

SUBMITTED ELECTRONICALLY

November 22, 2019

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

Re: Default Electronic Disclosure by Employee Benefit Plans under ERISA [RIN 1210-AB90]

Ladies and Gentlemen:

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to provide comments on the proposed regulation (“Proposal”) and Request for Information (“RFI”) published by the Department of Labor (“Department”) in the Federal Register on October 23, 2019 that would establish an additional safe harbor to furnish information electronically to participants and beneficiaries for use by employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).² Fidelity has included below comments on the Proposal and information in response to a portion of the Department’s RFI. Fidelity will continue to review the important questions posed in the RFI and intends to provide additional responsive information regarding improvements that can be made to notice content.

Fidelity commends the Department for its Proposal, which recognizes that embracing technology is a commonsense reform for today’s retirement savers. As one of the nation’s leading retirement services providers, Fidelity is committed to ensuring that retirement plan participants are informed, engaged, and saving enough to meet their retirement security goals. The Department’s Proposal is an important step toward providing participants with information they need to meet those goals in a more timely, convenient, and accessible manner.

Fidelity believes that electronic delivery (“e-delivery”) should be the primary distribution method for retirement plan disclosures. According to a 2015 study, 84% of retirement plan participants find it

¹ Fidelity was founded in 1946 and is one of the world’s largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 25 million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts (“IRA”) with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

² U.S. Department of Labor, Default Electronic Disclosure by Employee Benefit Plans Under ERISA, 84 *Fed. Reg.* 56,894 (2019).



acceptable to make e-delivery the default option (with the option to request paper at no cost to the participant).³ Preference for digital disclosures is clear; in fact, less than 1% of participants change their delivery preference to paper where plan sponsors use workplace emails for e-delivery under the current regulations. E-delivery also encourages participants to engage with their investments, which results in better outcomes, including higher deferral rates and improved retirement preparedness. The SPARK Institute’s data indicates that savers with e-delivery contribute 72% more and are three times as likely to be saving a sufficient amount for retirement than savers who receive paper disclosures.⁴

In addition to investor preference, e-delivery is more environmentally conscious and less costly. A recent study of defined contribution recordkeepers found the average cost for issuing a single disclosure was \$.80 per participant.⁵ In contrast, distributing disclosures via email or another electronic address is significantly lower presenting little to no cost.

Further, e-delivery is more accessible than paper, allowing retirement savers with disabilities to access information in a format that meets their unique needs. Nearly 70% of disabilities are related to age; those experiencing vision loss later in life now have the assistance of new technological advances such as screen readers (e.g., Voice Over on iPhones, Talk Back on Android phones, and Narrator on Windows 7 machines) to audibly receive the same information contained in a written disclosure. Moreover, because 85% of special requests for disclosures are for large print, having an electronic format for disclosure delivery allows participants with moderate vision impairment to easily enlarge the font on a computer or smart phone screen.

Delivering plan information electronically is a faster, more efficient and effective way for participants to get the plan information they need. Electronic accessibility enables participants to receive communications in the digital manner they now expect. Communications can be sent and received instantly, without delay, and without the risk of getting lost or misplaced in the daily shuffle of paper mailings. With a digital-first approach, Fidelity supports the delivery of plan related materials in a manner requested by plan participants.

For all these reasons, we appreciate the Department’s efforts in promulgating the Proposal. As set forth below, we believe that the Department should make certain modifications and clarifications to the Proposal that would further facilitate the valuable goal of expanding the electronic delivery of plan notices.

³ See the full report at https://www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf.

⁴ *Improving Outcomes with Electronic Delivery of Retirement Plan Documents*, SPARK Institute (2015).

⁵ Peter Swire and DeBrae Kennedy-Mayo, “*Why the Time Has Come to Prefer Electronic Delivery*” (2018). Data derived from the Investment Company Institute’s survey conducted in the winter of 2017/2018 to gather information on printing and mailing costs from a cross-section of DC plan recordkeepers. Survey respondents provided recordkeeping services for more than 40 million 401(k) plan participant accounts in 2017. Responses were weighted by the number of participant accounts.

