



November 22, 2019

Submitted electronically in reference to the matters identified below, via the Federal Rulemaking portal @ [www.regulations.gov](http://www.regulations.gov)

**Subject: Alight Solutions LLC's Comments on:**

- **RIN 1210-AB90, Proposed Rule and Request for Information, Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 84 Fed. Reg. 56894 (Oct. 23, 2019)**

To Whom It May Concern:

Alight Solutions LLC ("Alight") respectfully submits these comments relating to the proposed rule and request for information regarding Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, 84 Fed. Reg. 56894 (Oct. 23, 2019).

Alight is a leader in benefits, payroll and cloud solutions, supporting more than 3,250 clients, including 50% of the Fortune 500. Alight serves 26 million people and their family members including more than 5.5 million defined benefit participants, nearly 5 million defined contribution participants, and over 11 million health and welfare plan participants.

In addition to our comments here, which are specific to retirement plans, as the Department of Labor (the "Department") considers the future application of this safe harbor for employee welfare benefit plans, Alight would welcome the opportunity to discuss and assist the Department as appropriate to develop the parameters of an employee welfare benefit plan electronic disclosure safe harbor.

**I. The term "website" should be broadened to include other electronic access points such as mobile applications.**

As the Department describes in the preamble (at 84 Fed. Reg. 56901), many retirement plan administrators are providing disclosures and other materials through websites today. In some cases, mobile applications ("apps") are utilized because they provide a better user interface and user experience on mobile devices. Although some stakeholders may consider an app and a website effectively the same thing, in order to avoid confusion and future disputes, we respectfully suggest that the term "website" either be defined more broadly, or be modified to include a more encompassing reference such as "website or other electronic access point" throughout. This change will also help encourage the adoption of future technology and communication improvements by administrators.

**II. Confirm that the administrator is not required to affirmatively substantiate that a phone number is for a "smartphone".**

The proposed rule makes clear that, absent the provision of another electronic address, if the administrator becomes aware of an invalid or inoperable electronic address, the administrator must treat the otherwise covered individual as if they had elected to opt out of electronic delivery. Paragraph

(f)(4) (84 Fed. Reg. 66922). Aight respectfully requests confirmation that the administrator may rely, except as described below, on the individual's provision of a phone number indicated by the individual as a "cell phone," "mobile," "smartphone" or other commonly used term for a mobile computing device that uses a phone number, without additional substantiation. We believe this self-identification is a sufficient protection against the unlikely provision of a phone number not associated with an electronic device.

Additionally, administrators with such phone numbers on file should be able to use them for purposes of converting to and continuing under this safe harbor without undertaking to confirm that such phone numbers are for a "smartphone." If the Department believes that at least some confirmation is required in order to first use this safe harbor with phone numbers already on file, the effort should be minimal. For example, a "test" notice to the number, which may be relied upon as confirmation unless the administrator becomes aware that the "test" was undelivered or made to an invalid or inoperable electronic address.

### **III. The "sufficiently specific" standard in Paragraph (d)(3)(iv) should allow more flexibility and be time-limited for any direct-to-covered document or prominent link requirements.**

While we expect an administrator could, at least initially, technically be able to meet the "sufficiently specific" standard set forth in Paragraph (d)(3)(iv) (84 Fed. Reg. 56922), we believe the standard as written is too prescriptive and has at least two elements that will have unintended negative consequences.

First, the proposed rule effectively places a "click" or page limit on the number of steps, links, or pages through which a covered individual may pass before "landing" at the covered document. We acknowledge that such a standard affords certainty to those administrators that choose to meet it, and therefore support its inclusion in the rule (assuming adoption of the time-limit modifications proposed below). However, we also believe such limits create the risk of stifling good website design, communication advances, and other electronic access improvements. We believe there are a number of ways an administrator may be able to improve not only access, but benefits education and participant behavior when covered individuals seek out plan information. To achieve these goals, it may mean that the link to a covered document would not be best placed on the page immediately after the covered individual logs on. Further, the future of electronic access may not include these specific pages or steps, or may accomplish them in a way that we don't currently foresee.

