Via: https://www.regulations.gov

November 22, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste. S-2524
Washington, D.C. 20210

Re: RIN 1210– AB90
Proposed Rule on Default Electronic Disclosure
by Employee Pension Benefit Plans Under ERISA

Dear Assistant Secretary Rutledge:

AARP, on behalf of our 38 million members and all older Americans nationwide, is pleased to submit comments concerning the adverse impact on participants and beneficiaries of default electronic disclosure in employee retirement plans.

Congress enacted ERISA in order to protect the retirement benefits of participants and beneficiaries.[1] Among the key tools that Congress provided to protect the hard-earned benefits of participants and beneficiaries were disclosure provisions[2] and fiduciary obligations.[3] ERISA requires that a fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."[4] (Emphasis added). Congress enacted the required disclosures under Title I of ERISA to increase transparency, to ensure that participants and beneficiaries know where they stand in relationship to their plan and their benefits under the plan, and to help participants to monitor and police the plan.[5] This statutory disclosure duty requires plan

[1] 29 U.S.C. § 1001. Title I of ERISA is titled "Protection of Employee Benefit Rights."

[2] 29 U.S.C. §§ 1021 – 1031.

[3] 29 U.S.C. §§ 1101 – 1114.

[4] 29 U.S.C. § 1104(a)(1).

[5] 29 U.S.C. §§ 1021 – 1031; S. Rep. No. 93-127 (1974), as reprinted in 1974 U.S.C.C.A.N. 4838, 4863.

fiduciaries to provide those disclosures in understandable language and to ensure that the estimated 60 million covered participants[6] receive them.[7]

Since 1977—over 40 years—the Department of Labor (the Department or DOL) has consistently interpreted the statutory language to require that "the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals."[8] This proposed rule does not meet that standard.

For ERISA disclosures to fulfill Congress's intent of transparency and providing participants with knowledge of the plan's benefits, they must get the right information to the right person at the right time with the information they need in an understandable manner. Disclosure is the critical means for plan participants to know and understand their plan benefits, and to adequately manage and plan for their retirement security. Accordingly, AARP[9] presents our comments to the proposed rule on Default Electronic Disclosure on behalf of our members and all Americans saving and planning for retirement.

Executive Summary

This Department of Labor's proposed rule on electronic disclosures will result in participants failing to receive the important retirement disclosures required under ERISA. Without the required information and transparency, participants will be less likely to know and understand their plan benefits, and less able to monitor and manage their plan benefits. Although AARP's letter presents detailed comments on the proposed rule, we first emphasize several provisions in the proposal that are not protective of participant rights.

In its proposal, the Department acknowledges that certain households—primarily lower wage workers, workers with lower educational attainment, persons who live in rural communities, racial minorities, and older workers and retirees —will disproportionately bear the negative impacts of the proposed rule because they do not have ready access to computers, "they [may] fail to request hard copies of disclosures or exercise their opt-out rights due to inertia or if they face other impediments to accessing the covered documents on the internet."[10] And the

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[6] Throughout these comments, AARP uses the term "participants." It is meant to include individuals who are entitled to a disclosure including beneficiaries, spouses, retirees, and alternate payees.

[7] *Id*.

[8] 29 C.F.R. § 2520.104b-1.

[9] AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

[10] 84 Fed. Reg. at 56915-16. "[T]he data indicate that the following persons have lower rates of internet-access at home: Limited English-speaking households (63%), households with income less than $25,000 (59%), households

Department admits that it does not have sufficient data to quantify these negative impacts.[11] The Department also acknowledges that disclosures sent to the large number of individuals who are only connected with smartphone access[12] will not be as effective as for those that have computer access.[13] Those households with only smartphone access will find that "accessing disclosures online [. . .] may not be as convenient as for households with other means to access the internet."[14] Thus, for large segments of the retirement plan population, the Department acknowledges that its proposal will not provide them with the required ERISA disclosures.

Notably, the Department has not produced evidence or data that participants have asked for more electronic disclosure. In contrast, numerous studies show that participants still prefer paper disclosures because financial information is easier to read and understand in that medium.[15] And, the disclosures at issue here are personal to the participant – they have to do with the eligibility for and amount of an individual's benefits and actions that must be taken to help prepare for retirement.

Behavioral economics confirms that choice architecture may cause participants to make certain choices, including negative choices. Inertia is a powerful force, but results in participants becoming passive decisionmakers and becoming disengaged with their retirement plan.[16]

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where the head of the household is age 65 or older (68%), black households (73%), households in nonmetropolitan areas of the South (69%), and households where the head of the household obtained a high school diploma or less (56%)." *Id.*at 56915.

[11] *Id*.

[12] For purposes of this comment letter, AARP uses smartphones to include any internet-based mobile-computing device, such as a smartphone, tablet, or other hand-held device.

[13] *Id.* at 56905.

[14] *Id.* at 56916.

[15] *The 2019 Retirement Confidence Survey,* Fig. 33 at 42 (Apr. 23, 2019), https://www.ebri.org/docs/default-source/rcs/2019-rcs/2019-rcs-short-report.pdf; Alegra Howard, *Consumer Action survey: Given the choice, consumers prefer a paper trail* (Winter 2018-2019), https://www.consumer-action.org/downloads/english/CANews-paperless-2019.pdf; FINRA, *Investors in the United States 2016* at 14 (Dec. 2016), https://www.usfinancialcapability.org/downloads/NFCS_2015_Inv_Survey_Full_Report.pdf. *The 2012 Retirement Confidence Survey*: EBRI Issue Brief, No. 369 at 21-22 (May 13, 2012), https://www.ebri.org/content/the-2012-retirement-confidence-survey-job-insecurity-debt-weigh-on-retirement-confidence-savings-5017; *Generations 2010* at 2, 10, 13, 15 (Dec. 2010), http://pewlnternet.org/—/media/Files/Reports/2010/lP_Generations_and_Tech10.pdf;; AARP, *401(k) Participants' Awareness and Understanding of Fees* at iii, 7-8, 34, (June 2007), https://assets.aarp.org/rgcenter/econ/401k_fees.pdf; AARP, *Comparison of 401(k) of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* at 25 (Sept. 2008), http://assets.aarp.org/rgcenter/econ/fee_disclosure.pdf.

[16] James Choi, David Laibson, Brigitte Madrian, and Andrew Metrick, *For Better or for Worse: Default Effects and 401(k) Savings Behavior* (NBER Working Paper No. 8651 Dec. 2001), https://www.nber.org/papers/w8651.

This electronic disclosure proposal relies on two different types of choice architecture.[17] Either one separately would result in fewer individuals receiving and viewing their disclosures, but together they will result in a substantial drop in individuals viewing their retirement disclosures. The first is to force individuals to opt-out of receiving electronic disclosures. In order to receive paper disclosures, the participant must affirmatively request paper documents. The second is the Department's adoption of the notice and access model. This model permits a plan administrator to email a notice to participants which will then direct them to a website where the disclosures are posted. This mere notice and posting, without a determination of whether participants actually open the notice or access the disclosure, is not enough to be considered "measures reasonably calculated to ensure actual receipt of the material by plan participants . . .."

This notice and access model will result in a significant decrease in participants' information access about their retirement plans. We know this is the anticipated result, because that is exactly what happened after the Securities and Exchange Commission (SEC) adopted the notice and access model for proxy disclosures. After notice and access became the method of disclosure, the viewing rates of over 21 million investors indicated that less than one-half of one percent of those who received notification by mail visited the website and chose to view the disclosure information. Permitting investors to request free hard copies did not offset the decline in viewing. Investors did not view the website and did not request hard copies of the disclosures; they did nothing.[18] If the goal is to get more individuals engaged and informed, this is clearly the wrong approach.

The irony is that plans already know this—when plans and employers actively desire a certain action, they find electronic notice to be inadequate. For example, employers desiring to "derisk" their plans by offering lump sum payments to participants do not send this information electronically. Instead, they send this information by paper mail because they know it is more effective—the plan and employer want participants to notice, open and read, and understand these disclosures so the participants will take the action the plan and employers want—to accept a lump sum distribution of their pension.

Accordingly, the research leads to the obvious conclusion that permitting plans to furnish disclosures electronically with notice and access and giving participants the option to opt-in to receive paper disclosures will result in more participants "receiving" the alerts electronically, but not viewing them or acting upon them.

Especially troubling is that the Department's proposed rule deviates drastically from prior guidance by allowing the employers to simply create email or smartphone numbers—including

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[17] See Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008).

[18] *See* Comment Letter from Broadridge Financial Solutions, Inc., *File No. SR-MSRB-2009-02* (May 5, 2009), https://www.sec.gov/comments/sr-msrb-2009-02/msrb200902-2.pdf.

for workers who do not have computer access at work, are not required to use computers at work, and/or have not affirmatively consented to electronic disclosure. Plan beneficiaries who have no current ties to the workplace—retirees, deferred vested participants, and alternate payees—could be assigned a made-up email address or smartphone number. Indeed, the invented electronic address or smartphone number may be assigned for no other reason than to satisfy the safe harbor. And, to make matters worse, there is no obligation to electronically confirm participants' ability to access the electronic address provided; to independently verify an e-mail address or smartphone number; or to determine whether the electronic disclosure was actually received or opened. This provision is the antithesis of the transparency required by ERISA, and instead will result in participants' never receiving required disclosures. AARP strongly believes that ERISA requires actual receipt of retirement disclosures. There should be no scenario under which an employer or plan may invent an email or smartphone address for a participant, that the participant has not freely, willingly, and knowingly requested or agreed to, that would satisfy the actual receipt standard. Any action today by an employer or plan to invent such fictitious emails likely would be treated as a breach of fiduciary duty.

Finally, the main reason for this proposal seems to be the potential for plans to achieve cost-savings, but as currently written, none of these savings must be passed along to the participants.

AARP believes that the proposed rule—as the Department itself acknowledges—will leave large numbers of participants without the retirement disclosures they need to manage their plan and make informed decisions about their benefits. The proposed rule does not improve disclosure or transparency for participants, and is not consistent with ERISA's requirements. The proposal should therefore be withdrawn and substantially modified.

I. Only About Half Of Households Have Retirement Savings.

A priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. Unfortunately, the state of America's retirement landscape is cause for great concern. According to calculations by the Center for Retirement Research at Boston College, only about half of households, in mid-career, have retirement savings. This is not surprising since only about half of private employers offer some type of a retirement plan.[19]

For many people, the account balance in their 401(k) plan or Individual Retirement Account (IRA) represents the bulk of their personal savings.[20] The rest have little to no sources of

[19] Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Benefits Survey, *Retirement Benefits, March 2019*, at Table 1. Establishments offering retirement and healthcare benefits: private industry workers, March 2019, https://www.bls.gov/ncs/ebs/benefits/2019/benefits_retirement.htm.

[20] U.S. Gov't Accountability Office, GAO 15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* 8 (May 2015), http://www.gao.gov/assets/680/670153.pdf (to the extent that households have savings, they are not significant outside of retirement accounts).

retirement income other than Social Security[21] and the "retirement income deficit" for American households continues to grow. Recent analysis by the Employee Benefit Research Institute (EBRI) showed that 47 percent of workers in 2017 reported that the total value of their household's savings and investments, not just for retirement, was less than $25,000 and 24 percent had less than $1,000.[22] Moreover, the average longevity for persons who retire at age 65 has increased into their mid-80's.[23] Finally, many Americans lack strong financial literacy skills,[24] and results from financial education efforts have been mixed, at best.[25] Given these trends, it is critical to do all we can to help Americans to enhance and manage their hard-earned savings as much as possible and to ensure that they make well-informed investment decisions to enhance their retirement security.[26]

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[21] Federal Reserve Bulletin (Sept. 2017), https://www.federalreserve.gov/publications/files/scf17.pdf.

