November 22, 2019

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

Attention: Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, RIN 1210–AB90

Dear Sir/Madam:

The American Benefits Council ("Council") appreciates the opportunity to comment on the Department of Labor's ("Department" or "DOL") proposed rule regarding default electronic disclosure by employee pension benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA") and the accompanying request for information regarding other disclosure-related matters (the "Proposal" and the "RFI," respectively).[1]

We thank the Department for its efforts to broaden plan administrators' ability to furnish required pension plan disclosures to participants[2] using electronic means. The Proposal would help facilitate the increased availability and accessibility of important pension plan information to participants while maintaining important participant safeguards and lowering administrative costs that often reduce retirement savings. The Council supports the Proposal and encourages the Department to move forward expeditiously in adopting a final rule. Nonetheless, we believe the Proposal would benefit from some modest adjustments and clarifications. Among other things, as

[1] 84 Fed. Reg. 56,894 (Oct. 23, 2019).

[2] Any reference to "participant" herein is generally a reference to any individual who could be a "covered individual" under the Proposal, including beneficiaries and alternate payees, unless the context requires otherwise.

explained in more detail below, we recommend that the Department broaden the new safe harbor to include employee welfare benefit plans.[3] We believe that all our recommendations can be accommodated without further notice and comment.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

Set forth below are the Council's (1) general comments on the Proposal, (2) specific recommendations for modest adjustments and clarifications, and (3) responses to certain questions in the RFI.

I. General Comments and Support for the Proposal

As expressed above, the Council supports the Department's efforts in developing and proposing a new safe harbor for the default electronic disclosure of ERISA-required pension plan information. Generally speaking, our members have found the Proposal to present a thoughtful, appropriate, and markedly improved method for plan administrators to leverage both the benefits and cost savings of providing disclosures electronically. We also support the participant protections that are included in the Proposal, just as we have supported the protections included in the Receiving Electronic Statements To Improve Retiree Earnings ("RETIRE") Act,[4] as well as previous administrative efforts in this regard.[5] Further, inasmuch as the same policy reasons cited by the Department in support of the Proposal also apply to welfare plans, we believe it is important that the Department extend the same cost saving and opportunities for improved disclosure efficiencies to such plans, as explained in more detail later in this letter.

The Council believes that codifying the proposed new safe harbor in the Department's regulations through a notice and comment process is appropriate, especially in light of the President's recent executive orders emphasizing the more limited use of subregulatory guidance.[6] We also support the Department's intention to make the new safe harbor an optional, additional method that plan administrators may choose to use, while generally maintaining most existing options for administrators to furnish ERISA-required disclosures. Where, for example, the Department's existing safe

[3] Throughout this comment "welfare plan" is used to refer to an employee welfare benefit plan, as defined in ERISA section 3(1), which includes group health plans and plans providing disability benefits.

[4] H.R. 4610, 115th Cong. (1st Sess. 2017) (an identical bill, S. 3795, was introduced in the Senate).

[5] The Council filed a detailed response to the Department's 2011 Request for Information regarding electronic disclosure. Among the comments we made in response to the 2011 RFI was that the "notice and access" model in Field Assistance Bulletin 2006-03 had been found by Council members to be cost-efficient and effective.

[6] 84 Fed. Reg. 55,235 (Oct. 15, 2019) (Executive Order 13891); 84 Fed. Reg. 55,239 (Oct. 15, 2019) (Executive Order 13892).

harbor for electronic disclosure ("2002 Safe Harbor")[7] is working well for a plan administrator with respect to certain participants, that plan administrator would not be required to make any changes in light of the Proposal. (See below, however, for certain clarifications and improvements we suggest to reflect prior subregulatory guidance such as Field Assistance Bulletin 2006-03.) Making the new safe harbor optional will also allow plan administrators to determine for which groups of employees the new procedures would be appropriate.[8]

II. SPECIFIC RECOMMENDATIONS

As noted above, the Council and its members have some suggestions for adjustments and clarifications to the Proposal, which we describe in this section.

a) Continued Relevance of FAB 2006-03's "Notice and Access" Method

The Department states in the preamble to the Proposal that the proposed safe harbor "would, if adopted as a final rule, supersede the relevant portions of FAB 2006-03" and other related subregulatory guidance regarding electronic disclosure.[9] FAB 2006-03 allows plan administrators that provide participants with continuous access to benefit statement information through a secure website to furnish pension benefit statements by providing notification of the availability of such information as long as the notice is "furnished in any manner that a pension benefit statement could be furnished" under FAB 2006-03 (i.e., written, electronic, or "other appropriate form"). We have the following two recommendations related to the new safe harbor and FAB 2006-03:

- *Preserve FAB 2006-03 for Benefit Statements.* For over a decade, the disclosure method described in FAB 2006-03 has been used widely and successfully by many plan administrators to satisfy the benefit statement requirement. Although the new safe harbor is similar to and would build upon many of the successes of FAB 2006-03, there are two noteworthy differences (or apparent differences) in particular that would cause concern for many of our members if FAB 2006-03 is superseded by the new safe harbor and those unique aspects of FAB 2006-03 are not preserved.