1. The Department’s 2002 Electronic Delivery Safe Harbor Should be Available for Initial Notification of Default Electronic Delivery Notices

Since 2002, the Department’s electronic delivery regulations have supported plan fiduciaries making plan information available electronically to two categories of recipients: 1) participants who are “wired at work” and can access electronic information where they perform their duties as an employee and where access to the electronic information system is an integral part of those duties; and 2) participants, beneficiaries and other recipients who have affirmatively consented to receive such information electronically (“2002 Safe Harbor”).⁶

Under the Proposal, all participants and beneficiaries must receive a notice in paper that the plan administrator will adopt the new safe harbor delivery method.⁷ This will require plan administrators to send paper notices to plan participants who are currently receiving plan notices electronically in accordance with the Department’s 2002 Safe Harbor. While the Proposal offers great improvements to electronic delivery, the 2002 Safe Harbor has worked well for nearly two decades. Given that the Proposal affirms that plan administrators will continue to be able to use the Department’s 2002 Safe Harbor, this affirmation should extend to plan administrators’ ability to send initial notifications of default electronic delivery under the new proposed safe harbor.⁸ Participants are familiar with receiving communications about their plan under the 2002 Safe Harbor and permitting delivery of initial notifications of default electronic delivery through that methodology will provide consistency, effectiveness and efficiency.

2. Expand Proposal to Allow Paper Notices of Internet Availability

Under the Proposal, plan administrators must send notices of internet availability (“NOIA”) to “covered individuals,” those participants that have provided an electronic address.⁹ The Proposal does not permit a plan administrator to make documents available on a plan’s website and then send a NOIA to a participant in paper through the mail. The Department should revise the Proposal to allow plan administrators to furnish the NOIA in paper, provided other requirements of the proposed safe harbor are satisfied. Given the prevalence of internet access, sending a paper NOIA informing participants how they can access the information on the plan’s website will provide them with sufficient access to the information, as well as notice of their right to request paper documents. Expanding the definition of “covered individual” to include individuals who receive a NOIA through the mail would be consistent with other regulatory regimes, including the Department’s guidance related to pension benefit information in Field Assistance Bulletin 2006-03, delivery methods permitted under regulations published by the Treasury Department and Internal Revenue Service (“IRS”) as well as the electronic delivery methods permitted by the Securities Exchange Commission (“SEC”).¹⁰

⁶ See 29 C.F.R. Part 2520.104b-1 (general delivery requirements), 104b-1(c) (safe harbor).

⁷ See 84 *Fed. Reg.* 56,922.

⁸ 84 *Fed. Reg.* 56,895.

⁹ 84 *Fed. Reg.* 56,921.

¹⁰ 17 CFR Parts 200, 230, 239, 240, 249, 270, and 274 (<https://www.sec.gov/rules/final/2018/33-10506.pdf>).

3. Retain Field Assistance Bulletin 2006-03 Guidance Related to Pension Statements

As currently drafted, the Proposal would supersede the “relevant portions” of Field Assistance Bulletin 2006-03 (“FAB 2006-03”).¹¹ FAB 2006-03 provides important guidance that permits the delivery of pension benefit statements where participants have access to benefit statement information via a “continuous access website.”¹² Under this long-standing guidance, participants must be provided an annual notification explaining that pension benefit statement information is available and how such information can be accessed, as well as the right of the participant to request a paper version. These annual notifications may be provided in accordance with the 2002 Safe Harbor or provided in paper to plan participants.

The Proposal imposes additional requirements than those set forth in FAB 2006-03 and would result in an increase in the quarterly pension benefits statements sent in paper, which presumably is not the intention of the DOL given the success of that approach. Under the Proposal, if an electronic address is not available for a participant, the plan administrator would be required to send pension benefit statements in paper on a quarterly basis. Plan administrators would not be able to rely on FAB 2006-03 guidance that currently permits them to send an annual notification to participants, either electronically or in paper, explaining the availability of benefit statement information on the plan’s website. Further, under the Proposal, plan administrators sending a NOIA must furnish it “separately from any other documents or disclosures furnished to covered individuals.”¹³ In our experience, this will prove burdensome to plan administrators where, for many years, they have sent annual notices of pension statement information availability in combination with other logically related plan information. For example, under FAB 2006-03 the annual notice may be included with the annual participant disclosure notice set forth under ERISA’s Participant Fee Disclosure Regulation, which enables participants to be informed where they can get account statements when receiving information related to the plan’s fees and investment options.¹⁴

Maintaining a separate delivery approach for statements versus other required disclosures is not only cost-effective, it is reflective of the fact that statements differ from other required disclosures in key ways. First, account information is readily available to participants on a daily basis either via the internet or phone. Participants are often directed to the plan website for various other plan related matters including transaction confirmations, and many participants check their plan account balance on a weekly basis. Allowing continuous access statements electronically gives participants the ability to review and manage their account when they wish based on current account information versus referring to statements that might be several months old.

