

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2520**

RIN 1210-AB90

**Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA****AGENCY:** Employee Benefits Security Administration, Department of Labor.**ACTION:** Proposed rule and request for information.

**SUMMARY:** The Department of Labor is proposing in this document a new, additional safe harbor for the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries of plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The proposal, if adopted, would allow plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that certain disclosures will be made available on a website.

Individuals who prefer to receive these disclosures on paper will be able to request paper copies and to opt out of electronic delivery entirely. The Department expects that the proposal, if adopted, would improve the effectiveness of the disclosures and significantly reduce the costs and burden associated with furnishing many of the recurring and most costly ERISA disclosures. This document also contains, in section D of the preamble, a Request for Information that explores whether and how any additional changes to ERISA's general disclosure framework, focusing on design, delivery, and content, may be made to further improve the effectiveness of ERISA disclosures.

**DATES:** Comments on the proposal and on the Request for Information, in section D of the preamble, must be submitted on or before November 22, 2019.

**ADDRESSES:** You may submit written comments, identified by RIN 1210-AB90 to either of the following addresses:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

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

Disclosure by Employee Benefit Plans, RIN 1210-AB90.

*Instructions:* All submissions received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge, online at <https://www.regulations.gov> and <https://www.dol.gov/agencies/ebsa> and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210.

*Warning:* Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Davis or Kristen Zarenko, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background***(1) Current Delivery Standards for ERISA Disclosures*

The Employee Retirement Income Security Act of 1974 (ERISA) and regulations thereunder provide general standards for the delivery of all information required to be furnished to participants, beneficiaries, and other individuals under Title I of ERISA.<sup>1</sup> Plan administrators must use delivery methods reasonably calculated to ensure actual receipt of information by participants, beneficiaries, and other individuals.<sup>2</sup> For example, in-hand delivery to an employee at his or her workplace is acceptable, as is material sent by first class mail.

*(i) 2002 Electronic Disclosure Safe Harbor*

Based on developing technology, such as email and the internet, the Department of Labor (Department) amended the general standards for delivery of required disclosures in 2002 by establishing a safe harbor for the use of electronic media (the 2002 safe harbor).<sup>3</sup> The 2002 safe harbor is not the exclusive means by which a plan administrator may use electronic media to satisfy the general standard. Plan administrators may find that other

procedures will allow them to meet ERISA's general delivery requirements. However, administrators who satisfy the conditions of the safe harbor are assured that the general delivery requirements have been satisfied.

The 2002 safe harbor, which is set forth in paragraph (c) of § 2520.104b-1, is available only if: First, the plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt of transmitted information and protects the confidentiality of personal information relating to the individual's accounts and benefits; second, the electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format, and content requirements applicable to the particular document; third, notice is provided to each participant, beneficiary, or other individual, in electronic or non-electronic form, at the time a document is furnished electronically, that apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted and of the right to request and obtain a paper version of such document; and fourth, upon request, the participant, beneficiary or other individual is furnished a paper version of the electronically furnished documents.<sup>4</sup>

The 2002 safe harbor applies only to two categories of individual recipients. The first category includes those participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties. This group is sometimes referred to as being "wired at work." The second category includes participants, beneficiaries, and other persons who are entitled to documents under Title I of ERISA who do not fit into the first category, but who *affirmatively consent* to receive documents electronically. For this category, the safe harbor assumes the use of electronic information systems beyond the control of the plan or plan sponsor; therefore, relief is available for the second category of individuals only if they *affirmatively consent* to receive documents electronically.

In general, the affirmative consent condition requires plan administrators to ensure that an individual has affirmatively consented, in electronic or

<sup>1</sup> See 29 CFR 2520.104b-1.

<sup>2</sup> See 29 CFR 2520.104b-1(b)(1).

<sup>3</sup> See 29 CFR 2520.104b-1(c).

<sup>4</sup> 29 CFR 2520.104b-1(c)(1)(i) through (iv).

non-electronic form, to receiving documents through electronic media and has not withdrawn such consent. Alternatively, in the case of documents furnished through the internet or other electronic communication networks, the individual must have affirmatively consented or confirmed consent electronically. The manner in which an individual confirms consent must reasonably demonstrate the individual's ability to access information in the electronic form that will be used to provide the information that is the subject of the consent, and the individual must have provided an address for the receipt of electronically furnished documents.

In addition, before consenting, the individual must be provided, in electronic or non-electronic form, a clear and conspicuous statement indicating: First, the types of documents to which the consent would apply; second, that consent can be withdrawn at any time without charge; third, the procedures for withdrawing consent and for updating the participant's, beneficiary's, or other individual's address for receipt of electronically furnished documents or other information; fourth, the right to request and obtain a paper version of an electronically furnished document, including whether the paper version will be provided free of charge; and fifth, any hardware and software requirements for accessing and retaining the documents.

Further, following consent, if a change in such hardware or software requirements creates a material risk that the individual will be unable to access or retain electronically furnished documents, the individual: First, is provided with a statement of the revised hardware or software requirements for access to and retention of electronically furnished documents; second, is given the right to withdraw consent without charge and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and third, again consents in accordance with the requirements above.<sup>5</sup>

(ii) Field Assistance Bulletin 2006–03

Although the 2002 safe harbor remains in effect, the Department occasionally has issued guidance in limited circumstances addressing electronic delivery methods other than the method permitted by the 2002 safe harbor. For example, in 2006, the Department issued Field Assistance Bulletin 2006–03 (FAB 2006–03) to help

administrators and their service providers comply with amendments to ERISA's pension benefit statement requirements made by the Pension Protection Act of 2006.<sup>6</sup> FAB 2006–03, in relevant part, provides that when pension plans give participants continuous access to benefit statement information through one or more secure websites, "the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries." In addition, the notification "must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105."<sup>7</sup>

(iii) Field Assistance Bulletin 2008–03

On April 29, 2008, the Department issued Field Assistance Bulletin 2008–03 (FAB 2008–03), which provides guidance on the Department's final regulation providing relief from certain fiduciary responsibilities under ERISA for investments made on behalf of participants or beneficiaries who fail to direct the investment of assets in their individual accounts.<sup>8</sup> The qualified default investment alternative (QDIA) regulation requires plans that choose to offer a QDIA to provide participants and beneficiaries with an initial and annual notice thereafter of the QDIA.<sup>9</sup> FAB 2008–03 explains that, absent subsequent guidance to the contrary, plans that wish to use electronic means to satisfy their notice requirements may rely on either the regulations issued by the Department of Labor at 29 CFR 2520.104b–1(c) or the regulations issued by the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) at 26 CFR 1.401(a)–21 relating to use of electronic media.<sup>10</sup> FAB 2008–03 gives administrators additional flexibility and complements the Department's position that an administrator may use one consolidated notice to satisfy both the QDIA regulation and the notice requirements in Internal Revenue Code

(Code) sections 401(k)(13)(E) and 414(w)(4) for automatic contribution arrangements.

(iv) Technical Release 2011–03R

On December 8, 2011, the Department issued Technical Release 2011–03R (TR 2011–03R), which sets forth an interim enforcement policy regarding the use of electronic media to satisfy the disclosure requirements under 29 CFR 2550.404a–5, the participant-level disclosure regulation. Under TR 2011–03R, a plan administrator may furnish § 2550.404a–5 disclosures through electronic media (including through a continuous access website) if participants voluntarily provide the employer, plan sponsor, or plan administrator (or its designee) with an email address; if the administrator furnishes initial and annual notices; and if other conditions are satisfied. TR 2011–03R establishes a temporary enforcement policy until the Department issues further guidance in this area. Under this policy, the Department will not take any enforcement action against a plan administrator who complies with the conditions in TR 2011–03R. TR 2011–03R is specifically limited to the obligation to furnish required disclosures under 29 CFR 2520.104b–1(b)(1), as it applies to the disclosures under 29 CFR 2550.404a–5.

(2) 2011 Request for Information

The Department's Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, published April 7, 2011 (the 2011 Request for Information), explained in detail what is required for an administrator to establish "affirmative consent" by an individual.<sup>11</sup> The Department published the 2011 Request for Information in response to Executive Order 13563, "Improving Regulation and Regulatory Review," issued by the President on January 18, 2011. The Executive Order stressed the importance of achieving regulatory goals through the most innovative and least burdensome tools available, and the Department was mindful of this directive when issuing the Request for Information to assist its approach to electronic disclosure by employee benefit plans. The Department received approximately 78 comments in response to the 2011 Request for Information; the responses to this Request continue to inform the Department's understanding

<sup>6</sup> Public Law 109–280, 120 Stat. 780 (2006).

<sup>7</sup> Field Assistance Bulletin No. 2006–03 (Dec. 20, 2006).

<sup>8</sup> See 29 CFR 2550.404c–5.

<sup>9</sup> 29 CFR 2550.404c–5(c)(3).

<sup>10</sup> See Field Assistance Bulletin No. 2008–03, (Q&A7), quoting 72 FR 60458 (Oct. 24, 2007).

<sup>11</sup> 76 FR 19286 (Apr. 7, 2011).

<sup>5</sup> See 29 CFR 2520.104b–1(c)(2)(ii).

and analysis of electronic delivery and other disclosure issues.<sup>12</sup>

Since publication of the 2011 Request for Information, the Department continues to consider whether there are more effective ways to regulate the disclosure and delivery of information to participants and beneficiaries. Questions have been raised in connection with many of the Department's rulemaking and other initiatives. Stakeholders on these initiatives increasingly request that the Department recognize changes in technology as some other Federal agencies have done, and take advantage of those changes by updating and modernizing ERISA's electronic delivery standards. Many stakeholders believe the Department should promote electronic delivery of information to the greatest extent possible, and contend that electronic delivery is more efficient, less burdensome, and less costly than delivery of paper disclosures. Other stakeholders state that electronic delivery is not necessarily appropriate for all individuals, or for all ERISA disclosures. The Department agrees that electronic delivery generally can be as effective as paper based communication, and that it can reduce plan costs and increase the timeliness and accuracy of information that is disclosed. The Department also understands, however, that some of America's workers and retirees do not have reasonable access to the internet, and that some workers and retirees prefer, and may benefit from, traditional (paper) delivery for important financial information, including ERISA plan disclosures.

### (3) Purpose of Regulatory Action

The Department believes that caution is warranted before taking regulatory action to change the longstanding electronic delivery standard under ERISA. The Department has spent considerable time analyzing the issue, both internally and by consulting other Federal departments and agencies with disclosure requirements that may affect the employee benefit plan marketplace. The Department consistently strives to reconcile competing policy goals when considering the best framework for delivering ERISA disclosures—a framework that appropriately balances the innovations and reduced costs that may be achieved through enhanced use of electronic communication with suitable safeguards for participants and

beneficiaries who may be harmed or disadvantaged by such enhanced use.

Since publication of the 2011 Request for Information—and, before then, publication of the current electronic delivery safe harbor rule in 2002—the Department has recognized the importance of the ever-evolving changes in technology affecting individuals at home and at work. Examples include the expansion of broadband internet access through cable, fiber optic and wireless networks; internet-connected applications (apps); hardware improvements to servers and personal computers improving storage, memory, recovery, and computing power; introduction of smartphones, net books and other personal computing devices; and social networking (e.g., LinkedIn, Facebook, and Twitter).

Evidence suggests substantial access to and use of electronic media:

- A 2017 survey by the U.S. Census Bureau, for instance, found that 87 percent of the United States population lives in a home with a broadband internet subscription.<sup>13</sup>
- A 2018 study concluded that 93 percent of households owning defined contribution accounts had access to, and used, the internet in 2016.<sup>14</sup>
- A 2015 survey of retirement plan participants' online habits indicated that 99 percent reported having internet access at home or work, and 88 percent of respondents reported accessing the internet on a daily basis.<sup>15</sup>
- A 2015 report observes that smartphones are used for much more than calling, texting, or basic internet browsing. Based on surveys, the report notes that: 62 percent of smartphone owners have used their smartphones in the past year to look up information about a health condition; 57 percent to do online banking; 44 percent to look up

real estate listings; 43 percent to look up information about a job; 40 percent to look up government services or information; 30 percent to take a class or find education content; and 18 percent to submit a job application.<sup>16</sup>

The Department believes that these access and usage rates, to date and as they continue in the future, may increase the number of individuals for whom electronic delivery of ERISA disclosures is appropriate or preferred. Further, increased technological capabilities may enable plan administrators, their service and investment providers, and the Department to monitor and ensure the effectiveness of the safeguards in place for all participants and beneficiaries. Accordingly, and in response to Executive Order 13847, discussed in the next section, the Department is now prepared to propose a new electronic delivery framework, as a safe harbor, for ERISA disclosures. The proposed safe harbor would be in addition to the 2002 safe harbor. Thus, plan sponsors and administrators could choose between the two safe harbors, or use both safe harbors, selecting the best approach for their plan population.

### (4) Executive Order 13847

On August 31, 2018, President Trump issued Executive Order 13847, affirming the Federal Government's policy to expand access to workplace retirement plans for American workers, ensuring that workers will be financially prepared to retire.<sup>17</sup> The Order focused on the concern that costly and complex regulations may discourage employers, especially small businesses, from sponsoring retirement plans for their employees. Specifically, the Order instructs the Department to review whether regulatory or other actions could be taken to improve the effectiveness of required notices and disclosures and reduce their cost to employers, promoting retirement security by expanding access to workplace retirement plans. The Order also emphasizes that reducing the number and complexity of ERISA notices and disclosures currently required would ease regulatory burdens. Specifically, Executive Order 13847 directs that within 1 year of the date of the Order, the Secretary of Labor shall, in consultation with the Secretary of the Treasury, "complete a review of actions that could be taken through regulation or guidance, or both, to make retirement plan disclosures required under ERISA

<sup>13</sup> "Types of Internet Subscriptions by Selected Characteristics," U.S. Census Bureau American Community Survey 1-Year Estimates (Table S2802) (2017).

<sup>14</sup> Peter Swire and DeBrae Kennedy-May, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery—2018 Update," (April 2018), p. 19.

<sup>15</sup> 2015 Telephone Survey Conducted by Greenwald & Associates for the SPARK Institute. A total of 1,000 randomly-selected plan participants nationwide were administered a 10-minute telephone survey. Data collection was done by Greenwald & Associates and its affiliate National Research. To qualify for the survey, respondents needed to be employed either full or part time and participate in an employer retirement plan. Sample was weighted by age and gender to reflect demographics of plan participants in the United States, as reported in the Current Population Survey. See Also, Quantria Strategies for the SPARK Institute, *Improving Outcomes with Electronic Delivery of Retirement Plan Documents*, (June 2015).

<sup>12</sup> The comments on the 2011 Request for Information are available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50>.

<sup>16</sup> Aaron Smith, *Smartphone Use in 2015*, Pew Research Center (April 1, 2015).

<sup>17</sup> E.O. 13847, 83 FR 45321 (Sept. 6, 2018).

and the Internal Revenue Code of 1986 more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution.” In addition, the Order specifically emphasizes that this review “shall include an exploration of the potential for broader use of electronic delivery as a way to improve the effectiveness of the disclosures and to reduce their associated costs and burdens.” The Order directs that, if the Secretary of Labor finds that action should be taken, the Secretary shall, in consultation with the Secretary of the Treasury, consider proposing appropriate regulations or guidance, consistent with applicable law and policy set forth in the Order.<sup>18</sup>

Since issuance of the Order, the Department has undertaken a comprehensive review of actions that may be taken in response to the Order’s policy mandates. In doing so, the Department consulted with not only staff of the Treasury Department, as to notices required under the Code, but also the Securities and Exchange Commission (Commission), banking regulators, and others concerning their electronic disclosure requirements and practices. The Department also has reviewed recent studies focusing on changes in internet access and usage across different populations and met with stakeholders to hear about specific experiences with electronic delivery. Having completed this review as set forth in the Order, the Department decided to publish a proposed regulation on electronic disclosure that it believes will reduce the costs and burdens imposed on employers and other plan fiduciaries, while at the same time creating the opportunity for disclosures that are more useful to participants and beneficiaries. The Department has also concluded that it needs further information from stakeholders before proposing any substantive regulatory additions, deletions, or changes to ERISA’s disclosures themselves, as opposed to delivery of such disclosures. Therefore, this document includes, below, a Request for Information comprising a series of questions to elicit views from all interested parties on additional ways to enhance the usefulness and effectiveness of ERISA disclosures.

#### (5) Review of Other Agencies’ Electronic Disclosure Practices and Standards

The Department has reviewed other agencies’ practices and standards

regarding electronic delivery of required information. Although the Executive Order only directed the Department to consult with the Treasury Department, the Department of Labor believed it prudent to explore a wider variety of approaches to electronic delivery.

#### (i) Social Security Statements

For budgetary reasons, the Social Security Administration effectively eliminated paper as the primary method of furnishing benefits statements.<sup>19</sup> Individuals now are entitled to register on the Administration’s website for a “my Social Security” account to access their statements and other information. The Social Security Administration does, however, mail paper statements to individuals age 60 and older if they don’t yet receive Social Security benefits and they have not yet set up a “my Social Security” account on the website and to other individuals upon request.<sup>20</sup> In fiscal year 2018, the Administration mailed 14.5 million paper statements to individuals.<sup>21</sup> More than 45 million individuals have established “my Social Security” online accounts and the Administration sends an annual email reminding individuals that their statement is available online. In 2018, nearly 17 million registered users checked their online statements.<sup>22</sup>

#### (ii) Federal Thrift Savings Plan

The Federal Thrift Savings Plan (TSP) is a retirement savings plan similar to a 401(k) plan, covering Federal civilian employees and members of the uniformed services. The TSP has approximately 5.5 million participant accounts<sup>23</sup> with approximately 3.3 million participants contributing through payroll deduction and approximately \$559 billion in investment assets at fair market value.<sup>24</sup> Effective December 31, 2003, the TSP uses electronic delivery as the default for quarterly benefit statements, unless an individual requests mail delivery.<sup>25</sup>

<sup>19</sup> Office of the Inspector General Social Security Administration, *Issuance of Social Security Statements* (Report No. A–03–18–50724, Feb. 14, 2019), p. 4–5.

<sup>20</sup> See <https://www.ssa.gov/myaccount/>.

<sup>21</sup> See fn. 19 at p. 6.

<sup>22</sup> *Id.*

<sup>23</sup> This includes Federal employees covered under Federal Employee Retirement Systems (FERS), the Civil Service Retirement System (CSRS), or equivalent retirement systems for the uniformed services.

<sup>24</sup> Federal Thrift Savings Fund, Financial Statement for December 31, 2018, available at <https://www.frtib.gov/ReadingRoom/FinStmnts/TSP-FS-Dec2018.pdf>.

<sup>25</sup> 5 CFR 1640.6 (“The TSP will furnish the information described in this part to participants by making it available on the TSP website. A participant can request paper copies of that

The TSP notifies new participants of the internet availability of their account information through an initial welcome package followed by two separate mailings containing a web password and personal identification number for accessing the website and automated telephone system.<sup>26</sup> Annual statements are available on the website and delivered by mail, unless an individual requests only electronic annual statements.<sup>27</sup> Among the 3.5 million TSP participants who are covered under the Federal Employee Retirement System (FERS),<sup>28</sup> a large majority, or 81 percent, appear to be in default status, receiving only annual statements (and not quarterly statements) in paper by mail. Of these, 57 percent have accessed their account online at least once since January of 2018. A very small fraction of all FERS-covered TSP participants, or just 3 percent, have opted for no paper/mail delivery. Of these, 95 percent have accessed their account online.