  First, many of the Council's members comply with FAB 2006-03 by sending written (i.e., paper) notice of the availability of their benefit statement information to participants. In this regard, it appears that the Proposal would, by superseding the relevant portions of FAB 2006-03, take away one of the methods that plan administrators currently use for electronic disclosure because the Proposal would require that the corresponding "notice of internet availability" be furnished electronically. In other words, it appears that plan administrators

[7] 29 C.F.R. § 2520.104b-1(c).

[8] The Department requested comments on whether it should make a technical amendment to the existing electronic disclosure safe harbor in § 2520.104b-1(c) to direct readers to the new safe harbor. We agree that the Department should make the availability of the new safe harbor, and the fact that it builds on existing rules, as clear as possible.

[9] 84 Fed. Reg. 56,900 n.60.

would no longer have the option of using the "notice and access" option provided under FAB 2006-03 for benefit statements where such notice may be provided in paper.

The second issue relates to how a plan administrator complies with the benefit statement requirement when the plan offers, as almost all do, a secure website with continuously available account or benefit information. After enactment of the Pension Protection Act of 2006 ("PPA"), plan sponsors and service providers notified the Department that secure plan websites often make the information required by ERISA section 105, as amended by the PPA, available on a continuous and updated basis, which is preferable to the "static" benefit statement required by section 105. In other words, plans were already doing better than the PPA required, and this is even more true today. FAB 2006-03 subsequently confirmed that providing participants with "continuous access to benefit statement information through one or more secure web sites" is treated as compliant with ERISA section 105. The benefits community has assumed that this important, but nuanced, piece of guidance would be confirmed in regulations under ERISA section 105, but formal regulations on benefit statements have been delayed pending resolution of whether to require a lifetime income disclosure.

In light of the two important differences between FAB 2006-03 and the Proposal as described above, and the significant cost burdens and potential participant confusion that would result if FAB 2006-03 is superseded, ***we urge the Department to preserve FAB 2006-03 for benefit statements by stating in the final rule that the Department retracts the statement in the Proposal that FAB 2006-03 is superseded, and that FAB 2006-03 will remain available until further notice.***[10]

- *Incorporate FAB 2006-03's Paper Notice Option into the New Safe Harbor.* In addition to preserving FAB 2006-03's disclosure method for benefit statement information, as noted above, the Proposal does not appear to allow the notice of internet availability to be provided in paper. We see no reason not to allow a plan administrator to furnish the notice of internet availability in paper form, with respect to all covered documents. Some plan administrators may feel that certain participants, such as terminated employees, are better served by a regular paper notice alerting them that documents are available on the plan's secure website, which is what FAB 2006-03 allows with respect to benefit statements. ***We therefore request that the Department allow plan administrators the option of providing the Proposal's notice of internet availability either in paper or electronic form with respect to <u>all</u> covered documents.***[11]

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[10] In the alternative, we suggest that the Department could incorporate FAB 2006-03 into the new safe harbor regulation, such as through a new section providing special rules (i.e., the guidance provided in FAB 2006-03) for benefit statements.

[11] As a technical point, the Department will need to modify the definition of "covered individual." The Proposal defines covered individual by reference to someone for whom the plan has an electronic address. We think the notion of having an electronic address for the notice of internet availability is better located in the substantive requirements, rather than the definition of covered individual. And as we state in the text, we recommend that a plan

b) Effective Date and Transition Issues

We have two suggestions regarding the effective and applicability dates in the Proposal. First, because the regulation is proposed to be effective 60 days after final regulations are issued, it is not clear to us why the applicability date should be delayed. After all, the safe harbor is completely optional, but if a plan administrator and its service providers are able to comply with it quickly, we see no reason to prevent use of the safe harbor until the first day of the following calendar year.

We suppose one reason that the Department may have proposed a delayed applicability date is that, because prior subregulatory guidance would be superseded, the Department was concerned that plans will need time to adjust. As described in part (a) above, we know that many of the Council's members currently rely on FAB 2006-03 for benefit statements, and we assume that at least some plan administrators rely on Field Assistance Bulletin 2008-03 (for QDIA notices) or Technical Release 2011-03R (for participant fee and investment disclosures). Although we have urged the Department to preserve certain key features of FAB 2006-03, we expect there will be at least some differences in the final regulation from the subregulatory guidance. Accordingly, plan administrators will need sufficient time to change their systems. So while we generally would urge you to make a new safe harbor available as soon as possible, we believe that a transition period of at least 24 months is necessary with respect to FAB 2006-03 and any other subregulatory guidance that is being superseded.

c) Availability of Safe Harbor with Respect to Employee Welfare Benefit Plans

The Council understands the Department's focused efforts in issuing the Proposal with respect to pension plans, especially in light of the President's issuance of Executive Order 13847.[12] However, as recognized by the Department, the Executive Order did not foreclose the Department's consideration of welfare plans as part of its overall review. Nor do we believe the Proposal itself limits the Department's ability to include welfare plans within the final regulations. Inasmuch as the same policies supporting electronic delivery for pension plans equally apply to welfare plans, ***we encourage the Department to extend the Proposal to welfare plans, either as part of finalizing the Proposal or, if that will significantly delay finalization of the Proposal with respect to pension plans, as part of separate follow-on rulemaking***.