Superseding FAB 2006-03 is not in keeping with the Department’s intent of expanding the availability of e-delivery and would require plan administrators to produce and send additional quarterly statements in paper and create separate notices with likely no benefit to participants. In order to avoid this inefficient and costly result, the Proposal should be revised to permit the approach set forth in FAB 2006-03 as an alternative delivery method for pension statements, regardless of whether or not

¹¹ See 84 *Fed. Reg.* 56,900, footnote 60.

¹² See Field Assistance Bulletin (FAB) 2006-03 (Dec. 20, 2006).

¹³ See 84 *Fed. Reg.* 56,922.

¹⁴ 29 CFR 2550.404a-5

the administrator adopts the new safe harbor set forth in the Proposal. The Proposal should further clarify that if a plan administrator decides to deliver plan statements using the new safe harbor, it may continue to utilize the continuous access approach to furnish plan statement information consistent with FAB 2006-03. In particular, the new safe harbor should permit the statement to be generated on demand on the plan-related website, rather than posted on the website in a static form such as a pdf.

4. Clarify the Definition of “Electronic Address”

Under the Proposal, plan administrators must furnish covered individuals with a NOIA when notices are made available on a plan-related website. Covered individuals generally include any participant who has (i) provided the employer, sponsor, or administrator with an “electronic address” (i.e., an email address or an internet-connected mobile device number), or (ii) been assigned an email address by the employer.¹⁵ The Proposal allows participants to provide a personal email address and notes that such information is often provided in the employment application process or is requested by service providers in plan enrollment processes or in order to establish a plan participant’s online access to plan documents and account information.¹⁶ The Department has stated that it does not want to inhibit innovation in the delivery of required disclosures and seeks to promote technical neutrality. To this end, the Department requested comment regarding how the Proposal should be modified to explicitly include other internet-based mechanisms, such as multimedia messaging and mobile applications.¹⁷

In our experience, many plan sponsors enable participants to access plan information on a plan-specific website or mobile application via their smart device (“app”). These websites and apps contain numerous pieces of helpful plan information and in some instances include mechanisms to provide individual participants with secure electronic communications, similar to a personal or workplace email box. Like an email application, such plan website or app messaging mechanisms are typically accessible only by a specific participant after providing a PIN and password and can be used to securely furnish individual plan participants with individualized notices related to their plan.

Consistent with promoting innovation and neutrality, the Proposal should be clarified to provide that where a plan sponsor maintains or makes available a plan specific website or app that includes an individual messaging mechanism where participants can receive secure electronic messages and notices, plan sponsors may assign the plan’s website or app messaging mechanism as an “electronic address” under the new safe harbor for furnishing plan related notices and information. This clarification would work to provide participants with a specific, secure and consistent location to obtain notices and information related to the plan. In addition, it would dramatically enhance the ability of plan sponsors to keep track of how to reach plan participants for purposes of delivering plan notices and information, since it would be much less likely for the plan’s website or app messaging mechanism to change over time. Further, this revision would provide clarity and simplicity to participants with respect to where to obtain their important plan information and notices.

¹⁵ See 84 *Fed. Reg.* 56,921.

¹⁶ 84 *Fed. Reg.* 56,901.

¹⁷ *Id.*



In addition, the Department should clarify that an electronic address assigned by an employer that otherwise meets the requirements of the Proposal is valid, notwithstanding that the employee may be required to establish a PIN or password in order to access the electronic address.

5. Expand Proposal to Include Certain Health and Welfare Plan Notices

The notices that may be furnished under the Proposal include any documents that the plan administrator is required to furnish to participants and beneficiaries under Title I of ERISA, except for documents that must be furnished upon request.¹⁸ Notably, however, the proposed safe harbor only applies to pension benefit plans and not to welfare benefit plans.¹⁹ Although the Department has indicated that welfare benefit plans may be addressed separately in the future, significant efficiencies could be gained if certain welfare plan notices were governed by the proposed safe harbor. For example, in many instances, welfare benefit plans are required to send notices that are similar to retirement plans, such as summary plan descriptions or summary material modifications. We believe that the Proposal should be revised to permit these welfare plan documents to be delivered pursuant to the new safe harbor. Excluding welfare plans from the Proposal would require plan administrators to maintain different disclosure regimes for what are typically the same plan participants. This would result in inefficiencies for plan administrators and confusion among plan participants.

Clarifying the Proposal in this regard would also conform the new safe harbor to the 2002 Safe Harbor. That is, the 2002 Safe Harbor is not limited to pension benefit plans but may be used for welfare benefit plans as well.

