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

Subject: Electronic Disclosure by Employee Pension Benefit Plans under ERISA; RIN 1210-AB90

Greetings:

On behalf of the American Council of Life Insurers (ACLI)[1], we appreciate the opportunity to provide comments in response to the following:

1. A Proposed Rule regarding 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 Proposed Rule); and
2. A Request for Information exploring whether and how ERISA's general disclosure framework, focusing on design, delivery and content, may be made to further improve the effectiveness of ERISA disclosures.

I. The Proposed Rule

ACLI strongly supports policies that encourage and facilitate the use of modern electronic forms of communication while preserving the right of those who wish to receive paper copies to opt-out of

[1]The American Council of Life Insurers (ACLI) advocates on behalf of 280 member companies dedicated to providing products and services that promote consumers' financial and retirement security. 90 million American families depend on our members for life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, dental and vision and other supplemental benefits. ACLI represents member companies in state, federal and international forums for public policy that supports the industry marketplace and the families that rely on life insurers' products for peace of mind. ACLI members represent 95 percent of industry assets in the United States. ACLI member companies offer insurance contracts and other investment products and services to qualified retirement plans, including defined benefit pension and 401(k) arrangements, and to individuals through individual retirement arrangements (IRAs) or on a non-qualified basis. ACLI member companies also are employer sponsors of retirement plans for their own employees.

electronic delivery. Electronic disclosure should be viewed by the Department as no less effective than paper-based disclosure. Sound and reasonable electronic disclosure policies will have a direct and beneficial impact on plans, plan participants and beneficiaries, and plan sponsors.

ACLI agrees with the Department's conclusion that "technology has changed substantially since the establishment of the 2002 safe harbor, including through the use 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."[2] The Department also notes that the share of households with internet access has increased since issuance of the 2002 safe harbor – from 55 percent in 2003 to 82 percent in 2016.[3] Indeed, recent Pew Research Center data illustrates that in 2019, 90 percent of US adults use the internet, including 88 percent of adults ages 50-64 and 73 percent of adults over age 65.[4] Additionally, Americans regularly use electronic methods to access their financial information. As noted by the Department, a 2015 Federal Reserve Board survey found that 82 percent of smartphone owners with a bank account used online banking and 53 percent used mobile banking to check their balances. That report also noted the continuing increase in the adoption of mobile financial services by consumers.[5]

Given the substantial increase in the adoption of electronic communication modes since the issuance of the 2002 safe harbor, it is appropriate for the Department to re-evaluate and modernize the use of electronic media in the delivery of ERISA-required information. ACLI is appreciative of the Department's effort to implement an alternative safe harbor for disclosure through electronic media and supports the Proposed Rule's "notice and access" structure, as it properly focuses on ensuring effective participant disclosure while reducing plan administrative burdens and costs. We support the Department's rulemaking effort and offer the following comments intended to improve the effectiveness of the safe harbor and to reduce the administrative costs and burdens associated with furnishing ERISA disclosures.

Expand the Safe Harbor to Include Welfare Benefit Plan Required Disclosures

The Proposed Rule's safe harbor is available only for pension benefit plan documents and is not available for employee welfare benefit plan documents. As its basis for this restriction, the Department states in the preamble that (1) Executive Order 13847 focuses only on retirement plan disclosures; (2) 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; and (3) the Department shares interpretive jurisdiction over many health plan disclosures with Treasury Department and the Department of Health and Human Services.[6] Although we appreciate such concerns, as the Department notes, the Executive Order does not limit the Department's ability to take action with respect to employee welfare plans. The benefits of the Proposed Rule – improved disclosure/continuous access for participants and beneficiaries and cost reductions for plan sponsors – would be the same, whether applied to pension benefit plan disclosures or welfare benefit plan disclosures. Further, there are several overlapping document disclosure requirements associated with both types of plans (SPDs, SMMs, SARs). Finally, we note that the Department's

[2] 84 *Fed. Reg.* 56894, 56910 (Oct. 23, 2019).
[3] *Id.*
[4] *See* Pew Research Center, Internet Broadband Fact Sheet, June 12, 2019.
[5] "Consumer and Mobile Financial Services 2016" (Board of Governors of the Federal Reserve System, March 2016).
[6] 84 *Fed. Reg.* 56902.

April 7, 2011 "Request for Information Regarding Electronic Disclosure by Employee Benefit Plans" was not limited to retirement benefit plans and, accordingly, the Department likely has public views, comments, and suggestions on the benefits of electronic disclosure for health and welfare benefits plans.[7] Indeed, Question 4 of the RFI focuses solely on welfare benefits plans.[8]

If the Department determines that it is not yet in a position to include welfare benefit plans in this rule, we recommend that the Department consider alternatives to the complete exclusion of employee welfare benefit plan disclosures from the Proposed Rule. For example, the Department could consider including within the Proposed Rule's safe harbor required disclosures associated with "employee welfare benefit plans" as that term is defined In ERISA Section 3(1), but specifically exclude "group health plan" (as such term is defined in ERISA 733(a) disclosures - pending further study and coordination with Treasury and HHS. This alternative would appear to resolve the Department's concerns regarding pre-service claims review and access to emergency and urgent care, while allowing inclusion of other welfare benefit plans, such as disability plans, group insurance plans, or pre-paid legal services plans. We note that the Department has made this distinction before in an opposite fashion. In its Associated Health Plan rule, the Department limited its application to "group health plans" under ERISA section 733(a) and did not include all other ERISA 3(1) employee welfare benefit plans.[9]

Include a Definition of "Electronic Address"

The proposal's definition of "covered individual" provides the first use of the term "electronic address," which the safe harbor provides may be used by a plan administrator to satisfy the general furnishing obligations. "Electronic address" is not defined, although examples of what is considered to be an electronic address are found in the "covered individual" definition. We agree with the Department that an email address and an "internet-connected mobile-computing-device (e.g., "smartphone") number" are "electronic addresses." However, as the Department recognizes, there are other "electronic addresses." Americans possess a variety of devices that enable communications directly to them. It would be helpful to plan administrators and plan participants if the Department were to establish a principles-based definition as to what constitutes an electronic address. This approach would facilitate the broad use of electronic communication technologies, including texting, social media platforms, web-based applications, and also those technologies that are not yet available. ACLI suggests the following as an example of such a principles-based definition:

> *"Electronic address" means an address available through an electronic communication mechanism that permits a communication to be furnished directly to an individual, such as an email address, an internet-connected mobile-computing-device (e.g., "smartphone") number, device address or application, or other web-based or electronic platform with user notification capabilities.*

[7] 76 *Fed. Reg* 19285 (Apr. 7, 2011).
[8] *Id*. At 19288.
[9] 83 *Fed. Reg*. 28912 (June 21, 2018).

Provide Additional Flexibility in Delivering the Notice of Internet Availability

Section 2520.104b-31(d)(4) requires that the notice of internet availability be furnished electronically. Section 2520.104b-31(g) requires the initial notification of default electronic delivery and right to opt-out be provided in paper version. For continued reliance, 2520.104b-31(d)(4) requires an annual notice of "internet" availability be furnished "electronically" to "the address" described in the "covered individual" definition. Further, Footnote 60 states that the proposed safe harbor would, if adopted "supersede the relevant portions of FAB 2006-03."[10]

"Internet" - With respect to the provision s use of the term "internet," while the "internet" may be the infrastructure by which information is electronically transmitted and received, that term may be viewed as limiting. The information could be conveyed and accessible through a web-based application on a smartphone or other connected device that permits the user to access information without the need to access a website via a web browser. We recommend the final rule include more flexible language regarding the electronic medium or mediums by which the "covered individual" can access the information.

"Field Assistance Bulletin 2006-3" - With respect to the requirements associated with both the initial and subsequent Notice of Internet Availability, we recommend additional flexibility for plan administrators. Field Assistance Bulletin ("FAB") 2006-3 permits the furnishing of such a notice in a manner permitted under Internal Revenue Code section 1.401(a)-21 ("Treasury Regulation"). For ACLI members that provide administrative services to ERISA plans, many of their plan sponsor customers rely on FAB 2006-3 for the furnishing of quarterly plan benefit statements. We note that a paper approach prescribed for the initial notice is one of the approaches permitted under the Treasury Regulation. In addition to paper, the Treasury Regulation permits such notices to be made electronically when the electronic medium used to provide the notice is a medium that the recipient has the effective ability to access. The Proposed Rule should be amended to permit plan administrators the option to provide an initial notice or subsequent notices either electronically or on paper.

The guidance set forth in FAB 2006-03 and in the proposal at paragraph (g) is reasonable and has been used for more than a decade. We are not aware of any controversy regarding its use or any adverse impact on plan participants. For many plan sponsors, a shift to a paper approach for initial notices or an electronic only approach for subsequent notices will come at a cost. If the Department determines not to amend section 2520.104b-31(d)(4) to provide such additional flexibility, we urge the Department to provide at least two years from the effective date of any supersession of prior disclosure-related guidance during which plan sponsors and service providers may rely on the prior guidance to provide time to make any necessary changes to administrative systems.

"Multiple Electronic Addresses" - With respect to the phrase "the address," while it is possible that a plan administrator will have but one electronic address for a covered individual, they may have more than one. For example, a plan administrator may have a covered individual's

[10] 84 *Fed. Reg.* 56900.

email address. The administrator may also have a means to push the notification to an application on the covered individual's smartphone. When furnishing a notice of availability, the rule should permit the safe harbor to be satisfied by use of one or more "electronic addresses."

Broaden the Rule to Allow for the Direct Electronic Delivery of Documents

The Proposed Rule's "notice and access" structure focuses on providing participants with a notice of availability tied to the document being made available on a website. Section 2520.104b-31(d)(4) appears to prohibit the transmission of a participant notice concurrent with the disclosure, either as an attachment, as part of an email, or via other electronic means. We recommend that the final rule provide plan administrators with the flexibility to also directly furnish a document electronically along with a notice of availability. Allowing for direct delivery of documents electronically would further the Department s goal of improving the efficiency of disclosures, and enable participants access to important disclosure information in one step, rather than requiring an individual to read an email, text, or other notification and then requiring the individual to locate the issue-specific document on a website.

For example, in the case of Domestic Relations Order/Qualified Domestic Relations Order disclosures required under ERISA section 206, (or other event-specific disclosures), the most efficient means of electronic disclosure is likely via direct delivery of the disclosure. If the disclosure is provided as an attachment, the notification should provide a clear indication of how the covered individual may access the information (paper, website, app) if the individual is unable to access the attachment. Inclusion of a required disclosure together with a notice of such disclosure should not "obscure" the disclosure notification, nor "frustrate" the Department's goal of ensuring required disclosures are effectively furnished or that there be a clean and concise notice of availability.

Maintain ERISA's Current "Readability" Standard

Section 2520.104b-31(d)(4)(iv) includes a safe harbor within the safe harbor that includes enhanced "readability" requirements for the notice of internet availability. These requirements address sentence length, word choice, active vs. passive voice, and even include a Flesch Reading Ease test score requirement.

While we appreciate the need for these notices to be clear and concise, to gain the recipient's attention, we recommend that the Department abandon these additional requirements. We are concerned that these provisions will be viewed as a "safe harbor" for all disclosures, replacing the current and long-understood ERISA readability standard – that disclosures be "written in a manner to calculated to be understood by the average plan participant."[11] If the Department is committed to including this "readability safe harbor," the rule should be clear that the standard is limited solely to this notice and not disclosures in general. In today's litigious environment, it is likely that a lack of clarity regarding the limited application of these addition requirements would lead to increased plan administrator legal risk and liability. Thus, if the Department is unwilling to

[11] *See* ERISA Section 102(a).

strike the "readability safe harbor," striking the first sentence in this section would decouple the ERISA standard from this readability safe harbor, avoiding the inference that this safe harbor extends beyond this rule.

Revise the "Supersession" Requirement

Section 2520.104b-31(e)(2)(ii) requires a covered document to remain on the website until it is superseded by a subsequent version of the covered document. While this provision makes sense for certain basic disclosures (such as the 404a-5 participant disclosure notice) it does not make sense for other "event based" notices that may become irrelevant after a certain period of time (such as a blackout notice). We recommend that the Department amend this provision to require that a covered document remain available on the website until it is either (1) superseded by a subsequent version of the covered document or (2) determined by the plan administrator to no longer have continued relevance.

Clarify the Severance of Employment Provision

Section 2550.104b-31(h) requires that, at the time an employee severs employment, the plan administrator must take measures "reasonably calculated" to ensure the continued accuracy of the individual's electronic address, or obtain a new electronic address that enables receipt of covered documents following severance from employment. We note that the Proposed Rule includes, within section 2550.104b-31(f)(4), specific requirements applicable to the plan administrator if it is alerted that an individual's electronic address has become invalid or inoperable. We recommend that the Department clarify that the measures included within section (f)(4) are the measures "reasonably calculated" to ensure the electronic address of an individual who severs from employment remains accurate.

Clarify the Paper Delivery/Opt-Out Requirement

Section 2550.104(f)(2) provides that covered individuals must have the right to opt out of electronic delivery and receive only paper versions of *some or all* covered documents (emphasis added). This infers that a covered individual may pick and choose which disclosures he/she wants to receive electronically or on paper. This "pick and choose" approach is unusual in the financial services industry and will increase – not reduce – the costs and burdens associated with the furnishing of ERISA-required disclosures. While some administrators may have administrative systems to support such an individually tailored request, not all do. ACLI members urge this be amended by striking "some or all" in paragraph 2550.104(f)(2). This would provide that, at a minimum, an administrator must provide all covered documents in paper in response to an election to opt out of electronic delivery. It would also give administrators the flexibility to offer a tailored approach for each covered individual. We note that section 2550.104(d)(3)(vi) requires every notice of internet availability include "a statement of the right to opt out of receiving covered **documents** electronically, and an explanation of how to exercise this right." (emphasis added). That section refers to "covered documents" and not a single, individual covered document. As such, deleting "some or all" from section 2550.104(f)(2) is consistent with the plural use of "documents" in section 2550.104(d)(3)(vi).

Modify the Notice Consolidation Provision

Section 2550.104(i) provides that a plan administrator may provide one notice of internet availability for one or more of specifically listed covered documents, including "an-investment related disclosure, as required pursuant to 29 CFR 2550.404a-5(d)." It is unclear why the plan related information required under 29 CFR 2550.404a-5(c) is excluded. From a practical perspective, it is unclear why plan administrators would be able to include the required investment-related 404a-5 information in a consolidated notice, but not the plan-related 404a-5 information. We recommend the Department modify this provision to allow for the consolidation of "the disclosure as required pursuant to 29 CFR 2550.404a-5."

Modify the Applicability Date

The new safe harbor would be effective 60 days after date of publication of a final rule, and applicable to employee benefit plans on the first day of the first calendar year following the final rule's publication date. The proposed safe harbor is voluntary. We agree with the Department that the Proposed Rule will result in an increase in participant disclosure effectiveness and a reduction in plan administrator costs and burden. While, as a practical matter, many plans, especially those with calendar year plan years, may not be in a position to comply with and take advantage of the safe harbor on its effective date, there need be no delay in the rules applicability once effective, especially for those that can be in a position to take advantage of the rule on the date. Therefore, we recommend that the applicability date be the same as the effective date – 60 days after the date of publication of a final rule.

IRS/Treasury Should Quickly Adopt Electronic Disclosure Rules That Align with the Department's Final Rule

Executive Order 13847 applies to disclosures required under ERISA and the Internal Revenue Code. Further, the Department states in the preamble that the Proposed Rule "is intended to align with Treasury's electronic media regulation."[12] Given that some retirement plan notices are required under ERISA, and thereby covered by the Proposed Rule, while others are required under the Internal Revenue Code, and thereby not covered by the Proposed Rule, is essential that IRS/Treasury quickly adopt electronic media disclosure requirements consistent with those adopted by the Department. The ability to consolidate certain notices required under ERISA and the Internal Revenue Code is significantly impacted by the maintenance of two separate electronic media disclosure standards and places a significant burden and cost on plan administrators. We urge the Department to encourage Treasury/IRS to act quickly to implement an electronic disclosure regime that aligns with the Department's proposal.

[12] 84 *Fed. Reg.* 56901.

II. The Request for Information

As the Department notes, Executive Order 13847 called on the Department to explore not only reducing benefits 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. ACLI concurs with the Department's conclusion that the proposed electronic delivery safe harbor, would, without more, substantially respond to both prongs of the Executive Order, including the directive pertaining to improving the effectiveness of plan disclosures.

Nonetheless, ACLI appreciates the Department's inclusion of additional questions regarding the effectiveness of ERISA's disclosures. We recommend that, in addition to consideration of the responses to this RFI, the Department implement a direct consumer testing program to learn, directly from ERISA disclosure recipients, if the current disclosure regime is effective and how it can be improved. The SEC's Office of Investor Advocate recently completed extensive consumer financial disclosure testing in connection with new disclosure form CRS. We recommend that the Department review the final report, available at www.sec.gov/rules/final/2019/34-86032.pdf for guidance in developing its own participant testing program.

Several of the RFI questions relate to whether the Department should impose additional requirements on ERISA disclosures, such as readability, design, format, or website feature requirements. We recommend that the Department not impose these types of restrictions. Plan administrators are best positioned to understand how best to tailor disclosures based on the plan's demographics.

Finally, with respect to current required disclosures that may be obsolete or duplicative, we submit that, with respect to defined contribution plans, the Summary Annual Report is outdated and provides little meaningful information. The plan's Form 5500, which the SAR purports to summarize, is readily available in the Department's EFAST2 system.

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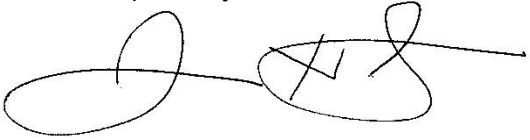
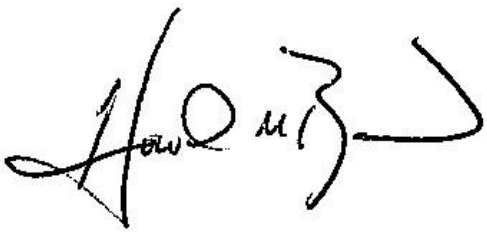
On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the Department.

Respectfully,





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