Notably, many of our member companies reached out to Council staff following the issuance of the Proposal to share their disappointment and concern that the Proposal, as contemplated, would not apply to welfare plans. While the costs and administrative burdens associated with pension plan notices/disclosures are indeed great, in many respects, these burdens are even greater with welfare plans – whether it be as a result of the sheer volume of required welfare plan notices/disclosures (such as claim-specific notices/disclosures) or the type and extent of the notices/disclosures. Thus, while the Proposal is certainly welcome news for member companies with respect to their

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should be allowed to send the notice of internet availability in paper, including to a covered individual for whom the plan does not currently have an electronic address.

[12] 83 Fed. Reg. 45,321 (Aug. 31, 2018).

retirement plan offerings, our members remain concerned that the Proposal, as contemplated, would not also apply to welfare plans.

Per the preamble to the Proposal, we understand the Department would like to "study the future application" of the Proposal to welfare plans.[13] While the Council is appreciative of the Department's interest in exercising care and diligence in developing an e-disclosure rule for welfare plans, we note that the same policy reasons that support adopting the Proposal with respect to pension plans, also apply to welfare plans, including the reduction of plan administrative costs and improvement of disclosures' effectiveness. As to the Department's efforts to study these issues, the Council stands ready to act as a resource for the Department and would be happy to provide whatever information the Department may find useful.

Making the Proposal applicable to welfare plans will help reduce welfare plan costs and improve notice effectiveness and speed of delivery for millions of working Americans and their families. Moreover, as evidenced by the Department's long-standing, existing e-disclosure safe harbor, the Department has not before deemed it necessary to apply a different e-disclosure rule for welfare plans from that which applies to pension plans. Further, applying the same e-disclosure rule for welfare plans as for retirement plans could result in plan efficiencies that could accrue to the benefit of plans and participants. For example, plans would be able to leverage common communications and delivery strategies across retirement and welfare plans and improve participant understanding of their total benefits package, including through the use of a single electronic repository location for notices. For these reasons, we urge the Department to use its authority to extend the Proposal to welfare plans as well as pension plans and, in doing so, adopt a uniform rule for ERISA plans.[14]

Additionally, the Council appreciates that certain required notices and disclosures may be governed by federal statutes under the collective authority of the Departments of Labor, the Treasury ("Treasury"), and Health and Human Services ("HHS") ("Tri-Agency Notices"). These Tri-Agency Notices include, for example, certain notices and disclosures required by reason of the Affordable Care Act ("ACA") market reform provisions, Consolidated Omnibus Budget Reconciliation Act ("COBRA"), and the Health Insurance Portability and Accountability Act ("HIPAA").

To the extent the Department is seeking comment as to whether it would be worthwhile for the Department to expend the time and effort to develop an expanded e-disclosure rule with respect to Tri-Agency Notices, the answer is "most definitely." While an expanded e-disclosure safe harbor for welfare plans would be helpful even without regard to the Tri-Agency Notices, creating such a rule would, by itself, solve only half the problem. The Tri-Agency Notices represent a very material portion of the cost and administrative burdens imposed on plans and their sponsors. For these

[13] 84 Fed. Reg. 56,902.

[14] To the extent that the Department believes special considerations regarding certain types of plans (such as health plans versus non-health welfare plans) require the development of a different e-disclosure rule than that contemplated for retirement plans, we urge the Department to at least allow employers to utilize the Proposal where otherwise appropriate with respect to their health and welfare plans.

reasons, we recommend the Department address the issue of e-disclosure holistically with respect to not only ERISA-only notices and disclosures, but also the Tri-Agency Notices, and work in consultation with Treasury and HHS as needed.

With regard to the above, we urge the Department to explore with Treasury and HHS whether the Department's Proposal can be utilized with respect to the Tri-Agency Notices. Application of the Proposal across all welfare plan notices and disclosures, including the Tri-Agency Notices, would be very helpful in reducing costs and burdens on plans and also in reducing participant confusion and increasing notice effectiveness. To the extent this does not occur, we urge DOL, Treasury, and HHS to be mindful of the existing costs and administrative burdens already confronted by employers in connection with their sponsorship and maintenance of group health plans, and to develop an e-disclosure rule with respect to any Tri-Agency Notice that is practical and useful not only for plan participants *but also* for plan sponsors and service providers. Further, although we recommend that the Department address the issue of e-disclosure holistically for welfare plans with respect to not only ERISA-only notices and disclosures, but also the Tri-Agency Notices, if the Department determines that such a coordinated effort with the impacted agencies would result in a significant delay in promulgating rules, we encourage the Department to move forward with extending the Proposal to welfare plan disclosures, while excluding from "covered documents" those disclosures over which there is shared jurisdiction and concern about potential application of the safe harbor on participants and beneficiaries.

