclosure by
Employee Pension Benefit Plans

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates the opportunity to comment on the U.S. Department of Labor's (the "Department") proposed rule establishing a new safe harbor for the use of electronic delivery as the default means by which documents may be furnished to participants in ERISA-covered pension plans.[1]

Prudential, as both a Fortune 50 company with its own benefit plans and a provider of recordkeeping and financial services to ERISA plans covering an estimated 20 million plan participants and beneficiaries, commends the Department's effort to promote the use of electronic media as the default means by which ERISA-required disclosures may be furnished. Consistent with the Department's own findings, we believe furthering the use of electronic disclosure will not only facilitate access to important plan information, but also will result in cost-savings for tens of millions of plan participants and beneficiaries, as well as plan sponsors, through lower plan administration costs.

With regard to costs, the Department estimates that the move from paper to electronic disclosure under the proposal would result in an estimated net savings of $2.4 billion, over 10 years, annualized to $274 million per year and, we note, that

[1] 84 FR 56894 (October 23, 2019).

estimate only takes into account seven specific retirement plan disclosures and does not factor in the potential cost savings that could result from extending the proposal to all ERISA-covered plans and providing greater flexibility in connection with the consolidated notice of internet availability.[2] Obviously, for participants in defined contribution plans, reductions in administrative costs can translate into increased retirement savings. Similarly, reduced administrative costs for other ERISA-covered plans can translate into increased or new benefit offerings for plan participants and beneficiaries. For these reasons, we support and encourage the Department's effort to further the use of electronic media and to explore alternatives to the current disclosure regime.

Given the limited period of time within which to both comment on the proposed rule and respond to the incorporated Request for Information and, taking into account the importance to affording plans and their participants and beneficiaries relief on the earliest possible date, the focus of this letter will be on the proposed rule.[3] We will separately review the Request for Information and follow up with the Department, as appropriate, at a later date.

With regard to the proposal generally, we submit the following recommendations:

The final rule should apply to all ERISA-covered plans (2520.104b-31(c)(2))

While we appreciate the Department's effort to respond, in the first instance, to the directive of Executive Order 13847, we agree with the Department that the Executive Order does not limit "the Department's ability to take action with respect to employee welfare benefit plans, especially to the extent similar policy goals, including the reduction of plan administrative costs and improvements of disclosures' effectiveness, may be achieved."[4] And, we believe the proposal does not, itself, limit the Department's ability to expand the application of the final rule to include welfare plans.

Taking into account our many years of experience with a broad array of employee benefit plans, we are unable to find any basis for distinguishing the benefits to be derived by pension plans under the proposal (*e.g.*, reductions in administrative costs and improvements in the effectiveness of disclosures) from those that would flow to welfare plans should the final rule be expanded in application. Thus, from our perspective, as a major provider of benefit plan-related services, the policy goals to be

[2] Id. at 56911.
[3] 84 FR 56908, section D of the preamble.
[4] 84 FR 56902.

achieved by pension and welfare plans through improved electronic delivery, especially given the similarity in many of the required disclosures (e.g., SPD, SMMs, SARs, claims notifications) are indistinguishable. Accordingly, there would appear to be no policy basis on which to justify not extending the final rule to include welfare plans.

Moreover, separate delivery rules for different plans are likely to cause unnecessary confusion on the part of those participants who are receiving their required pension plan disclosures solely via electronic media, while their required group health, life and disability disclosures are being furnished solely in paper form through the mail. Such confusion could cause some sponsors of multiple plans to forego the benefits of electronic delivery in favor of uniformity and simplicity.

In terms of the proposal itself, the framework, with reservation of paragraph (a)(2) of sec. 2520.104b-31, easily lends itself to encompassing welfare plans. We also understand that, given the similar policy goals and an adequate public record on which the agency can rely, the Department could include welfare plans within the scope of its final rule, and we encourage the Department to do so.

If, however, the Department believes that shared agency jurisdiction over group health plans would cause a delay in promulgating a final rule, we would encourage the Department to except only the disclosures of such plans over which there is shared jurisdiction. Sponsors of, and participants in, group health and other welfare plans should not be deprived of administrative costs savings and improved disclosures while the responsible agencies attempt to resolve issues unique to certain group health plan disclosures.

Preserve 2520.104b-1(c) and related guidance

With regard to 2520.104b-1(c), we support the Department's approach to supplement that guidance with the proposal, although we believe adding a cross-reference in 2520.104b-1(c) to 2520.104b-31 would better ensure the provisions of the new alternative are considered in conjunction with a plan sponsor/fiduciary assessment of electronic delivery options.