#### (iii) Treasury Department, Internal Revenue Service

On October 20, 2006, the Treasury Department and the IRS published 26 CFR 1.401(a)–21, setting forth rules relating to the use of an electronic medium to provide applicable notices and to make participant elections, with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan.<sup>29</sup> These regulations provide that an applicable notice<sup>30</sup> required to be in writing or in written form<sup>31</sup> can be provided to a recipient electronically only if the requirements of 26 CFR 1.401(a)–

information from the TSP by calling the ThriftLine, submitting a request through the TSP website, or by writing to the TSP record keeper.”) See also U.S. Government Accountability Office, *Federal Thrift Savings Plan: Customer Service Practices Adopted by Private Sector Plan Managers Should Be Considered*, GAO–05–38 (Jan. 2005) at 12, n. 21, available at <https://www.gao.gov/new.items/d0538.pdf> (providing statistics on cost savings experience with TSP).

<sup>26</sup> See TSP enrollment form, Form TSP–1; See also Summary of the Thrift Savings Plan at <https://www.tsp.gov/PDF/formspubs/tspb08.pdf>.

<sup>27</sup> Summary of the Thrift Savings Plan, p.24, available at <https://www.tsp.gov/PDF/formspubs/tspb08.pdf>.

<sup>28</sup> This generally includes Federal civilian employees hired in 1984 or later.

<sup>29</sup> T.D. 9294, 71 FR 61877 (Oct. 20, 2006).

<sup>30</sup> An applicable notice is any notice, report, statement, or other document required to be provided to a recipient under a retirement plan, employee benefit arrangement, or individual retirement plan. See 26 CFR 1.401(a)–21(e)(1).

<sup>31</sup> For notices that are not required to be in writing or in written form, 26 CFR 1.401(a)–21(a)(1)(iii) provides that the rules are a safe harbor method for using an electronic medium to provide the notice.

<sup>18</sup> See *id.*

21(a)(5)<sup>32</sup> are satisfied and either the requirements of 26 CFR 1.401(a)–21(b) (relating to the consumer consent requirements) or 26 CFR 1.401(a)–21(c) (providing an exemption from the consumer consent requirements) are satisfied.<sup>33</sup> Under the consumer consent requirements, the recipient must affirmatively consent to the electronic delivery of the notice in accordance with the requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act, Public Law 106–229 (114 Stat. 464) (2000) (E-SIGN Act). Under the exemption from consumer consent requirements, the electronic medium used to provide the applicable notice must be a medium that the recipient has the effective ability to access, at the time the applicable notice is provided, the recipient must be advised that he or she may request and receive the applicable notice in writing on paper at no charge, and upon request the notice must be provided to the recipient at no charge. In the past, some parties have encouraged the Department to allow providers to rely on these rules for providing electronic notices, which they interpreted to be more flexible than the Department's 2002 safe harbor.<sup>34</sup> And from time to time, in temporary guidance, the Department has allowed administrators to rely on these regulations under the Code for electronic delivery of disclosures as an

<sup>32</sup> 26 CFR 1.401(a)–21(a)(5) contains requirements relating to the design of the electronic system used to deliver applicable notices. The requirements are that the electronic system must be reasonably designed to provide the information in the notice to a recipient in a manner that is no less understandable than a written paper document and that the system must be designed to alert the recipient, at the time the applicable notice is provided, to the significance of the information in the notice and to provide instructions needed to access the notice, in a manner that is readily understandable.

<sup>33</sup> See, however, the special electronic delivery requirements for providing a section 204(h) notice to an applicable individual, which are described in 26 CFR 54.4980F–1, Q&A–13(c). A section 204(h) notice may be provided electronically if certain requirements are satisfied: (a) The notice is provided using an electronic method (other than an oral communication or a recording of an oral communication) that satisfies the requirements in 26 CFR 1.401(a)–21, and (b) either the notice is actually received by the applicable individual or the plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic method results in actual receipt. There are special safe harbor rules on the actual receipt rule in 26 CFR 54.4980F–1, Q&A–13(c)(3).

<sup>34</sup> For example, in comments submitted to the ERISA Advisory Council in 2017, the Department was encouraged to adopt the Treasury Department's approach. See Groom Law Group, statement to the ERISA Advisory Council, June 7, 2017, p. 4, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ehsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-levine-and-winters-written-statement-06-07.pdf>.

alternative to reliance on the Department's regulation.<sup>35</sup>

(iv) Securities and Exchange Commission

The mission of the U.S. Securities and Exchange Commission (SEC) is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The SEC oversees the key participants in the securities marketplace, including securities exchanges, securities brokers and dealers, investment advisers, and mutual fund companies. These participants very often are service providers to ERISA-covered retirement plans.

On June 22, 2018, the SEC adopted a new rule, 30e–3, under the Investment Company Act of 1940.<sup>36</sup> Subject to conditions, rule 30e–3 provides certain registered investment companies with an optional method to satisfy their obligation to transmit shareholder reports by making such reports and other materials accessible at a website address specified in a notice to investors. The new rule incorporates a set of protections so that investors who prefer to receive reports on paper will continue to receive them in that format. These protections include, among others, a minimum length phase-in period that ends no earlier than December 31, 2020, and notice requirements that must be implemented and followed beginning January 1, 2019, or the date shares are first publicly offered, if a registered investment company wants to use new rule 30e–3 as of January 1, 2021. The rule requires that a paper notice be sent to an investor each time a current shareholder report is accessible online.<sup>37</sup>

Similarly, in 2007 the SEC adopted amendments to the proxy rules under the Securities Exchange Act of 1934 that provide an alternative method for issuers and other persons to furnish proxy materials to shareholders by posting them on an internet website and

<sup>35</sup> See, e.g., Field Assistance Bulletin No. 2006–03 (Dec. 20, 2006), providing for “the furnishing of pension benefit statements in accordance with the provisions of [26 CFR] section 1.401(a)–21, as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries” under ERISA.

<sup>36</sup> 83 FR 29158 (Jun. 22, 2018).

<sup>37</sup> See 17 CFR 270.30e–3. The D.C. Circuit Court of Appeals denied a Petition for Review regarding the electronic delivery method permitted in the SEC's rule 30e–3. *Twin Rivers Paper Co. v. SEC* 934 F.3d 607 (D.C. Cir. Aug. 16, 2019). The Department further notes that this proposal includes a notice and access structure similar to the SEC rule, but also contains many differences. The structure and purposes of ERISA are different from the structure and purposes of the Investment Company Act of 1940.

providing shareholders with notice of the availability of the proxy materials. Under the amendments, issuers must make copies of the proxy materials available to shareholders on request, at no charge to shareholders. The amendments put into place processes that provide shareholders with notice of, and access to, proxy materials while taking advantage of technological developments and the growth of the internet and electronic communication. The amendments were phased-in over a two-year period.<sup>38</sup>

On January 26, 2009, the SEC adopted amendments to the form used by mutual fund companies to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933 in order to enhance the disclosures that are provided to mutual fund investors. The amendments require key information to appear in plain English in a standardized order at the front of a mutual fund statutory prospectus. The amendments also permit persons to satisfy their mutual fund prospectus delivery obligations under Section 5(b)(2) of the Securities Act by sending or giving the key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an internet website. Upon an investor's request, mutual fund companies are also required to send the statutory prospectus to the investor.<sup>39</sup> Under these rules, paper copies of the prospectus must be sent at no charge to shareholders requesting them.

Apart from these three document-specific rules, the SEC has a longstanding position that governs the use of electronic media for other investor disclosures by issuers of all types, including operating companies, investment companies, and municipal securities issuers, as well as market intermediaries. In general, issuers and market intermediaries must assess their compliance with legal disclosure delivery requirements in terms of notice, access, and evidence of delivery. One method for satisfying the evidence-of-delivery standard is to obtain an informed consent from an investor to

<sup>38</sup> 72 FR 4148 (Jan. 29, 2007).

<sup>39</sup> 74 FR 4546 (Jan. 26, 2009). In addition, in 2018, the SEC proposed a rule that permits a person to satisfy its prospectus delivery obligations for a variable annuity or variable life insurance contracts by sending a summary prospectus to investors and making the prospectus available online. Securities and Exchange Commission, 17 CFR parts 230, 232, 239, 240, 270 and 274. “Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts.” 83 FR 61730 (Nov. 30, 2018).

receive information through a particular electronic medium.<sup>40</sup>

(v) Office of the Comptroller of the Currency.

The Office of the Comptroller of the Currency (OCC) charters, regulates, and supervises all national banks and Federal savings associations as well as Federal branches and agencies of foreign banks. The OCC is an independent bureau of the Treasury Department. The mission of the OCC is to ensure that national banks and Federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. These businesses very often are service providers to ERISA-covered retirement plans. On January 23, 2017, as part of its review under the Economic Growth and Regulatory Paperwork Reduction Act of 1996, the OCC revised certain of its rules to remove outdated or otherwise unnecessary provisions. The OCC found that the use of electronic communications has become widespread and is provided for in state and Federal law, such as the E-SIGN Act, which allows for electronic communications with customers. The OCC, consequently, removed 12 CFR 12.102 and 151.110 which required, among other things, that customers must agree to electronic instead of hard-copy notifications.<sup>41</sup> In a separate regulatory action, the OCC now treats the posting of certain collective-investment-fund information on a bank's website as satisfying the bank's obligation to furnish such information to customers on request.<sup>42</sup>

#### (6) Other Recommendations to the Department

The actions taken today are responsive not only to Executive Order 13847, but to recommendations made to the Department by the Employee Benefits Security Administration's ERISA Advisory Council, the U.S. Government Accountability Office (GAO), and other parties.

#### (i) ERISA Advisory Council Recommendations

The ERISA Advisory Council (the Advisory Council) has repeatedly made recommendations to the Department concerning possible changes to the electronic delivery rules for ERISA

disclosures. Most recently, in its November 2017 report, the Advisory Council recommended that to ease burdens on plans and improve understandability for participants, an ideal disclosure protocol would implement both paper and electronic delivery.<sup>43</sup> In making its recommendation, the Advisory Council cited to witness testimony that a majority of participants do not read paper documents sent to them, and participants who do read the documents find them difficult to understand, noting that "SPDs were becoming increasingly detailed and using legalistic language to mitigate the litigation risks."<sup>44</sup> The Council also noted that home internet and computer use for adults over age 50, individuals with less than \$25,000 in annual income, those without a college degree, and those living in rural areas is lower than for other demographic groups.<sup>45</sup> The Council further recommended that a new disclosure called a "Quick Reference Guide" could be distributed annually to participants that would provide answers to basic questions about the plan.<sup>46</sup>

*2009 Advisory Council Report.*<sup>47</sup> In July and September of 2009, the Advisory Council held public hearings to study the efficacy of ERISA's reporting and disclosure requirements, as well as problems and costs related to such disclosures. Upon completion of testimony from 18 witnesses, the Advisory Council issued its report recommending that the Department allow administrators to rely on the IRS regulations. In support of this recommendation, the Council stated this rationale:

The Council believes that the IRS Regulations will adequately protect the rights of those participants who are actively employed because it will generally be very simple for administrators to determine whether active employees have reasonable access to the electronic medium used to furnish the disclosure. The Council believes that administrators will not furnish those individuals who are not working actively—such as retirees or beneficiaries—with electronic disclosure *unless the administrator has a working electronic mail*

*address for such individuals.* In that way, participants who are not actively employed and plan beneficiaries will be protected (emphasis added).

The Council's report further explains:

Electronic communications have enormously improved the retirement system for both plans covered by ERISA and their participants. They have improved participant education, retirement planning, and plan participation. Electronic communications have allowed plans to furnish more information to participants and beneficiaries for less cost. They have simplified plan administration and improved plan recordkeeping. All of these benefits of electronic communication have improved retirement security, which was and remains an underlying goal of ERISA. The Council believes that this goal of retirement security would be better served if the DOL would expand the array of electronic media that plan administrators may use to satisfy ERISA's disclosure requirements.

*2007 Advisory Council Report.*<sup>48</sup> Another public hearing was held by a working group of the Advisory Council in July and September of 2007, in this case to hear thirteen witnesses testify about the new pension benefit statement requirements in the Pension Protection Act of 2006.<sup>49</sup> In its report issued following the hearing, the Advisory Council recommended that "the Department of Labor should update its regulations regarding electronic communication to a 'reasonable access' standard more similar to the Department of Treasury safe harbor, recognizing the continued advancement in Web-based communication and the increase in its use by participants." The Advisory Council also cautioned that many participants would nonetheless be better served with paper when managing their plan assets. In any event, the Advisory Council recommended that the Department reexamine the use of electronic communication for benefit statements to recognize the changes in technology and participants' use of such technology.

*2006 Advisory Council Report.*<sup>50</sup> An Advisory Council working group held hearings at which it heard testimony from thirteen witnesses in August and September of 2006 on a variety of issues pertaining to the management of plan assets, including the use of electronic media for furnishing disclosures

<sup>43</sup> *Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors*, ERISA Advisory Council, p.27 (Nov. 2017).

<sup>44</sup> *Id* at p.7 (referring to the 2005 ERISA Advisory Council Report).

<sup>45</sup> *Id* at p.26

<sup>46</sup> *Id* at p.7.

<sup>47</sup> See 2009 ERISA Advisory Council Report on Promoting Retirement Literacy and Security by Streamlining Disclosures, at <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2009-promoting-retirement-literacy-and-security-by-streamlining-disclosures-to-participants-and-beneficiaries>.

<sup>48</sup> See ERISA Advisory Council Working Group Report on Participant Benefit Statements, at <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2007-participant-benefit-statements>.

<sup>49</sup> Public Law 109–280, 120 Stat. 949–952.

<sup>50</sup> See ERISA Advisory Council Report Working Group on Prudent Investment Process, available at <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2006-prudent-investment-process>.

<sup>40</sup> SEC Release 34–42728 (2000). See also Release No. 33–7288 (1996).

<sup>41</sup> 82 FR 8082 (Jan. 23, 2017).

<sup>42</sup> See 12 CFR 9.18(b)(1), permitting banks to make copies of their investment fund plan available on their websites and to furnish electronic copies upon request.

required by ERISA section 404(c). The Council's subsequent report recommended that the Department reconsider the efficacy of its 2002 safe harbor. Given the growth in access to and use of the internet since the 2002 safe harbor was adopted, the working group recommended that the Department relax the conditions in the 2002 safe harbor, especially the "integral part of the employee's duties" condition.

(ii) U.S. Government Accountability Office

In its 2013 report, "Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved," the GAO recommended requiring plans to include the summary plan description (SPD) and any summaries of material modifications (SMMs) on a continuous access website.<sup>51</sup> Furthermore, the GAO recommended that the Department focus on the readability standard for required disclosures by adding "clear, simple, brief highlights"<sup>52</sup> of required disclosures, noting that "the quantity of information diminishes the positive effects it can have for participants."<sup>53</sup>

(iii) Congressional Activity

The Department also observes that in recent years there has been continued Congressional interest in expanding the use of electronic media for ERISA disclosures.<sup>54</sup> In 2018, the Secretary of Labor testified before the Senate Appropriations Subcommittees on Labor, Health and Human Services, Education, and related Agencies' Senate Appropriations on the Department's FY 2019 budget request.<sup>55</sup> In response to the hearing, U.S. Senator Jeanne Shaheen (D-NH) submitted a question for the record to the Secretary, explaining her view that the Department's rules for employees to receive required information on their retirement plan are out of date. She believes that furnishing disclosures

electronically should be the default method of delivery for retirement savers, because electronic delivery will reduce costs for retirement savers, save countless amounts of wasted paper, protect the environment, and help connect savers with a wealth of online tools and resources to help put them on a better path to a secure retirement. In 2017, 38 bipartisan cosponsors introduced the Receiving Electronic Statements to Improve Retiree Earnings Act (RETIRE Act), which would have amended ERISA and the Code to give employers the option of furnishing required information to participants and beneficiaries electronically, while preserving their right to choose to receive disclosures in hard copy.<sup>56</sup> In 2018, a bipartisan group of six Senators introduced the RETIRE Act, but the bill failed to pass before the close of the 115th Congress.<sup>57</sup> To date, no further Congressional action has taken place with respect to the RETIRE Act.

**B. Proposed Rule—Alternative Method for Disclosure Through Electronic Media—Notice and Access**

In this document, the Department proposes to amend part 2520 by adding a new section, § 2520.104b–31, entitled "Alternative method for disclosure through electronic media—Notice and access." This proposed safe harbor method for electronic disclosure is an additional method and would not change the Department's current safe harbor for electronic delivery in § 2520.104b–1(c). As proposed, plan administrators who wish to continue to rely on the existing safe harbor for electronic delivery, or to furnish paper documents by hand-delivery or by mail, are free to continue to do so. The Department requests comments on whether it should make a technical amendment to § 2520.104b–1(c) to direct readers to the newly proposed safe harbor, or whether affected parties would know to consider both possible options without such a technical amendment.<sup>58</sup> The proposed § 2520.104b–31 provides a new,

optional method for compliance with ERISA's general standard for delivery of disclosures to participants and beneficiaries. Specifically, proposed paragraph (a) provides that the administrator of an employee benefit plan may satisfy § 2520.104b–1(b)(1) with respect to covered individuals and covered documents, as described below, by complying with the notice, access, and other requirements of the proposal.<sup>59</sup>

After reviewing and analyzing a variety of electronic disclosure standards and other related information, and discussions with various regulators, the Department has determined that its policy objectives may be best advanced through adoption of a "notice and access" structure, similar to that previously adopted by the Department in FAB 2006–03 and by the Commission for certain investor disclosures.<sup>60</sup> The Department proposes to extend this structure to all required ERISA disclosures for pension benefit plans, as discussed below, and has adapted the structure to reflect the nature and context of disclosures required by ERISA from administrators, as plan fiduciaries, to participants and beneficiaries. The Department anticipates that permitting administrators to post ERISA disclosures online will create significant efficiencies in disclosing information by affording participants and beneficiaries the convenience of continuous access to their ERISA disclosures using an internet connected device.

Administrators also have flexibility, within the framework provided by the proposed rule, to take advantage of existing and developing technology and to create internet-based experiences that result in a better understanding of the disclosed information. Online access enables a layered approach to disclosure that can be designed not only to reduce the time and expense of disclosure, but to more effectively communicate information. The Department believes the "notice and access" structure proposed in this document answers the directive of Executive Order 13847 "to

<sup>51</sup> GAO–14–92, *Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved*, p. 40, GAO (Nov. 2013), available at <https://www.gao.gov/assets/660/659211.pdf>.

<sup>52</sup> *Id.* at p. 41.

<sup>53</sup> *Id.* at p. 29.

<sup>54</sup> See, e.g., Joint Committee on Taxation, *Technical Explanation of H.R. 4, the "Pension Protection Act of 2006"*, as Passed by the House on July 28, 2006, and as considered by the Senate on Aug. 3, 2006 (JCX–38–06), Aug. 3, 2006 (regulations relating to the furnishing of pension benefit statements, "could permit current benefit statements to be provided on a continuous basis through a secure plan website for a participant or beneficiary who has access to the website").