[22] Lisa Greenwald *et al*., *The 2017 Retirement Confidence Survey: Many Workers Lack Retirement Confidence and Feel Stressed About Retirement Preparations* (Mar. 21, 2017), https://www.ebri.org/pdf/briefspdf/EBRI_IB_431_RCS.21Mar17.pdf. This figure refers to the total value of their household's savings and investments, excluding the value of their primary home.

[23] According to Social Security, "[a] man reaching age 65 today can expect to live, on average, until age 84," and, "[a] woman turning age 65 today can expect to live, on average, until age 86.5." *Social Security*, Benefits Planner | Life Expectancy, https://www.ssa.gov/planners/lifeexpectancy.html (last visited July 9, 2019.

[24] Annamaria Lusardi *et al*., *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS* (Sept. 2009), http://www.mrrc.isr.umich.edu/publications/papers/pdf/wp216.pdf ("In view of the fact that individuals are increasingly required to take on responsibility for their own retirement security, this lack of [financial] knowledge has serious implications."); *see also* FINRA Inv'r Educ. Found., *Financial Capability in the United States 2018* (June 2019), https://www.usfinancialcapability.org/downloads/NFCS_2018_Report_Natl_Findings.pdf (the amount and quality of financial education correlate positively with behaviors indicative of financial capability); Annamaria Lusardi & Peter Tufano, *Debt Literacy*, *Financial Experiences, and Overindebtedness*, 14 J. OF PENSION ECON. AND FIN. 332 (Oct. 2015) (only one-third of respondents correctly answered debt literacy questions concerning compounding of interest); Annamaria Lusardi & Olivia S. Mitchell, *Financial Literacy and Planning: Implications for Retirement Wellbeing,* Nat'l Bureau of Econ. Research Working Paper 17,078 at 6 (May 2011), http://www.nber.org/papers/w17078.pdf (one-third of survey respondents did not understand compound interest, one-quarter did not understand inflation implications and half did not know about risk diversification).

[25] Susannah Snider, *Do Financial Literacy Courses Work?,* U.S. NEWS (Aug. 28, 2018), https://money.usnews.com/money/personal-finance/family-finance/articles/2018-08-28/do-financial-literacy-courses-work**;** Justine S. Hastings, Brigitte C. Madrian, William L. Skimmyhorn, *Financial Literacy, Financial Education And Economic Outcomes*, ANNUAL REV. ECONOMICS at 1; 5: 347–373 (May 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3753821/#R80.

[26] *See, e.g*., Jay Goodliffe, *et al*., *The Cost of Retiring Poor: Cost to Taxpayers of Utahns Retiring Poor* (Jan. 2015), http://www.aarp.org/content/dam/aarp/ppi/2016-03/cost-to-taxpayers-of-utahns-retiring-poor.pdf (increases in retirement savings will prevent substantial increases in costs associated with existing public programs); Aleta Sprague, *The California Secure Choice Retirement Savings Program* 5 (Apr. 26, 2013), http://www.retirementmadesimpler.org/Library/CAretirementFinal4.26.13.pdf (noting that retirees without adequate retirement savings will rely on the federal and state social safety net).

AARP has historically supported and promoted the employer-sponsored retirement system because it is the easiest and most effective manner for workers and their families to accumulate retirement savings. AARP has also supported the development of rules and regulations that help Americans save and manage their plans and protect retail investors when they make investment decisions concerning their retirement monies. Among these rules is the need for clear, easy to understand, readable, and helpful disclosures which hard-working Americans actually receive. Without these disclosures, it is difficult for individuals to effectively plan for a secure and adequate retirement.

II. This Proposal Does Not Protect Participant Disclosure Rights.

A. The Department acknowledges that the adverse impact of this proposed rule will be borne by lower wage workers, workers with lower educational attainment, persons who live in rural communities, racial minorities, older workers, and retirees.

AARP believes any proposal on electronic disclosure must balance the option of electronic disclosure with the preservation of consumer education and consumer choice over plan communications preferences. This balance should take into account the basic fact that the demographics show that significant numbers of individuals still do not have ready access to computers. These groups include primarily lower wage workers, workers with lower educational attainment, persons who live in rural communities, racial minorities, and older workers and retirees. The Department acknowledges that these groups will disproportionately bear the negative impacts of the proposed rule.[27] Indeed, these individuals could be at risk of impairment to their participant or beneficiary rights, which could materially increase the risk of harm to them and undermine their economic and retirement security.

The Department also recognizes the large number of individuals who are only connected with a smartphone and acknowledges many unanswered questions, including whether engagement, readability, and the ability to print information would be compromised.[28] However, the Department seems prepared to move forward permitting disclosures to be sent to smartphones, regardless of these issues.

Finally, there are many plan beneficiaries who have no current ties to the workplace—retirees, deferred vested participants, and alternate payees. The Department's response is that these individuals must provide an electronic address— rather than requiring plans to provide either paper disclosures or affirmative consent to electronic disclosure—after they have severed their relationship with the workplace.

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[27] 84 Fed. Reg. at 56915-16.

[28] 84 Fed. Reg. at 56905.

Internet use has steadily increased since 2000 so that by 2018 about 90 percent of Americans used the internet.[29] However, certain groups have lower use based on factors such as age, income, education,[30] and community type. Less than 75 percent of individuals over the age of 65 use the internet, while a slightly lower percentage of individuals with less than a high school education use the internet. Rural communities use the internet less than urban and suburban communities.[31]

Significantly, slightly less than 75 percent of American adults have broadband internet service at home. Given the differential between usage and home broadband adoption, it seems likely that individuals are using devices in places other than their home or using their smartphones.[32] Racial minorities, older adults, rural residents, and those with lower levels of education and income are less likely to have broadband service at home.[33] For example, 59 percent of individuals over 65 have broadband at home, compared with 77 percent of the next groups (ages 18-29 and 30-49).[34] Rural Americans are now 12 percent less likely than Americans overall to have home broadband.[35] Going into a public place such as a library requires additional, potentially inconvenient steps for an individual, coupled with a lack of privacy and confidentiality. Clearly, a public place does not provide the appropriate level of secure access to the internet for purposes of receiving information about what may be an individual's largest financial asset—a participant's 401(k) plan—or other personal finances. (*See* Section X, G). Indeed, it would not be surprising at all if these individuals never receive these disclosures.

In contrast, approximately 20 percent of individuals are "mobile phone-only" internet users; they own a mobile phone, but do not have home internet service.[36] Reliance on mobile phones only

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[29] *See generally* Pew Research Center, *10% of Americans don't use the internet. Who are they?* (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/.

[30] Online Social Security users who are accessing their information declined by more than 50 percent from FY 2012 to FY 2018 (from 96% to 43%). OIG SSA, *Issuance of Social Security Statements* at Summary (A-03-18-50724 Feb. 2019), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-03-18-50724.pdf.

[31] Pew Research Center, Internet/Broadband Fact Sheet*, Internet use over time and Who uses the internet* (June 12, 2019), https://www.pewinternet.org/fact-sheet/internet-broadband/; *see generally* Pew Research Center, *10% of Americans don't use the internet. Who are they?, supra.*

[32] AARP notes that the Federal Communications Commission's (FCC) current broadband mapping Form 477 is likely to overstate the availability of broadband. Currently the Form allows ISPs to count an entire census block as served even when it is only serving a single household within a census block.

[33] Pew Research Center, Internet/Broadband Fact Sheet, *Home broadband use over time and Who has home broadband.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at *Home broadband use over time and Who has home broadband.*

for online access is especially common among younger adults, non-whites, and lower-income Americans.[37] The Census Bureau's surveys are in accord with the findings of Pew Research Center.[38] In contrast, households with an individual 65 years and older were the least likely to be highly connected (that is, own a computer, mobile phone and tablet and have broadband internet subscription).[39]

The Department acknowledges that there are large groups of retirement plan participants who do not have convenient, effective internet access necessary for ERISA disclosures to be received, viewed, and meaningful. Instead of issuing a rule that will ensure important disclosures are actually received and readable to all participants, the Department has proposed a rule that will certainly not achieve that goal nor meet the ERISA standard for meaningful disclosure.

B. Participants still prefer paper disclosures.

Even those who have access to and feel comfortable with computers may not automatically want to receive pension plan information electronically. An EBRI study showed that only a minority of workers and retirees feel very comfortable using online technologies to perform various tasks related to financial management.[40] Not surprisingly, a more recent EBRI study showed that only 21 percent used online calculators for retirement planning.[41] This is consistent with a Pew study that found that less than half of Americans of any age said they get financial information online.[42]

In two surveys concerning 401(k) plan fees, AARP found that paper materials were the most widely desired vehicle for receiving fee-related information, regardless of age.[43] Similarly, a

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[37] *Id*. at *Who is mobile phone dependent; see generally* Pew Research Center, *Mobile Technology and Home Broadband 2019* (June 13, 2019), https://www.pewinternet.org/2019/06/13/mobile-technology-and-home-broadband-2019/.

[38] Camille Ryan, U.S. Census Bureau, American Community Survey Reports, *Computer and Internet Use in the United States: 2016* (ACS-39 Aug. 2018), http://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf.

[39] *Id*. at 9.

[40] *The 2012 Retirement Confidence Survey*: EBRI Issue Brief, No. 369 at 21-22.

[41] *The 2019 Retirement Confidence Survey,* Fig. 33 at 42 (Apr. 23, 2019), https://www.ebri.org/docs/default-source/rcs/2019-rcs/2019-rcs-short-report.pdf.

[42] *See Generations 2010* at 2, 10, 13, 15 (Dec. 2010), http://pewlnternet.org/—/media/Files/Reports/2010/lP_Generations_and_Tech10.pdf.

[43] *See* AARP, *401(k) Participants' Awareness and Understanding of Fees* at iii, 7-8, 34, (June 2007), https://assets.aarp.org/rgcenter/econ/401k_fees.pdf; AARP, *Comparison of 401(k) of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* at 25 (Sept. 2008), http://assets.aarp.org/rgcenter/econ/fee_disclosure.pdf.

2016 FINRA study showed that only 31 percent of respondents preferred receiving disclosures by email or through internet access; the remainder preferred physical mail (49 percent) or in-person meetings (14 percent). Older respondents preferred paper documents, while younger respondents preferred in person meetings. There was no age differential between those who preferred to receive disclosures by email.[44] Recent surveys are consistent with these findings.[45]

Moreover, Vanguard's research concerning digital adoption in its retail investment business found that investors older than age 65 were significantly less likely to register for digital access.[46] In addition, defined contribution (DC) plan-only investors who have digital accounts logged in only three days per year with a median daily attention of eight minutes; the number one reason that these DC-only investors logged in was to check investment performance.[47] Moreover, industry studies have found that individuals understand and retain financial information better on paper than in electronic form.[48] Even those DC-only investors who sign up for paperless statements only have a 7 percent increase in their likelihood of being attentive.[49] The overall takeaway is that the large majority of participants with paperless statements do not adequately review their benefit statements.

Most significantly, the Department has cited no data or evidence that participants are asking for more electronic disclosures or are dissatisfied with the current safe harbor.

III. Defaults And Safe Harbors Should Be Designed To Protect Those Individuals Who May Be Economically At Risk In Retirement.

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[44] FINRA, *Investors in the United States 2016* at 14 (Dec. 2016), https://www.usfinancialcapability.org/.downloads/NFCS_2015_Inv_Survey_Full_Report.pdf.

[45] Alegra Howard, *Consumer Action survey: Given the choice, consumers prefer a paper trail* (Winter 2018-2019), https://www.consumer-action.org/downloads/english/CANews-paperless-2019.pdf.