Additionally, as a technical matter, while the covered individual may only see one page with substantive content immediately following log on, the website may have connected through numerous pages and/or systems (even through various service providers). For example, in some systems, the displayed page immediately following a login page (once the user submits the log-in information) is a "loading" page that indicates the website is meeting security requirements, authenticating the login, or connecting to or otherwise loading the desired content. It is unclear whether such a "loading" page or other series of technically necessary or advisable steps/pages would jeopardize or at least cause dispute regarding the administrator's satisfaction of the standard.

Therefore, in addition to the methods already issued (but modified for time-limitation as suggested below), we urge the Department to add a more inclusive "other reasonable procedures" method (similar to the standard under Paragraph (f)(3)) for satisfying the "sufficiently specific" standard and accessing the electronic documents through the website address or other electronic access point provided in the notice of internet availability.

Second, the standard does not specify a time period during which the website address must lead directly to the covered document itself, or that the login page (or page immediately after the login page) must provide a prominent link to the covered document. Pragmatically, the set-up and content of websites shifts over time, and it may become confusing for participants as well as unduly burdensome for administrators to maintain every direct-to-covered document website address or link to the covered document immediately after a login page. This is especially true in light of potential technological advances that would allow for better delivery and archiving, which would be stifled by requiring that once a website address is sent it may effectively never change.

For administrators using website addresses leading directly to the covered document, we suggest the direct access should be maintained for at least 30 calendar days, after which the covered individual may be redirected to a website or other electronic access point through which the covered document is made available. Alternatively, the redirect could be accomplished by specifying in the notice of internet availability that the direct-to-covered document website address will be active for at least thirty (30) days, after which the covered individual may access the covered document by accessing an alternative, more general address (also to be provided in such notice of internet availability).

Administrators using website addresses leading to a login page or page immediately following (in our view, the most likely option), often do so as part of a website used to communicate other relevant and important employer and benefit plan information (for example: employment policies, pay statements, and various announcements). Accumulating covered document links following the login page may, over time, cause confusion, undermine good website design and communication practices, and overwhelm the broader value and utility of such a website. Therefore, we suggest that the page immediately following a successful log on, should prominently display the link to the covered document for at least fifteen (15) calendar days, after which the link to the covered document may be moved to a reasonably accessible electronic archive not generally requiring additional logging on by the covered individual.

#### **IV. Confirm that there is no prohibition on concurrently using more than one electronic address for the same notice.**

In order to help ensure receipt, some administrators may choose to send any given notice to more than one electronic address concurrently (or within a short period of time of each other). The proposed rule generally contemplates use of a single address, but does not appear to prohibit administrators from sending the notice concurrently to additional electronic addresses for each person, assuming they have them on file.

Paragraph (f)(4) of the proposed rule provides as an example that an electronic notice returned undeliverable may be cured by “furnishing a notice of internet availability to the covered individual’s secondary electronic address that is valid and operable” (84 Fed. Reg. 56922). While many administrators may take a one-at-a-time approach in order to avoid providing a covered individual with duplicative notices, we expect some administrators may prefer to send the electronic notice to all or more than one electronic addresses on file concurrently (or within a short period of time) even without being alerted to a delivery failure. Although there may be some concern that concurrent, rather than consecutive, notices may add confusion, we believe the notice itself could be customized to explain to the covered individual that he or she may receive it at more than one of the electronic addresses on file with the administrator.

In this instance, we would suggest that unless the administrator becomes aware that all the electronic addresses are inoperable or are otherwise failing to deliver the notice, the administrator is permitted to provide notices to multiple electronic addresses and satisfy the safe harbor.

**V. Request that the Department coordinate with and secure assurances from the Federal Communications Commission (“FCC”) that applicable notices to “smartphones” or other mobile electronic devices that are assigned a phone number will not violate applicable laws/rules.**

We are supportive of the inclusion of mobile-computing devices in the proposed rule, and are aware that such devices, as indicated, are often only identified by a phone number. We believe further guidance and coordination between the Department and the FCC may be advisable regarding whether the FCC can identify an existing exception or create a new exception under the Telephone Consumer Protection Act’s (“TCPA’s”) consent requirements for sending certain messages to such number.