<sup>55</sup> Review of the FY 2019 Dept. of Labor Budget Request, Senate, 115th Cong. (April 12, 2018), <https://www.appropriations.senate.gov/hearings/review-of-the-fy2019-dept-of-labor-budget-request>.

<sup>56</sup> See H.R. 4610 (Dec. 11, 2017).

<sup>57</sup> S. 3795 (Dec. 19, 2018).

<sup>58</sup> The Department may have to make a number of technical amendments to other sections of the Code of Federal Regulations (CFR) if the proposal in this document becomes a final rule. Certain other CFR sections currently cross reference the 2002 safe harbor and may need to cross reference Proposed Rule § 2520.104b–31 as well. See, e.g., 29 CFR 2560.503–1(g)(1) (where the provision stating that any electronic notification of benefit determination "shall comply with the standards imposed by 29 CFR 2520.104b–1(c)(1)(i), (iii), and (iv)" may have to reference the new safe harbor as well). Commenters are encouraged to identify other CFR sections that would need conforming edits of this type.

<sup>59</sup> When certain material, including reports, statements, notices and other documents, is required under Title I of ERISA or regulations issued thereunder, to be furnished either by direct operation of law or on individual request, a plan administrator "shall use measures reasonably calculated to ensure actual receipt by plan participants, beneficiaries and other specified individuals." 29 CFR 2520.104b–1(b)(1).

<sup>60</sup> Although the proposed safe harbor would have no impact on the current regulatory safe harbor at § 2520.104b–1(c), it would, if adopted as a final rule, supersede the relevant portions of FAB 2006–03 (Dec 20, 2006), FAB 2008–03 (Q&A 7) (April 29, 2008), and Technical Release 2011–03R (Dec. 8, 2011).

make retirement plan disclosures required under ERISA . . . *more understandable and useful* for participants and beneficiaries, while also *reducing the costs and burdens* they impose on employers and other plan fiduciaries[.]”<sup>61</sup>

In addition to the specific conditions of the proposed rule, the Department invites commenters to submit general views on the proposed “notice and access” disclosure framework. For example, the Department is interested in comments on the desire for enhanced internet availability of required disclosures, from the plan’s and from the participants’ perspective; how many plans (or sponsoring employers) already have and use websites to make information available to employees; whether administrators or service providers for small plans are more or less likely to have and use websites, and whether and what other disclosure rules may be more appropriate for small plans; and whether the Department should reconsider the existing electronic delivery rules in § 2520.104b-1(c)(2), including the consent requirement, instead of or in addition to the proposed framework. Although the proposed safe harbor provides for access to required disclosures on a “website,” the Department invites comments on whether, and how, the proposal should be modified to explicitly include other internet-based mechanisms, such as multimedia messaging and mobile applications. When feasible and sufficiently protective of plan participants, the Department does not want to inhibit innovation in the delivery of required disclosures, especially as forms of internet-based communication continue to expand. In this sense, the Department wishes to explore whether the proposal would require revision to promote technical neutrality. Commenters should explain not only their views on the use of other internet-based mechanisms, but also their (or plan participants’) experiences with such mechanisms.

In light of Executive Order 13847 requiring consultation with the Treasury Department, this proposal is intended to align with Treasury’s electronic media regulation for applicable notices at § 26 CFR 1.401(a)–21(c). Commenters are invited to share their views on whether this objective is desirable and what other steps might be needed to achieve it.

### (1) Covered Individual

The proposed rule begins by defining the individuals to whom disclosure may

be made under the new safe harbor. Paragraph (b) defines a “covered individual” for purposes of the rule as a participant, beneficiary, or other individual entitled to covered documents and who, as a condition of employment, at commencement of plan participation, or otherwise, provides the employer, plan sponsor, or administrator (or an appropriate designee of any of the foregoing) with an electronic address, such as an email address or internet-connected mobile-computing-device (*e.g.*, smartphone) number. Alternatively, if an electronic address is assigned by an employer to an employee for this purpose, the employee is treated as if he or she provided the electronic address.<sup>62</sup> The existence of an electronic address by which a covered individual can be notified as to the availability of required disclosures is critical to the effective implementation of the proposed notice and access framework, much like a mailing address is critical to delivery of a paper document. The Department believes it is appropriate, therefore, to require as a condition of reliance on the safe harbor that an administrator receives an electronic address or number with which to communicate with a covered individual. The Department intends to provide a sufficient level of flexibility to administrators, and to covered individuals, as to how to institute this condition. In many cases, for employees who are given a company-provided email address upon employment, the Department anticipates that satisfying this condition will be fairly simple, without significant burden. The proposal also allows an employee to provide a different, personal email address to the administrator; often employers obtain electronic addresses from new employees’ application materials or from other human resource documents. Alternatively, an administrator or plan service provider may request an electronic address in plan enrollment paperwork or to establish a plan participant’s online access to plan documents and account information. A company-issued mobile smartphone (with a data plan) and corresponding mobile phone number

<sup>62</sup> The Department requests comment on whether an employer-provided electronic address, as distinguished from a personal electronic address, would necessitate additional or different conditions, and if so, why. For example, is there a heightened need to ensure covered individuals’ awareness of the electronic address and the notice and access method of delivery, or to prevent unauthorized access, email compromise, or other malicious activity in the case of inactive employer-provided addresses?

also may be used to satisfy this condition.

While the proposal conditions “covered individual” status on the provision of an electronic address, which may include an address or number associated with an internet-based mobile-computing device, such as a smartphone, tablet, or laptop computer, the proposal does not impose any specific requirements or limitations on the type of device that a person must have in order to be a covered individual under the safe harbor. The Department intends to avoid favoring any particular technology that is considered advanced today but could be outdated tomorrow. On prior rulemaking initiatives under ERISA, many commenters have cautioned the Department against inadvertently stifling innovation by sanctioning particular technologies considered state-of-the-art at the time, especially in matters of digital technology. The Department invites comments on this analysis and whether different types of mobile-computing devices, or technologies, warrant different conditions to ensure that covered individuals are able to receive, review, and take appropriate actions in response to a notice of internet availability.

### (2) Covered Documents

#### (i) Employee Pension Benefit Plans

Paragraph (c) of the proposal goes on to define the “covered documents” to which the rule applies. The safe harbor may be used, for a pension benefit plan, as defined in ERISA section 3(2), to furnish any document that the administrator is required to furnish to participants and beneficiaries pursuant to Title I of ERISA, except for any document that must be furnished upon request.<sup>63</sup> This includes documents that, pursuant to ERISA’s disclosure provisions, must be furnished solely because of the passage of time, such as pension benefit statements or summary annual reports. This also includes documents that must be furnished because of a specific triggering event

<sup>63</sup> Under ERISA, some documents must be furnished automatically and others only upon request by an eligible person. The proposed safe harbor does not apply to documents that are furnished only upon request. *See, e.g.*, 29 U.S.C. 1024(b)(4) for the general requirement that upon written request of any participant or beneficiary, plan administrators must furnish plan documents including the latest updated summary plan description, latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. *See also* 29 U.S.C. 1021(k) with respect to multiemployer plan information provided to participants and beneficiaries upon written request.

<sup>61</sup> E.O. 13847 (emphasis added).



other than the passage of time, such as an SMM or a blackout notice. A plan administrator is not required to furnish all of these documents, as applicable for a particular plan, pursuant to the safe harbor if the administrator prefers a different method of furnishing for some of the documents. The Department requests comments generally as to whether the scope of covered documents is appropriate, and specifically whether certain employee pension benefit plan disclosures are better suited for such electronic disclosure.

#### (ii) Employee Welfare Benefit Plans

The safe harbor, as proposed, does not apply to employee welfare benefit plans, as defined in section 3(1) of ERISA, such as plans providing disability benefits or group health plans. Paragraph (c)(2) of the proposal, instead, is reserved so that the Department can study the future application of the new safe harbor to documents that must be furnished to participants and beneficiaries of employee welfare benefit plans. This reservation follows the directive of Executive Order 13847, which focuses the Department's review on retirement plan disclosures. Although the Department does not interpret the Order's directive as limiting the Department's ability to take action with respect to employee welfare benefit plans, especially to the extent similar policy goals, including the reduction of plan administrative costs and improvement of disclosures' effectiveness, may be achieved, this proposal is limited to retirement plan disclosures. Welfare plan disclosures, such as group health plan disclosures, may raise different considerations, such as pre-service claims review and access to emergency and urgent health care. Moreover, the Department shares interpretive jurisdiction over many group health plan disclosures with the Treasury Department and the Department of Health and Human Services. In considering any possible new electronic delivery safe harbor for group health plan disclosures in the future, the Department would want to consult with these other Departments. Accordingly, focusing its attention first on retirement disclosures is a sound and efficient use of the Department's resources.

#### (3) Notice of Internet Availability

As a general rule, the proposed method for delivery through electronic media requires that administrators furnish to each covered individual a notice of internet availability for each covered document, in accordance with

the requirements of this section. Thus, for example, if a particular plan is required to furnish to all of its covered individuals eight different covered documents in a given year, the proposed safe harbor's general rule would require that the plan's administrator instead furnish to covered individuals eight notices of internet availability (subject to the more specific rule in paragraph (i), which allows an administrator to combine notices for certain covered documents). Paragraph (d) sets forth the conditions for satisfying this first requirement of the safe harbor.

#### (i) Timing of Notice of Internet Availability

Paragraph (d)(2) provides that the administrator must furnish a notice of internet availability at the time the covered document that is the subject of the notice is made available on the website. For example, if section 105 of ERISA requires a plan administrator to furnish to covered individuals their pension benefit statements no later than April 15th of a given year, the administrator could satisfy that obligation by furnishing to these individuals a notice of internet availability on April 15th and ensuring that the covered document is accessible on the internet website on this date.

If, however, the administrator furnishes a combined notice of internet availability for more than one covered document, pursuant to paragraph (i) of the proposal, discussed below, the requirement to furnish a notice of internet availability will be treated as satisfied if the combined notice of internet availability is furnished each plan year, and, if the combined notice was furnished in the prior plan year, no more than 14 months following the date the prior plan year's notice was furnished. The proposal provides administrators with a 14-month period in which to comply with the annual notice requirement to ensure adequate flexibility to the extent the date of furnishing may vary slightly from year to year. Further, the Department does not want administrators to have to push back the date of furnishing from year to year to avoid the risk that they run afoul of a strict 12-month requirement. The Department intends that the proposed two-month grace period will offer sufficient administrative flexibility without compromising participants' and beneficiaries' receipt of a notice on a periodic, and essentially annual, basis. The Department requests comments on these timing requirements, and whether different timing requirements would be more likely to ensure prompt and

efficient delivery to participants and beneficiaries.

The proposal also requires, as discussed below, that a covered document must be made available on the website no later than the date on which the covered document otherwise must be furnished in accordance with the applicable section of ERISA or regulation thereunder. This proposal is *not* intended to alter the substance or timing of any of ERISA's required disclosures for pension benefit plans. Rather, this "notice and access" structure merely provides a possible method of delivery for disclosures by concluding that a website posting, in conjunction with a properly-timed notice of internet availability, constitutes "furnishing" for purposes of ERISA pension plan disclosures. An administrator who chooses to rely on this safe harbor would continue to be subject to the content, timing, and other provisions that apply to any particular disclosures. Further, if an administrator chooses to furnish a consolidated notice of internet availability under paragraph (i) of this section, once a year, doing so will not change the date on which the covered documents must be made available on the website. Each covered document contained in the consolidated notice of internet availability must be made available on the website no later than the date it must be furnished to participants and beneficiaries by law. It is only the timing for the combined notice of internet availability that would be altered to furnish one each year, rather than furnishing a separate notice for each of the covered documents at the time it otherwise would be required.

#### (ii) Content of Notice of Internet Availability

Paragraph (d)(3) lists the proposed content requirements for the notice of internet availability: A prominent statement, for example as a title, legend, or subject line that reads, "Disclosure About Your Retirement Plan;" a statement that, "Important information about your retirement plan is available at the website address below. Please review this information;" a brief description of the covered document; the internet website address where the covered document is available; a statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right; a statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right; and a telephone number to contact the

administrator or other designated representative of the plan.

The rule provides that the required internet website address must be sufficiently specific to provide ready access to the covered document (or, in the case of a combined notice of internet availability, covered documents).<sup>64</sup> A website address will satisfy this requirement if it leads the covered individual directly to the covered document. A website address also will satisfy the “sufficiently specific” standard if the address leads the covered individual to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document. The term “website address” in paragraph (d)(3)(iv) of the proposed safe harbor includes links and hyperlinks, as appropriate. The Department invites comments on whether the notice of internet availability should also address secure login procedures, such as how participants can securely receive and recover login information.

An administrator must ensure that the “brief description” of a covered document communicates key information about its importance. The Department does not intend this “brief description” to be a technical summary of the content of the underlying disclosure. The Department encourages comments on the content requirements for the notice, including views as to the most critical information that should be included in a “brief description” of a covered document. Although the current requirement provides a level of flexibility to administrators in how they draft the “brief description,” the Department may consider providing more explicit guidelines or models for administrators to use in drafting these descriptions. Commenters may address whether additional guidelines or models would be useful, and the specific issues it would be most helpful to address.

One of the Department’s goals in establishing the proposed framework was to be certain that, regardless of the

<sup>64</sup> See, e.g., 29 CFR 2550.404a–5(d)(v), which similarly requires disclosure of specified information at “[a]n internet website address that is sufficiently specific to provide participants and beneficiaries access to” such information (emphasis added). To date, the Department has not been made aware by plan fiduciaries, administrators, or service or investment providers that this “sufficiently specific” standard requires further interpretation or is ineffective in ensuring that individuals are able to access information online. However, to assist administrators and their service providers in complying with this standard, the proposal includes two methods for website access that satisfy this standard. These methods are not the exclusive means by which a website address will be “sufficiently specific.”

delivery method chosen by a plan administrator, covered individuals who wish to receive paper copies of covered documents would be able to do so without undue burden. Paragraphs (d)(3)(v) and (vi) set forth two significant protections for such covered individuals. First, any time a participant prefers to receive a paper copy of any of the covered documents, he has the right to request and receive a paper copy, free of charge. For example, a participant who receives a notice of internet availability of the plan’s SPD, but prefers to have a paper copy of the SPD to keep in his personal finance files at home, will be able to request a paper copy of the SPD in accordance with the explanation of how to exercise his right to do so. Further, a covered individual who prefers to receive all covered documents in paper may opt out of receiving any covered documents electronically. This global opt out provision enables a participant who wants to have all of her disclosures in paper, without having to make repeated elections to do so; she will receive all covered documents in paper, unless and until she later consents to receive covered documents electronically.

The Department requests comments on these proposed content requirements and whether the notice of internet availability will adequately serve its intended purpose. Commenters are encouraged to focus on whether the content requirements are sufficient or excessive. Specifically, the Department requests comments regarding whether a toll-free number should be used or whether specific website, login or password reset features should be described in the notice.

#### (iii) Form and Manner of Furnishing Notice of Internet Availability

The Department intends the notice of internet availability to be a concise, clear disclosure that will convey its importance and easily call the recipient’s attention to its content. With this goal in mind, paragraph (d)(4) describes standards for the form and manner of furnishing the notice. To satisfy the safe harbor, a notice of internet availability must: First, be furnished electronically to the address referred to in paragraph (b) of the proposal; second, contain only the content specified in paragraph (d)(3) of the proposal, except that the administrator may include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear; third, be furnished separately from any other documents or disclosures furnished to covered

individuals, except as permitted under paragraph (i) of the proposal (which deals with consolidation of certain notices of internet availability); and fourth, be written in a manner calculated to be understood by the average plan participant. A notice that 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 will satisfy the fourth requirement.<sup>65</sup>

Because the notice of internet availability contains important information alerting covered individuals to the online disclosures available to them with respect to their plan, the Department believes it is essential that the notice be furnished by itself and not be obscured by other information, including other information that is required to be disclosed under ERISA. The second and third requirements in paragraph (d)(4) are intended to achieve this objective. Any additional information or content must be limited; to permit otherwise may frustrate the Department’s goal of a clear, concise notice. However, to the extent design elements may enhance the appearance of the notice of internet availability and possibly increase the likelihood that it will draw the desired attention of covered individuals, the proposal does not exclude the use of pictures, logos, and similar design elements, so long as the design is not inaccurate or misleading and the required content is clear.

Plan administrators must write clear and understandable notices of internet availability. The proposal relies on the standard measure for readability of ERISA disclosures—that the annual notice be “written in a manner calculated to be understood by the average plan participant[.]” However, because the content of this notice is so concise, and because the information is so critical to the effectiveness of covered documents, paragraph (d)(4)(iv) includes additional guidelines for administrators to satisfy the readability requirement. Administrators are encouraged to apply the plain language concepts described above. The Department believes that use of these concepts may improve individuals’ comprehension of the information on the notice of internet availability. Administrators who apply these concepts will satisfy the readability

<sup>65</sup> See, e.g., general information about this formula for writing in plain English, at [https://web.archive.org/web/20160712094308/http://www.mang.canterbury.ac.nz/writing\\_guide/writing/flesch.shtml](https://web.archive.org/web/20160712094308/http://www.mang.canterbury.ac.nz/writing_guide/writing/flesch.shtml) (Rudolf Flesch).

standard for purposes of the proposed safe harbor.

The Department is mindful of the additional cost and burden associated with any additional disclosure, especially when it must be furnished separately. In this case, however, the Department believes that the additional cost and burden associated with the required notice of internet availability will be more than offset by the reductions in cost and burden available to administrators who rely on this safe harbor to make disclosures available online instead of furnishing them directly to covered individuals. The Department invites commenters to discuss these relative costs, as well as the other standards in paragraph (d)(4). The Department also is interested in views on whether additional or different content should be required, or permitted, on the notice, and whether commenters have other ideas about how to ensure the notice is clear and understandable to an average plan participant, consistent with the notice's intended purpose. If commenters believe that a model notice of internet availability would be useful, the Department requests that they submit a sample "model notice" for the Department's consideration, along with any reason(s) to believe that such a model notice would be used and would be helpful.

#### *(4) Standards for Internet Website*

The proposed safe harbor also includes minimum standards concerning the availability of the covered documents on a website. Paragraph (e)(1) of the proposal begins by stating the general requirement that the administrator must ensure the existence of an internet website at which a covered individual is able to access covered documents. This paragraph holds the plan administrator responsible for ensuring the establishment and maintenance of the website. The Department understands that in some cases the administrator may not establish and maintain a website himself or herself. Some responsibilities associated with websites may be assumed by plan service or investment providers or other third parties. The proposed safe harbor does not preclude the assignment of website-related activities to parties other than the administrator, subject to the administrator's compliance with paragraph (j) of the safe harbor, "Reasonable procedures for compliance," discussed below, and the administrator's general obligation as a plan fiduciary under ERISA section 404

to prudently select and monitor such parties.

A plan administrator also must take measures reasonably calculated to ensure that the specific standards for the internet website, listed in paragraph (e)(2), have been satisfied. First, paragraph (e)(2)(i) requires that the covered document be available on the website no later than the date on which the covered document must be furnished under ERISA. As discussed above, the proposed safe harbor does not alter the substantive or timing requirements for covered documents. Even if an administrator chooses to consolidate a notice of internet availability for certain disclosures and furnish a combined notice pursuant to paragraph (i) of the proposal, a covered document (as opposed to the notice for such document) must be made available on the website on a timely basis consistent with when it would otherwise be required to be furnished under the relevant statute or regulation. For example, if the administrator of a participant-directed individual account plan wishes to rely on the safe harbor to make its comparative investment chart for participants available on the website, the administrator must look to the timing requirements in 29 CFR 2550.404a-5(d)(1) to determine when the annual investment chart must be furnished; the comparative investment chart must be made available on the website no later than that date.