We also recommend that the Department preserve, if not indefinitely, for a period of years, the guidance supplementing 2520.104b-1(c), namely FAB 2006-03, FAB 2008-03, and Technical Release 2011-03R. While we recognize there may be some overlap, the aforementioned guidance has been relied upon by many of our customers. We are concerned that if such guidance is superseded by the new rule there may be

inadvertent or unavoidable compliance gaps.[5] Among other things, we note that the aforementioned guidance in some cases permits reliance of either Labor Department or IRS distribution rules and, in the case of QDIA notices, facilitates satisfying both Labor Department and IRS disclosure requirements.[6]

We note that the aforementioned has served plans and their participants and beneficiaries well and, to the best of our knowledge, has not resulted in any participants or beneficiaries being adversely impacted by a plan's reliance of such guidance. Thus, we see no downside for plan participants or beneficiaries resulting from the Department continuing to permit reliance on that guidance following adoption of the new rule, especially while plan sponsors/fiduciaries transition to compliance with the new e-disclosure provisions. We do not believe such a determination by the Department requires a change to the operative language of the proposal, but merely a statement clarifying the Department's position in the preamble accompanying the final rule.

Broaden or clarify the rule to encompass the direct delivery of documents as part of an electronic communication, rather than just promoting website access.

As framed the proposal appears focused on making documents available via an internet website and, while we agree this is a significant step forward, the final rule should address or make clear the rule's application to the direct furnishing of documents in electronic form, such as a pdf, as part of an email, text or other direct electronic communication with plan participants and beneficiaries. While many of our clients utilize a website, many other clients rely on the direct furnishing of documents in electronic form to their plan participants and beneficiaries.

Such an approach to electronic delivery strikes us as wholly consistent with the Department's goals of reducing administrative costs and improved disclosure efficiencies and, thus, should clearly be encompassed within the final regulation. Such a clarification would also ensure that plan administrators have the flexibility necessary to ensure that their method of electronic delivery accommodates their plan operations and the best interests of their plan's participants and beneficiaries.

Lastly, while we believe the term "website" is generally understood, we believe it would be helpful for the Department to clarify that the term is intended to merely

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[5] *See* 84 FR 56900, ftnt 50 in which the Department indicates that the adoption of a final rule would supersede the relevant portions of FAB 2006-03, FAB 2008-03 and Technical Release 2011-03R.
[6] *See* Field Assistance Bulletin 2008-03, Q&A 8, April 29, 2008.

represent an electronic source for accessing information and should be interpreted broadly to accommodate advances in technology and changes in terminology.

Do not superimpose a readability standard on participant communications (2520.104b-31(d)(4)(iv))

Clause (iv) of paragraph (d)(4) of the proposal superimposes a readability test on the statutory and regulatory standard that materials be "written in a manner calculated to be understood by the average plan participant." It is unclear why, in conjunction with this proposed rule, the Department now finds it necessary to superimpose a readability standard - a Flesh Reading Ease test score of a least 60 on participant disclosures. In addition to increasing plan administrative costs, we are very concerned about the potential spillover implications for the imposition of such a standard on all other ERISA-required disclosures, especially when viewed as the Department's interpretation of what it means to be "written in a manner calculated to be understood by the average plan participant."

It is not difficult to imagine, particularly in this highly litigious environment, the imposition of such a standard being interpreted by the plaintiff's bar as the new legal standard applicable to all ERISA required disclosures, exposing plan sponsors and fiduciaries to significantly increased litigation and other risks. We, therefore, encourage the Department to abandon the establishment of any specific readability standard, without regard to the rule being characterized as a "safe harbor" approach.

The applicability date should be the same as the effective date of the final rule (2520.104b-31(k))

Given the opportunity for significant administrative cost savings and improved effectiveness of required disclosures under the proposal, we encourage the Department to conform the applicability date with the effective date. As proposed the effective date would be 60 days after the date of publication of the final rule in the Federal Register; whereas the applicability date would be the first day of the first plan year following the publication date. Inasmuch as it is highly unlikely that the Department will be able to publish a final rule in 2019, calendar year plans would not be able to avail themselves of the new rule until January, 2021.