[46] Vanguard Research, The Digital Investor, *Patterns in digital adoption* at 1, 4, 5, 9-11 (July 2017), https://personal.vanguard.com/pdf/CIRDA.pdf.

[47] Vanguard Research, The Digital Investor, *Introduction to Digital Financial Attention* at 4, 5, 9-11 (Mar. 2019), https://personal.vanguard.com/pdf/CIRDIIFA_032019_Online.pdf.

[48] TIAA Institute, J. Wesley Hutchinson, Robert Botto, Gal Zauberman, *Financial Communications and Asset Allocation Decisions: The Effects of Reading Style, Financial Knowledge, and Individual Differences* at 2, 18 (Issue No. 137 June 2017), https://www.tiaainstitute.org/sites/default/files/presentations/2017-06/Hutchinson%20Zauberman%20Botto_Financial%20Communications_RD_June2017.pdf.

[49] Vanguard Research, The Digital Investor, *Introduction to Digital Financial Attention* at 10 (Mar. 2019), https://personal.vanguard.com/pdf/CIRDIIFA_032019_Online.pdf.

A. In the proposed rule, the Department has chosen a structure that will result in fewer participants receiving and viewing the retirement plan disclosures.

A critical issue concerning electronic disclosures is whether a participant is defaulted into receiving electronic disclosures and then can opt-out or whether a participant is defaulted into receiving paper disclosures and then can opt-in to receive disclosures electronically. The Pension Protection Act (PPA) automatic enrollment provisions are illustrative. Congress endorsed the automatic enrollment provisions to increase employees' participation in their 401(k) plan, and by so doing, to increase retirement savings.[50] Although employees subject to automatic enrollment can opt-out of the 401(k) plan at any time, few choose to do so. As a result, 401(k) participation rates have significantly increased since Congress enacted these provisions.

However, a number of issues have resulted from automatic enrollment mainly because participants follow the path of least resistance when it comes to *how* they participate in the 401(k) plan. Participants generally do not, by themselves, increase the plan-specified default contribution rate (commonly 3 percent) and participants tend to remain in the default investment chosen by the plan, which may not be the best choice for them. In addition, when they terminate employment, the default treatment of 401(k) balances of terminated employees largely determines what happens to their accumulated savings. This lack of active participant choice and action often leads to the creation of "missing participants" and low balance accounts eaten up by fees when a plan decides to close out these accounts.[51]

It is clear that passive or nearly passive choices dominate over other choices that require more active effort. Research has clearly shown that employees tend to be "passive decisionmakers" taking the path of least resistance when it comes to their 401(k) plans. Thus, employers and plans have a great degree of control over the information that participants actually look at and savings and investment decisions that they make.[52] In this proposed rule, the Department permits the plan to use a default disclosure regime that will result in those individuals who do not regularly use a computer for their job failing to receive their disclosures.

In a study that it commissioned about defaults, TIAA/CREF concluded that because "passive investors tend to be less educated, have lower wealth and labor income, and are less

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[50] 152 Cong. Rec. No. 106 at 58754, 58757, 58759-63 (Aug. 3, 2006) (statements of Sen. Enzi, Nelson, Hatch, Kohl, Levin, Reed, Baucus, Grassley).

[51] James Choi, David Laibson, Brigitte Madrian, and Andrew Metrick, *For Better or for Worse: Default Effects and 401(k) Savings Behavior* (NBER Working Paper No. 8651 Dec. 2001), https://www.nber.org/papers/w8651.

[52] James J. Choi, David Laibson, Brigitte C. Madrian, & Andrew Metrick, *Defined Contribution Pensions: Plan Rules, Participant Decisions, and the Path of Least Resistance* (NBER Working Paper No. 8655 Dec. 2001), https://www.nber.org/papers/w8655.

sophisticated on an overall basis," defaults should be designed to protect their interests.[53] Employers and policymakers need to recognize that there is no such thing as a neutral action in a 401(k) plan—rather how information is delivered and presented will affect what participants notice, read, and understand, and as a consequence will impact the choices that employees make. Of particular importance are the defaults and rules that apply to disclosures, notices, and other information in 401(k) plans.[54]

Moreover, we know the results when the notice and access model is used as a method of disclosure. The SEC—one of the Department's comparators—employed a notice and access model for its rule on the submission and dissemination of official statements for municipal securities. The results were stark. Information access decreased as a result of requiring investors to view information online or request hard copies. Prior to notice and access, various studies demonstrated that over 85 percent of respondents looked at proxy information, at least some of the time. After notice and access became the method of disclosure, the viewing rates of over 21 million investors indicated that less than one-half of one percent of those who received notice visited the website and chose to view the disclosure information. And, permitting investors to request free hard copies did not offset the decline in viewing because only slightly more than one-half of one percent recipients request hard copies.[55]

It is apparent that permitting plans to furnish disclosures electronically and giving participants the option to opt-in to receive paper disclosures will result in most participants "receiving" the disclosures electronically. Where an employer or plan simply creates electronic addresses for participants who do not use a computer for their work, the chances of them ever actually receiving the disclosures drop dramatically. And, only providing a notice versus the actual disclosure itself will result in even fewer individuals viewing the retirement disclosures. In contrast, disclosures—tailored to a particular workforce and sent so that the workforce actually receives them—can be used to increase understanding and engagement with the plan.

B. When plans and employers want employees to take a certain action, they use paper notification.

When plans and employers want participants to read the required disclosures and take a certain action, they choose paper mail, not electronic notices. For example, employers desiring to "derisk" their plans by offering lump sum payments to participants do not send this information electronically. Instead, they send this information by paper mail because the plan and employer

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[53] Chester S. Spatt, TIAA Institute, *The role of the employer default allocation in defined-contribution retirement plan design* at 8 (Issue No.149 Oct. 2018), https://www.tiaainstitute.org/sites/default/files/presentations/2018-10/TIAA%20Institute_Role%20of%20Employer%20Default%20Allocation_rd149_Spatt_October%202018.pdf.

[54] *Id*.

[55] *See* Comment Letter from Broadridge Financial Solutions, Inc., *File No. SR-MSRB-2009-02* (May 5, 2009), https://www.sec.gov/comments/sr-msrb-2009-02/msrb200902-2.pdf.

want participants to notice, open and read, and take action based on these disclosures. Thus, if the purposes of the disclosures are transparency and ensuring that participants have the information they need to make informed decisions about their retirement security, an email or text explaining how to gain access to the documents is simply inadequate.

IV. The Proposed Regulation Adopts The Notice And Access Model Which Is Harmful To Participants' Information Access.

A. ERISA permits only certain disclosures to be provided through notice and access.

ERISA permits only these specific notices to be provided through a reasonable accessibility standard:

- defined benefit plan funding notices;[56]
- notice of blackout period;[57]
- notice of funding-based limitation on certain forms of distribution;[58]
- notice of potential withdrawal liability;[59]
- notice of right to divest;[60] and
- pension benefit statements.[61]

Any other document must be furnished to the participants. The Supreme Court has made clear that "furnished" means something different from "reasonably accessible."[62] Accordingly, DOL's notice and access model for any document other than those listed above is contrary to the plain language of ERISA. The proposed rule therefore should be withdrawn and substantially modified to comply with the statute as interpreted by the Supreme Court.

B. Any final rule should require plan administrators to affirmatively monitor whether participants actually open the electronic notice and access the website and disclosures.

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[56] 29 U.S.C. § 1021(f)(4).

[57] 29 U.S.C. § 1021(i)(2)(D).

[58] 29 U.S.C. § 1021(j).

[59] 29 U.S.C. § 1021(*l*)(2)(B).

[60] 29 U.S.C. § 1021(m).

[61] 29 U.S.C. § 1025(a)(2)(iv) & (a)(3)(A).

[62] *Cf. Inter-Modal Rail Employees Assn. v. Atchison, Topeka & Santa Fe Ry*., 520 U.S. 510, 515 (1997) (Congress uses the words it means in ERISA).

The proposed safe harbor operates through "notice and access." In contrast to the current DOL safe harbor, the proposed rule imposes no requirements on plan administrators to analyze whether individual participants interact with an electronic system as a function of their job; to determine whether participants use a computer as part of their job; or to obtain affirmative consent to this proposed notice and access approach. Under the proposed rule, a mere notice and posting is enough to be considered "measures reasonably calculated to ensure actual receipt of the material by plan participants . . .," regardless of whether participants open the notice or access the disclosure. Given that the proposed rule permits invented electronic addresses for individuals who do not work with computers, it is highly probable that many individuals will never see these retirement plan disclosures.

AARP is extremely concerned that email and text messages concerning plan disclosures will go unread. We already know that in a world of information overload, many people prefer to get important financial information delivered on paper, not electronically. The reality is missed emails, misplaced passwords, and difficulties reading complex information on a small smartphone screen mean that most people will not see messages and will not visit their retirement plan website on a regular basis. Individuals are inundated with information on a daily basis—and, in this instance, we are talking about information that is complex and incomprehensible to many readers. Currently, workers send and receive an average of 246.5 emails per day.[63] That number is expected to continue to go up.[64] Moreover, Americans send and receive about 94 text messages per day, with people between the ages of 18-25 sending or receiving many more.[65] Electronic information overload is real.

Thus, it is likely that any given disclosure might easily escape the attention of even the most diligent employee. Even if the notice is seen, the emails or texts themselves do not even contain the disclosure, but require navigation to a separate site, a separate login, and an additional download—steps that put up additional obstacles for many employees. Especially given many Americans' discomfort with using online technologies to perform various financial management tasks, including fear of their confidential data being misused, it is more than likely that workers and retirees simply will not have the time, information, or confidence to read and make use of disclosures provided in this manner.

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[63] The Radicati Group, Inc., *Email Statistics Report*, *2015-2019*, available at https://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf.

[64] The Radicati Group, Inc., *Email Statistics Report, 2019-2023,* https://www.radicati.com/wp/wp-content/uploads/2018/12/Email-Statistics-Report-2019-2023-Executive-Summary.pdf. Extrapolating between the two reports in footnotes 17 and 18, the number of emails could top 345 per day in 2023.

[65] Kenneth Burke, *How Many Texts Do People Send Every Day (2018)?* (originally posted May 18, 2016), https://www.textrequest.com/blog/how-many-texts-people-send-per-day/; Aaron Smith, *How Americans Use Text Messaging* (Sept. 19, 2011), https://www.pewresearch.org/internet/2011/09/19/how-americans-use-text-messaging/.

If the plan administrator knows that large numbers of participants are not opening notices or going to the website, AARP submits the plan is not "furnishing" disclosures within the meaning of ERISA.[66] By its proposed safe harbor, the Department is in effect improperly waiving a plan administrators' fiduciary duty to monitor whether individuals are actually receiving these disclosures; the only instance when plan administrators must deal with a participant's failure to receive a disclosure is when the plan administrator is alerted to an invalid or inoperable address. If the plan administrator receives no such alert, the administrator has no duty under the proposed rule to determine whether an individual has ever opened a notice or logged on to a website. This is despite all of the easy tracking tools that are now available to plan administrators.[67]

Plans should not be permitted to operate notice and access disclosure if they know participants are not opening up the emails. This is especially true if the plan has participants who do not use computers as an integral part of their work. Plan administrators should be required to determine if participants are successfully using the website and how often; for example, if a required notification is sent to participants, the plan should know how many recipients went to the website based on the included link.

AARP believes DOL has, as directed by the President's Executive Order, an opportunity to make ERISA's required disclosures more useful and illuminating to participants. That means getting understandable information to participants in a timely manner. This proposal does not meet this standard.