To the extent the Department (by itself or in coordination with Treasury and HHS regarding Tri-Agency Notices) anticipates issuing an e-disclosure rule for welfare plans that deviates from the Proposal, we request that such rule be issued in proposed form to allow for meaningful public notice and comment. This will ensure that any final rule is the product of careful and reasoned rulemaking and is considerate of the input of plan participants and beneficiaries, as well as employer plan sponsors and plan service providers. However, given the significant importance of this issue to our members, we urge the Department to work expeditiously to issue rulemaking so that plans will be able to operationalize expanded e-disclosure for welfare plans as soon as practicable.

Lastly, for clarity's sake, we note that the Council's comments with respect to the Proposal should be read by the Department to apply to welfare plans as well as pension plans, unless expressly stated to the contrary or otherwise inapplicable.

d) Technology and Website Considerations

- *Methods of Providing Access to Covered Documents.* Under the Proposal's "notice and access" approach, the access prong would require covered documents to be made available on an internet website. It is not apparent from the Proposal why covered documents could not optionally be provided through other electronic means that are reasonably calculated to ensure actual receipt. For example, today some plan administrators use email to deliver certain required information, such as the Summary Plan Description, Summary of Material Modifications, or Summary Annual Report. This is especially the case with respect to many larger employers that prepare and send these documents through the employer's HR

department. In this regard, we ask the Department to provide in the final rule that covered documents ***may be provided electronically using any electronic means that is reasonably calculated to ensure actual receipt***,[15] and not only through an internet website.

- *Adapting to Changing Technology.* Due to the high speed at which technology changes, we recommend that the Department take additional steps to ensure that the new safe harbor will appropriately adapt to new technology. Taking such action will prolong the relevance of the final rule and delay requests for the Department to revisit it at a later date. The Council's long-term strategic plan published in 2014, A 2020 Vision: Flexibility and the Future of Employee Benefits, included this recommendation:

  > **Adopt a "presumption of good faith" standard allowing employers to use technology as it becomes available, rather than waiting for regulatory approval.** Technology is constantly evolving to improve productivity and administrative efficiency. A "presumption of good faith" standard will allow employers to leverage evolving technology immediately. Because technology advances faster than the regulatory process, even relatively permissive policies are destined to be obsolete before they can be effectively used by employers.

  It is not clear under the Proposal whether some forms of currently available and widespread technology could be used to satisfy the new safe harbor's requirements. For example, it is unclear whether plan administrators would meet the requirements of the new safe harbor if they send a text message to a smart phone where the text message includes a click-through to the notice of internet availability. As another example, it is unclear whether a covered document must be made available at a website address or whether it could be provided instead through an application ("app").

  We ask the Department to address the specific questions posed above as well as to consider the need for additional flexibility in the safe harbor to reflect changing technologies. The RETIRE Act, for example, would accommodate future changes to technology in part by allowing documents to be delivered by posting them to "a website or internet or other electronic-based information repository" or through "other electronic means reasonably calculated to ensure actual receipt." We encourage the Department to consider incorporating similar language into the Proposal.

- *Non-Employer-Provided Smartphone Numbers as an Electronic Address.* The Proposal would define a "covered individual" in part as certain persons who provide an

[15] This language is taken near verbatim from the bipartisan RETIRE Act. In addition, the Department's existing regulation describing a plan administrator's disclosure obligation requires a plan administrator to use measures "reasonably calculated to ensure actual receipt." 29 C.F.R. § 2520.104b-1(b).

"electronic address, such as an … internet-connected mobile-computing-device (*e.g.*, 'smartphone') number."[16] In the Preamble, the Department states that "[a] company-issued mobile smartphone (with a data plan) and corresponding mobile phone number…may be used to satisfy this condition."[17] Given the broader language of the proposed rule, we read the preamble as simply providing that the mobile phone number of an employer-issued smartphone is but one example of providing a smartphone number that satisfies the electronic address requirement. However, we would appreciate clarification that non-employer-provided smartphone numbers may also satisfy the requirement.

- *Documents that Cease to Have Continued Relevance.* The Department requested comment on whether documents that are not superseded but that cease to have continued relevance should be explicitly addressed in the final rule.[18] The Council recommends that, at a minimum, plan sponsors should not be required to make covered documents available for a period of time that exceeds ERISA's record retention requirements. Thus, if a document is not necessary, or is no longer necessary, to determine a participant's benefit or to support the information in the Annual Report after six years, we see no reason this Proposal should require that it be retained.

- *Ensuring the Existence of Internet Website.* In order to use the new safe harbor, a plan administrator "must ensure" the existence of an internet website at which a covered individual is able to access covered documents.[19] Our members are concerned that this requirement presents a standard that plan administrators will not be able to meet at all times. We ask the Department to require instead that an administrator "must take reasonable steps to ensure" the existence of an internet website, which is a formulation the Department has used in other regulations. Alternatively or in addition, we suggest that the Department expand the relief proposed in § 2520.104b-31(j) such that the conditions of the safe harbor would be satisfied even if the internet website itself (in addition to the covered documents) is temporarily unavailable for a period of time due to unforeseeable events or circumstances.