As recognized by the Department, the rule is a safe harbor, with respect to which compliance is voluntary.[7] The Department notes in this regard that administrators, therefore, will not have to be in compliance with all of the conditions as of the

[7] 84 FR 56908.

applicability date. For that same reason, we recommend that the Department provide the earliest possible applicability date in order to permit those plans in a position to comply earlier than 2021 to do so and start to enjoy the benefits of lower administrative costs and enhanced efficiencies in their disclosure regime. Given the voluntary nature of the rule, we see no adverse consequences for plans or their participants and beneficiaries resulting from the Department permitting compliance as soon after publication of the final rule as is possible.

In addition to the foregoing, we submit the following comments, on a paragraph by paragraph basis, for your consideration:

(b) Covered individual

The proposal defines "covered individuals" as those that provide an electronic address and those with an electronic address "assigned by an employer to an employee *for this purpose*." (Emphasis supplied) Inasmuch as employers may assign electronic addresses for a variety of business purposes and not solely for the receipt of benefit-related information and material, we suggest that the referenced language be clarified similar to the following: "… assigned by an employer for a purpose that includes the delivery of covered documents …."

(c)(1) Covered individual documents

Except for the limitation to pension plans, an issue addressed above, we support the Department's approach to defining covered documents. However, we do recommend that the Department make clear that plans are not foreclosed from furnishing "requested" documents electronically when a participant or beneficiary requests or agrees to such a method of delivery. As a policy matter, it would, in our view, be inconsistent with the overall goal of the proposal to require that participants and beneficiaries who affirmatively request or agree to the furnishing of "requested" documents electronically to nonetheless be required to be furnished a paper version of those documents. We do not believe the Department intended otherwise, but a clarification would be helpful.

(d)(2) Notice of internet availability - Timing

We support the Department's framing of the timing requirements and believe that the encompassed two-month window/grace period provides the necessary flexibility to ensure on-going compliance, without adversely impacting participant and beneficiary access to required disclosures*(d)(3) Notice of internet availability - Content*

First, we do not believe a model notice of internet availability is necessary. Second, we recommend that the content of the proposed notice be revisited. In this regard, we believe content items (i) through (iii) should be satisfied by merely identifying the document(s) that are new or modified, such as Updated Summary Plan Description for your retirement plan, Individual Benefit Statement for your retirement plan, Annual Funding Notice for your retirement plan. Such an identifier will put participants on notice as to the plan and the specific document or documents, thus rendering unnecessary, in our view, a statement or legend that a document relates to their pension or other employee benefit plan. Adding "important" will become meaningless over time, given that all such communications will be described as such, and adding a description of document only complicates the notice making it less likely it will be read at all. We believe the more succinct the notice, the more likely it is to serve as a meaningful notification for participants and beneficiaries.

As the Department finalizes the content requirements for the notice of internet availability, it should take into consideration the use of text message, mobile application notification or other means of electronic communication with character limitations. In this regard, we find participants and beneficiaries, the disabled in particular, are using their mobile phones and tablets to communicate with us through text, apps, and chat. Accordingly, we request that the Department specifically consider the growing use of such media as it considers our recommendations and revisions to the notice of internet availability.

We also recommend that notice not be required to include a statement as to the right to request paper or opt out of receiving documents electronically, if the participant or beneficiary is otherwise notified of these rights annually. Again, it is our experience that the more information you include in a notice, the less the likelihood the notice will be effective in its communication. An annual notice exception would adequately ensure that all participants and beneficiaries are informed of these important rights.

Finally, we encourage the Department to drop the requirement for a telephone number to contact the administrator or other plan designee and merely require that the notice include a source for information or questions, whether by phone, email, text or chat.

(d)(4) Notice of internet availability - Form and manner of furnishing

First, with regard to clause (i), we recommend that the notice of internet availability be permitted to be furnished in either electronic or paper form. Such an option

would provide plan administrators the flexibility to determine what form of delivery of such a notice would be in the best interest of their plan's participants and beneficiaries.

Second, with regard to clause (iii), we do not believe the notice of internet availability, should be required to be furnished as a separate notice when the document at issue accompanies the communication. In this regard, we note our comment above with regard to clarifying that the rule applies to the direct delivery of documents, not merely documents accessible via a website. Also, we believe a separate, standalone notice of internet availability would make the most sense in conjunction with an annual notification type requirement, similar to what we proposed in our discussion of paragraph (d)(3).

Our concerns with regard to the readability standard imposed by clause (iv) are set forth above.

(e) Standards for internet website

In general, we believe the standards encompassed within the proposal are workable. With regard to issues raised by the Department in the preamble accompanying the proposal,[8] we do not believe that additional actions/standards are necessary to ensure that an effective and useful presentation of covered documents is available to hand-held device only individuals. We believe that the plan's fiduciaries and administrator are best positioned to create a workable user experience for plan participants and beneficiaries, without the imposition of specific standards, that, ultimately, could constrain flexibility and unnecessarily inhibit creativity and innovation in this area.

On the retention of documents on a website, we support making documents available until they are superseded by a subsequent version. However, it would be helpful for the Department to clarify that nothing in the rule precludes making available on a website historical documents that may continue to have relevance for some participants

On the topic of privacy and security, we believe existing rules and plan practices are adequate to address privacy and security concerns. Accordingly, we would discourage the Department from attempting to take on those issues beyond the standards set forth in the proposal, at paragraph (e)(3).

[8] 84 FR 56904

(f) Right to paper copies

The Department notes that the proposal does not address issues relating to a participant's or beneficiary's understanding or knowledge of contents of covered documents. The Department also notes that the provisions do not impose an affirmative obligation on plan administrators to monitor participant access to websites. The Department invited comments on both issues.[9] We do not believe the standards for utilizing electronic delivery, in the context of the issues raised, should be any different for plan administrators utilizing electronic media than those imposed on plan administrators that utilize hard copy delivery methods. Moreover, designing or modifying electronic delivery systems to accommodate such requirements could entail significant additional costs and unnecessarily expose plan administrators and fiduciaries to additional liability.

With regard to paragraph (f)(4), we commend the Department for affording plan administrators flexibility in determining the best means by which to address notifying participants of document availability when an electronic address is determined to be inoperable.

(g) Initial notification of default

In response to the Department's inquiry, we do not believe a model notice is needed for purposes of satisfying this requirement.[10]

However, with regard to the initial notification requirement, we do believe that this provision should be modified to eliminate the requirement that the initial notification be furnished in paper form for all participants. In recognition of the fact that there are categories of participants who, for many years, have been receiving plan-related information, documents, notices, etc. electronically and who would expect that all plan-related disclosures to be so furnished, there should be a limited electronic delivery exception for the initial notification of default. Requiring these participants to receive initial notification in paper form will create participant confusion and degrade the user experience. In addition, participants who are accustomed to accessing plan disclosures and other important plan-related materials digitally may not open plan-related materials sent via U.S. mail on a timely basis.

[9] 84 FR 56906

[10] *Id.*

Specifically, we recommend that electronic notification be permitted for all participants who are receiving disclosures electronically either as a result of being "wired at work" or having affirmatively elected to receive required disclosures electronically. With regard to both categories of participants, there is, as noted, an expectation that plan-related information, notices, and documents will be furnished electronically and, thus receipt of the initial notification in paper form may, inadvertently or intentionally, be disregarded and not garner the attention it deserves by such participants. We encourage the Department to amend the rule accordingly.

(h) Special rule for severance from employment

We believe it would be helpful if the Department clarified that pursuing the measures set forth in paragraph (f) for invalid or inoperable emails are sufficiently reasonable steps for addressing delivery issues attendant to severance from employment.

(i) Special rule for consolidation of certain notices

We recommend that the final rule, with regard to the permitted consolidation of certain notices, permit consolidation of notices of internet availability for any documents required to be furnished on a periodic (*e.g.,* quarterly, annually) basis, including plan-related information required by 29 CFR 2550.404a-5(c). While we recognize much of this information might otherwise be available through other sources, such as a plan's summary plan description, we nonetheless think it would be helpful for purposes of those plans providing a more integrated .404a-5 type disclosure to clarify that a consolidated notice suffices for purposes of such disclosures.

Additionally, we encourage the Department to consider how plans can continue, consistent with any final rule, to consolidate QDIA notices with the notice requirements in Internal Revenue Code sections 401(k)(13)(E), 414(w)(4), and 401(k)(12)(D) for Qualified Automatic Contribution Arrangement (QACA), Eligible Automatic Contribution Arrangement (EACA), and traditional safe harbor notifications. On this point also see our earlier comment on preserving 2520.104b-1(c) and related guidance, including Field Assistance Bulletin 2008-03.

In concluding, we welcome the opportunity to work with you and your staff on this and other issues critical to ensuring the financial security of working Americans. Should you have any questions concerning any of the matters discussed herein, please contact Robert J. Doyle, Vice President, Government Affairs, at robert.j.doyle@prudential.com or 202.327.5244.

Sincerely yours,

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