Accordingly, AARP submits that the Department should amend its proposed rule that would, as a practical matter, exclude a substantial segment of current plan participants from the benefits of disclosures. If the suggested defaults or safe harbors were adopted, they would, for many individuals, amount to no disclosures at all. AARP believes that the proposal does not protect participants adequately or sufficiently to ensure that "covered individuals" are furnished "covered documents."

C. The proposed rule's notice and access model will result in fewer participants receiving and viewing the disclosures.

The notice and access safe harbor does not require that the required disclosures be attached to the notice or be accessed with a one-click to the document. Instead, participants will need to

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[66] *Cf. Tibble v. Int'l*, 135 S. Ct. 1823, 1827-28 (2015) (trust law includes a duty to monitor of investments). Similarly, a plan can breach its fiduciary duties in administering the benefit claims process. *See Friedrich v. Intel Corp*., No. S-94-1613., 21 EBC 2203 (E.D. Cal. June 11, 1997), *aff'd*, 81 F.3d 1105 (9th Cir. 1999) (disability claims reviewed by corporate risk management department).

[67] Vanguard acknowledges that "[d]igital environments permit exceptional precision in tracking the relationship between investors' consumption of information and their subsequent behavior." Vanguard Research, The Digital Investor, *Patterns in digital adoption* at 2 (July 2017), https://personal.vanguard.com/pdf/CIRDA.pdf. Consequently, this type of tracking can be easily performed at a minimal cost.

affirmatively undertake a series of additional steps to view the disclosures that they are required to receive. Participants will need to go to one or more specified websites (either plan or provider, or both), create a user name, create a password, retain these codes, use these codes, and perhaps obtain a second-factor verification code every time they want to read their own disclosures.

By proposing an "access equals furnish" standard and introducing a "two-step" process for participants to obtain information they otherwise automatically receive today, the proposal would result in less disclosure. This is contrary to the purpose of ERISA and not in accordance with both the preferences and needs of participants. (*See* Section II., B).

V. The Proposed Rule Covers Individuals Who Do Not Necessarily Have Internet Access.

The proposed rule establishes a framework that identifies "covered individuals" to whom "covered documents" may be provided, as long as certain requirements of the safe harbor are met. The proposed rule defines a "covered individual" as a participant, beneficiary, or other individual entitled to covered documents and who provides the employer, plan sponsor, plan administrator (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" electronic addresses to employees—regardless whether those employees use a computer for their jobs and whether a computer is integral to their jobs—those employees are treated as if they provided the electronic addresses. The electronic address that may be used for purposes of the regulation is technology neutral, and imposes no requirements with respect to the type of device that may be used for receipt (whether a smartphone, tablet, laptop, or other internet-connected device).

A. Any final rule should prohibit employer "invention" of email addresses because it will not result in participants' receiving required disclosures.

The Department's proposed rule deviates drastically from all prior guidance. The proposed rule would authorize employers to "invent" email or smartphone numbers for workers who do not have computer access at work, are not required to use computers at work, and have not affirmatively consented to electronic disclosure. Indeed, the invented electronic address may be assigned solely for purposes of satisfying the safe harbor. This approach by definition will ensure that few participants with invented electronic addresses—who neither chose to receive disclosures electronically nor chose the address to which disclosures may be sent—will receive or look at the retirement disclosures. The proposed rule also significantly broadens who may receive electronic disclosure, no longer requiring any ties to employment. AARP cannot overstate how far short such an approach falls from the Department's duty under ERISA and the Administrative Procedure Act. This proposal to simply invent a participant address does not meet ERISA's requirement of "furnishing" disclosures. AARP urges the Department to withdraw this unsupported provision which undermines participant rights in direct contravention of ERISA's purpose and plain meaning.

ERISA requires several participant disclosures because the drafters of ERISA intended robust disclosure to workers and their families to not only be one of the fundamental methods for workers to understand their rights, but also to enable them to monitor their plans to prevent abuses by plan administrators and managers.[68] Prior to ERISA, there had been several noted scandals involving underfunded pension plans and plans with unclear terms that employers used to deny earned pensions to retirement age workers.[69] ERISA was specifically drafted to prevent these types of abuses.[70] Congress wanted to ensure a protective retirement system that is prudently administered and monitored.[71]

The proposed rule reverses the Department's long-standing, consistent interpretation of ERISA's statutory language that required that "the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals"[72] without providing any rationale for this change or evidence how it is beneficial to participants. Moreover, the Department freely acknowledges that there are groups of participants that will be adversely impacted by this change, but fails to provide adequate protections.

AARP strongly believes that ERISA requires actual receipt of retirement disclosures. There should be no scenario under which an employer or plan may invent an email or smartphone address for a participant, which the participant has not freely, willingly, and knowingly requested or agreed to, that would satisfy the actual receipt standard. Any action today by an employer or plan to invent fictitious emails likely would be treated as a breach of fiduciary duty and subject to legal redress. Indeed, there may be jurisdictions in which such an action would be considered fraud. Within the statutory confines of ERISA itself, neither employers nor plan administrators may designate a participant's beneficiaries, select their investment options, or make-up their distribution options. These are clear breaches of fiduciary duty, and creating a participant address is no different. ERISA clearly requires that participants regularly receive plan information,[73] and inventing an e-mail address is not a permissible construction of ERISA.

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[68] 29 U.S.C. §§ 1021 – 1031; S. Rep. No. 93-127 (1974), as reprinted in 1974 U.S.C.C.A.N. 4838, 4863.

[69] Berio LeBeau, *et al*., EMPLOYEE BENEFITS LAW , *Brief History of the Regulation of Employee Benefits* at 1-9 (4th ed. 2017).

[70] ERISA § 2(a) & (b), 29 U.S.C. § 1001(a) & (b).

[71] *Id.*

[72] 29 C.F.R. § 2520.104b-1 (emphasis added).

[73] ERISA § 2(b); 29 U.S.C. §§ 1101- 1024; S. Rep. No. 93-127 (1974), as reprinted in 1974 U.S.C.C.A.N. 4838, 4863.

The proposal presents the baffling question as to why any employer would want or need to invent an email address for an employee who does not work with the internet or voluntarily request electronic documents. The employer has the employee's home address. It is required for all tax filings. When an employee is hired, the employer has many opportunities as part of job application forms, job acceptance forms, and employee benefit sign-up forms to ask the employee where he or she would like employee benefit information sent. For current employees, the employer can ask employees at any time or as part of an open season (when health benefits must be chosen) if they wish to provide an updated contact address, including an electronic address, for the purpose of sending future retirement plan notices (of course, the employer should clearly explain how the address will be used). These processes are clear and familiar to both employers and employees. There is no need to create a new process. Instead, the Department's safe harbor appears to attempt to permit what should otherwise be a plan's breach of fiduciary duty. Quite simply, the proposed rule should require employers and plans to ask employees for preferred contact information as part of existing regular employer processes in which new employee information is collected and benefit plan information can be modified, changed, or updated.

The Department gives no reason or research to support that changing its interpretation of "furnishing" from requiring actual receipt of the disclosure to a mere notice of and access to the disclosure would serve the interests of the participants. The proposed rule also gives no reason or evidence to support inventing email addresses for a participant that does not use that email at work (and is never notified).[74] As a result, this rule is arbitrary and not designed to ensure that participants actually receive the legally required disclosures.

B. Any final rule should require plan administrators to regularly check if emails or texts are opened.

Under DOL's current electronic disclosure safe harbor, the plan administrator must take appropriate and necessary measures reasonably calculated to ensure actual receipt of the electronic material.[75] Such measures could include using return-receipt, notice of undelivered electronic mail features, or periodic reviews or surveys to confirm receipt of the transmitted information.[76]

Unlike the DOL's current safe harbor, the proposed rule would not require any electronic confirmation of the covered individual's ability to access the electronic address provided. Nor is there any obligation to independently verify the provided e-mail address or smartphone number.

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[74] AARP notes that the proposed rule does not require that the participant be notified of the "invented" electronic address.

[75] 29 C.F.R. § 2520.104b-1(c)(1)(i)(A).

[76] *Id*.

Nor is there any obligation to determine whether the electronic disclosure was actually received or opened.

Moreover, unused and unmonitored accounts would be at high risk for online privacy and theft violations by imposters. AARP can think of no compelling reason to place employers, plan administrators, and participants in such preventable jeopardy.

Again, the proposal is in direct conflict with ERISA because known segments of participants will not receive their retirement disclosures. Moreover, the proposal provides no evidence or rationale as to why this proposal is needed or how it is protective of participants rights.

AARP proposes that any electronic system should be designed to reasonably assure actual receipt of the information. This may require periodic reviews or surveys to confirm receipt of the electronically delivered information. The plan administrator should be aware of, and follow-up on, undelivered and—to the extent known—unopened e-mail. Given that software now enables plans and service providers to track this information, a failure to do so where the plan knows (or should know) that participants fail to open their emails could rise to a breach of fiduciary duty.[77] Fiduciaries' failure to establish a process and procedure for dealing with bounced and unread emails, by itself in appropriate circumstances, could give rise to a breach of fiduciary duty.

In short, the final rules should require that:

(1) all participants should be asked their preference as to how they would like to receive disclosures;
(2) if a participant fails to submit a preference, then paper would be the default;
(3) participants who elect email or smartphone disclosures should actually receive them; and
(4) plans must send paper disclosures if email or smartphone numbers bounce back or are consistently left unread.

VI. The Scope Of The Definition Of "Covered Documents" Is Too Broad.

The proposed rule broadly includes any document that the plan administrator is required to furnish participants under Title I of ERISA, except for any document that must be furnished upon request.

A. The scope of covered documents is contrary to ERISA.

As AARP has already described in Section IV., A., ERISA permits only six specific notices to be provided under a reasonable accessibility standard. Accordingly, DOL's notice and access

[77] Vanguard Research, The Digital Investor, *Patterns in digital adoption* at 2 (July 2017), https://personal.vanguard.com/pdf/CIRDA.pdf. (describing Vanguard's ability to track its clients).

concept for any document other than those listed above is contrary to ERISA and the Administrative Procedure Act.

B. Any final rule should require that participants be specifically told which documents are covered under this proposed rule.

Commenters seem to disagree which documents are included within the proposed rule. AARP believes that such documents would include, but not be limited to, claims denials, black out and mapping notices, suspension of benefits notices, domestic relations orders, and notices of right to divest. Accordingly, the Department should list all of the potential disclosures under Title I that would be covered under the rule, and that list of disclosures should be included in the Initial Notice of Internet Availability.

C. Any final rule should require that participants receive one paper benefit statement a year, unless they affirmatively elect electronic statements.

AARP has consistently proposed that the Department require employers and plan administrators to provide participants an annual paper benefit statement, unless the participant or beneficiary has specifically requested electronic delivery of all ERISA required disclosures. Simply put, the annual benefit statement—particularly disclosure about the amount of retirement benefits to which an individual is entitled—is one of the most important aspects of ERISA.

As employers have shifted from defined benefit to defined contribution types of pension benefits, employers, service providers, and policymakers have faced new dilemmas related to participants' lack of understanding about retirement savings, adequacy, and investing. In the defined benefit model, employees have fewer decisions to make. The plan terms determine when they vest, the amount of benefits earned, and when they can retire with earned benefits. It still is important for workers to understand these rights and their status. Under defined contribution plans, however, workers' decisions will greatly affect their retirement savings, from amounts saved, to investments selected, to timing of withdrawals. The more that workers are effectively informed about their retirement benefits, the better their decision-making ability to maximize their retirement savings. There are frequent employee benefit news articles noting that employees—as well as employers on behalf of their employees—worry that they are not saving enough for retirement.