Second, the covered document must remain available on the website, pursuant to paragraph (e)(2)(ii) of the rule, until it is superseded by a subsequent version of the covered document. In the preceding example, the participant-level fee disclosure regulation requires an updated investment chart to be furnished "at least annually"—an administrator would need to adhere to the definition of "at least annually" in 29 CFR 2550.404a-5(h)(1) to determine when the next year's investment chart would have to be made available on the website. Requiring the covered document to remain available on the internet site until it is superseded is intended to ensure that covered individuals have readily available the information they need to protect and enforce their rights under ERISA and the plan. The Department requests comments on whether there are circumstances when a superseded document may still be relevant to a covered individual's claims or rights under the plan and, if so, whether additional or different conditions are needed to address such circumstances. Comments also are invited on whether

a final rule should explicitly address the category of covered documents that technically do not become superseded by reason of a subsequent version of the covered document, but instead ceases to have continued relevance to covered individuals. For instance, as opposed to the investment chart referenced earlier in this paragraph, blackout notices typically are not superseded by subsequent blackout notices, but they do lack relevance after the temporary restriction ends. Would a final rule be clearer on this point if it provided that a covered document must remain available on the website until it is superseded by a subsequent version of the covered document or, if applicable, until it ceases to have continued relevance?

Paragraphs (e)(2)(iii) through (vi) of the proposed safe harbor address the presentation of covered documents on the website. Paragraph (e)(2)(iii) requires that a covered document be presented on the website in a manner calculated to be understood by the average plan participant. This standard is identical to the readability standard for the notice of internet availability in paragraph (d)(4)(iv), which is discussed above. Next, the covered document must, pursuant to paragraph (e)(2)(iv), be presented on the website in a widely-available format or formats that are suitable to be both read online and printed clearly on paper. An administrator may be able to comply with this requirement, for example, by posting the document in a portable document format (PDF) or similar widely-used format on the website. The covered document also must be searchable electronically by numbers, letters, or words, to satisfy paragraph (e)(2)(v). The Department believes that an electronic searching capability for covered documents will contribute significantly to making disclosures more effective for participants, enabling them to use keywords to quickly and easily find specific information about a particular topic or benefits question.

Finally, under paragraph (e)(2)(vi), the covered document must be presented on the website in a widely-available format or formats that allow the covered document to be permanently retained in an electronic format that satisfies the requirements of paragraph (e)(2)(iv) (requiring a format that can be read online and printed clearly on paper). This requirement is intended to enable covered individuals and plans to keep a copy of the covered document, for example, by saving it to a file in electronic format, on a personal computer.

Several studies observe that some individuals access the internet only through hand-held devices, such as smartphones. Some of these individuals may not have full access to the enhanced functionality of plan websites and may find the presentation of covered documents to be less effective. What, if any, additional actions are needed to ensure that an effective and useful presentation of covered documents is available to hand-held-device-only individuals? Should such actions be mandatory for administrators who wish to comply with the proposal? What are the likely cost implications of these actions?

The final standard for the internet website is based on the fact that, in some cases, covered documents contain personal information about covered individuals and their benefits. In order to protect this information, paragraph (e)(3) of the proposal requires the administrator to take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual. For example, a pension benefit statement includes individualized information about a specific person's accrued benefit and should not be accessible to others without authority.<sup>66</sup> Given the employee benefit plan industry's increasing reliance on and use of electronic technology, the Department expects that many administrators, or their service or investment providers, already have secure systems in place to protect covered individuals' personal information, as is generally required by section 404 of ERISA. The Department requests comments on whether this standard is sufficient to protect covered individuals' personally identifiable information, including whether more specific security guidelines or best practice protocols would be helpful and appropriate.<sup>67</sup>

#### *(5) Right to Copies of Paper Documents or To Opt Out of Electronic Delivery*

As part of any increase in electronic disclosure permitted under ERISA, the Department believes it is essential to respect the wishes of participants and beneficiaries who prefer to receive covered documents on paper, mailed or delivered to them in accordance with

2520.104b-1(b). To that end, the proposed safe harbor, in paragraph (f), provides two safeguards for these covered individuals. First, paragraph (f)(1) provides that, upon request from a covered individual, the administrator must furnish to such individual, free of charge, a paper copy of a covered document. The Department expects that the copy will be furnished to the covered individual as soon as reasonably practicable after receiving the request.<sup>68</sup> Covered individuals also can request more than one covered document pursuant to this provision. For instance, a participant could contact the administrator for a participant-directed individual account plan and request paper copies of the plan's comparative investment chart required by 29 CFR 2550.404a-5(d)(2) as well as a copy of the participant's most recent quarterly pension benefit statement. Only one paper copy of any covered document must be provided free of charge, however, under this provision. Beyond that, whether the plan charges for additional copies of the same covered document depends on the terms of the particular plan and other provisions of ERISA and regulations thereunder.

The Department expects that some covered individuals, however, may want all of their covered documents in paper and, accordingly, paragraph (f)(2) of the proposal provides covered individuals with a broad opt out right. Specifically, the administrator must give covered individuals the ability to opt out of electronic delivery and receive only paper versions of some or all covered documents. If a covered individual elects to opt out, the administrator must promptly comply with the individual's election. This provision may be referred to as a "global" opt out, in the sense that an individual can opt out of electronic delivery entirely. All future covered documents must be furnished to the electing covered individual in paper, unless and until the covered individual expresses the desire to "opt back in" to electronic delivery. Covered individuals may opt out pursuant to this provision at any time in accordance with the plan's reasonable procedures for doing so. The two provisions operate together to give covered individuals a good deal of flexibility in how they receive their disclosures. A participant who does not wish to opt out entirely but, for a variety of potential reasons, would like a paper copy of a covered document, may request a copy under paragraph (f)(1). Alternatively, the global opt out

provision in paragraph (f)(2) provides a more comprehensive option for a covered individual who truly prefers paper in all circumstances. The Department requests that commenters address whether these two safeguards are sufficiently protective of covered individuals who do not always want to receive information electronically. Commenters are invited to suggest additional or different safeguards that they believe may be more effective.

To further protect the rights of covered individuals who want paper copies of covered documents, the rule requires administrators to carefully manage requests for paper copies or requests to opt out of electronic delivery under the safe harbor. Specifically, paragraph (f)(3) provides that the administrator must establish and maintain reasonable procedures governing requests or elections under paragraphs (f)(1) and (2) of the safe harbor. 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.

Finally, paragraph (f)(4) requires that the system for furnishing the notice of internet availability must be designed to alert the plan administrator of an invalid or inoperable electronic address. In the event that a plan administrator becomes aware of an invalid or inoperable electronic address, such as if an email is returned as undeliverable and the problem is not promptly cured, the administrator must treat the covered individual as if he or she had elected to opt out of electronic delivery. One way to cure the problem would be to keep a secondary electronic address for the covered individual on file and send the notice of internet availability to the secondary address when alerted of the invalidity or inoperability of the primary electronic address. Another way to cure the problem would be to promptly obtain a new electronic address for the covered individual. Certainly other cures exist depending on the particular facts and circumstances surrounding the un-deliverability of the notice of internet availability. If the problem is not promptly cured, however, the deemed election would persist until the administrator is able to obtain a valid and operable electronic address for the covered individual.

This provision is intended to ensure that covered individuals actually receive their pension documents by guarding against invalid or inoperable electronic addresses. So long as the plan administrator is not alerted to an invalid or inoperable address, and the other

<sup>66</sup> The Department invites comments on whether additional standards for account authorization are necessary, for example, whether the proposed safe harbor should specifically prohibit automatic authentication of user identification, password, or other similar information.

<sup>67</sup> See, e.g., National Cybersecurity Center of Excellence Practice Guide and related materials, at <https://www.nccoe.nist.gov/projects/use-cases/access-rights-management>.

<sup>68</sup> See, e.g., 29 U.S.C. 1132(c)(1).

conditions of the proposed safe harbor are satisfied, the administrator is considered to have furnished the pension documents required under Title I of ERISA. This provision does not address issues such as whether a covered individual read, understood, or had actual knowledge of the contents of the covered documents accessed. Nor does this provision impose an affirmative obligation on the plan administrator to monitor whether covered individuals visit the specified website or login at the website. The Department requests comments on whether the protections in paragraph (f)(4) are excessive or sufficient to ensure covered individuals have access to covered documents.

*(6) Initial Notification of Default Electronic Delivery and Right To Opt Out*

The Department believes it is important for all participants and beneficiaries, who are accustomed to the current ERISA delivery rules, to be notified, on paper, that the administrator will be adopting a new method of electronic delivery. At this point in time, before a participant or beneficiary receives disclosures in accordance with the proposed safe harbor, the individual must be apprised that he or she will receive future retirement plan information electronically, through a notice and access model in which the notice will be furnished to an electronic address (e.g., email), and that he or she has a legal right to request paper copies or to opt out of electronic delivery. Paragraph (g) therefore requires an administrator to furnish to each person for whom the new safe harbor is to be used, an initial notification on paper that some or all covered documents will be furnished electronically to an electronic address, of the right to request paper copies of some or all of the covered documents or to opt out of electronic delivery altogether, and the procedures for exercising such rights. The Department intends that each such person receive this notification one time; a paper copy is required because of the importance of advising participants at the outset how covered documents will be furnished and their rights described in the notification. For transition purposes, an administrator who wants to rely on the safe harbor, if finalized, would have to send this notification to existing employees before the administrator could rely on the safe harbor for such existing employees. Thereafter, an administrator must send this notification to all new employees who would be covered by the new safe

harbor. This notification must be sent to an employee even if that employee is currently receiving electronic disclosures under the existing safe harbor at 29 CFR 2520.104b-1(c), for example because he previously provided affirmative consent to receive disclosures electronically, if an administrator wishes to rely on the safe harbor for that employee. If the employer does not wish to rely on this new safe harbor for a group of employees, however, the employer does *not* need to send this initial notification to that group of employees. To illustrate, assume that an existing defined contribution plan covers three participants, only one of whom is covered under the 2002 safe harbor as an employee who is “wired at work.” This plan could take advantage of the new safe harbor for all three participants, in which case each participant would have to be furnished the initial notification, even the employee who is “wired at work.” Alternatively, this plan could take advantage of the new safe harbor only with respect to the two participants who are not covered under the 2002 safe harbor, in which case only these two participants would have to be furnished the initial notification. The Department requests comments on whether this initial notification is sufficiently protective of employees to make sure they understand their rights with respect to electronic delivery. Additionally, the Department requests comments on whether a model would be useful. If commentators believe a model would be useful, they are encouraged to submit a model notice for the Department’s consideration along with their reason(s) for its helpfulness.

*(7) Special Rule for Severance From Employment With Plan Sponsor*

The Department appreciates that, as part of the framework proposed today, covered individuals may continue to receive and need access to certain ERISA disclosures even after they sever their employment with the employer sponsoring the plan. To ensure that this severance does not interrupt a covered individual’s access to important ERISA information if he or she continues to participate in the plan, paragraph (h) of the proposal provides a special rule for severance from employment. At the time a covered individual who is an employee severs from employment, the administrator must take measures reasonably calculated to ensure the continued accuracy of the covered individual’s electronic address or number, described in paragraph (b), or to obtain a new electronic address that

enables receipt of covered documents following the individual’s severance from employment. This provision focuses on circumstances in which there is special cause for concern about the accuracy of contact information in connection with an employee’s severance from employment, and does not diminish or alter plan fiduciaries’ ongoing obligation to keep accurate records on plan participants.

The Department requests comments as to whether this requirement will be effective in ensuring a seamless transition with respect to the dissemination of ERISA plan information when an employee has a severance from employment. For example, commenters may submit views on whether any unique issues arise in the context of terminated vested participants after severance from employment, for example as to updating and validating changes to contact or similar information, and whether these issues warrant additional safeguards in the proposal. This provision may ensure not only effective electronic delivery in the future for such individuals, but may also serve as a protection against these individuals becoming missing participants. Further, commenters should raise any other relevant transition issues that may arise for employees severing employment under the notice and access framework of this proposal.

When an email address was previously provided by the employer, the employer could (as part of its severance from employment procedures) ask the participant for another means of electronic communication for future notifications. The Department requests comments as to whether such information is currently requested or provided at severance from employment. The Department also requests comments on whether employers envision relying on this safe harbor for participants who have severed from employment.

The words “severance from employment” in paragraph (h) are intended to have their ordinary meaning. Thus, for example, a severance from employment occurs when an employee dies, retires, is dismissed, or otherwise terminates employment with the employer that maintains the plan, including when the employee continues on the same job for a different employer as a result of a liquidation, merger, consolidation or other similar corporate transaction. Whether a severance from employment has occurred is determined based on the facts and circumstances of the particular situation. The Department

solicits comments on whether further clarity is needed on this point.

As noted above, the proposed safe harbor would be available to all pension benefit plans, including multiemployer pension plans. The Department solicits comments on whether the requirements in paragraph (h) accommodate routine practices of multiemployer pension plans. For example, will the administrator of a multiemployer pension plan typically have knowledge of a covered individual's severance from employment from a contributing employer = "at the time" of the individual's severance? Commenters are encouraged to identify whether there are unique circumstances in this setting that warrant modifications or adjustments to the approach taken in paragraph (h) of the proposal, or with respect to any other provision in the safe harbor, (including paragraph (b) permitting the administrator to use an electronic address assigned by an employer).

*(8) Special Rule for Consolidation of Certain Notices of Internet Availability*

Although the proposal generally requires, in paragraph (d)(1), that an administrator furnish a notice of internet availability for each covered document, a special rule in paragraph (i) of the proposal allows an administrator to furnish one notice of internet availability, subject to the timing requirements in paragraph (d)(2), that incorporates or combines the content required by paragraph (d)(3) with respect to one or more of a subset of covered documents. These documents include, as applicable: (1) A summary plan description; (2) a summary of material modifications; (3) a summary annual report; (4) an annual funding notice; (5) an investment-related disclosure under 29 CFR 2550.404a-5(d); (6) a qualified default investment alternative notice; and (7) a pension benefit statement. These covered documents represent the most common and recurring disclosures that are made to pension plan participants, and which are triggered by no event other than the passage of time.<sup>69</sup>

The Department excluded other required documents, for example, because they are event-specific disclosures and might communicate information that requires or invites

specific and timely action on behalf of a participant or beneficiary. In other cases, this special rule excludes contingent or irregular documents that are furnished based on an individual transaction or plan status basis, or that are not regularly furnished to participants and beneficiaries. For example, a participant who receives notice of a blackout period, as required by ERISA section 101(i), may consider changing her investment directions and, if so, must do so within the timeline specified. Similarly, a participant who receives notice of an adverse benefit claim determination, as required by ERISA section 503(1), may wish to appeal or take other action following such determination, in which case he too must act within defined periods of time. Additional examples include a qualified domestic relations order determination under ERISA section 206(d)(3)(G)(i)(II), a notice of the right to divest under ERISA section 101(m), a notice of failure to meet minimum funding standards under ERISA section 101(d), and a notice of significant reduction in future benefit accruals under ERISA 204(h).

In short, the Department excluded documents that it believes do not lend themselves, primarily because of their timing, irregularity, or requirement of potentially timely action by a covered individual, to a framework that permits consolidation into one annual notice. The Department solicits comments on whether, and why, the subset of covered documents eligible for paragraph (i) should be expanded or narrowed, and the criteria that would justify an expansion or narrowing. In addition, the Department solicits comments on whether, instead of an explicit list of the covered documents to which paragraph (i) applies, a final rule should adopt a principle-based or categorical approach, describing the type or nature of covered documents that may be consolidated?

Paragraph (d)(2), as discussed above, requires that a combined notice of internet availability for more than one covered document under paragraph (i) be furnished at least once each plan year, and, if the combined notice was used for the prior plan year, no more than 14 months following the prior year's notice. The Department intends that this combined notice of internet availability be an annual disclosure; however, to provide flexibility to administrators and avoid potential foot faults associated with a strict 12-month standard, the rule provides that an "annual" notice of internet availability may be furnished up to 14 months following the prior "annual" notice.

*(9) Reasonable Procedures for Compliance*

The Department understands that, for a variety of technical and other reasons beyond the control of the administrator, there may be temporary interruptions to the availability of covered documents on a website. For example, in spite of reasonable diligence by an administrator, its information technology staff, and service and internet providers, there may be network outages or connectivity problems due to utility interruptions, force majeure, or other factors reasonably beyond these parties' control. To prevent administrators from violating their disclosure obligations under ERISA in such limited circumstances, the proposal includes relief for administrators if reasonable compliance procedures are in place. Paragraph (j) explains that if certain requirements are satisfied, the conditions of the safe harbor are satisfied, notwithstanding the fact that covered documents are temporarily unavailable for a period of time in the manner required by § 2520.104b-31 due to unforeseeable events or circumstances beyond the control of the administrator. The administrator must have reasonable procedures in place to ensure that the covered documents are available in the manner required by § 2520.104b-31. In the event that covered documents are temporarily unavailable, the administrator must take prompt action to ensure that the documents become available in the manner required by § 2520.104b-31 as soon as practicable following the earlier of the time at which the administrator knows or reasonably should know that the documents are temporarily unavailable. The Department believes that paragraph (j) fairly balances the reality of temporary disruptions to website accessibility in modern times with the protection of participants and beneficiaries by expecting that administrators act reasonably in preparing for, and reacting to, such disruptions. The Department requests comments on whether this is a suitable standard that is practical and realistic, but also sufficiently rigorous to make sure that, as a general matter, important ERISA information is available to participants and beneficiaries when they need it.

*(12) Effective and Applicability Dates*

The Department proposes effective and applicability dates for the safe harbor in paragraph (k). Specifically, paragraph (k)(1) provides that the new alternative method for disclosure

<sup>69</sup> While the SMM does not technically fit under the passage of time descriptor, the document's timing requirement sets it apart from, and warrants different treatment than, other event-triggering disclosures, the timing for which more closely corresponds to the particular event. See 29 CFR 2520.104b-3(a) (requiring the plan administrator to furnish the SMM "not later than 210 days after the close of the plan year in which the modification or change was adopted").

through electronic media, as finalized, will be effective 60 days following publication of a final rule in the **Federal Register**. In establishing an applicability date, the Department wants to make the safe harbor in new 29 CFR 2520.104b-31 available to administrators as soon as possible. Because it is a safe harbor, rather than a required method for disclosure, administrators will not have to be in compliance with all of the conditions as of the applicability date—administrators are free to begin taking advantage of the safe harbor at any time on or after the applicability date. Thus, the Department proposes that the new safe harbor apply to employee benefit plans on the first day of the first calendar year following the publication of the final rule in the **Federal Register**. The Department requests comments on the extent to which this applicability date should be sooner, given that the provision is optional, or later, if necessary to safeguard plan participants and beneficiaries from potential harm if administrators rely on the safe harbor too soon.