- *Handheld Device-Only Individuals.* The Department requested comment on whether any additional actions are needed to ensure that covered documents are presented in an effective and useful manner to individuals who only have access to a handheld device.[20] We believe that the Proposal's existing requirement to notify covered individuals of their right to obtain a paper version, free of charge, is appropriately protective of handheld device-only users, who may generally prefer viewing covered documents on their device but may occasionally wish to

[16] Proposed 29 C.F.R. § 2520.104b-31(b).

[17] 84 Fed. Reg. 56,901.

[18] 84 Fed. Reg. 56,904.

[19] Proposed 29 C.F.R. § 2520.104b-31(e)(1).

[20] 84 Fed. Reg. 56,905.

see a particular document in a different format (i.e., on paper). And, if any handheld device users determine that routinely receiving their disclosures in paper is preferable, they may always exercise that preference by opting into paper delivery.[21]

e) Notices

- *Readability Standard.* The Proposal would require that the safe harbor notice of internet availability be "written in a manner calculated to be understood by the average plan participant," where a notice would satisfy that standard if it "uses short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60." Our members have expressed concern that this requirement would encourage longer documents, the provision of less information, and could be viewed or inappropriately upheld as applying to other ERISA-required documents beyond the new safe harbor's notice of internet availability. We are further concerned that this new standard would invite increased litigation against plan sponsors, thus offsetting many of the cost savings and other benefits that the Proposal would otherwise help achieve. We therefore ask that the Department simply require that the notice of internet availability be written in a manner calculated to be understood by the average plan participant, which is the typical standard under ERISA that already reflects a focus on writing in a manner that participants understand.[22]

- *Scope of the Participant Fee Disclosure Included in Consolidated Notice.* The Proposal lists a number of documents that a plan administrator may include as part of the consolidated notice of internet availability, including "[a]n investment-related disclosure, as required pursuant to 29 CFR 2550.404a-5(d)."[23] That reference is to only a portion of the information required to be disclosed as part of the participant fee disclosure, and notably it does not encompass the plan-related information required under 29 C.F.R. § 2550.404a-5(c). It is unclear whether the Department intended to omit the plan-related information in the participant fee disclosure from the rules regarding the consolidated notice. In this regard, we ask the Department to consider expanding § 2520.104b-31(i)(5) to include all information required under the participant fee disclosure regulations or, if not, to explain the reason for the exclusion.

- *Initial Notification.* Some of the Council's members have indicated that it would be helpful if the Department would provide a model notice for the initial

[21] As noted further below, the Council believes that allowing covered individuals to opt out of electronic disclosure entirely and receive disclosures on paper is an important participant safeguard, although some plan administrators are concerned about the expense and complexity that allowing opt out on a *document-by-document basis* could entail.

[22] Ensuring that a document that is required by a regulation has a particular Flesch score will be very difficult because exacting legal requirements must be met. We ran the Department's own model notice of ERISA rights through a Flesch test and it would have failed the test in the Proposal.

[23] Proposed 29 C.F.R. § 2520.104b-31(i)(5).

notification of default electronic delivery that must be delivered in paper. Other Council members are comfortable developing their own notice based upon the guidance provided in the Proposal.

- *Description of Covered Documents.* The Proposal would require notices of internet availability to include a "brief description" of the covered document. Due to the variability in covered documents across plans, our members do not believe that a model notice would be especially helpful, but some of our members would nonetheless appreciate an example or more explicit guidance from the Department regarding the notice.

- *Duration of "Prominent Link."* The Proposal would require the notice of internet availability to include a website address where the covered document is available. One permissible manner in which to accomplish this would be by providing the website address of a login page "that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document."[24] Our members would appreciate further guidance with respect to how long the link to such document must be displayed "prominent[ly]." As the Department can imagine, if the link must be displayed prominently for an extensive period, an increasing number of prominent links will be added as more and more covered documents also become available over time. Our members are concerned that the significance of the prominent link will be diminished in such cases unless the plan administrator is allowed to manage older links in a more effective manner.

- *Requirement to Furnish Separately.* The Proposal would require the notice of internet availability to generally be "furnished separately from any other documents or disclosures."[25] Some of our members have indicated that additional information regarding this requirement would be helpful, especially if the final rule provides that notices of internet availability may be provided in paper (as requested above). For example, if paper notices are permitted under the new safe harbor, our members would find it helpful if the notice of internet availability may be included in a folder or envelope along with other plan or benefits-related information, where the notice itself is provided as its own separate document. With respect to electronic notices, a similar concept would be providing clarification that the plan administrator may, for example, send a single text message to a covered individual, but that text message provides one link to the notice of internet availability, and another link to other plan information.

f) Administration of New Safe Harbor

- *Change in Service Provider.* Under the Proposal, one of the criteria for an individual to be a "covered individual" is that he or she provides the plan's

[24] Proposed 29 C.F.R. § 2520.104b-31(d)(3)(iv).