Workers value receiving the annual benefit statement and seeing how much they have earned and how to measure their ability to reach their retirement savings goals. It is also an important way for workers to appreciate their employers for offering them a retirement plan and to feel rewarded for the work they carry out each day. Further, the annual benefit statement is a simple 1-2-page document that is easy to send and important for workers to review and understand. In addition, the annual benefits statement could remind participants how to opt-out of electronic delivery of other disclosures. AARP urges the Department to modify the proposed rule to maintain an annual mailed benefit statement (unless another delivery method is specifically requested by the participant).

D. Any final rule should clarify plan and participant obligations surrounding requests for documents.

The proposed rule should clarify plan obligations surrounding requests for documents. The rule requires plan notices to include the ability to obtain paper documents, but permits plan officials to specify all procedures. Any final rule should require the plan to permit written document requests through a toll-free phone number, any provided email address, and other human resources contacts. Otherwise, the proposal is unclear as to: Is a participant request sent to the plan administrator by email considered a request in writing? Does a plan and/or plan administrator have an obligation to provide an electronic address to participants? If so, does the plan administrator have an obligation to confirm that the request was received, and within what time frame? This, of course, could be easily done with an automatic response if there is a dedicated email for document requests. In addition, if a designee requests a document, what is the required authorization?[78] Must it be in hard copy or is an s-signature[79] adequate? AARP submits that if the Department goes forward with this proposed rule, these issues must be addressed for equal treatment of participants, but also as part of the process and procedures for opt-outs. (*See* Section XI).

Regardless of the mode of request (electronic or mail), AARP urges that the plan administrator be required to provide the document in hard copy, unless participants or their designee request that the document be provided electronically.

E. The Department should not expand this proposal to welfare plans without a thorough analysis of the differences between types of welfare plans.

AARP urges that welfare plan[80] disclosures should remain excluded from the proposed safe harbor for a number of reasons. Welfare plans include various types of plans, each with their own unique issues. Health and medical plans are qualitatively different from sick, accident, disability, death, unemployment, vacation, apprenticeship, training, day care, scholarship funds or prepaid legal services plans for the simple reason that health and medical plan disclosures can be a matter of life and death. People other than the participants—such as physicians and guardians—may need to obtain the disclosures to determine which treatments are covered.

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[78] We note that the courts and the Department are split as to whether proof of authorization is required for an attorney or other third party to obtain documents on behalf of a participant. *Compare Daniels v. Thomas & Betts Corp*., 263 F.3d 66, 77-78 (3d Cir. 2001) (ruling that an attorney's request on behalf of a participant triggers to duty to provide documents without written authorization, unless there is some reason to question the attorney's authority) *with Bartling v. Fruehauf Corp*., 29 F.3d 1062 (6th Cir. 1994) (holding that a plan may require written authorization from participants where a third party including an attorney makes a request for documents upon their behalf) and DOL ERISA Advisory Op. 82-21A (Apr. 21, 1982).

[79] An S-signature is an electronic signature between forward slashes and includes any signature made by non-handwritten means (i.e. electronic or mechanical).

[80] 29 U.S.C. § 1002(1).

The Department's comment focuses on group health plans, noting correctly the different considerations of these plans—such as emergency and urgent care—from retirement plans. AARP suggests that if DOL is considering expanding this rule to welfare plans, the DOL should issue a separate RFI for further analysis requesting input on the various types of welfare plans—all of which have unique issues.

VII. The Content Of The Initial Notice Of Internet Availability Does Not Adequately Protect Participants.

The proposed rule requires that the plan administrator provide a one-time paper notification that explains that (1) some or all covered documents will be provided electronically to an electronic address (or more simply that all future disclosures will be available online at a website); and (2) the participant and beneficiary have the right to request a paper version of any document, free of charge; the right to opt-out of receiving covered documents electronically completely; and an explanation of how to exercise those rights prior to the plan administrator relying on the safe harbor for any covered individual. AARP believes that the Initial Notice of Internet Availability does not fully protect participant rights, and we urge the following improvements to ensure participants understand their rights with respect to electronic delivery.

A. Any final rule should maintain the requirement that the Initial Notice of Internet Availability be provided in paper, but a similar paper notice should also be provided annually.

AARP welcomes the fact that the Initial Notice of Internet Availability will be provided in paper and applies to any of the electronic disclosure safe harbors; this is a needed modification to the current electronic disclosure safe harbor. However, AARP urges that the Initial Notice of Internet Availability should be issued twice—the first time ninety days before the system goes live and the second time between fifteen and thirty days before the system goes live.[81]

AARP also urges that this Initial Notice of Internet Availability should be provided when employees are newly hired and at the time of termination from employment, because these circumstances are when an employee has a change in employment status.

Moreover, if the Department does not require a paper annual benefits statement, then we urge that the proposed rule require an annual notice provided in paper to remind participants that they have the option to opt-out of receiving documents electronically. This is especially crucial for those participants who do not check their assigned electronic addresses regularly because it is not part of their job to do so. An annual opt-out notice will remind participants of their ability to receive paper disclosures and to opt-out of electronic delivery if they so choose.

[81] If a new method of electronic disclosure becomes available, the Department should require the plan to send out an Initial Disclosure Notice explaining to participants how the new process will be implemented.

B. The Initial Notice of Internet Availability should include the electronic address that will be used to send the disclosures; a list of documents that are covered by this plan's adoption of the safe harbor; what electronic delivery means; and the location of and length of time disclosures will be maintained on the website.

The Initial Notice of Internet Availability should inform the participant and beneficiary what electronic address that plan administrator will use to send the disclosures. Without this information, participants will not know where their electronic notices will be sent. Again, this is especially crucial for those participants for whom the plan invented electronic addresses and who need to decide whether to opt-out of electronic disclosures.

This Initial Notice of Internet Availability should include a list of documents that are covered by this plan's adoption of the safe harbor. Without this list of documents, participants cannot make an informed decision as to whether to opt-out of receiving covered documents electronically completely because they will not know what they will not be receiving in paper. Moreover, some plans may choose to furnish only certain documents electronically; the participants should know which documents are at issue.

The Initial Notice of Internet Availability should also explain what electronic disclosure means—that is, clicking on an attached document, downloading additional software, retaining plan and personal passwords, or going to a website and logging into an account. If the Department moves forward with the notice and access model, then participants need to understand that they will need user names and passwords and it will be their responsibility to search for the materials. Participants should understand what all of their obligations will be under this new system.

The Initial Notice of Internet Availability should state the location of disclosures (the specific website where they will be stored) and the length of time that they will be available to the participant on the website. If the Department decides to permit disclosures to be superseded, participants may decide to receive paper disclosures.

C. The Initial Notice of Internet Availability should explicitly include participant protections of no retaliation, the right to print at the employer's office, a 24/7 toll-free telephone number, and assistance with password access.

Although AARP appreciates that participants have the right to receive paper disclosures, free of charge, we believe that the proposed rule regarding the Initial Notice of Internet Availability is missing four crucial participant protections. First, the proposed rule should emphasize that participants cannot be retaliated against for requesting paper disclosures. Second, the proposed rule should state that the participant or beneficiary can download and/or print the disclosures at the employer's place of business, free of charge and without retaliation. Third, because this will be the first-time participants will receive such a notice, the proposed rule should require that the plan provide a toll-free telephone number so that the participants can contact the plan administrator or designated representative of the plan with questions. The plan should be

expected to return telephone calls within 72 business hours. Fourth, the Initial Notice should make clear that the plan is available to assist with password access.

D. Any final rule should require that the plan administrator establish a process and procedure to track opt-outs from the delivery of disclosures electronically.

The plan administrator must have a written process and procedure to track opt-outs from electronic disclosures to ensure that participants receive their disclosures properly. A plan's procedures are not reasonable if they contain any provision, or are administered in a way, that unduly inhibits or hampers the initiation or processing of a request or election.[82]

VIII. The Content Of The Notice Of Internet Availability Does Not Adequately Protect Participants.

A. Like the current electronic disclosure safe harbor, the Notice of Internet Availability should explain the significance of the disclosure.

AARP urges that the content of the Notice of Internet Availability should not only include a brief description of the document, but also should state the significance of the document, including the reason(s) it is important for the participant or beneficiary to read and keep the disclosure. For example, while some people may know the significance of a summary plan description, others may not. The current electronic safe harbor contains the requirement to explain the significance of the document. The proposed rule neither explains the reason for this omission nor provides any rationale for why this would no longer necessary.

B. Any final rule should require that participants be notified of required action due to time limits.

Significantly, some of the covered disclosures may require participants to take actions during a limited time frame. For example, a claims denial may require participants to file suit to protect their rights within 30 days of the notice of claims denial. Sending such a denial to an email address that was assigned by an employer to workers who do not use a computer at work more than likely means that these participants will not see the denial and lose their right to appeal the denial. Quite simply, a notice and access model may not provide participants adequate notice to make informed decisions on these important issues in a timely manner. Moreover, we urge that the notice should be sent out a reasonable period—not too early or too late—before action on a plan deadline must be taken. Accordingly, if an action must be taken by October 31, a notice sent out in January concerning that deadline would not be reasonable.

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[82] The Department of Labor should audit the plan to determine whether a plan has a process for tracking opt-outs and consistently follows it, and, more generally, whether the plan's process of electronically transmitting disclosures (such as the number of invalid electronic addresses, the read receipt rate, whether the read receipt rate goes up after multiple transmissions, the amount of time participants spend on the email) ensures that participants are receiving them.

At a minimum, all electronic disclosures should indicate what actions participants might wish to take in response to a disclosure. It could be as simple as "this is required information" and "you should keep a copy of this for your records" or "this is a benefit denial and you have 30 days to appeal this denial." This is particularly important given that many individuals do not have expertise in these matters.[83] To help participants better understand eligibility and vesting policies, the Department should require separate disclosures concerning eligibility and vesting requirements. For example, if employees leave their job before the end of the year, the 401(k) plan should explain whether these employees will receive any matching employer contributions. Moreover, plans should clearly inform participants if they are required to be employed as of December 31 to receive the employer matching contribution.[84]

C. Any final rule should require that participants be notified of the length of time the document will be available to them on the website.

The Notice of Internet Availability should state the length of time that the disclosure will be available to the participant on the website. If the Department decides to permit electronic disclosures to be superseded, participants may wish to request the disclosure in paper before access to the information is removed.

D. The Notice of Internet Availability should explicitly include participant protections of no retaliation, the right to print at the employer's office, a 24/7 toll-free telephone number, and assistance with password access.

AARP submits that there are the same shortcomings on the Notice of Internet Availability as in the Initial Notice of Internet Availability. We repeat our comments here. Although AARP appreciates that participants have the right to receive paper disclosures, free of charge, we believe that the proposed rule regarding the Notice of Internet Availability is missing four crucial participant protections. First, the proposed rule should emphasize that participants cannot be retaliated against for requesting paper disclosures. Second, the proposed rule should state that the participant or beneficiary can download and/or print the disclosures at the employer's place of business, free of charge and without retaliation. Third, the proposed rule should require that the plan provide a toll-free telephone number so that the participants can contact the plan administrator or designated representative of the plan with questions. The plan should be expected to return telephone calls within 72 business hours. Fourth, the notice should make clear that the plan is available to assist with password access.

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[83] *See* Section I.

[84] *See* U.S. Gov't Acc't Office, *401(k) PLANS: Effects of Eligibility and Vesting Policies on Workers' Retirement Savings* (GAO-17-69 Oct. 21, 2016), https://www.gao.gov/assets/690/680568.pdf (demonstrating significant losses in account balances due to these provisions).

E. A notice that is "reasonably calculated to be understood by the average plan participant" means a document that meets the Flesch Reading Ease test, but also ensures that the participant understands the significance of the notice.