### C. E-SIGN Act

Under this proposed regulation, for the reasons discussed below, the covered documents would be exempt from the consumer consent requirements of the E-SIGN Act and would provide an alternative method of complying with the requirement that covered documents be furnished in writing. Section 101(c) of the E-SIGN Act sets forth special protections that apply when a statute, regulation, or other rule of law requires that information relating to a transaction be provided or made available to a consumer in writing. Section 101(e) of the E-SIGN Act provides that if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of the contract or other record may be denied if the contract or other record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

Under section 104(d)(1) of the E-SIGN Act, a Federal regulatory agency may exempt, without condition, a specified category or type of record from the consumer consent requirements in section 101(c) if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. If finalized, this proposed

regulation would be an alternative method of compliance which would satisfy section 104(d)(1) of the E-SIGN Act. In accordance with section 104 of the E-SIGN Act, the Department believes that there is substantial justification for this proposed regulatory exemption from the consent requirements of the E-SIGN Act because the rule is necessary to eliminate a substantial burden on electronic commerce and the proposal would not pose a material risk of harm to consumers. The Department requests comments as to whether there are additional, or different, steps it could take to ensure that these proposed rules are consistent with the requirements of section 104(d)(1) of the E-SIGN Act. The Department is particularly interested in receiving comments that provide suggestions or evidence related to whether these proposed rules would (or would not) impose unreasonable costs on the acceptance and use of electronic records. The Department believes that, as proposed, these regulations would not require (or accord greater legal status, or effect to) the use of any specific technology. The Department requests comments, however, on whether there are any changes to the proposal that would better ensure the proposal does not require (or in any way endorse) any specific technology.

### D. Request for Public Comments and Information

#### (1) Request for Comments on Proposed Regulation

The Department invites comments from interested persons on all facets of the proposed alternative method for disclosure through electronic media—*i.e.*, the “notice and access” safe harbor. Commenters are free to express their views not only on the specific provisions of proposed 29 CFR 2520.104b-31, as set forth in this document, but on other issues germane to the subject matter of the proposal. This may include, for example, comments, questions, or ideas on how the proposed safe harbor interrelates with the 2002 safe harbor, or improvements to that safe harbor. Comments should be submitted in accordance with the instructions at the beginning of this document. The Department believes that this period of time will afford interested persons an adequate amount of time to analyze the proposed safe harbor and submit comments. This comment solicitation, which focuses on the electronic delivery framework in proposed 29 CFR 2520.104b-31, is distinguished from the

Request for Information, in section D-(2) of this document.

#### (2) Request for Information on Effectiveness of ERISA Disclosures

As discussed earlier in this document, Executive Order 13847 called on the Department to explore not only reducing burdens and costs associated with ERISA disclosures, in particular through the use of electronic media, but also enhancing the effectiveness of ERISA’s disclosures for participants and beneficiaries. The Department is confident that the electronic delivery safe harbor proposed in 29 CFR 2520.104b-31 would, without more, substantially respond to both prongs of the Executive Order, including the directive pertaining to improving the effectiveness of plan disclosures. As discussed in the Regulatory Impact Analysis section of this document, a notice and access framework has the potential to significantly reduce plan costs. A notice and access framework also facilitates, among other things, interactivity, just-in-time notifications, layered or nested information, word and number searching, engagement monitoring, anytime or anywhere access, and potentially improved visuals, tutorials, assistive technology for those with disabilities, and translation software. These features may be used to improve participants’ and beneficiaries’ disclosure experiences.

Nevertheless, pursuant to the Executive Order’s directive pertaining to improving the effectiveness of plan disclosures, the Request for Information solicits information, data, and ideas on additional measures (beyond the electronic delivery safe harbor proposed in 29 CFR 2520.104b-31) the Department could take in the future (either as part of finalizing the proposal in this document, or a separate regulatory or appropriate guidance initiative) to improve the effectiveness of ERISA disclosures, especially with respect to design and content of ERISA disclosures. To foster consideration of these issues, the Department sets forth below a number of questions for consideration. Commenters need not answer every question, but should identify by number the questions that are addressed. Although the rule, as proposed in this document, does not include employee welfare benefit plans, commenters should feel free, as relevant, to respond to these questions for both pension and welfare benefit plans. Commenters also are encouraged to address any other matters they believe to be relevant to the effectiveness of ERISA disclosures and, when relevant, to submit samples or

models of information, disclosures, or formats that they believe to be particularly effective.

1. What is the best way to measure the effectiveness of a disclosure? Should participant engagement or attentiveness to plan affairs be a measure of the effectiveness of mandated disclosures? If so, how can the Department have the most meaningful impact on engagement through mandated disclosures? Are there factors other than design, delivery, and content that should be considered by the Department? Please direct the Department's attention to relevant research and evidence that illuminates how and to what degree plan disclosures can be made more effective, and how regulation (or deregulation) can best promote effective disclosure.

2. How do or could plan sponsors and administrators assess the use, effectiveness, and impact of disclosures? What are the findings of these assessments? What actions are taken in response to such assessments? Should assessments and responses be required by regulation, either together with or as an alternative to prescriptive standards for disclosures?

3. Please identify any currently mandated routine retirement plan disclosures for which effectiveness and efficiency could be improved and set forth recommendations for improvement. Please explain why the particular disclosure needs improvement.

4. Would more personalized disclosure enhance engagement? If so, how?

5. Are there ways through regulation or appropriate sub-regulatory 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?

6. Some people have indicated that at least some ERISA documents may be too voluminous, complex, or both. These individuals highlight a need to strike a balance between providing too little information for participants to gain an adequate understanding of what the disclosure is trying to convey and providing too much information, which can become overwhelming and confusing. Please identify each ERISA document in these categories.

7. With respect to each document identified in the previous question, 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. To illustrate this concept, readers are directed to the 2017 ERISA Advisory Council Report.

8. 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?

9. Is there redundant or inconsistent information disclosed to participants under current rules? If so, which information?

10. Is the problem that there are too many disclosures, or that there is too much information that is disclosed, or both? Would it be feasible, and advisable, to condense and streamline information into fewer disclosures or less voluminous disclosures, rather than eliminating disclosure of certain information?

11. To what degree does the design of disclosures (as opposed to their content) impact the likelihood that participants will read and understand the information disclosed? Are there design elements or tools that are particularly effective? For example, should certain information be presented in a question-and-answer (Q&A) format? Are larger font sizes, greater use of white spaces, colors, or visuals, or the use of audio or video potentially helpful? Would it be appropriate for the Department to require particular design elements for all plans (e.g., including small plans, retirement and welfare plans, defined contribution and defined benefit plan, etc.)?

12. Are there additional or better standards for improving the readability of the content in disclosures than the Department's general standard—i.e., that documents must be written in a manner calculated to be understood by the average plan participant?

13. How can the Department best assess the views of plan participants themselves on the frequency, content, design, delivery, and other aspects of ERISA disclosures? Although commenters who represent plan participants are well positioned to evaluate participants' understanding of, and opinions on, ERISA disclosures, would the Department be better served by supplementing these commenters' point of view with feedback from individuals directly? If so, what would be an effective approach (e.g., surveys, focus groups), factoring in the resources necessary to administer such an

approach? What, precisely, do commenters believe the Department should measure, and how? Specific suggestions, including sample outreach materials if relevant, are requested.

14. Do the timing requirements for various ERISA disclosures increase or decrease the likelihood that participants will pay attention to them? Should the Department consider changing when information is disclosed to participants and, if so, how? Explain how such changes would enhance the likelihood that participants would pay attention to the disclosure or disclosures or otherwise improve the disclosure experience.

15. Discuss the role of education in assisting participants and beneficiaries with the often technical and complex subject matter of ERISA disclosures, including investing generally. Should the Department take additional steps or provide further guidance with respect to participant education and, if so, what steps? How would this improve participants' receipt, understanding, or use of information required to be disclosed? What could or should the Department do to increase engagement on the part of ERISA plan participants?

16. Well-designed plan websites or internet-connected apps may benefit plan participants by effectively communicating plan information, including by adopting features not possible with paper, such as interactive videos, calculators, and layered design. What common features have plan administrators adopted in their websites or apps that are effective in communicating plan information to participants and attracting participants to engage in activity with their plan accounts online? What are the benefits of these features, and how do they achieve them? Should any such features be required by regulation?

17. As discussed in the regulatory impact analysis (RIA), well-designed plan websites and apps may also be used to provide effective communication of plan information to certain vulnerable populations, such as the visually impaired and non-native English speakers, by adding voice-reader and translation features. How do plan websites and apps currently use these features and how effective are they in enhancing the presentation and use of covered documents by participants with special needs?

18. Some plan sponsors and participants have expressed concerns about cybersecurity and privacy when participants access sensitive plan information and engage in financial activity online. To protect against these concerns, how do plan administrators



currently assess risks and provide secure online access to their participants? What safeguards are implemented to protect participants, how effective are they, and what improvements could be made to make current systems more secure? What cost considerations are raised by increasing cyber security and privacy protections? Should risk assessments and security measures be required by regulation?

19. Some literature suggests that participants find that different documents are presented more effectively in different mediums. For example, some participants prefer to receive certain covered documents on paper while other types of covered documents are preferred to be received electronically. What, if any, types of covered disclosures do plans and participants perceive to be more effectively communicated in print (e.g. highly individualized and complex notices), and what explains this preference? How might modern technology and effective website or app design make electronic presentation of these covered disclosures more effective and increase participant engagement?

20. In the RIA for this proposal, the Department estimates that plans will benefit from substantial cost savings by distributing more covered documents electronically. How and to what extent do plans share these cost savings with plan participants?

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

## E. Regulatory Impact Analysis

### (1) Relevant Executive Orders for Regulatory Impact Analyses

Executive Orders 12866<sup>70</sup> and 13563<sup>71</sup> direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action”

as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. The Department anticipates that this proposed regulatory action would likely have economic impacts of \$100 million or more in any one year, and therefore meets the definition of an “economically significant rule” within the meaning of section 3(f)(1) of the Executive Order 12866. Therefore, the Department has provided an assessment of the potential benefits, costs, and transfers associated with this proposed rule. In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by OMB.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. This proposed rule is expected to be an E.O. 13771 deregulatory action, because it would provide pension benefit plans subject to ERISA with an alternative safe harbor to use electronic media to provide required disclosures to participants and beneficiaries thereby reducing the printing, material, and postage costs associated with providing printed disclosures by mail. Details on the estimated net cost savings of this proposed rule can be found below.

### (2) Need for Regulatory Action

Technology has changed substantially since the establishment of the 2002 safe harbor,<sup>72</sup> including through the expansion of broadband and wireless networks and use of email, improvements to servers and personal computers, as well as the expanded use of smartphones, tablets, and other mobile devices. These changes are reflected in data. For example, in 2003, one year after the existing safe harbor rule was established, approximately 62 percent of households had one or more

computers.<sup>73</sup> More recently, in 2016, approximately 89 percent of households had computers, smartphones, or tablets at home.<sup>74</sup> Smartphone ownership has increased rapidly in the past decade. The share of Americans who own a smartphone increased from 35 percent in 2011 to 81 percent in 2019.<sup>75</sup> The share of households with internet access also has increased: 55 percent of households had access to internet at home in 2003,<sup>76</sup> while 82 percent had such access in 2016.<sup>77</sup> As the internet, smartphones, and other electronic devices have become an integral part of everyday American life, consumers use them in a wide range of activities, including shopping online and conducting financial transactions. According to an online survey conducted by the Federal Reserve Board in 2015, 82 percent of smartphone owners with a bank account used online banking and 53 percent used mobile banking to check their balances or recent transactions in the prior 12 months.<sup>78</sup>

Moreover, as technological capabilities and access to and use of the internet has increased, other government agencies have issued rules encouraging wider use of electronic disclosure. For example, the Social Security Administration no longer sends paper statements to workers; rather, workers generally must register on the Administration’s website for a “my Social Security” account to access their statements.<sup>79</sup> As another example, the Federal Thrift Savings Plan uses paperless delivery as the default for its quarterly statements, unless an individual requests mail delivery.<sup>80</sup>

<sup>73</sup> Jennifer Cheeseman Day, Alex Janus, and Jessica Davis, “Computer and internet Use in the United States: 2003” (U.S. Census Bureau, 2005).

<sup>74</sup> Camille Ryan, “Computer and internet Use in the United States: 2016” (U.S. Census Bureau, 2018).

<sup>75</sup> Monica Anderson, “Mobile Technology and Home Broadband 2019,” *Pew Research Center* (June 13, 2019).

<sup>76</sup> Jennifer Cheeseman Day, Alex Janus, and Jessica Davis, “Computer and internet Use in the United States: 2003” (U.S. Census Bureau, 2005).

<sup>77</sup> Ryan, “Computer and internet Use in the United States.”

<sup>78</sup> “Consumers and Mobile Financial Services 2016” (Board of Governors of the Federal Reserve System, March 2016).

<sup>79</sup> See section (5)(i) of the Notice for a fuller discussion. See also <https://faq.ssa.gov/en-us/Topic/article/KA-01741>. The Administration does, however, mail paper social security statements to workers age 60 and older if they don’t receive social security benefits and they have not yet set up a “my social security” account on the website.

<sup>80</sup> 5 CFR 1640.6 (“The TSP will furnish the information described in this part to participants by making it available on the TSP website. A participant can request paper copies of that information from the TSP by calling the ThriftLine, submitting a request through the TSP website, or by

<sup>70</sup> 58 FR 51735 (Oct. 4, 1993).

<sup>71</sup> 76 FR 3821 (Jan. 21, 2011).

<sup>72</sup> See 29 CFR 2520.104b–1(c).

Annual statements are available on the website and delivered by mail, unless an individual requests only electronic annual statements. TSP reported its switch from delivering statements by mail to electronic paperless delivery saved about \$7 to \$8 million in 2006.<sup>81</sup>

In addition, on October 20, 2006, the Treasury and the IRS published 26 CFR 1.401(a)-21, setting forth standards for electronic systems that make use of an electronic medium to provide a notice to a recipient or to make a participant election or consent, generally with respect to a retirement plan, an employee benefit arrangement, or an individual retirement plan.<sup>82</sup> See section A(5)(iii), above, for a fuller discussion of these regulations. Similarly, the Securities and Exchange Commission (SEC) has issued several regulations facilitating electronic deliveries of certain required disclosures. See section A(5)(iv), above, for a fuller discussion of these regulations.

The ERISA Advisory Council in prior years has made multiple recommendations regarding improvements to the 2002 safe harbor. Most recently, in its November 2017 report, the Advisory Council recommended that to ease burdens on plans and improve understandability for participants, an ideal disclosure protocol would implement both paper and electronic delivery.<sup>83</sup> The ERISA Advisory Council, in the 2017 report, recommended electronic delivery because it can help participants better navigate and understand their benefits in addition to reducing the cost burden on plan sponsors.<sup>84</sup> In prior reports, the Council has recommended that the Department consider adopting electronic disclosure regulations more aligned with 26 CFR 1.401(a)-21. Also, in a 2013 report, the General Accountability Office (GAO) recommended that the Department (1)

require plans to include the SPD and any SMMs on a continuous access website,<sup>85</sup> and (2) focus on the readability standard for required disclosures by adding “clear, simple, brief highlights”<sup>86</sup> of required disclosures, noting that “the quantity of information diminishes the positive effects it can have for participants.”<sup>87</sup>

As discussed earlier in this preamble, in Executive Order 13847 dated August 31, 2018,<sup>88</sup> President Trump required the Department to make retirement plan disclosures required under ERISA more understandable and useful for participants, while also reducing the costs and burdens imposed on plan sponsors. The executive order also required the Department to explore the broader use of electronic delivery of disclosures as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens.

Responding to the mandate in Executive Order 13847, recommendations by the ERISA Advisory Council and GAO, and widespread use of the internet, computers, and mobile devices, as discussed in detail in Section B, above, the Department is proposing an alternative method for disclosure through electronic media in addition to the Department’s current safe harbor for electronic delivery, which also would remain available. According to the Private Pension Plan Bulletin, there exist approximately 702,000 private retirement plans with over 136 million participants in 2016.<sup>89</sup> Some of these participants already receive disclosures electronically by relying on the Department’s current safe harbor for electronic delivery. Under the proposed rule, plan administrators could electronically deliver disclosures to participants who have been receiving paper copies by mail by sending a notice of internet availability that directs participants to access a website for detailed information. By taking this approach, participants can be informed of covered disclosures and access the website for details if desired, and request any covered disclosures to be sent by mail or email free of charge. The Department is also publishing a companion Request for Information

soliciting comments on additional ideas on how to improve the effectiveness of ERISA disclosures.

### (3) Impacts

The Department expects that the proposed rule would facilitate expanded use of electronic technologies when providing covered disclosures to participants and beneficiaries, which will produce cost savings for plan sponsors by eliminating materials, printing, and mailing costs associated with furnishing printed disclosures.

The Department estimates that plans currently incur approximately \$355 million annually to furnish only seven selected disclosures such as SPDs by mail.<sup>90</sup> As described in detail below, the Department estimates that the gross savings produced by moving from printed to electronic disclosures would be \$289 million in the first year. These savings would be partly offset by \$146 million incurred to maintain a website; prepare the notice of internet availability; and prepare and distribute the initial notification and right to opt out. These added costs produce \$144 million in net savings, or a 40 percent cost reduction from the \$355 million current cost burden. In the second year, the cost reduction would increase to 72 percent, or \$264 million in net savings. In the 10th year, the cost reduction would increase to 86 percent. Over 10 years, the approximate net savings are \$2.4 billion, annualized to \$274 million per year, using a three percent discount rate, resulting from eliminating distribution and mailing costs associated with furnishing retirement plan related disclosures.<sup>91</sup> When the Department uses a perpetual time horizon to allow for comparisons under E.O. 13771, the perpetual annualized cost savings are \$324 million at a three percent discount rate and \$305 million at a discount rate of seven percent in 2016 dollars.<sup>92</sup> However, the Department cautions against relying on the perpetual annualized cost savings estimate for purposes other than the required analyses under E.O. 13771 because any long-term projection is inherently uncertain. The fast pace of technological innovations in the context of this rulemaking makes it especially

writing to the TSP record keeper.”). See also “Federal Thrift Savings Plan: Customer Service Practices Adopted by Private Sector Plan Managers Should Be Considered,” GAO-05-38 (U.S. Government Accountability Office, Jan. 2005), p. 12, n. 21, [www.gao.gov/new.items/d0538.pdf](http://www.gao.gov/new.items/d0538.pdf) (providing statistics on cost savings experience with TSP).

<sup>81</sup> See Federal Retirement Thrift Investment Board, Board Meeting Minutes (February 2007), available at <https://www.frtib.gov/MeetingMinutes/2007/2007Feb.pdf>.

<sup>82</sup> 71 FR 61877.

<sup>83</sup> “Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors,” ERISA Advisory Council, p. 27 (Nov. 2017).

<sup>84</sup> “Mandated Disclosure for Retirement Plans—Enhancing Effectiveness for Participants and Sponsors,” ERISA Advisory Council on Employee Welfare and Pension Benefit Plans (Nov. 2017).

<sup>85</sup> “Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved,” GAO-14-92, p. 40 (Government Accountability Office, Nov. 2013), <https://www.gao.gov/assets/660/659211.pdf>.

<sup>86</sup> *Id.* at p. 41.

<sup>87</sup> *Id.* at p. 29.

<sup>88</sup> 83 FR 45321.

<sup>89</sup> Private Pension Plan Bulletin 2016, Employee Benefits Security Administration, Department of Labor.

<sup>90</sup> These seven disclosures are those that may be included in a combined notice of internet availability pursuant to paragraph (i) of the proposal.

<sup>91</sup> The net cost savings would be approximately \$2.0 billion over 10-year period, annualized to \$270 million per year, if a seven percent discount rate were applied.

<sup>92</sup> The cost savings in years 11 and beyond are estimated using the same methodology as for years 1 to 10, which is explained in the following section.

difficult to reliably project cost savings into the far-distant future.

#### (i) 10-Year Cost Saving Projection

The Department's projections are based on the following assumptions: (i) The number of participants will grow at 0.7 percent per year,<sup>93</sup> (ii) the percentage of participants opting out of the default e-delivery system, will gradually decrease from 18.5 percent to 7.5 percent over the 10-year period.<sup>94</sup> The Department's 10-year projection may overstate cost savings because more participants may gradually receive disclosures electronically even in the absence of this proposed rule. This occurs because more participants may affirmatively consent to receive disclosures electronically as internet access expands and/or the internet and computer access become an integral part of more jobs in various occupations and industries. Therefore, plans would mail fewer disclosures to participants, and incur smaller printing and mailing costs even without this proposed rule. On the other hand, the Department's 10-year projection may understate cost savings if there are a small number of electronic delivery failures for notices of internet availability over time as plan administrators develop and maintain the most up-to-date lists of covered individuals' electronic addresses. If so, printing and mailing costs for covered documents will decrease and net cost savings will increase within the 10-year period. However, the Department's projection is based on the assumption that the rates of undelivered notices of internet availability would remain constant over the 10-year period. These cost savings could indirectly benefit

<sup>93</sup> The Bureau of Labor Statistics projects that total employment will grow at 0.7 percent annually from 2016 to 2026. Based on this employment projection, the Department assumes that the total number of participants will also increase at 0.7 percent each year. See T. Allan Lacey, Mitra Toossi, Kevin S. Dubina, and Andrea B. Gensler, "Projection overview and highlights, 2016–2026," *Monthly Labor Review* (October 2017).

<sup>94</sup> The Department assumes that (1) in the first year, approximately 18 percent of participants currently receiving disclosures by mail will opt out of the proposed default e-delivery and receive disclosures by mail, and (2) in the second year, about 16.2 percent of participants receiving disclosures by mail will opt out, based on the American Community Survey data. Then the Department projects the opt-out rates will decrease gradually at rates consistent with exponential decay function,  $a * b^{(t-1)}$ , where  $a$  is the initial opt-out rate 18 percent,  $t$  is year, and  $b$  is the decay rate, 0.9 ( $= 16.2/18$ ) and in the 10th year, only seven percent of those participants currently receiving disclosures by mail will continue to do so. Then the Department made an additional adjustment by adding 0.5 percentage point annually to account for the requirement in paragraph (f)(4) of the proposal regarding invalid or inoperable electronic addresses for covered individuals. For more detailed discussion, see the quantified cost section, below.

covered individuals if they are used to defray plan expenses and lower the direct or indirect participant fees.

#### (ii) Comparisons Between the Department's Estimates and Industry Estimates

Industry groups have published estimates of the costs plans incur to furnish covered documents by mail taking into account printing, material, and mailing costs. For example, a recent report submitted to the Department<sup>95</sup> estimates that plans would incur total costs of more than \$385 million per year to mail an average of six documents per year to 80.3 million 401(k) participants, assuming a cost of \$0.80 per document. The Department's estimated cost savings are distinguishable from the report's cost estimate for the following reasons:

- Reflecting practices under current rules, including the Department's 2002 safe harbor, the Department assumes that *slightly less than half* of participants currently receive covered documents by mail, and plans would realize cost savings by switching many of these participants from mail delivery to e-delivery if the proposed rule is finalized. In contrast, the cost estimate in the report assumes that *all* participants currently receive notices by mail.

- The Department assumes that in the first year about 18 percent of individuals that currently receive paper documents would opt out of e-delivery and continue to receive covered documents by mail.<sup>96</sup> In subsequent years, the Department assumes that opt-out rates will gradually decrease such that in ten years only seven percent of current mail recipients will continue to receive paper copies of disclosures by mail. In contrast, the cost estimate in the report does not factor in the percentage of participants that request paper copies by mail.

- The Department estimated the cost savings disclosure by disclosure, assuming different percentages of plans and participants would receive different disclosures. Due to this methodology, it is difficult to directly compare the report's assumptions regarding the

<sup>95</sup> Peter Swire and DeBrae Kennedy-May, "Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time has Come to Prefer Electronic Delivery—2018 Update," *peterswire.net* (April 2018), p. 19.

<sup>96</sup> This 18 percent opt-out assumption used in the Department's estimates comes from the 2016 American Community Survey (ACS) conducted by the Census Bureau. According to ACS, about 82 percent of U.S. households have internet subscriptions, thus can securely and conveniently access the internet at home; therefore, the Department assumes that the remaining 18 percent are more likely to opt out.

average number of notices participants receive annually.

- The Department assumes plans would incur one-time start-up costs to develop systems and notices required by the proposal and material, printing, and postage costs to mail the initial notice of internet availability and right to opt out. As shown in the cost savings table below, these one-time costs will significantly diminish over time and become negligible in the long-term.

#### (iii) Cost Savings

The Department's cost savings estimates understate the potential savings generated from this proposed rule, because they account for cost savings that would be realized by eliminating materials, printing, and mailing costs associated with furnishing only seven selected disclosures, such as SPDs, even though the rule would be more broadly available for other pension disclosures as well.<sup>97</sup> According to the Department's Paperwork Reduction Act information collection inventory, these seven selected disclosures are some of the most costly disclosures for retirement plans in terms of distribution and mailing costs, because they affect a large number of plans and participants.<sup>98</sup> Therefore, the proposed rule will generate the most cost savings from these seven disclosures by allowing plans to electronically deliver them without incurring printing and mailing costs. In contrast, other pension disclosures are distributed irregularly because they are triggered by the occurrence of certain events. Consequently, the proposed rule would produce relatively smaller cost savings from these irregular disclosures because they affect a smaller number of plans and covered individuals.

The Department's cost savings estimate is derived from the methodology it uses to estimate costs associated with furnishing printed disclosures for information collections subject to the Paperwork Reduction Act. For this purpose, preparation costs generally include costs plans incur to develop the content and format of disclosures, while distribution costs generally include materials, printing,

<sup>97</sup> These are the same disclosures that can be included in a combined notice of internet availability pursuant to paragraph (i) of the proposal.

<sup>98</sup> Out of these seven disclosures, all but one (Pension Benefit Statements) have the associated information collection requests under the Paperwork Reduction Act. To estimate cost savings attributable to this proposed rule, the Department estimated the current cost burden associated with Pension Benefits Statements, although it is not a part of the Department's information collection inventory.

and mailing costs administrators incur to furnish required disclosures to participants and beneficiaries. The Department's estimates assume that preparation costs for covered disclosures such as SPDs and SMMs would be unchanged by the proposed regulation, because the proposed rule would not change the content of such disclosures. This reflects the Department's assumption that master copies of printed versions of disclosures are typically maintained in electronic form or can be easily converted to such form to be distributed to covered individuals.

(iv) Quantified Costs

While the Department expects the proposed rule to reduce costs associated with distributing covered disclosures by eliminating material, printing, and mailing costs, these cost reductions are partly offset by costs incurred by administrators to meet the new safe harbor's requirements to: (1) Furnish a notice of internet availability to covered individuals ((paragraph (d) of the proposal); (2) ensure the existence of a website at which a covered individual is able to access covered documents (paragraph (e) of the proposal); and (3) furnish an initial notification of default electronic delivery and right to opt out in paper to each person, before he or she becomes a covered individual (paragraph (g) of the proposal).

The Department assumes that plans will incur one-time start-up costs to develop systems and notices required by the proposal, which would include time for the plan's (or the plan service provider's) legal counsel to prepare and review the notices to ensure compliance with the proposed regulatory requirements. While the Department also assumes that the cost incurred by plans to distribute notices of internet availability would be negligible because they could be distributed electronically, the initial notification of default electronic delivery and right to opt out would impose material, printing, and postage costs on administrators, because they would be required to be furnished to covered individuals in a non-electronic format.

The initial notification and right to opt out is a one-time transitional notice that informs participants who are existing employees of changes in default delivery system to e-delivery.<sup>99</sup> Administrators are required to furnish

<sup>99</sup> For newly hired employees, it is assumed that they will receive the Initial Notice and Right to opt out in their new employee packets, as it will be incorporated into a part of new employee intake process, thus employers incur only negligible costs in subsequent years.

this notice in paper form to each person, prior to such person becoming a covered individual, informing them that some or all covered documents will be furnished electronically, that they have the right to request paper copies of some or all of the covered documents or to opt out of electronic delivery altogether, and of the procedures for exercising such rights. For transition purposes, the proposed rule would require an administrator using the proposed safe harbor to send this notification to all existing employees before any or all of them can become a "covered individual."

Thereafter, an administrator must send this notification to all new employees and beneficiaries receiving benefits. To minimize any unnecessary confusion and ensure smooth transitions from participants' perspectives, the proposal requires this notification to be sent to employees who have affirmatively consented to receive electronic disclosures under the existing safe harbor if an administrator wishes to transition to providing electronic disclosures to such participants under the proposed safe harbor. The Department believes that the costs for the initial notice are justified, because it is essential to protect participants' interests by adequately notifying them in paper that the administrator will be adopting a new method for electronic delivery of covered documents and that they have the option to opt out and receive paper copies of such documents.

Retirement plans will incur one-time costs to develop and design an initial notice. The proposed rule clearly describes the specific information required to be included in this notice; therefore, the Department expects the costs to develop and design the notice would be modest, approximately \$39 million on aggregate assuming all retirement plans decide to rely on this proposed alternative.<sup>100</sup> The Department estimates that approximately 60 million retirement plan participants received covered disclosures by mail in 2016;<sup>101</sup> and

<sup>100</sup> The Department estimates there were over 702,000 retirement plans in 2016. The Department estimates that attorneys will take approximately 293,000 hours to develop and review the Initial Notice. Assuming the hourly rate for in-house attorneys was \$133.50 in 2016, the costs of developing the Initial Notice are estimated approximately \$39 million (292,725 hours \* \$133.50).

<sup>101</sup> ICRs associated with the SPD, SMM, SAR, and 404(a)(5)/404(c) disclosures recently were renewed after OMB review and public comment. These ICRs assume that approximately 56 percent of participants electronically receive those disclosures by relying on the 2002 safe harbor e-disclosure rule. According to the 2016 Private Pension Bulletin, there are approximately 136 million participants. Therefore, the Department estimates that

therefore, could potentially receive the initial notice from their plan administrators. Assuming a one-page notice is mailed to these 60 million participants, the Department estimates the costs of distributing and mailing the initial notice will be approximately \$50 million.<sup>102</sup> Therefore, the Department estimates that retirement plans would incur approximately \$90 million one-time costs to develop and mail the initial notice. The Department assumes that these are one-time transitional costs that would not be incurred in subsequent years.<sup>103</sup>

Paragraph (e) of the proposed rule would require administrators to ensure the existence of a website at which plan participants can access covered disclosures. The Department understands that very modest one-time costs would be incurred to comply with this condition of the proposed safe harbor. This is based on the Department's assumption that nearly all plans have institutional recordkeepers, third-party administrators, trustees, or investment providers that have compliant or easily adaptable platforms that most plans would rely on for compliance. The Department acknowledges that a small fraction of plans without institutional recordkeepers, third-party administrators, or investment providers may incur costs to develop or modify their websites. The Department is concerned that, while most small plans use bundled service providers that maintain highly functional websites, those few small plans that do not are less likely than larger plans to have their own websites, and, thus, are more likely to bear the cost burden associated with this requirement. The Department, however, does not have sufficient data to estimate such costs. The Department solicits comments regarding the fraction of plans, particularly the fraction of small plans, that would need to develop or modify a website in order to rely on this proposed safe harbor rule, and how the burden on small plans can be minimized while encouraging plans to furnish disclosures electronically.

approximately 60 million participants (44 percent of 136 million) receive disclosures by mail, while 56 percent of participants currently receive disclosures electronically.

<sup>102</sup> This estimate is based on \$36 million mailing costs (approximately 60 million notices \* \$0.60) and \$14 million preparation costs incorporating an in-house clerk's time to prepare for mailing (approximately 330,000 hours \* \$64.20 hourly rate of mailing clerk).

<sup>103</sup> For newly hired employees, the Department assumes that they will receive the Initial Notice in their new employee packets, as it will be incorporated into a part of new employee intake process, thus employers incur only negligible costs in subsequent years.

Paragraph (f)(4) of the proposal requires plan administrators to take certain actions if they are alerted that a covered individual's electronic address has become invalid or inoperable, such as if a notice of internet availability sent to that address is returned as undeliverable. In such circumstances, the administrator must (1) promptly take reasonable steps to cure the problem (for example, by furnishing a notice of internet availability to the covered individual's secondary electronic address that is valid and operable, if available, or obtaining a new valid and operable electronic address for the covered individual), or (2) treat the covered individual as if he or she made an election to opt out of electronic disclosure under paragraph (f)(2) of the proposal. If the covered individual is treated as if he or she opted out, the plan administrator must furnish to the covered individual, as soon as is reasonably practicable, a paper version of the covered document identified in the undelivered notice of internet availability. To satisfy this requirement, plan administrators would incur costs associated with detecting invalid or inoperable electronic addresses, taking appropriate actions to remedy the problem, and/or treating those covered individuals as if they opted out of electronic disclosure and furnishing covered documents to them via mail.

Some plan administrators would incur costs to purchase software to detect the validity and operability of electronic addresses due to this requirement. The Department believes, however, that most plan administrators already have such features built into their electronic delivery systems. The Department assumes that a small fraction, approximately one percent, of plans currently do not have such

features built in to their systems, and thus, would incur costs to purchase software to allow them to verify whether electronic notices are delivered, bounced back, opened, and clicked through.<sup>104</sup> The Department estimates these plan administrators would incur approximately \$2.5 million in aggregate annual costs to purchase such software.<sup>105</sup> The Department invites comments on costs associated with monitoring the validity and operability of electronic addresses, particularly how many plans currently lack these capabilities and also whether these types of software are widely available for types of electronic communications other than email such as texts and mobile applications.

Plan administrators also would incur costs to remedy failed delivery of internet availability notices. The Department assumes that before mailing out covered documents to the recipients of an undelivered notice of internet availability, plan administrators would choose the option of resolving issues that are relatively easier to fix such as attempting to redeliver bounced emails or reaching out to covered employees to obtain updated electronic addresses. However, it may be difficult for plan administrators to remedy failed delivery for certain covered individuals, such as those who have separated from service. Plan administrators consequently are likely to treat at least some such covered individuals as opting out of electronic delivery. Although the Department acknowledges that plan administrators would spend time attempting to correct failed delivery as provided in paragraph (f)(4) of the proposal, it does not have sufficient data to quantify associated costs. The Department, however, assumes that plan administrators always would select the least costly and most

efficient option. Therefore, if obtaining updated electronic addresses were too burdensome, the Department assumes that the plans would furnish covered documents identified in the undelivered notice of internet availability to those participants by mail.

For purposes of this regulatory impact analysis, the Department assumes that this requirement would increase the global out-of-rate by 0.5 percentage points relative to what it otherwise have been in each year as plans furnish covered disclosures by mail to covered individuals with invalid or inoperable electronic addresses.<sup>106</sup> The Department assumes that plan administrators would exercise due diligence to remedy the problem by reaching out to participants with invalid or inoperable electronic addresses rather than simply treating them as participants globally opting out of electronic delivery; therefore, this increase in the global opt-out rate would not compound over time. The 0.5 percentage point increase in the global opt-out rate is reflected in the cost savings estimates for the seven covered documents.

This proposed rule would provide a comprehensive alternative to the 2002 safe harbor, such that all participants and beneficiaries may be easily covered. Although some plan sponsors currently using the 2002 safe harbor may prefer to switch entirely to the proposed alternative, the Department assumes that most will maintain their existing systems and use the proposed rule to cover individuals that fall outside of the existing safe harbor.

(v) Quantified Net Cost Savings

The Department's estimates of the net cost savings from the proposed regulations are summarized below.

TABLE—ESTIMATED COST SAVINGS ATTRIBUTABLE TO THE PROPOSED RULE

[\$ million]

|   | 1st Year | 2nd Year | 3rd Year | Total over 10 years |
|---|----------|----------|----------|---------------------|
| Cost Savings from eliminating printing & mailing costs: |          |          |          |                     |
| Summary Plan Description (SPD) .....                    | \$76     | \$76     | \$76     | \$741               |
| Summary of Material Modification (SMM) .....            | 15       | 15       | 15       | 151                 |
| Summary Annual Report (SAR) .....                       | 23       | 23       | 23       | 225                 |

<sup>104</sup> The Department understands that software is commercially available to produce a list of email addresses that have bounced back with the owners' name, export the list into different formats, and, in certain circumstances, remove invalid email addresses from the list. Such software also generates and reports relevant statistics such as bounce rate, open rate and click-through rate. Some software has the capability to automatically re-attempt delivery depending on the reasons of failed delivery.

<sup>105</sup> The Department gathered pricing information for five commercial software packages that ranged

from \$10 per month to \$320 per month depending on the volume and sophistication of features available. Taking the average of basic level price of these five products, the Department assumes that it would cost \$28.2 per month (\$338.4 per year) to subscribe. Assuming 7,392 plans would purchase this type of product, the Department estimates that the aggregate costs would total an estimated \$2.5 million (7,392 plans \* \$338.40).

<sup>106</sup> One industry report indicates that a well-targeted and maintained email list yields on average 1.06% bounce rate. See <https://www.campaignmonitor.com/resources/guides/>

*email-marketing-benchmarks/* for more information. For another example, EBSA's newsletter email deliveries yield a 4% bounce back rate. Although the Department's assumed 0.5% bounce back rate is lower than the information discussed here, the Department believes that in general, plan administrators are able to generate and maintain more accurate and current electronic addresses for covered individuals.

TABLE—ESTIMATED COST SAVINGS ATTRIBUTABLE TO THE PROPOSED RULE—Continued  
[\$ million]

|   | 1st Year | 2nd Year | 3rd Year | Total over 10 years |
|---|----------|----------|----------|---------------------|
| Annual Funding Notice .....                     | 13       | 13       | 13       | 129                 |
| 404(a)(5)/404(c) Disclosure .....               | 42       | 42       | 42       | 411                 |
| Annual QDIA Notice .....                        | 8        | 8        | 8        | 79                  |
| Pension Benefits Statement .....                | 112      | 111      | 111      | 1,085               |
| Subtotal: Gross Cost Savings [1] .....          | 289      | 290      | 289      | 2,821               |
| Costs imposed by the proposed rule:             |          |          |          |                     |
| Website .....                                   | 23       | 16       | 16       | 154                 |
| Initial Notification and Right to Opt out ..... | 90       | 0        | 0        | 90                  |
| Notice of Internet Availability .....           | 33       | 17       | 17       | 170                 |
| Subtotal: Costs of the proposed rule [2] .....  | 146      | 33       | 32       | 413                 |
| Total Net Cost Savings: [1]–[2] .....           | 144      | 257      | 257      | 2,408               |

**Note:** Totals in table may not sum precisely due to rounding. Discounted at three percent.

The estimated cost savings of each covered disclosure, \$289 million for the first year, in the Table reflect the Department's assumption that approximately 81.5 percent of participants who currently receive paper copies of covered documents by mail would receive covered documents electronically under the proposed rule, while 18.5 percent would elect to receive such documents by mail.<sup>107</sup> This assumption is based on the American Community Survey (ACS) estimate that about 82 percent of U.S. households had internet subscriptions in 2016.<sup>108</sup> This assumption may overstate the cost savings in some circumstances, because some participants with internet access at home may opt out because they prefer to receive paper copies. In other circumstances, however, this assumption may overstate the cost savings, because households holding defined contribution plan accounts tend to have higher internet access rates and are more comfortable navigating online, which could lead to a lower opt-out rate.<sup>109</sup> In projecting cost savings for 10

years, the Department assumes that in the 10th year this opt-out rate will gradually decrease to only seven and half percent of those participants currently receiving documents by mail.<sup>110</sup> The Department solicits comments regarding any relevant information about the share of recipients that would elect to opt out and request to receive print disclosures by mail.