Without such an explicit exception, there may be cases where a notice of internet availability sent to an electronic address that is a phone number for a smartphone under the proposed rule may be subject to scrutiny as a text message requiring consent under the TCPA. We would expect this would be a significant concern for administrators and would have a chilling effect on the utility of these proposed rules.

**VI. Individuals currently receiving electronic disclosures under an existing safe harbor should be exempted from the initial notice requirements in Paragraph (g), or the administrator should be permitted to send such initial notice to an electronic address already on file for such individual.**

We anticipate that many administrators will prefer to rely primarily on a single safe harbor for their entire population. Given that covered individuals already receiving electronic disclosures based on their consent or their status as “wired at work” could have opted for paper and had not done so, this strongly implies that they are comfortable with, and may even prefer, receiving notices and disclosures electronically. Also, it is very likely that the administrator has a valid electronic address for these people that it already uses for certain communications.

With these factors in mind, for administrators that wish to use the new proposed safe harbor, we respectfully suggest that no paper or electronic copy need be sent under Paragraph (g) (84 Fed. Reg. 56922) for people already receiving electronic disclosures, and that such individuals may be shifted into the new safe harbor with the rest of the administrator’s population (who will get the initial paper notice). Alternatively, the administrator should be permitted to send the initial notice via any electronic address(es) already on file for these individuals, subject to monitoring for undeliverable electronic notices. This approach will reduce the initial cost and burden on administrators to “convert” to the new safe harbor and decrease the ongoing cost and burden of relying on two different safe harbors.

**VII. The administrator’s responsibility upon severance from employment under Paragraph (h)**

Although it is common to characterize the terms under which an individual severs employment into a number of identifiable categories (e.g., voluntary termination, involuntary termination, death, etc.), the circumstances surrounding each severance can vary greatly, and can impact the ability of the administrator to meet any safe harbor standards that assume access to or responsiveness of the individual. We respectfully suggest that the Department focus solely on the elements of the interaction with the individual that are within the control of the administrator when further developing or enforcing Paragraph (h) (84 Fed. Reg. 56922-56923).

In many cases, we expect that administrators will have an electronic address not provided by the employer already in its records at the time of the termination. We suggest that such last known non-employer provided electronic address should be permitted to satisfy the requirements of Paragraph (h). In addition, it is our impression that the provisions of Paragraph (f)(4) (84 Fed. Reg. 56922) provide sufficient protection for severance of employment circumstances, including where an employer-provided electronic address becomes inaccessible.

Generally, “special” rules and approaches for individual circumstances are burdensome and expensive to implement and maintain. We have some concern that creating a special post-employment burden on administrators may cause a headwind on the positive industry trend of employees leaving their retirement savings in lower-cost employer plans, and the plans embracing that behavior, rather than expecting former employees to roll over their savings to higher cost investment options such as individual retirement accounts.

We urge the Department to revise Paragraph (h) to grant administrators additional flexibility in the severance circumstance, but otherwise to rely on Paragraph (f)(4) for ensuring valid and operable electronic addresses. Along these lines, the Department may wish to consider revising Paragraph (h) as follows:

*(h) Special rule for severance from employment.* At the time a covered individual who is an employee severs from employment with the employer, the administrator may treat any employer-provided electronic address as invalid and substitute any other electronic address that is valid and operable, if available, in order to furnish the notice of internet availability ~~must take measures reasonably calculated to ensure the continued accuracy of the electronic address described in paragraph (b) of this section or to obtain a new electronic address that enables receipt of covered documents~~ following the individual's severance from employment.