The Department has defined "reasonably calculated to be understood by the average plan participant" as follows: a notice that uses short sentences, everyday words rather than technical and legal terminology, and active voice, avoids double negatives, and has a Flesch Reading Ease test score of at least 60.[85] And, the Department has promulgated a safe harbor within the safe harbor that meeting these criteria means that the "reasonably calculated" standard is met. However, this standard is insufficient. Words must convey the import and significance of the notice.

AARP welcomes the Department's first attempt at this definition, but cautions this definition is only the first step in making disclosures understandable. AARP knows this from first-hand experience.

While developing model fee disclosures, AARP learned the complexity of generating disclosures that are understandable to a wide audience.[86] A few criteria did emerge from the fee disclosure focus groups and testing. To be effective, disclosures should be short and easy to read and understand. Disclosure forms for participants should be clear and concise, not overwhelming. Writing in plain language would make the disclosure far more meaningful.[87] The purpose of the disclosure should be clear. The disclosure should provide meaningful information. Terms that are used in the disclosure form should be clearly defined. The disclosure form should direct plan participants to how they may obtain more detailed information from the plan administrator on the benefits under the plan.[88] Clearly, the format of the form as well as the vocabulary can have a significant impact on the understandability and value of the information. Accordingly, we believe that the Department should move cautiously if it is considering combining disclosures; while merging of disclosures may be feasible, participants' comprehension level may well be

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[85] AARP notes that the more disclosures that are consolidated the harder it will be to meet the Flesch Reading Ease test score of 60.

[86] AARP, *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* at 5 (Sept. 2008), https://www.aarp.org/money/investing/info-09-2008/fee_disclosure.html.

[87] Plain language is easier to read than technical, legal, or complicated writing. Therefore, readers are more likely to read through the information rather than just skim it. *Plain Language Action and Information Network*, http://www.plainlanguage.gov, provide checklists to assess whether documents or web-based materials comport with plain English standards. Experts have identified processes to help individuals use written information to inform choices. Strategies to help compensate for literacy deficits and build on cognitive strengths are recommended. *E.g*., Jeanne McGee, *Toolkit for Making Written Material Clear and Effective*, a web-based resource prepared for the Centers for Medicare and Medicaid.

[88] *Id*. at 26.

compromised. (See Section IX). Participant testing can provide necessary feedback to mitigate this issue.

Layout and design elements can be used to enhance understanding of key information in the form. For example, using bold type, underlining, bullets, and borders to highlight important information may enhance comprehension by drawing participants' attention to it. Charts and tables may help to present comprehensive information in a way that allows for the easy presentation of information. Many people find graphic presentations easy to understand. However, while charts, tables and other graphic presentations are a viable way to convey information, testing to ensure participants find them helpful would be beneficial.

Good layout and design elements may lower the amount of cognitive effort required to use information (*e.g*., reducing the amount of information individuals must process); give consumers a way of relating the implications of a choice to their own experience; and highlight the meaning and significance of information through specific presentation approaches. Participants will better comprehend information if the layout and design elements are combined with written materials that use short sentences, the active voice, and large print. Grouping segments of information and limiting directions will improve instructions. Moreover, visual aids can help to reduce the amount of reading required and clarify written materials.[89] The use of narratives and evaluable formatting helps those with moderate skill, but not those in the lowest quartile of skills. Significantly, how information is presented and framed will highly influence consumers This may be as important as the content itself and failure to focus attention on the manner in which materials are presented could undermine participants' ability to consider their own self-interest in the context of making a decision.[90]

Web-based materials can also be designed to facilitate decision making by: offering step-by-step guidance to navigate a web site; including functionalities that enable the user to search on key words; defining key terms; allowing the user to easily print a web page; protecting personal information and securing such information. Web-based materials are often very complex and require a unique set of navigation and graphic reading skills. For internet-based materials, specific techniques such as graphics, multimedia, and interactive elements may make content more accessible, but they ultimately cannot remove the barriers for individuals with poor financial literacy skills.[91] Moreover, all electronically disclosed documents should be word searchable with links or the ability to hover above terms (as the SEC now requires).

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[89] *See* Peggy Murphy, Terry C. Davis, Robert H. Jackson, Barbara C. Decker and Sandra W. Long, *Effects of Literacy on Health Care of the Aged: Implications for Health Professionals*, Educational Gerontology at 19, 311-6 (1993).

[90] *Cf*. J. Hibbard, J. Dubow, E. Peters, *Decision Making In Consumer-Directed Health Plans*, Washington, DC. (2003).

[91] *Cf*. Ahmad Risk and Carolyn Peterson (2002), *Health Information on the Internet: Quality Issues and International Initiatives*, JAMA, 287 (20), 2713-5.

As a rule, individuals with poor literacy skills rely on their listening skills to learn.[92] However, it is not always feasible to provide one-on-one teaching or counseling. For those with low literacy skills, other interventions include offering audio or video instructions and providing visual rather than written cues,[93] and suggesting behaviors and actions that the patient/consumer should take. The Department should require the use of bolding or some other type of differentiation so that participants know when they need to take action in response to an electronic disclosure.

AARP strongly recommends that the Department test its proposed disclosures before making changes to ensure that the disclosures present the information to participants in a manner that is understandable to the average participant and is useful. (*See* Section X, A).

The proposed rule should clarify that even if a plan's Notice meets the Department's definition of "understandability," the plan needs to apply some common sense to the Notice as well. For example, if the Initial Notice of Internet Availability stated that the documents in the Notice included "any document that the plan administrator is required to furnish participants under Title I of ERISA," participants might understand the words, but they would not understand the import and which documents were encompassed within that group. A plan administrator should know that such a statement would fail the understandability test.

F. Any final rule should require that a Notice of Internet Availability be separately sent every time a disclosure is made available on the website, regardless of whether the disclosure is original or amended.

AARP urges that the proposed rule should clarify that every time a new or amended disclosure is made available on the website a new Notice of Internet Availability will be sent separately at the same time. If an annual Notice of Internet Availability is provided, the proposed rule should clarify that if one or more of the documents is amended or superseded the plan has a duty to affirmatively notify covered individuals. This clarification is necessary because at least one commenter has suggested that "if an annual Notice of Internet Availability is provided, it does not appear necessary to affirmatively notify covered individuals when a new notice is posted to the website."[94] AARP urges the Department to make clear that if there are any changes, amendments, or updates to disclosures, a Notice of Internet Availability must be sent to the participants; otherwise participants would have no reason to check the website. Participants

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[92] Murphy, *supra*.

[93] J. Gazmararian, D. Baker, M. V. Williams, R. Parker, T. Scott, D. Green, S. N. Fehrenback, J. Ren and J. Kaplan, *Health Literacy Among Medicare Enrollees in a Managed Care Organization*, JAMA, 281 (No. 6) (1999).

[94] Smith, Gambrell & Russell, LLP, *Department of Labor Proposes New Rules for Electronic Retirement Plan Disclosures* (Oct. 22, 2019), https://www.sgrlaw.com/client-alerts/department-of-labor-proposes-new-rules-for-electronic-retirement-plan-disclosures/.

should not be expected to periodically check a website to see if new disclosures or notifications are added.

The Department should clarify that employers must also notify plan participants **each time** documents have been posted on the website. Merely posting the plan documents without providing notice to participants of the posting should not satisfy the DOL's electronic delivery rules. Moreover, the email or text supplying the link should contain the notice, the reason this disclosure is important, and the link to the website and document.[95] If there is no direct link, there should be explicit instructions as to how to access the document. All of these notifications should explain that the participant can request the disclosure in paper, how to do so, and the timelines for action and document retention policies.

G. The Notice of Internet Availability should not address secure login procedures; instead, a separate notice should be sent.

AARP submits that the Notice of Internet Availability should not address secure login procedures, such as how participants can securely receive and recover login information. Instead, a separate notice should be sent with this information as well as information about the ability to receive paper disclosures and information about the toll-free 24/7 telephone number.

IX. Consolidation of Multiple Notices May Be Confusing To Participants.

The proposed rule permits the plan administrator to announce the availability of these seven disclosures in a single Notice of Internet Availability: (1) summary plan descriptions (SPDs); (2) summaries of material modification (SMMs); (3) summary annual reports (SARs); (4) annual funding notices; (5) the required comparative investment-related disclosure for plans offering participant directed investments for individual account plans under DOL's ERISA § 404a-5 regulation; (6) QDIA notices; and (7) pension benefit statements required by ERISA § 105. Pursuant to the proposed rule, this single Notice of Internet Availability can be provided once each plan year and no more than 14 months after the prior plan year's notice was given.

A. Any final rule should not permit plan administrators to combine electronic notices.

The Department's rule would permit plans to combine multiple notices and electronically provide them in one email or text. AARP can understand the desire for some flexibility to combine paper disclosures in order to reduce postage costs. However, electronic communication does not entail similar delivery costs. In addition, it seems obvious that individuals will have improved comprehension if they read one notice or disclosure at a time and would be better served by clear and highlighted delivery of provided information.

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[95] *E.g., Thomas v. CIGNA Group Ins*., 2015 U. S. Dist. Lexis 25232, 2015 WL 893534 (E.D.N.Y. Mar. 2, 2015); *Rosenberg v. CNA Fin. Corp*., 41 EBC 2902 (N.D. Ill. July 23, 2007).

Given there is minimal cost to multiple electronic communications, we urge the DOL to require plans to provide one notice at a time. Plans should be encouraged to space the timing of notices so participants are not confused or overwhelmed. Plans also should be encouraged to provide multiple alerts and reminders. Many proponents of electronic communication state it can be a means to actually improve consumer understanding of complex information. We urge the Department to ensure any plan communications are improved, not made worse, by simple, clear, succinct communications.

B. Because the proposed consolidated documents are the main documents that participants use to understand their eligibility for benefits, distribution options and other information which they need to make an informed decision about their retirement benefits, they should not be consolidated.

AARP strongly believes that the underlying plan trust agreement, the summary of the plan, financial report (Form 5500), and fee and investment performance disclosures are critical and essential documents and should be offered or provided in paper at the beginning of an employee's tenure (and offered again periodically, if updated). These documents are fundamental to workers' and their families' understanding how the plan works, where they stand under the plan and how to manage, monitor and protect their earned benefits. The SPD is generally the primary way that participants know how the plan works and what benefits are offered. Without delivery of the SPD, workers would not know when they are eligible, when they are vested, when they may claim benefits, how to claim benefits, and a myriad of other rules and requirements. Accordingly, notice of the SPD should not be consolidated with other disclosures.

Indeed, many of the documents which this proposed rule states may be consolidated—the SPDs, the SMMs, the required comparative investment-related disclosure for plans offering participant directed investments for individual account plans under DOL's ERISA § 404a-5 regulation and pension benefit statements required by ERISA § 105—are among the most important that a participant and beneficiary may receive. These documents provide the eligibility rules, the amount in the account balance (which the participant should be checking to ensure that all employee deductions and employer matches have been made), and the information they need to make informed investment decisions.

The notice(s) should explain the reasons an individual may need this information to better monitor and manage their plan benefits to achieve retirement security.[96] For example, when individuals receive their benefit statements, they should be told to match the amount of their employee contributions to the deductions in their pay. In this way, they can ensure that the amounts are correct. The Department should consider a mandatory notice such as "**If the**

[96] *See* Section I.

amounts on your benefit statement do not match the amounts deducted from your pay, you should call the Department of Labor."

C. The consolidated notice does not relieve the plan from sending a separate notice for those documents which have been amended, changed, or reposted on the website.