(vi) Non-Quantified Costs (Potential Adverse Impacts)

Although overall 82 percent of U.S. households had access to the internet at home in 2016, the 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 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%).<sup>111</sup> Responding to these relatively lower internet access rates for certain demographics, ICI/ARA pointed out in a letter to the Department that households with defined contribution (DC) plan accounts tend to have higher internet access rates. For example, ICI/ARA stated that among households with DC accounts, 79 percent of households with income between \$20,000 and \$39,999 use the internet and 76 percent of households where the head of the household is age 65 or older use the internet.<sup>112</sup> However, these numbers confirm that some groups owning DC plan accounts still have a lower usage rate than the overall 93 percent internet usage rate of DC plan account holders.

Another subpopulation worth noting is households connected to the internet only through smartphones. Racial/ethnic minorities and low-income households are more likely to comprise these smartphone-only households.<sup>113</sup> In 2015, approximately 8 percent of households in the U.S. depended on handheld devices for internet connectivity, and 16 percent of households where the head of the household obtained a high school diploma or less are handheld device-only households. In contrast, only 3 percent of households where the head of the household obtained a Bachelor's degree or higher are handheld device-

<sup>107</sup> Among participants who currently receive disclosures by mail under the existing safe harbor, 18.5 percent are assumed to opt out of electronic delivery and receive paper copies. This 18.5 percent global opt-out rate reflects 0.5 percentage point upward adjustment due to failed delivery of internet availability notice such as bounced emails. Without this adjustment, the global opt-out rate would be 18 percent, which is consistent with the data from American Community Survey 2016.

<sup>108</sup> Ryan, "Computer and Internet Use in the United States."

<sup>109</sup> According to one study, for households owning DC plan accounts, 93 percent used the internet in 2016. See Peter Swire and DeBree Kennedy-Mayo, "Delivering ERISA Disclosure for Defined Contribution Plans," *peterswire.net* (April 2018). Another survey suggests that 99 percent of respondents have a computer at home or work that is connected to the internet and 84 percent agree

that employers can provide retirement plan information electronically if they can opt out at any time. This implies approximately 83 percent (99% × 84%) have internet access and would agree to receive plan information electronically, which is similar to the Department's assumption of 82 percent. See "Improving Outcomes with Electronic Delivery of Retirement Plan Documents," *Quantria Strategies* (June 2015), Appendix A—Plan Participant Views on Paper Versus Electronic Delivery of Plan Documents.

<sup>110</sup> Based on the American Community Survey (ACS) data from 2016 and 2017, the Department assumes the opt-out rate for the 2nd year is 16 percent. The Department's projection on the opt-out rates is based on these two recent years of ACS data, and gradually declining but adjusted to not reach a zero opt-out rate far in the future. This also reflects the 0.5 percentage point upward adjustment due to bounced emails.

<sup>111</sup> Ryan, "Computer and Internet Use in the United States."

<sup>112</sup> Investment Company Institute and American Retirement Association Letter to the Department of Labor, dated April 30, 2018.

<sup>113</sup> Ryan, "Computer and Internet Use in the United States."

only households.<sup>114</sup> Although connected to the internet, these households face some limitations in fully harnessing the efficiency, capacity, and convenience offered by modern technology. Therefore, accessing disclosures online for these households may not be as convenient as for households with other means to access the internet.

For participants without ready internet access, this proposed rule may create additional impediments to accessing critical plan information by requiring them to go to a public library or family members' home to access the information if they do not opt out or request printed documents. As stated earlier in this preamble, the proposed rule would require covered individuals to receive a notice of internet availability containing statements regarding their rights to (1) request and obtain a paper version of the covered document, free of charge, and receive an explanation of how to exercise this right, and (2) opt out of receiving all covered documents electronically and an explanation of how to exercise this right. One of the Department's goals in establishing the proposed framework was to be certain that, regardless of the delivery method chosen by a plan administrator, covered individuals who wish to receive paper copies of covered documents would be able to do so without undue burden. Further, a covered individual who prefers to receive all covered documents in paper may opt out of receiving any covered documents electronically. This global opt-out provision enables a participant who wants to have all of her disclosures in paper, without having to make repeated requests, to elect to do so; she will receive all covered documents in paper.

If covered individuals in groups with low internet-access rates fail to request hard copies of disclosures or exercise their opt-out rights due to inertia or if they face impediments to accessing the covered documents on the internet (if, for example, they forget their password that must be entered when the plan's internet address takes them to a login page), the negative impacts imposed on these individuals would offset some benefits of this proposed regulation. The Department does not have sufficient data to quantify these negative impacts, which most likely would be borne disproportionately by demographics such as the low-income, the elderly, and

workers in rural areas. If these unintended consequences were to occur, plan administrators might take steps to limit their impact, such as conducting outreach with these demographics and communicate their plan's electronic disclosure policy effectively, providing sufficient time for participant education before implementing any electronic disclosure changes, and employing simple processes for requesting print documents, opting out of electronic disclosure, and establishing and resetting passwords. Such steps might help ensure that the cost savings discussed above would be realized without unduly burdening vulnerable subpopulation groups.

Another potential negative impact is that covered individuals' confidential information could be intentionally or unintentionally breached due to increased use of electronic media to furnish covered documents to them. Paragraph (e)(3) of the proposal requires the administrator to take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual. As generally required by ERISA section 404, the Department expects that many administrators, or their service or investment providers, already have secure systems in place to protect covered individuals' personal information, which should reduce the possibility that confidentiality breaches would occur.

#### (vii) Benefits

Although this proposed regulation generally would not require plan sponsors to develop formats or content beyond that which satisfies disclosure requirements in printed form, some plan sponsors may elect to develop new formats and content for electronic disclosures. Such formats may include interactive interfaces that involve hot-links and/or multimedia presentations, all of which could improve the quality and accessibility of information for participants. Furthermore, for defined contribution plans, the account information is available to participants continuously and updated in real-time, which allows them to effectively manage their accounts. Using assistive technology such as screen readers, some electronic disclosures could be read to the visually impaired, thus making disclosures more accessible to a wide participant population. Some technology features, such as online translation, also could enhance the ability of covered individuals with limited English proficiency to

understand their disclosures, which would assist their decision-making process. Some plans may create apps with interactive features that will allow participants to navigate with ease and conduct account transactions. Although the Department does not have sufficient data to quantify these benefits, it underscores that effective design using currently available technology could make disclosures more accessible and relevant to recipients. The Department solicits comments about how to improve the effectiveness of ERISA disclosures, particularly by incorporating recent technological features in the companion Request for Information.

#### (4) Regulatory Alternatives

In conformance with Executive Order 12866, the Department considered several regulatory approaches in developing this proposed rule, which are discussed below.

##### (i) Covering Welfare Benefit Plan Disclosures

As discussed earlier in section (B)(2)(ii) of this document, while the Department considered including welfare benefit plan disclosures in the proposal, it has concluded not to include them. Therefore, paragraph (c)(2) of the proposed rule currently is reserved so that the Department can study the future application of the new safe harbor to documents that must be furnished to participants in employee welfare benefit plans. This reservation follows the directive of Executive Order 13847, which focuses the Department's review on retirement plan disclosures.

Although the Department does not interpret the Order's directive as limiting the Department's ability to take action with respect to employee welfare benefit plans, especially to the extent similar policy goals, including the reduction of plan administrative costs and improvement of disclosures' effectiveness, may be achieved, this proposal is limited to retirement plan disclosures.

Welfare plan disclosures, such as group health plan disclosures, may raise different considerations, such as pre-service claims review and access to emergency and urgent health care. Moreover, the Department shares interpretive jurisdiction over many group health plan disclosures with the Treasury Department and the Department of Health and Human Services. In considering any possible new electronic delivery safe harbor for group health plan disclosures in the future, the Department would want to consult with these other Departments. Accordingly, focusing its attention first

<sup>114</sup> Jamie M. Lewis, "Handheld Device Ownership: Reducing the Digital Divide?" SEHSD Working Paper 2017-04 (U.S. Census Bureau, 2017).

on retirement disclosures is a sound and efficient use of the Department's resources.

(ii) **Conforming With Electronic Delivery Approaches Adopted by Other Departments and Agencies**

Executive Order 13847 directed the Department to coordinate with the Treasury Department in exploring the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens. Following discussions with Treasury staff, the Department considered as one of its regulatory alternatives adopting an approach similar to 26 CFR 1.401(a)-21 relating to the use of an electronic medium for disclosures.<sup>115</sup> As discussed in Section A(5)(iii), above, the Treasury regulation generally provides that a plan may use an electronic medium to provide applicable notices only for a participant who affirmatively consents to receive the notice electronically or who has the "effective ability to access" the electronically delivered notice.<sup>116</sup> In the past, a number of parties have encouraged the Department to adopt this approach, which they interpreted to be more flexible than the Department's 2002 safe harbor.<sup>117</sup> The proposed rule does not adopt 26 CFR 1.401(a)-21 verbatim. In light of Executive Order 13847 requiring consultation with the Treasury Department, this proposal is intended to align with 26 CFR 1.401(a)-21(c) for applicable notices.

The Department also consulted with other relevant regulators, including the Securities and Exchange Commission. The Department's proposed approach, discussed in Section B above, resembles the "notice and access" approach taken by the Securities and Exchange

Commission for certain investor disclosures.<sup>118</sup> The Department believes that this approach significantly modernizes electronic delivery and, importantly, facilitates a layered approach—participants and beneficiaries will be notified directly about the availability of important plan disclosures on a regular basis and can access the full disclosures online at any time. Administrators who wish to furnish disclosures on paper, or electronically in accordance with the 2002 safe harbor, may continue to do so under the proposed alternative method. Although the basic framework of the proposal is similar to the Commission's guidance for furnishing certain disclosures, such as proxy materials and shareholder reports, it also differs, because ERISA disclosures that may be furnished pursuant to the Department's guidance impact a different segment of the population, in a different manner, than the investor disclosures covered by the Commission's guidance. Accordingly, the specific provisions of the proposal in this document are in some ways broader, and in other ways narrower, than the Commission's rules. For example, the Department proposed applying the "notice and access" standard to a larger set of required disclosures. The proposal is structured in its entirety as a safe harbor—administrators will not, under the proposal, be required to make any specific disclosures available on a website (unless otherwise required by different Department rules). Further, paragraph (i) of the Department's proposal includes a provision that permits administrators to furnish one annual notice of internet availability covering a subset of required disclosures, as opposed to requiring in all cases that a separate notice of internet availability be required for each disclosure. Of course, both the Department and the Commission are dedicated to protecting participants and investors, respectively by including appropriate safeguards in their disclosure rules, for example by always permitting them to request paper copies of required disclosures or to opt out of electronic delivery altogether.

(5) **Paperwork Reduction Act**

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, the Department is soliciting comments concerning the proposed information collection requests (ICR) incorporated in the proposed rule relating to use of electronic communication by employee benefit plans. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <https://www.RegInfo.gov>.

The Department has submitted a copy of the proposed information collection to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the proposed ICR to ensure their consideration.

<sup>115</sup> The Treasury Department and the IRS have issued a series of guidance on electronic delivery of required disclosures, beginning with IRS Notice 99-1 and most recently in 26 CFR 1.401(a)-21(c) issued in 2006 on the "Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents." See, e.g., Notice 99-1 (1999-2 I.R.B. 8), Announcement 99-6 (1999-4 I.R.B. 24), T.D. 8873, 65 FR 6001 (Feb. 8, 2000), and T.D. 9294, 71 FR 61877 (Oct. 20, 2006).

<sup>116</sup> See 26 CFR 1.401(a)-21(b) and (c).

<sup>117</sup> For example, in comments submitted to the ERISA Advisory Council in 2017, the Department was encouraged to adopt the Treasury Department's approach. See Davis & Harman LLP, statement to the ERISA Advisory Council, June 7, 2017, p. 8, at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-hadley-written-statement-06-07.pdf>. See also Groom Law Group, June 7, 2017, p. 4, at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-levine-and-winters-written-statement-06-07.pdf>.

<sup>118</sup> See 83 FR 29158 (June 22, 2018), permitting issuers to transmit certain shareholder reports by posting on a website specified in a required notice to investors; 70 FR 44722 (Aug. 3, 2005), permitting "access equals delivery" framework for final prospectus; 72 FR 42221 (Aug. 1, 2007), requiring issuers to post proxy materials on a specified website and furnish a notice of internet availability to shareholders; and 75 FR 9073 (Feb. 26, 2010), providing additional flexibility as to the format of the notice of availability for proxy materials.



*PRA Addressee:* Address requests for copies of the ICR to Joseph Piacentini, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers. ICRs submitted to OMB also are available at <https://www.RegInfo.gov>.

*Dates:* The Department has requested that OMB approve or disapprove the collection of information by December 23, 2019. Comments should be submitted to OMB by November 22, 2019 to ensure their consideration.

As discussed above, the proposed regulation would create two new information collections that are subject to the PRA: The annual notice of internet availability (§ 2520.104b-31(d)(2)) and the initial notification (§ 2520.104b-31(g)). These information collections are discussed below. Also, as discussed below, the proposed rule also would reduce costs for some of the Department's existing information collections.

The Department is unaware of any data source that would directly identify the number of plans that will decide to use the proposed new alternative safe harbor. Therefore, for purposes of this analysis, the Department conservatively assumes that all plans will use the proposed alternative safe harbor for at least some of their covered individuals. As discussed in the Cost Saving section above, the Department has estimated that plans using the proposed new safe harbor would incur a one-time start-up cost to prepare the annual notice of internet availability, and prepare and distribute by paper the initial notification. The proposed rule's impact on the hour and cost burden associated with the Department's information collections are discussed below.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Consent to receive employee benefit plan disclosures electronically.

*Type of Review:* Revision of currently approved collection of information.

*OMB Control Number:* 1210-0121.

*Affected Public:* Individuals or households; Business or other for-profit; Not-for-profit institutions.

*Respondents:* 750,000.

*Responses:* 114,548,000.

*Estimated Total Burden Hours:* 1,209,000.

*Estimated Total Costs:* \$40,652,000.

The expiration date for this information collection is May 31, 2021.

As discussed earlier in this preamble, on April 9, 2002, the Department

published a notice of final rulemaking on electronic disclosure and recordkeeping issues<sup>119</sup> to establish a safe harbor for the use of electronic media to satisfy the general furnishing requirement. Based on public comments, the final regulation expanded the list of disclosures addressed by the safe harbor to disclosures under Title I generally. The final regulation also provided for the receipt of required disclosures at locations other than the workplace. For those participants and beneficiaries offered the opportunity and wishing to receive disclosures via electronic information systems outside the workplace, the final regulation requires advance affirmative consent on the part of the recipient.<sup>120</sup>

Before consenting, the plan administrator must provide a participant or beneficiary with a clear and conspicuous statement indicating: The types of documents to which the consent would apply; that consent may be withdrawn at any time; the procedures for withdrawing consent and updating necessary information; the right to obtain a paper copy, free of charge; and any hardware and software requirements.

The Department is proposing to revise this information collection by adding the information collections that are associated with the alternative safe harbor in this proposal that are discussed above. This will increase the number of respondents for the information collection by 703,000, the responses by 109,756,000, the hour burden by 1,189, and the cost burden by \$40,412.

Although the foregoing discussion pertains to the information collections contained in the existing safe harbor and proposed alternative new safe harbor, the Department's burden estimates for several existing information collections that are covered disclosures also would be affected by the proposal. Specifically, as a result of meeting the conditions of this existing and proposed new alternative safe harbors, the burden associated with the following existing covered disclosures that are information collections covered by the PRA would be reduced: The SPD, the SMM, the SAR, the annual funding notice, disclosures for participant directed individual account plans under ERISA section 404(a)(5), and the QDIA notice. The burden reductions resulting from a wider adoption of electronic delivery of covered disclosures that

would be facilitated by this proposed regulation are estimated based upon cost and hour burdens for the Department's existing ICRs for the covered disclosures as adjusted for the number of plan and participants assumed to rely on the proposed rule to send and receive the covered disclosures electronically. The Department discusses these ICRs and its revised estimates below. The Department has submitted the revised information collections for these covered disclosures to OMB for review in accordance with 44 U.S.C. 3507(d).

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Summary Plan Description Requirements under the ERISA.

*Type of Review:* Revised Collection.

*OMB Control Number:* 1210-0039.

*Affected Public:* Businesses or other for-profits, Not-for-profit institutions.

*Respondents:* 3,033,000.

*Responses:* 112,733,000.

*Estimated Total Burden Hours:* 164,000.

*Estimated Total Costs:* \$233,051,000.

*Description:* Section 104(b) of ERISA requires the administrator of an employee benefit plan to furnish plan participants and certain beneficiaries with an SPD that describes, in language understandable to an average plan participant, the benefits, rights, and obligations of participants in the plan. The information required to be contained in the SPD is set forth in section 102(b) of ERISA. To the extent there is a material modification in the terms of the plan or a change in the required content of the SPD, section 104(b)(1) of ERISA requires the plan administrator to furnish participants and specified beneficiaries with a summary of material modifications (SMM) or summary of material reductions (SMR). The Department has issued regulations providing guidance on compliance with the requirements to furnish SPDs, SMMs, and SMRs. These regulations, which are codified at 29 CFR 2520.102-2, 2520.102-3, and 29 CFR 2520.104b-2 and 29 CFR 2520.104b-3, contain information collections for which the Department has obtained OMB approval under OMB Control No. 1210-0039. The current approval is scheduled to expire on October 31, 2022.

The Department estimates that due to plan administrators' use of the proposed alternative safe harbor to provide disclosures to participants who currently are receiving them by mail, the hour burden will be reduced by 125,000 and the cost burden by \$90,969,000.

<sup>119</sup> 67 FR 17264.

<sup>120</sup> This requirement is incorporated at 29 CFR 2520.104b-1(c)(2)(ii)(A), (B), and (C).

*Agency:* Employee Benefits Security Administration, Department of Labor.  
*Title:* ERISA Summary Annual Report Requirement.

*Type of Review:* Revised Collection.

*OMB Number:* 1210-0040.

*Affected Public:* Not-for-profit institutions, Businesses or other for-profits.

*Respondents:* 744,000.

*Responses:* 170,629,000.

*Estimated Total Burden Hours:* 1,817,000.

*Estimated Total Costs:* \$26,091,000.

*Description:* ERISA Section 104(b)(3) and the regulation published at 29 CFR 2520.104b-10 require, with certain exceptions, that administrators of employee benefit plans furnish annually to each participant and certain beneficiaries a summary annual report (SAR) meeting the requirements of the statute and regulation. The regulation prescribes the content and format of the SAR and the timing of its delivery. The SAR provides current information about the plan and assists those who receive it in understanding the plan's current financial operation and condition. It also explains participants' and beneficiaries' rights to receive further information on these issues. EBSA previously submitted the ICR provisions in the regulation at 29 CFR 2520.104b-10 to OMB, and OMB approved the ICR under OMB Control No. 1210-0040. The ICR approval is scheduled to expire on June 30, 2022.

The Department estimates that due to plan administrators' use of the proposed alternative safe harbor to provide disclosures to participants who currently are receiving them by mail, the cost burden will be reduced by \$23,132,000.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Annual Funding Notice for Defined Benefit Pension Plans.

*Type of Review:* Amendment of a currently approved collection of information.

*OMB Control Number:* 1210-0126.

*Affected Public:* Businesses or other for-profits, Not-for-profit institutions.

*Respondents:* 33,000.

*Responses:* 69,453,000.

*Estimated Total Burden Hours:* 713,000.

*Estimated Total Costs:* \$7,510,000.

*Description:* Section 101(f) of the ERISA sets forth requirements applicable to furnishing annual funding notices. Before the enactment of the Pension Protection Act of 2006 (PPA), section 101(f) applied only to multiemployer defined benefit plans. The Department has issued multiple

final regulations with regard to this provision, most recently on February 2, 2015 (80 FR 5625). Section 501(a) of the PPA amended section 101(f) of ERISA and made significant changes to the annual funding notice requirements. These amendments require administrators of all defined benefit plans that are subject to Title IV of ERISA, not only multiemployer plans, to provide an annual funding notice to the Pension Benefit Guaranty Corporation (PBGC), to each plan participant and beneficiary, to each labor organization representing such participants or beneficiaries, and, in the case of a multiemployer plan, to each employer that has an obligation to contribute to the plan. An annual funding notice must include, among other things, the plan's funding percentage, a statement of the value of the plan's assets and liabilities and a description of how the plan's assets are invested as of specific dates, and a description of the benefits under the plan that are eligible to be guaranteed by the PBGC. The ICR was approved by OMB under OMB Control Number 1210-0126, which is scheduled to expire on August 31, 2021.

The Department estimates that due to plan administrators' use of the proposed alternative safe harbor to provide disclosures to participants who currently are receiving them by mail, the cost burden will be reduced by \$12,676,000.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Disclosures for Participant Directed Individual Account Plans.

*Type of Review:* Revised Collection.

*OMB Control Number:* 1210-0090.

*Affected Public:* Businesses or other for-profits, Not-for-profit institutions.

*Respondents:* 547,000.

*Responses:* 669,852,000.

*Estimated Total Burden Hours:* 6,439,000.

*Estimated Total Costs:* \$209,764,000.

*Description:* Plan administrators are required to provide plan- and investment-related fee and expense information to participants and beneficiaries in all participant directed individual account plans (e.g., 401(k) plans) for plan years beginning on or after January 1, 2011. The Department previously requested review of this information collection and obtained approval from OMB under OMB control number 1210-0090. The ICR is scheduled to expire on April 30, 2022.

The Department estimates that due to plan administrators' use of the proposed alternative safe harbor to provide disclosures to participants who

currently are receiving them by mail, the cost burden will be reduced by \$42,307,000.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Title:* Default Investment Alternatives under Participant Directed Individual Account Plans.

*Type of Review:* Revised collection.

*OMB Control Number:* 1210-0132.

*Affected Public:* Not-for-profit institutions, Businesses or other for-profits.

*Respondents:* 276,000.

*Responses:* 36,250,000.

*Estimated Total Burden Hours:* 192,000.

*Estimated Total Burden Costs:* \$1,842,000.

*Description:* Section 404(c) of ERISA states that participants or beneficiaries who can hold individual accounts under their pension plans, and who can exercise control over the assets in their accounts "as determined in regulations of the Secretary [of Labor]" will not be treated as fiduciaries of the plan. Moreover, no other plan fiduciary will be liable for any loss, or by reason of any breach, resulting from the participants' or beneficiaries exercise of control over their individual account assets.

The Pension Protection Act (PPA), Public Law 109-280, amended ERISA section 404(c) by adding subparagraph (c)(5)(A). The new subparagraph says that a participant in an individual account plan who fails to make investment elections regarding his or her account assets will nevertheless be treated as having exercised control over those assets so long as the plan provides appropriate notice (as specified) and invests the assets "in accordance with regulations prescribed by the Secretary [of Labor]." Section 404(c)(5)(A) further requires the Department of Labor (Department) to issue corresponding final regulations within six months after enactment of the PPA. The PPA was signed into law on August 17, 2006. The Department of Labor issued a final regulation under ERISA section 404(c)(5)(A) offering guidance on the types of investment vehicles that plans may choose as their "qualified default investment alternative" (QDIA). The regulation also outlines two information collections. First, it implements the statutory requirement that plans provide annual notices to participants and beneficiaries whose account assets could be invested in a QDIA. Second, the regulation requires plans to pass certain pertinent materials they receive relating to a QDIA to those participants and beneficiaries with assets invested in

the QDIA as well to provide certain information on request. The ICRs are approved under OMB Control Number 1210-0132, which is scheduled to expire on June 30, 2020.

The Department estimates that due to plan administrators' use of the proposed alternative safe harbor to provide disclosures to participants who currently are receiving them by mail, the cost burden will be reduced by \$8,117,000.

#### (6) Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.<sup>121</sup> The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued at 29 CFR 2520.104-20, 2520.104-21, 2520.104-41, 2520.104-46 and 2520.104b-10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements.

Further, while some large employers may have small plans, in general small

employers maintain most small plans. Thus, EBSA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). Therefore, EBSA requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

The Department has determined that this proposed rule is likely to have a significant impact on a substantial number of small entities based on the definition considered appropriate by EBSA as based on section 104(a)(2) of ERISA, as an employee benefit plan with fewer than 100 participants. Therefore, the Department provides its IRFA of the proposed rule, below.

#### (i) Need for and Objectives of the Rule

Pursuant to section 505 of ERISA, the Secretary of Labor has broad authority "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [Title I] of ERISA." As discussed earlier in this preamble, the proposed rule offers a voluntary alternative method to broaden the use of electronic delivery of disclosures and, thus, would reduce the costs and burdens that disclosures impose on employers and other plan fiduciaries responsible for their production and distribution. By reducing printing and mailing costs of covered disclosures, the proposed rule would benefit plans regardless of the size, large and small. Thus, the Department intends and expects that the proposed rule would deliver benefits to the participants of many small plans and their families, as well as many small plans themselves.

#### (ii) Affected Small Entities

The majority of private retirement plans are small plans with fewer than 100 participants. The 2016 Form 5500 filings show out of total 702,000 private retirement plans approximately 87 percent, 613,000 ERISA-covered retirement plans were small plans with fewer than 100 participants.<sup>122</sup> However, small plans cover only a fraction of total participants. In 2016, over 136 million individuals participated in private retirement plans. Out of these 136

million participants, over 12 million participants, less than 10 percent, were in these small plans. The Department estimates that slightly more than half of these 12 million participants of small plans already receive disclosures electronically. If this rule is finalized, the remaining half of participants are expected to be covered by this proposed rule, and therefore receive the notice of internet availability, and access the covered disclosures on their plan's website.

#### (iii) Projected Reporting, Recordkeeping, and Other Compliance Requirements

As discussed above, by broadening a base of participants who access covered disclosures online, the proposed rule would yield cost savings to retirement plans including small plans. These cost savings could in turn be used to defray other plan-related expenses, and thus lower the overall fees charged to participants. In addition, although not required by the proposed rule, disclosures that effectively use modern technology features can better assist participants with disabilities or limited English skills to understand the content of disclosures, which will allow them to better manage their plan accounts. Both large and small plans would benefit from the cost savings and other benefits that result from wider use of e-disclosure.

As discussed in the preamble, this proposed rule is a voluntary safe harbor. Therefore, plan administrators would not be required to make any specific disclosures available on a website. This proposed rule would simply provide an additional method for plan administrators to deliver covered disclosures to participants and beneficiaries electronically and would not change any underlying reporting, disclosure and recordkeeping compliance requirements of plans under ERISA. Therefore, the Department does not believe this proposed rule would impose any additional reporting and recordkeeping compliance requirements on small entities.

#### (iv) Duplicate, Overlapping, or Relevant Federal Rules

The proposed rule would provide retirement plans with an alternative method to furnish covered disclosures electronically. In an effort to assess how to best disseminate information electronically to workers participating in employee benefit plans without duplicating or overlapping other relevant regulatory requirements, the Department consulted with other relevant regulators, including the Treasury Department and the Securities

<sup>121</sup> The Department consulted with the Small Business Administration in making this determination as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c).

<sup>122</sup> Private Pension Plan Bulletin 2016, Employee Benefits Security Administration, Department of Labor.

and Exchange Commission. The Treasury Department has interpretive jurisdiction over certain notices relating to pension plans covered by Title 1 of ERISA, but the covered disclosures under the proposed rule are exclusively in the jurisdiction of the Department. Although the Securities and Exchange Commission has jurisdiction over the issuers of investment products that often are used as ERISA employee retirement plan investments, as well as some service providers to ERISA-covered plans, it has no jurisdiction over ERISA-covered pension plans.

#### (iv) Significant Alternatives Considered

The RFA directs the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. As discussed above, the Department expects that this proposed rule, as currently drafted, would generate significant cost savings for small plans as well as large plans by eliminating materials, printing and mailing costs.

The Department considered an option to relax the notice of internet availability by emailing the combined notice of internet availability less frequently than on an annual basis. One of the disclosures that can be included in the combined annual notice of internet availability is a Pension Benefit Statement. This pension benefit statement is required to be furnished on a quarterly basis for certain types of plans. If the combined annual notice of internet availability is to be sent less frequently than an annual basis, for example, every other year, some participants may not know their benefit statements are available online, and thus not access them for an extended period of time. In the Department's view, this can have detrimental impacts on participants' retirement savings, while resulting in only minimal cost savings. Therefore, the Department determines that the current proposal is a more balanced approach that provides sufficient protection for participants while generating substantial cost savings. The Department further determines that this current approach does not impose any undue burden on small plans nor place small plans in disadvantaged positions.

#### (7) Congressional Review Act

The proposed rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized, will be transmitted to Congress and the Comptroller General

for review. The proposed rule is a "major rule" as that term is defined in 5 U.S.C. 804(2), because it likely would result in an annual effect on the economy of \$100 million or more.

#### (8) Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal would not include any Federal mandate that the Department expects would result in such expenditures by State, local, or tribal governments, or the private sector. This is because the proposal merely would provide an alternative safe harbor for pension benefit plans subject to the ERISA to use electronic media to furnish required disclosures to participants and beneficiaries.

#### (9) Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. E.O. 13132 requires Federal agencies to follow specific criteria in forming and implementing policies that have "substantial direct effects" on the States, the relationship between the national Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final rule.

In the Department's view, these proposed regulations would not have federalism implications because they would not have a direct effect on the States, the relationship between the national Government and the States, and on the distribution of power and responsibilities among various levels of government. The Department welcomes input from affected States and other interested parties regarding this assessment.

#### List of Subjects in 29 CFR Part 2520

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor

proposes to amend 29 CFR part 2520 as follows:

### PART 2520—RULES AND REGULATIONS FOR REPORTING AND DISCLOSURE

■ 1. The authority citation for part 2520 continues to read as follows:

**Authority:** 29 U.S.C. 1021–1025, 1027, 1029–1031, 1059, 1134 and 1135; and Secretary of Labor's Order 1–2011 77 FR 1088 (Jan. 9, 2012). Sec. 2520.101–2 also issued under 29 U.S.C. 1132, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.102–3, 2520.104b–1 and 2520.104b–3 also issued under 29 U.S.C. 1003, 1181–1183, 1181 note, 1185, 1185a–b, 1191, and 1191a–c. Secs. 2520.104b–1 and 2520.107 also issued under 26 U.S.C. 401 note, 111 Stat. 788. Sec. 2520.101–5 also issued under sec. 501 of Pub. L. 109–280, 120 Stat. 780, and sec. 105(a), Pub. L. 110–458, 122 Stat. 5092.

■ 2. Add § 2520.104b–31 to read as follows:

#### § 2520.104b–31 Alternative method for disclosure through electronic media—Notice and access.

(a) *Alternative method for disclosure through electronic media—Notice and access.* As an alternative to § 2520.104b–1(c), the administrator of an employee benefit plan satisfies the general furnishing obligation in § 2520.104b–1(b)(1) with respect to covered individuals and covered documents, provided that the administrator complies with the notice, access, and other requirements of paragraphs (b) through (k) of this section, as applicable.

(b) *Covered individual.* For purposes of this section, a *covered individual* is a participant, beneficiary, or other individual entitled to covered documents and who, as a condition of employment, at commencement of plan participation, or otherwise, provides the employer, plan sponsor, or administrator (or an appropriate designee of any of the foregoing) with an electronic address, such as an email address or internet-connected mobile-computing-device (e.g., "smartphone") number. Alternatively, if an electronic address is assigned by an employer to an employee for this purpose, the employee is treated as if he or she provided the electronic address.

(c) *Covered documents.* For purposes of this section, a *covered document* is:

(1) *Pension benefit plans.* In the case of an employee pension benefit plan, as defined in section 3(2) of the Act, any document that the administrator is required to furnish to participants and beneficiaries pursuant to Title I of the Act, except for any document that must be furnished upon request.

(2) [Reserved]

(d) *Notice of internet availability*—(1) *General.* The administrator must furnish to each covered individual a notice of internet availability for each covered document in accordance with the requirements of this section.

(2) *Timing of notice of internet availability.* A notice of internet availability must be furnished at the time the covered document is made available on the website. However, if an administrator furnishes a combined notice of internet availability for more than one covered document, as permitted under paragraph (i) of this section, the requirements of this paragraph (d)(2) are treated as satisfied if the combined notice of internet availability is furnished each plan year, and, if the combined notice of internet availability was furnished in the prior plan year, no more than 14 months following the date the prior plan year's notice was furnished.

(3) *Content of notice of internet availability.* A notice of internet availability furnished pursuant to this section must contain the information set forth in paragraphs (d)(3)(i) through (vii) of this section:

(i) A prominent statement, for example as a title, legend, or subject line that reads, “Disclosure About Your Retirement Plan.”

(ii) A statement that: “Important information about your retirement plan is available at the website address below. Please review this information.”

(iii) A brief description of the covered document.

(iv) The internet website address where the covered document is available. The website address must be sufficiently specific to provide ready access to the covered document. A website address satisfies the standard in the preceding sentence if the address leads the covered individual directly to the covered document. A website address also satisfies the “sufficiently specific” standard if the address leads the covered individual to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document.

(v) A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right.

(vi) A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right.

(vii) A telephone number to contact the administrator or other designated representative of the plan.

(4) *Form and manner of furnishing notice of internet availability.* A notice of internet availability must:

(i) Be furnished electronically to the address referred to in paragraph (b) of this section;

(ii) Contain only the content specified in paragraph (d)(3) of this section, except that the administrator may include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear;

(iii) Be furnished separately from any other documents or disclosures furnished to covered individuals, except as permitted under paragraph (i) of this section; and

(iv) Be written in a manner calculated to be understood by the average plan participant. A notice that 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 satisfies the understandability standard in the preceding sentence.

(e) *Standards for internet website.* (1) The administrator must ensure the existence of an internet website at which a covered individual is able to access covered documents.

(2) The administrator must take measures reasonably calculated to ensure that:

(i) The covered document is available on the website no later than the date on which the covered document must be furnished under the Act;

(ii) The covered document remains available on the website until it is superseded by a subsequent version of the covered document;

(iii) The covered document is presented on the website in a manner calculated to be understood by the average plan participant;

(iv) The covered document is presented on the website in a widely-available format or formats that are suitable to be both read online and printed clearly on paper;

(v) The covered document can be searched electronically by numbers, letters, or words; and

(vi) The covered document is presented on the website in a widely-available format or formats that allow the covered document to be permanently retained in an electronic format that satisfies the requirements of paragraph (e)(2)(iv) of this section.

(3) The administrator must take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual.

(f) *Right to copies of paper documents or to opt out of electronic delivery.* (1) Upon request from a covered individual, the administrator must promptly furnish to such individual, free of charge, a paper copy of a covered document.

(2) Covered individuals must have the right to opt out of electronic delivery and receive only paper versions of some or all covered documents. Upon request from a covered individual, the administrator must promptly comply with such an election.

(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.

(4) The system for furnishing a notice of internet availability must be designed to alert the administrator of a covered individual's invalid or inoperable electronic address. If the administrator is alerted that a covered individual's electronic address has become invalid or inoperable, such as if a notice of internet availability sent to that address is returned as undeliverable, the administrator must promptly take reasonable steps to cure the problem (for example, by furnishing a notice of internet availability to the covered individual's secondary electronic address that is valid and operable, if available, or obtaining a new valid and operable electronic address for the covered individual) or treat the covered individual as if he or she made an election under paragraph (f)(2) of this section. If the covered individual is treated as if he or she made an election under paragraph (f)(2) of this section, the administrator must furnish to the covered individual, as soon as is reasonably practicable, a paper version of the covered document identified in the undelivered notice of internet availability.

(g) *Initial notification of default electronic delivery and right to opt out.* The administrator must furnish to each individual, prior to the administrator's reliance on this section with respect to such individual, a notification on paper that some or all covered documents will be furnished electronically to an electronic address, a statement of the right to request and obtain a paper version of a covered document, free of charge, and of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise these rights.

(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 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.

(i) *Special rule for consolidation of certain notices of internet availability.*

Notwithstanding the requirements in paragraphs (d)(4)(ii) and (iii) of this section, an administrator may furnish one notice of internet availability that incorporates or combines the content required by paragraph (d)(3) of this section with respect to one or more of the following covered documents:

(1) A summary plan description, as required pursuant to section 104(a) of the Act;

(2) A summary of material modification, as required pursuant to section 104(a) of the Act;

(3) A summary annual report, as required pursuant to section 104(b)(3) of the Act;

(4) An annual funding notice, as required pursuant to section 101(f) of the Act;

(5) An investment-related disclosure, as required pursuant to 29 CFR 2550.404a-5(d);

(6) A qualified default investment alternative notice, as required pursuant to section 404(c)(5)(B) of the Act; and

(7) A pension benefit statement, as required pursuant to section 105(a) of the Act.

(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 unforeseeable events or circumstances beyond the control of the administrator, provided that:

(1) The administrator has reasonable procedures in place to ensure that the covered documents are available in the manner required by this section; and

(2) The administrator takes prompt action to ensure that the covered

documents become available in the manner required by this section as soon as practicable following the earlier of the time at which the administrator knows or reasonably should know that the covered documents are temporarily unavailable in the manner required by this section.

(k) *Effective and applicability dates—*

(1) *Effective date.* This section shall be effective on [date 60 days after date of publication of final rule].

(2) *Applicability date.* This section shall apply to employee benefit plans on the first day of the first calendar year following [date of publication of final rule].

Signed at Washington, DC, October 16, 2019.

**Preston Rutledge,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

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