[25] Proposed 29 C.F.R. § 2520.104b-31(d)(4)(iii).

administrator with an electronic address.[26] In some cases, we anticipate that the individual will have provided the electronic address to the plan's service provider, for example when first logging on to the secure website. The Council's members have requested confirmation that, in the event a plan changes its service provider, a covered individual will not cease to be a covered individual solely because he or she provided an electronic address to the predecessor service provider and not directly to the successor service provider. Similarly, our members would also appreciate confirmation that the successor service provider may rely on any elections the covered individual provided to the predecessor service provider, as well as notices provided to a covered individual by the predecessor.

- *Terminating Employees.* The Council's members would find it helpful to have additional flexibility under the Proposal in the event of a covered individual's severance from employment. Although the proposed rule in § 2520.104b-31(h) would accommodate some of our members' current processes, there are many instances where, for example, a plan sponsor will start sending a paper notice of a document's availability, while continuing to provide access to the document on a website. Similar to our request above regarding FAB 2006-03, we request that the Department allow employers to provide a paper notice of internet availability, especially in the context of a severance from employment.

- *Rehired Employees.* If a covered individual terminates his or her employment but is subsequently rehired, our members would appreciate clarification regarding how the Proposal would apply in that situation. For example, may the employer rely on an electronic address that the rehired individual provided in connection with initially becoming a covered individual (prior to the individual's termination and rehire)? May the employer rely on any prior elections the individual made under the safe harbor? Is the employer required to send another initial notification of default electronic delivery in order to rely on the safe harbor again with respect to the rehired individual?

- *Document-by-Document Delivery Selection.* Under the Proposal, it appears that a covered individual must have the right to both (1) opt out of electronic disclosure entirely and (2) opt out of electronic disclosure on a document-by-document basis.[27] Although providing individuals with the option to opt out of electronic disclosure entirely is an important participant protection that the Council supports, we believe that allowing for opt out on a document-by-document basis is a decision that should be left to plan sponsors and the capabilities of their service providers. Some plan administrators will conclude that document-by-document opt out adds expense, complexity, and potential participant confusion. (Others may think it is important for participants to be able to make individual elections as to particular documents.) We therefore request that the Department clarify that a plan administrator may provide that an election to receive

[26] Proposed 29 C.F.R. § 2520.104b-31(b).

[27] Proposed 29 C.F.R. § 2520.104b-31(f)-(g).

documents in paper will apply to all documents otherwise being furnished under the new safe harbor. Of course, participants could always elect to receive a particular document in paper after receiving the notice of Internet availability.

- *Continuous Monitoring of Email Addresses.* The Proposal includes two substantive requirements for the monitoring of electronic addresses. First, the system for furnishing notices of internet availability must be designed to alert the administrator of a covered individual's invalid or inoperable address. Second, the administrator must take measures reasonably calculated to ensure the continued accuracy of an electronic address in the case of a severance from employment. Our members have expressed some confusion about what exactly these standards require. We believe that the requirements are intended to be fairly straightforward, but we ask for confirmation. For example, with respect to invalid or inoperable addresses, our understanding is that having a process to monitor email "bouncebacks" and then take further steps as outlined in the Proposal would be sufficient. In addition, we understand that, upon severance from employment, it would be sufficient to (a) notify the participant, as part of the ordinary outboarding process and/or as part of plan distribution materials, that the plan has an electronic address on file to which notices will be sent, and the plan will continue to assume the electronic address is current unless the participant provides another electronic address and (b) if the electronic address subsequently bounces back, the plan's procedures for bouncebacks, as described above, will apply. It would be helpful for the Department to confirm our understanding or provide workable examples of compliance with these monitoring rules.

- *Monitoring of Actual Access.* Under the Proposal, an administrator is considered to have furnished an ERISA-required document as long as the administrator is not alerted to an invalid or inoperable electronic address. The Department noted in the preamble that this requirement does not address whether a covered individual read, understood, or had actual knowledge of the contents of the covered documents, nor does it impose an affirmative obligation on the administrator to monitor whether the individual accessed the document on the website.[28]

  The Council believes that the Department has appropriately balanced the need for participant protections with other considerations, such as what comparable protections exist when notices and documents are delivered on paper. As such, we do not believe that the Department should place additional requirements on administrators that use electronic disclosure, such as responsibility for monitoring when an email has been opened or an online document accessed, when there is no such equivalent requirement if paper is used instead.

- *Annual Delivery of Consolidated Notice.* Under the Proposal, a plan administrator would have the option of combining the notice of internet availability with respect to any or all of a set list of required disclosures. If a combined notice of

[28] 84 Fed. Reg. 56,906.

internet availability is used, the administrator would satisfy the requirement to furnish such notice if it is provided each plan year and, if the combined notice was furnished in the prior year, it is furnished no more than 14 months following the date the prior plan year's notice was furnished. The Council supports this 14-month rule, which provides necessary flexibility, and appreciates that the Department took care to propose a combined notice option with annual delivery that will be administrable for plans.

g) Option to Include Internal Revenue Service ("IRS") Disclosures with Consolidated Notice

Because many of our members currently package together DOL- and IRS-required plan disclosures where possible, we believe the Proposal would be even more effective at reducing costs and making disclosures more effective and efficient if the consolidated notice of internet availability were extended to optionally include IRS notices. To accomplish this, we request that the Department (1) expand the list of disclosures in § 2520.104b-31(i) to include annual notices required under the Code, and (2) ask Treasury and IRS to acknowledge that the DOL's new safe harbor would satisfy the requirement in the Treasury regulations that an individual have the "effective ability to access" materials through the electronic medium with respect to IRS-required disclosures that are furnished electronically. If the Proposal's consolidated notice is not expanded in this manner, its usefulness will be more limited.

III. RESPONSES TO RFI

The Council agrees with the Department's statements that the Proposal, without more, would "substantially respond to both prongs" of the President's Executive Order 13847. That order directed the Department to explore ways to both (1) reduce the burdens and costs associated with ERISA-required retirement plan disclosures and (2) enhance the effectiveness of the disclosures for participants. Nevertheless, we believe there are further improvements that could be made to plan disclosures that the use of technology alone cannot address, and so we support the Department's effort to solicit additional information and ideas through the RFI. The Council's responses to several of the questions in the RFI are set forth below. To be clear, we urge the Department to finalize the Proposal without delay, and then separately address further improvements to notices and disclosures as described in the RFI questions.

Q2. How do or could plan sponsors and administrators assess the use, effectiveness, and impact of disclosures? Should assessments and responses [to such assessments] be required by regulation, either together with or as an alternative to prescriptive standards for disclosures?

The Council does not believe that plan sponsors and administrators should be required to assess the use, effectiveness, and/or impact of disclosures. With respect to federally required plan disclosures, the onus should be on Congress and the federal agencies – with the assistance, of course, of any information or feedback that the private sector is willing and able to provide – to determine that a disclosure is useful, effective, and/or impactful before requiring (or continuing to require) its furnishing. Nevertheless, many of our members are already experimenting with ways to improve

the utility of disclosures within the confines of current law. We believe that finalization of the proposed new safe harbor will enable plan sponsors and administrators to do even more in this regard because such actions are much more feasible in an electronic environment.

Q3. Please identify any currently mandated routine retirement plan disclosures for which effectiveness and efficiency could be improved and set forth recommendations for improvement.

The Council's members generally find that the Summary Annual Report ("SAR") no longer provides any useful information to participants that is not already provided in another required disclosure, and that the effectiveness and efficiency of required plan disclosures would be improved by substantially streamlining the SAR requirements.

As the Department is aware, the SAR is intended to be a "summary" of the financial information in a plan's annual report. It provides generic information about any insurance contracts held under the plan, as well as information about the total assets that were held under the plan and paid out in benefits. In a defined contribution plan, where the benefits promised always equal the assets held under the plan, the SAR does not provide any information that would be actionable by a participant. Plan sponsors report that the only thing the SAR accomplishes is generating questions from participants about why the disclosure is being provided, what it is supposed to mean to them as participants, and whether the participant needs to do anything with it.

Any relevant or useful information that the SAR may have provided in the past has now been overtaken by other more useful notices. For defined benefit plans, participants now receive an annual funding notice that provides information about the funded status of the plan, and Congress very appropriately eliminated the SAR for defined benefit plans that provide the annual funding notice. For defined contribution plans, participants now receive the quarterly benefit statement, which provides much more useful detail on the financial information for their respective account, and the annual fee and investment (404a-5) notice.

Receiving information about the total assets, total income, and total expenses of a defined contribution plan as required in the SAR is generally not helpful to a plan participant because the participant's plan benefit depends on the participant's individual account balance and not on the total income or expenses of the plan. Not only does the SAR fail to provide useful, personal, and actionable information, but the disclosure provided by the SAR may make it more difficult for participants to determine which disclosures they should look to for useful information about their plan and its benefits.

The Council strongly believes that the Department has the authority to eliminate or streamline the SAR without the need for legislation. Section 104(b)(3) of ERISA provides that the administrator of the plan (other than a plan that must provide the annual funding notice) must furnish to participants and beneficiaries the specified information "as is necessary to fairly summarize the latest annual report." This language gives the Department flexibility to require only the information that is actually "necessary" in light of the additional disclosures participants receive and the fact that a plan's annual

report is now posted online and fully searchable for any participant interested in reviewing it. In this regard, none of the financial information currently in the SAR of a defined contribution plan is necessary.

Putting aside the plan's financial information, which is not useful to participants in a defined contribution plan, the SAR does inform a participant that the annual report is available and provides a brief summary of the information in the annual report. Informing a participant that he or she may request a copy of the annual report or can access recent annual reports on the Department's website could be done in any number of ways, including through a brief annual statement on benefit statements or in the annual fee and investment disclosure. In addition, the SAR informs non-English language readers in certain plans that assistance is available to them in a common non-English language. This information can be provided as part of other required disclosures.

Accordingly, the Council encourages the Department to amend the SAR regulation to provide that the SAR obligation in a defined contribution plan may be satisfied by informing a participant, at least once a year, of the participant's right to receive a copy of the full annual report and how to obtain a copy, and of the participant's right to receive assistance in a non-English language.

Again, the Council's long-term strategic plan published in 2014, A 2020 Vision: Flexibility and the Future of Employee Benefits, included a relevant recommendation:

> **Reduce or combine the number of retirement plan information disclosure requirements.** The volume and redundancy of disclosures adversely affect transparency for participants to the point where excessive amounts of information means they tend to read none of it. Transparency would be better served by the delivery of more concise, well-organized information. Notices could be shortened and consolidated to maximize effectiveness and eliminate repetitiveness and redundancy. For example, all notices provided at enrollment and annually could be combined into a single "Quick Start" notice. This would require harmonization and streamlining of timing requirements. Certain duplicative and irrelevant notices, such as the summary annual report, the deferred vested pension statement and the notice of determination letter application, should be eliminated.

Q5. Are there ways through regulation or appropriate subregulatory guidance to require, incentivize, or facilitate plan administrators to organize information within the required disclosures to reflect life events so that information is available as the need arises?

The Council believes that facilitating the increased use of electronic disclosure, such as the proposed new safe harbor would do, is one of the most productive steps the Department can take to encourage plan administrators to organize and present disclosures in a more meaningful way for participants. Many plan sponsors and service providers are already investing time and resources into experimenting with ways to

help participants better understand their plan and save for retirement more successfully, including the consideration of various life events that participants may be experiencing. As such, in addition to facilitating use of the very tools that make this possible (which are often unique to an electronic environment), the other way for the Department to encourage these actions is to avoid being overly prescriptive with its disclosure requirements and allow plan administrators an appropriate amount of leeway to try new approaches.

Q6/7. Some people have indicated that at least some ERISA documents may be too voluminous, complex, or both. Please identify each ERISA document in these categories and state whether the Department should encourage or require, as an alternative to furnishing the entire document, that the plan administrator furnish a brief, clear, and accurate summary of key information from the document, for example not to exceed one or two pages, coupled with access to more detailed information online, on request, or both. Also identify what should be considered "key" for this purpose.

The Council has testified on this topic many times before the ERISA Advisory Council:

- In 2009, we testified on "Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries." We said that it is essential that the disclosure regime both (a) provide information to participants in a manner they are likely to use/understand and (b) not unduly burden employers by increasing costs or potential litigation risk.
- In 2013, we testified on "Successful Plan Communications for Various Population Segments." We pointed out that the most effective communications follow three main tenets: (1) they are simple; (2) they recognize that most participants make emotional, rather than logical, decisions with regard to their financial savings; and (3) they employ diagnostic techniques that not only target based on employment status and savings practices, but also create segments or personas based on demographics and behavioral patterns.
- In 2015, we testified on "Model Notices and Disclosure on Risk Transfers." We pointed out that any new guidance should be prospective only and should provide flexibility for plan sponsors to fulfill their disclosure obligations in a way that fits their circumstances and their workforce.
- In 2017, we testified in connection with both topics involving improving retirement and health plan disclosures, where we emphasized flexibility, innovation, and avoiding unnecessary costs.

Rather than repeat all of our recommendations here, we would urge the Department to consider the testimony and recommendations of the ERISA Advisory Council, which has offered many ideas to the Department on this question in recent years.

Q8. Does ERISA require disclosure of any information that has become obsolete, for example as a result of the passage of time or changes in the regulatory, business, or technological environment? If so, what information? Is there

information that would be important to disclose instead of the obsolete information?

The Council has found that the Summary Annual Report ("SAR") in particular has become almost entirely obsolete and that the Department could take steps to substantially streamline the SAR requirements. Please see our response to Q3 for more information.

Q21. Are there steps the Department could take to better coordinate disclosures required under ERISA and notices required under the Code?

As noted above in our comments on the Proposal, our members would find it very helpful if the Treasury Department and IRS would acknowledge that meeting the requirements of the DOL's new safe harbor would be treated as satisfying the "effective ability to access" requirements in the Treasury Department's regulation[29] for purposes of allowing plan administrators to use electronic disclosure with respect to IRS-required notices without obtaining affirmative consent from the recipient.

In addition, with respect to the Proposal's consolidated notice of internet availability in particular, we ask that the Department allow for the consolidated notice to incorporate any annual plan notice required to be provided under the Internal Revenue Code, in addition to the discrete list of ERISA-required notices that are listed in § 2520.104b-31(i) of the Proposal. Together, these actions would allow plan administrators to package annual notices under both ERISA and the Code using one process and one notification, which would help further simplify and streamline communications provided to participants.

* * * * *

Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact either of us at (202) 289-6700 or by email at jjacobson@abcstaff.org or kjohnson@abcstaff.org.

Sincerely,

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Senior Counsel, Health Policy

[29] 26 C.F.R. § 1.401(a)-21(c)(2).