The proposed rule should clarify that each time a new or amended disclosure (of these permitted consolidated disclosures) is made available on the website a new Notice of Internet Availability should be sent separately at the same time. (*See* Section VIII, F). Moreover, the email or text supplying the link should contain the notice, the reason this disclosure is important, what has changed in the disclosure, and the link to the website and document.[97] If there is no direct link, there should be explicit instructions as to how to access the document. We also urge the Department to ensure that all of these notifications explain that the participant can request the disclosure in paper, how to do so, and the timelines for action and document retention. Just placing the plan document on a website and expecting that participants will notice a new document only if and when they check the website is not an appropriate disclosure under ERISA's requirements.

D. Any final rule should not permit consolidation of notices for multiple plans.

AARP opposes the concept of consolidation of notices for multiple plans. It will be more difficult for participants to understand the notice and they will have to determine what information belongs to which plan. We note that the more notices that are consolidated, the less likely the Flesch Reading Ease test score of at least 60 will be met. Given that the notices are to be sent electronically, it should not be difficult to send out separate electronic notices for different plans.

E. Any final rule should not adopt a principle-based or categorical approach, describing the type or nature of covered documents that may be consolidated.

AARP opposes the concept of a principle-based or categorical approach to consolidation of disclosures because plans will interpret which disclosures are covered by this approach, with different interpretations across millions of plans. In addition, participants will not know which notices they can expect and the timing of those disclosures. It will be extremely confusing and therefore not protective of participants.

X. The Requirements For The Format, Content, And Availability Of Covered Documents On A Website Should Be Improved.

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[97] *E.g., Thomas v. CIGNA Group Ins*., 2015 U. S. Dist. Lexis 25232, 2015 WL 893534 (E.D.N.Y. Mar. 2, 2015); *Rosenberg v. CNA Fin. Corp*., 41 EBC 2902 (N.D. Ill. July 23, 2007).

The proposed rule states that the plan administrator must ensure that the website where the covered documents are posted actually exists. Under the rule, the plan administrator also must take measures reasonably calculated to ensure that:

1) the covered document is available no later than the date it is required to be furnished,
2) the document remains available until it is superseded by a subsequent version,
3) is presented on the website in a manner calculated to be understood by the average plan participant;
4) is presented on the website in a format that is suitable to be read online or printed clearly on paper;
5) must be capable of being searched electronically by numbers, letters, or words;
6) the document is maintained in a widely-available format that allows the document to be permanently retained (such as in PDF form), and
7) the website protects the confidentiality of the individual's personal information.

A. The Department's request for model disclosures cannot be met in the 30-day comment period because it takes a minimum of 6 months to design and test a disclosure.

The Department has asked numerous times for commenters to provide model disclosures for its review. Given the 30-day response time, it is not possible to design and test disclosure forms that are understandable, useful to the reader, and effective for participants.

To design a model disclosure that meets these standards generally requires a minimum period of 6 months from the initial focus groups, initial design, testing, redesigns, and re-testings. For example, in the case of AARP's 2008 model fee disclosure, the model was built upon surveys undertaken in 2007,[98] while developing the model itself in comparison with the DOL model fee disclosure took about 3 months.[99]

Likewise, AARP, along with the Consumer Federation of America and Financial Planning Coalition, this past year hired Kleiman Communications Group, Inc. to conduct usability testing of the SEC's proposed Customer Relationship Summary (CRS) Disclosures. The report demonstrated significant understandability issues with the SEC's proposed disclosures. The *Final Report On Testing Of Proposed Customer Relationship Summary Disclosures* concluded that many, if not most, investors failed to understand the key information in the CRS Disclosures and, therefore, could not use the CRS to make an informed choice between a brokerage account and an advisory account. This initial determination took approximately 3 months. Kleiman then attempted, with several iterations and testing, to design a model CRS Disclosure. While some

[98] S. Kathi Brown, *401(k) Participants' Awareness and Understanding Of Fees* (July 2007), https://assets.aarp.org/rgcenter/econ/401k_fees.pdf.

[99] See AARP, *Comparison of 401(k) of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* (Sept. 2008), http://assets.aarp.org/rgcenter/econ/fee_disclosure.pdf.

progress was made, we found that 6 months was insufficient time to perform and complete the requisite testing.

AARP is happy to work with the Department on a model disclosure, as we have done before, understanding that any model done correctly and with proper testing would not be available before the middle of next year at the earliest.

B. The furnishing of disclosures—whether by notice and access or by paper—must still meet the statutory due dates.

Not surprisingly, the proposed rule requires that the covered document is made available no later than the date it is required to be furnished. Of course, the due dates should not change; only Congress can do that.

However, as a condition of using the electronic disclosure rule, the Department should require that disclosures be posted earlier. Because of the ease of posting, AARP submits that no extensions should be needed or permitted for covered disclosures. Moreover, for disclosures concerning changes in types of or eligibility for benefits (like an SMM), AARP submits that there is no reason that the disclosures cannot be issued within 30 days of the decision to make these changes.

Plans should send out required disclosures which impact a participant's benefits (e.g., SMM or 204(h) notices) as soon as possible after the decision has been made to change benefits. For example, the SMM may be sent up to 210 days after the plan year of the change, a period far too long to be helpful to most consumers. If plans use electronic disclosures, the Department should require any SMM to be transmitted the earlier of the effective date of the provisions, or, within 30 days after the adoption of the provisions.

C. The disclosure is presented on the website in a manner calculated to be understood by the average plan participant.

The Department has defined "reasonably calculated to be understood by the average plan participant" as follows: a notice that uses short sentences, everyday words rather than technical and legal terminology, and active voice, avoids double negatives and has a Flesch Reading Ease test score of at least 60. This is a good first step in establishing a standard for "calculated to be understood by the average plan participant." AARP urges the Department to require not only the covered documents to meet that standard, but also the entire website. (*See* Section VIII, E).

D. The disclosure is presented on the website in a format that is suitable to be read online or printed clearly on paper.

AARP agrees with this standard.

E. Any final rule should require plan administrators to retain all required plan and participant documents on the website or another web-based storage indefinitely.

The proposed rule takes the questionable step of directing plans to only provide the most recent information on plan websites. While we understand this may keep the website clearer and less cluttered, it raises two problems. First, where will participants find all of the information that is not presented on the plan website? Under current law, when documents are mailed to participants, participants can file and maintain that information forever. Also, under Department rules, the plan must keep plan level information for at least six years[100] and participant-level documents until sufficient to determine benefits due.[101] For participants, the plan rules that apply to them are the rules in force at the time they are hired and/or vest; thus, they need to be able to view those rules at all times in order to make informed decisions concerning their retirement. There are many periods during a person's work career where they need to check their retirement eligibility and rules, and thus, the Department and the plan should ensure that the information is searchable and viewable electronically. These disclosures are crucial to benefit determinations. For example, a participant would need access to this information if a plan is demanding return of an alleged overpayment.

Second, if plans are permitted only to post the most recent information on a website, then the Department should specify where older information will be retained and plans must prominently notify participants reasonably in advance before any plan information is moved. The Department has an obligation to clearly direct plans as to where they may transfer plan and participant information. Information can easily be archived on the plan website or other prudently selected internet repositories. In addition, the plan administrator should retain paper copies of all removed documents. Finally, in any case in which plan administrators wish to remove ERISA required disclosures from plan websites, the plan administrator should be clearly required to prominently notify each affected participant and beneficiary when and where the information will be moved, and notify the participants of the ability to transfer the applicable disclosures via paper copying or digital transfer.

There is no technological reason for plans to permanently delete participant disclosures once new information becomes available. All electronic systems have archive capabilities, and the Department should make clear that plan electronic communication systems must retain and ensure that participants can electronically receive all plan disclosures, including less than the most recent disclosure. In the alternative, if the Department does not believe it can require indefinite availability of electronic disclosures, then every notice to participants and every website must clearly and prominently notify participants that the information will be replaced on a specified date and that if the participant wants to retain this information, then the participant could make an electronic copy and save it separately, request a printed copy, or print a paper

[100] ERISA § 107, 29 U.S.C. § 1027. The IRS follows similar rules as the DOL for record retention. https://www.irs.gov/retirement-plans/maintaining-your-retirement-plan-records.

[101] ERISA § 209, 29 U.S.C. § 1059.

copy, free of charge and without retaliation. In any event, the plan administrator should be required to maintain copies of all plan disclosures for plan recordkeeping purposes and participants should always retain the right to contact the plan administrator for copies of any needed documents. The clearer that the Department can make the rules for plan administrators and participants, the less confusion and more successful our retirement system will be.

Indeed, if a plan desires to rely on documents in litigation, they must be able to produce them. If plans deny a claim based on a document they cannot produce, a participant cannot receive a full and fair review of that claim.[102] In addition, claims alleging fraud and concealment have a much longer statute of limitations, and thus the need for longer retention periods. AARP urges that DOL—if it chooses a shorter retention period, such as six years—should also establish a presumption against the plan or fiduciary if it cannot produce documents surrounding the claim of fraud or concealment. Finally, AARP notes that claims using state statute of limitations (such as benefit claims denial) can be as long as ten years.[103] If, for example, the DOL chooses a 6-year retention period and participants have older documents supporting their claim, any guidance should make clear that the presumption is in favor of the participants. Finally, the shortening of the retention period might impact the Department's own litigation where there is a long-standing breach of fiduciary duty in the administration or management of a plan.[104] These documents could provide support for asset recovery and removal of a fiduciary.

Importantly, the proposed rule is silent on retention and transfer procedures for changes in business structure or service providers. DOL should specify retention procedures if an employer closes, merges, transfers, consolidates, or otherwise changes its business; if a plan terminates; or if the employer changes service providers responsible for sending disclosures and maintaining the website, including how and when disclosures must be transferred to a successor entity. Such a document transfer is necessary to maintain the availability of records—particularly for vesting and other eligibility issues—to ensure that all contributions have been made to a plan, and to minimize the number of missing participants.

If electronic disclosures are going to be beneficial for both the plan and the participants, then keeping disclosures online indefinitely is one of the methods for achieving that end. AARP urges the Department to ensure maintenance of prior versions of disclosures.

F. Disclosures must be capable of being searched electronically by numbers, letters, or word.

We commend the Department for requiring that all electronically disclosed documents be word, letter, and number searchable. We suggest that the Department go further and require links or the

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[102] 29 U.S.C. § 1133.

[103] *E.g.*, Wyo. Stat. §§ 1-3-105(a)(i), 1-3-105(a)(ii); 735 Ill. Comp. Stat. 5/13-206; Ind. Code Ann. §§ 34-11-2-11; Ky. Rev. Stat. Ann. § 413.160; Mo. Rev. Stat. §§ 516.110(1); R.I. Gen. Laws § 9-1-13(a).

[104] Examples include Intel, CIGNA, Foot Locker, and Enron.

ability to hover above terms that are previously defined (similar to SEC disclosures). This capability would make it easier for participants to read and understand the document.

G. The individual's personal information must be protected.

We urge the Department to do more to protect personal information than to require belief that the website protects the confidentiality of the individual's personal information.[105] The plan should be required to maintain cyber protection tools to prevent hacking and any losses of confidentiality and personal information, and inform the participants of their rights and responsibilities.[106] For example, some state laws require an individual to use a verification code, if it is available, in order for an individual to have a viable claim. Moreover, the more types of devices that the Department permits to be used to access disclosures, the more likely the website may be breached and personal confidential information hacked. The Department's rules will need to balance the protection of individuals' accounts with accessibility to the information. The more codes and verifications that are needed to access required disclosures, the less likely that participants—especially many older and less computer savvy participants will access and read them.