**VIII. Paragraph (j) should additionally allow covered documents to be temporarily unavailable for maintenance, changes, upgrades, or other activities needed to maintain, improve, or operate the website or other electronic access point.**

The Department’s recognition of unforeseen circumstances where access to covered documents is temporarily interrupted is appreciated. Additionally, websites and other electronic media require periodic and circumstantial maintenance, changes, upgrades and other work in order to keep them operational and to improve them. These events are generally scheduled and often are done “off hours” overnight or on weekends. Occasionally there is a need for unscheduled maintenance or other activities, which may fall within the language already proposed in Paragraph (j) as “unforeseeable events or circumstances beyond the control of the administrator.” (84 Fed. Reg. 56923). In order to ensure support without jeopardizing the administrator’s adherence to the safe harbor, we respectfully suggest including language related to such activities.

As one alternative, the Department may wish to revise Paragraph (j) to provide:

*(j) Reasonable procedures for compliance.* The conditions of this section are satisfied, notwithstanding the fact that the covered documents described in paragraph (b) of this section are temporarily unavailable for a period of time in the manner required by this section due to maintenance, changes, upgrades, or other activities needed to maintain,

improve, or operate the website, or unforeseeable events or circumstances beyond the control of the administrator, provided that:

A second alternative would be to add a Paragraph (j)(3) stating that “notwithstanding the other requirements of this Paragraph (j), it shall not be unreasonable for covered documents to be temporarily unavailable due to maintenance, changes, upgrades, or other activities needed to maintain, improve, or operate the website through which such covered documents are accessed.”

**IX. Paragraph (e)(2)(ii) should be broadened to include other reasons the covered document may be unavailable on the website.**

In order to avoid confusion and disputes, we respectfully suggest that Paragraph (e)(2)(ii) (84 Fed. Reg. 56922) be appended, as follows, to provide additional flexibility for administrators to discontinue providing a covered document through the website.

(ii) The covered document remains available on the website until it is superseded by a subsequent version of the covered document, made available or delivered by other permissible means, or is no longer necessary based on final distribution in a plan termination or other action;

**X. Paragraph (f)(3) should affirm the administrator’s discretion whether to follow an “all or nothing” or “document-by-document” opt out.**

Administrators may not have the capacity or desire to support the ongoing monitoring of a document-by-document opt out and should have the ability to apply elections to all covered documents, to each covered document, or to some subset of covered documents as determined by the administrator. For this purpose, we respectfully suggest the following revision to Paragraph (f)(3) (84 Fed. Reg. 56922):

(3) The administrator must establish and maintain reasonable procedures governing requests or elections under paragraphs (f)(1) and (2) of this section. The 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. Procedures that require any election under paragraph (f)(2) to apply to all covered documents or specified groupings of covered documents, rather than each covered document separately, shall not be considered unreasonable.

**XI. The Department should avoid specifying particular current technology methods, standards, and references in the rule, and instead rely on the existing ERISA Section 404 standard.**

The Department raises several questions regarding whether this safe harbor should specify various technical elements, including, for example, whether security guidelines or best practice protocols would be helpful and appropriate. (84 Fed. Reg. 56905). For all of these types of questions we would urge the Department not to include or specify any technical methods, standards, or references in order to avoid them becoming obsolete, superseded, or otherwise unavailable in the future.

As described in the proposed rule, ERISA Section 404 already covers administrators’ responsibilities in a manner that allows for evolving technology, standards, and requirements. We strongly believe specifying particular current-day standards anywhere in these rules, even if they are best practices now,

will potentially cause problems for administrators, including potentially developing a conflict between any rule-based specifications and ERISA Section 404 itself.

**XII. Response to Q 21: Are there steps the Department could take to better coordinate disclosures required under ERISA and notices required under the Code?**

We encourage the Department and the Treasury Department to continue to work together to harmonize and coordinate both the documentation required and the methods by which documents may be delivered. Specific examples where coordination would be helpful include the annual Tax Equity and Fiscal Responsibility Act (“TEFRA”) withholding notice for annuitants and the rollover notice required under Internal Revenue Code Section 402(f).

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Thank you for the opportunity to submit these comments on the proposed rule and the request for information. Alight would welcome the opportunity to meet and discuss our comments, or the broader application of the rule to employee welfare plans, in greater detail or to answer any question that you may have.

Respectfully submitted,  
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