6. Expand the Scope of the Combined Notice of Internet Availability

Under the Proposal, plan administrators must send a NOIA when a covered document is made available on the plan website. With respect to one or more of seven enumerated types of covered documents required under Title I, an administrator may furnish a combined notice of internet availability.²⁰ While the ability for plan administrators to include information about certain specified documents in a single combined notice will prove helpful and reduce the necessity for multiple communications, the Proposal should be revised to expand the scope of the combined notice of internet availability in two respects.

First, in addition to the list of seven documents that may be included in a combined NOIA, the Department should develop and include in the final regulation a principles based standard that would allow notices that are required to be furnished by plans annually or on a periodic basis to satisfy the proposed safe harbor. Including a principles based category of notices, those provided on a periodic basis, would permit flexibility should alternate disclosure notices be required or developed pursuant to future regulation or guidance.

Second, under the Proposal, one of the covered documents that plan administrators may furnish within a combined NOIA is "investment-related disclosure, as required pursuant to 29 CFR 2550.404a-

¹⁸ See 84 *Fed. Reg.* 56,921.

¹⁹ 84 *Fed. Reg.* 56,902.

²⁰ 84 *Fed. Reg.* 56,923.

5(d).”²¹ However, this covers only a portion of the information required to be furnished to plan participants pursuant to the Participant Fee Disclosure Regulation (i.e. “investment-related disclosure”). The Proposal should be clarified to confirm that the entire Participant Fee Disclosure notice may be included in the combined NOIA under the new safe harbor, provided that plan administrators continue to provide participants with separate timely notices of any changes required under the Participant Fee Disclosure Regulation.

7. Clarify Participant Right to Opt Out of the New Safe Harbor

The Proposal states that covered individuals “must have the right to opt out of electronic delivery and receive only paper versions of *some or all* covered documents.”²² In our experience, this will prove operationally challenging for many plan administrators and recordkeepers. As written, the Proposal would require close monitoring of a participant’s opt out selections related to a wide variety of plan notices. This will be burdensome to plan administrators and potentially confusing to plan participants who may not recall various elections they may have provided with respect to different notices over time. The Proposal should be clarified to provide that administrators may determine whether to allow participants the option to opt out of receiving *all* notices electronically, or the option to opt out of *some or all* notices as currently drafted. This will provide plan administrators the option of obtaining and implementing only one participant opt out election with respect to all notices under the new safe harbor, instead of monitoring many elections which may prove overly administratively challenging.

8. Notice of Internet Availability Flesch Reading Ease Score Requirement Should be Clarified

When furnishing a NOIA, the Proposal requires that the notice is “written in a manner calculated to be understood by the average plan participant.” The Proposal further provides that “language that results in a Flesch Reading Ease test score of at least 60 satisfies the understandability standard.”²³ While we applaud the Department’s efforts to ensure clear communication to participants, we are concerned that the reference to the Flesch Reading Ease test could be interpreted to apply in any context in which the “calculated to be understood by the average plan participant” standard is present. This would include a wide array of notices currently in use for which the test would not have been considered. The Department should clarify that, pending further study and guidance, a given Flesch Reading Ease test score is not required to meet the understandability standard for any notice. Rather, the test is simply an example of how compliance with the understandability standard may be met for the NOIA.

9. Clarify Effective and Applicability Date of New Safe Harbor

The proposed safe harbor effective date is 60 days after the publication of the final rule, and the proposed applicability date is January 1 following publication of the final rule.²⁴ Given the substantial benefits of the Proposal to both plan sponsors and plan participants, and considering that the new safe harbor is optional, Fidelity urges the Department to make clear in the final regulation that plan

²¹ See 84 Fed. Reg. 56,923.

²² 84 Fed. Reg. 56,922 (emphasis added).

²³ *Id.*

²⁴ 84 Fed. Reg. 56,923.



administrators may voluntarily use the new safe harbor as of the effective date (i.e., 60 days after the publication of the final rule), but would not be required to comply with the effects of the regulation on other guidance, if any, until the applicability date (i.e., January 1 following publication of the final rule).

We applaud the Department's Proposal and appreciate the Department advancing elements of the President's Executive Order to make retirement plan disclosures more digital and effective.²⁵ Investors want more concise, effective information to make retirement planning decisions. We urge the Department to continue to consider ways to simplify and streamline disclosures for even greater disclosure effectiveness.

We are available to discuss any questions you may have with respect to these comments or electronic delivery generally.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Barr Haines".

James Barr Haines
Senior Vice President & Deputy General Counsel

cc: Jeanne Klinefelter Wilson, U.S. Department of Labor

²⁵ Executive Order 13847 "Strengthening Retirement Security in America," September 6, 2018.