The Department should consider different rules for different types of disclosures. For example, disclosures such as the SPD, SMM, blackout notices, and other types of general plan information should be sent with a "one-click" hyperlink that does not need a code to open. Individual information such as benefit statements will most likely need additional protection. We note that the use of mobile devices will make the plan and/or service provider more vulnerable to hacking. The Department should ensure that the plan is liable if a participant's account or the plan is hacked.

In particular, the relationship between the plan and the service provider is one avenue fraught with possibilities for misuse of personal information.[107] To underscore the value of participant

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[105] *E.g.,* Aaron Boyd, *IG: Social Security's Information Security Program is 'Not Effective,' Says Watchdog* (Nov. 4, 2019), https://www.nextgov.com/cybersecurity/2019/11/ ig-social-securitys-information-security-program-not-effective-says-watchdog/161060/ (effective cyber protections are crucial to protect personal information).

[106] The necessity of such protection cannot be overstated as demonstrated by the recent Capital One hack. The New York Times reported that: "Big banks like Capital One, the victim of a recent attack that captured the personal information of over 100 million people, are a target for digital troublemakers. ... A single weak spot is all savvy hackers need. And they often find them. Already this year, there have been **3,494 successful cyberattacks against financial institutions**," according to the Treasury Department's Financial Crimes Enforcement Network." (Emphasis added.) S. Cowley & N. Perlroth, One *Gap in Bank's Armor, and a Hacker Slips In*, New York Times, at Section A, Page 1 (July 31, 2019), https://www.
nytimes.com/2019/07/30/business/bank-hacks-capital-one.html.

[107] *See, e.g.*, Geoffrey A. Fowler, *Think you're anonymous online? A third of popular websites are 'fingerprinting' you*, WASH. POST (Oct. 31, 2019), https://www.washingtonpost.com/technology/
2019/10/31/think-youre-anonymous-online-third-popular-websites-are-fingerprinting-you/ (personal information is being tracked in increasingly sophisticated ways).

data, a recent case settlement required the employer to take additional steps to protect confidential participant information.[108] The case alleged that the service provider misused confidential participant information for its own benefit and used its position as a recordkeeper to gain "valuable, private, and sensitive information including participants' contact information, their choices of investments, the asset size of their accounts, their employment status, age, and proximity to retirement, among other things."

The Department should prohibit the employer, the plan, and the service provider from using participant information to sell products and wealth-management services to participants outside the plan. For example, one method of preventing the sale of participant information is for the plan to contractually prohibit the recordkeeper from using or selling information about participants, acquired throughout the course of providing services to the plan, to market or sell unrelated products or services to the participants unless the participant requests information for such products or services.

Finally, permitting employers to invent electronic addresses certainly increases the possibility that these addresses may be hacked or compromised. The appropriate response is not "to ensure covered individuals' awareness of the electronic address and the notice and access method of delivery."[109] It is to require a delivery process that ensures actual receipt, including an administrator's monitoring of the receipt and opening of notices.[110]

H. If an action must be taken by a specified date, all related communications should clearly and prominently highlight the need to take action by the specified date.

Some of the covered disclosures may require participants to take actions during a limited time frame. For example, a claims denial may require participants to file suit to protect their rights within 30 days of the notice of claims denial. The Department should require the disclosure to state the date, if any, by which action must be taken. (*See* Section VIII, B).

XI. Plan Procedures Must Protect The Individual's Right to Request a Paper Version or Opt-Out.

The system for delivering the notice should be designed to alert the plan administrator if an individual's electronic address is invalid, inoperable, or unopened. If the administrator is alerted to such a problem, steps should be taken to correct the problem (such as using a secondary email

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[108] *Cassell v. Vanderbilt Univ.*, 3:16-cv-02086 (M.D. Tenn. April 22, 2019); see Mercer, *Settlement in Vanderbilt University 403(b) Case Includes Participant Data Safeguards* (May 13, 2019), https://www.mercer.com/our-thinking/law-and-policy-group/settlement-in-vanderbilt-university-case-includes-participant-data-safeguards.html.

[109] As we have seen with financial literacy, mere awareness is inadequate.

[110] AARP notes that cyber insurance may require monitoring even if the Department does not.

address or obtaining a new address for the individual). If the problem cannot be quickly cured, the individual should be treated as having elected paper notices.

At all times, the covered individual must have the opportunity to request a paper copy of the covered documents furnished on the website at no charge. The proposed rule should clarify that a participant can request a paper copy of a document once every 12 months without charge. Additionally, the individual should have the opportunity at any time to elect to opt-out of electronic delivery completely and receive only paper copies in the future. Finally, the plan administrator must have procedures governing these requests for documents, opting out, or invalid or inoperable electronic addresses.[111] The Department should make clear that procedures are not reasonable if they contain any provision, or are administered in a way, that unduly inhibits or hampers the initiation or processing of a request or election. In addition, rules concerning valid email addresses and bounce backs need to be clear and detailed.

AARP urges that all notices should provide participants with an explanation of their right to request paper documents. Participants should be provided a toll-free telephone number, email address, and written address to contact for information. Participants should never be charged or fear retaliation for electing paper disclosures. The Department should prohibit plans from requiring participants to follow unduly burdensome procedures, such as having to write a letter, in order to elect paper. Further, the participant and beneficiary should be able to change from electronic notice to paper notice and vice versa at any time without charge or retaliation. Finally, the Department should ensure that there is no charge or retaliation if an employee or participant chooses to print the disclosure on the employer's printer.

X. The Proposed Rule Is Not Protective Of Participants When There Is Temporary Unavailability Of Covered Documents.

The proposed rule provides that the plan administrator will not fail to be in compliance with the safe harbor of the proposed rule in the event that the covered documents become temporarily unavailable due to unforeseeable events or circumstances beyond the control of the plan administrator, provided the plan administrator has procedures in place to ensure the documents are available and the plan administrator takes prompt action to cure any unavailability as soon as practicable following knowledge of the problem.

AARP urges that the proposed rule should define "temporary" or at least provide some parameters. Is a week without access to the website temporary? What happens if the unavailability occurs during a period when participants need to make a decision such as with a change of funds or a blackout of selling of securities, or decide whether to appeal an adverse benefit determination? What is the cure? An extension of time to make the decisions? The proposed rule should also define "prompt action," "cure" and "as soon as practicable." The

[111] We note that maintaining a secondary email, if it is not voluntarily offered, has similar problems to electronic addresses that are "invented." Individuals will not necessarily know to check those addresses.

Department should require plan administrators to remedy problems promptly, and to especially ensure that steps are taken to protect individual accounts.

XI. Participants Should Be Offered Paper Disclosures When They Terminate Employment.

The proposed rule provides that the plan administrator should take measures calculated to ensure the continued accuracy of the electronic address following a severance from employment, or to obtain a new address that enables receipt of covered documents following the severance. The proposed rule assumes that electronic delivery is preferred by participants upon their severance from employment.

AARP urges that participants at the time of severance from employment be told that they can receive disclosures in paper. The terminating employee could be given a Post-termination Notice of Internet Availability. This is especially crucial if the plan administrator (or designee) is not the same as the employer in order to prevent problems of continuity.

Again, we are strongly opposed to permitting the administrator to use an invented electronic address for a deferred vested participant, retiree, or beneficiary. (*See* Section V. A). The individual is less likely to have notice of the address, less likely to receive or read the disclosures, and more likely to have their personal financial security put at risk.

XII. Any Final Rule Should Require Plan Administrators To Document All Cost Savings And Credit Savings To Participant Accounts.

According to the Society for Human Resources Management (SHRM), in 2018, 62.7 percent of all defined contribution retirement plan administrative expenses were paid entirely from participant accounts at an average total annual cost of $35 a participant a year (.07 percent).[112] Further, in 19.5 percent of plans, participants and employers shared administrative expenses.[113] Only 17.8 percent of employers fully paid administrative expenses.[114] SHRM does not document the extent to which employers that "pay" some retirement plan expenses, offset their costs through lower wages, lower non-retirement benefits, or through other forms of employer reimbursement, direct or indirect, from the plan.

The Department estimates that expanding usage of electronic communications will create approximately $2,408 million in "savings" over 10 years.[115] Assuming the Department is correct,

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[112] Stephen Miller, 401(k) Sponsors Focus on Benchmarking—and Lowering—Fees (Feb. 22, 2018), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/401k-fee-benchmarking.aspx.

[113] *Id.*

[114] *Id*.

[115] 84 Fed. Reg. 56,894, 56,914-15 (Oct. 23, 2019).

AARP urges the Department to specify in its final rule that plan administrators must document savings and deliver such savings to participants in their retirement benefits or accounts, as applicable. Careful documentation will protect plan administrators as well as participants. The Department and participants need to know the benefits, if any, from reducing paper disclosures. Employers and plan administrators are legally required to ensure prudent plan expenditures, and explicit documentation will prevent against misuse of savings or payment for additional unrequested services.

XIII. The Proposed Rule Should Make It Clear Which Entities Have Responsibility For Compliance With The Rule's Requirements And Whether Responsibility Can Be Delegated.

Although the proposed rule places responsibility upon the Plan Administrator to ensure that all requirements of the safe harbor are met, most employers and plans use a third-party service provider, such as Vanguard, Fidelity, or T. Rowe Price. However, under the proposal, these providers would not have any responsibility.

AARP urges the proposed rule to clarify that service providers can be liable and that the plan administrator has a fiduciary responsibility to select and monitor the service provider. If DOL chooses not to specify service provider obligations, the Department should alert employers and plan officials that they are fully liable for any breach of fiduciary duty.

XIV. The Final Rule Should Not Be Applicable Until January 1 Of The Second Calendar Year Following Publication.

Given the importance and breadth of this proposed rule, AARP urges that it not be applicable until January 1 of the **second** calendar year following its publication. This will enable plan administrators to inform participants, beneficiaries, alternate payees, and retirees of these upcoming changes and for these recipients to learn about this new system of disclosures, especially those who do not use a computer regularly at their job. It will also give plans and service providers time to revise their contracts, ensure that they have correct electronic addresses for recipients, issue the Initial Notice(s) of Internet Availability, secure personal information, maintain and strengthen cyber protection tools, obtain additional cybersecurity insurance, post all the documents the plan intends to send by complying with this safe harbor, and draft and vote on the rules and processes the plan intends to use to track opt-outs, requests for documents, and the methods for handling temporary unavailability of disclosures. Moreover, multiple disclosures and media platforms must be considered, and may interact with each other differently. As the Department has calculated, approximately 60 million participants may lose written paper disclosures. This is an incredible number for plans to fully and fairly contact and give time to retain or modify their preferred information form delivery.

REQUEST FOR HEARING

AARP respectfully requests that the Department hold a hearing on this proposed rule before finalizing the rule in order to ensure that all relevant issues are fully evaluated and discussed and to give commenters the ability to poll their members, as appropriate.

In addition, given the short comment period, AARP did not have the opportunity to address numerous issues, such as cybersecurity and fraud issues, and family member or guardian access for disabled or diseased participants, including some of which were asked about in the Request for Information. We hope to provide additional comments in the coming weeks and months.

CONCLUSION

AARP's positions on participant disclosures stems from our concern about respect for the fundamental principle of ERISA, which is to protect the retirement security of participants and beneficiaries. Ensuring participants' receipt of complete, accurate, understandable, meaningful, and timely information—in a manner in which they are able to process and preserve the information—will assist them in making informed decisions that will enhance their retirement security. Indeed, failure to actually receive or review electronic disclosures in a timely fashion could lead to significant financial harm

AARP appreciates the opportunity to share its views on these important issues to ensure that participants and beneficiaries have the information they need to make informed decisions about their retirement benefits. If you have any questions, please feel free to contact me or Michele Varnhagen at 202-434-3829 or at mvarnhagen@aarp.org.

Sincerely,

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs