

November 22, 2019

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

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

Dear Assistant Secretary Rutledge:

The American Retirement Association (ARA) appreciates this opportunity to comment on a proposed regulation under Section 104 of the Employee Retirement Income Security Act of 1974 (ERISA) regarding a new additional safe harbor for the use of electronic media by employee benefit plans to furnish information to participants and beneficiaries (“Proposal”). This is an issue that is of great importance to the ARA and its members and we look forward to working with the Department of Labor (DOL) in this rulemaking process. We are separately submitting responses today to the DOL’s related request for information seeking views on additional ways to enhance the usefulness and effectiveness of ERISA disclosures.

The American Retirement Association (ARA) is a national organization of more than 26,000 members dedicated to expanding access to workplace retirement savings plans for America’s workers and who provide a wide variety of services to American employers and sponsors of retirement plans, including investment advice, retirement plan consulting and administrative services. ARA members are a diverse group of plan sponsors and retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is comprised of five premier retirement industry associations; the American Society of Pension Professionals & Actuaries (ASPPA), the ASPPA College of Pension Actuaries (ACOPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), and the Plan Sponsor Council of America (PSCA).

Introduction

The ARA and its underlying affiliate organizations have long been supportive of the DOL’s initiatives concerning electronic delivery of ERISA disclosures. We previously have recommended to the DOL that electronic disclosure be the default method of communication with ERISA plan participants and beneficiaries. The ARA supports the principle that informs the Proposal: to make disclosures more readily accessible and useful for America’s workers and allow electronic retirement plan disclosures that reduce administrative expenses which are ultimately borne by plans and participants. Our hope is that wider use of electronic disclosure will be facilitated by a new safe harbor. We also believe that the Proposal is consistent with the President’s August 2018, Executive Order¹ instructing the DOL to review whether agency

¹ Executive Order on Strengthening Retirement Security in America, No. 13847 (Aug. 31, 2018).

actions could improve the effectiveness of disclosures and reduce their cost to employers, which in effect promotes retirement security by expanding access to workplace retirement plans, a principal focus of the ARA. The Executive Order also emphasizes that reducing the number and complexity of ERISA notices and disclosures currently required would ease regulatory burdens.

The expertise and experience of the ARA's members is relevant to issues raised by the Proposal and we believe that we can provide meaningful input to the DOL. We are providing comments on the Proposal and, in context, responses to requests for comments that appear in the preamble. We are also providing a link (below) to an update of a 2011 study: "2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery," a White Paper by Professor Peter P. Swire and DeBae Kennedy-Mayo the updating of which the ARA and the Investment Company Institute sponsored.² As detailed in the updated report, by 2011, there were compelling reasons to shift the default method to electronic delivery for holders of defined contribution plan accounts, rather than rely on outmoded paper delivery systems. The 2018 update concludes that the reasons to shift to electronic delivery have become even stronger during the intervening seven years.

Discussion

The Proposal makes it clear that the DOL is seeking to make retirement plan disclosures required under ERISA more understandable and useful for participants and beneficiaries, while reducing administrative burdens imposed on employers and other plan fiduciaries responsible for their production and distribution as well as reducing costs ultimately borne by plans and participants. At the same time, the DOL wants to protect individuals who prefer paper documents or lack access to the internet. The ARA believes that these goals are not mutually exclusive and that an appropriate balance can be found.

At the outset, we want to emphasize that we believe it is important to keep in mind the goal of an expanded unified electronic delivery standard across all relevant agencies. The ARA believes that it is critically important that the DOL coordinate with the Department of the Treasury and the Pension Benefit Guaranty Corporation in developing a uniform approach that can be used for all required disclosures in an ERISA-covered plan. It may be confusing for individuals to receive documents in inconsistent formats or through multiple media, for example, when combining required disclosures is logical, as with combined QDIA and EACA notices, for example.

New Additional Safe Harbor

The ARA supports the DOL's approach in the Proposal of adding an additional safe harbor for electronic disclosure rather than replacing the current safe harbor for the use of electronic media at 29 CFR 2520.104b-1(c). Preferred compliance methods will vary among plans and we believe that the flexibility afforded by alternative safe harbors will be welcomed by plan sponsors. The same may be said for the safe harbors under Field Assistance Bulletin 2006-03 for delivery of participant statements and Field Assistance Bulletin 2008-03 for delivery standards when furnishing a QDIA notice. The ARA believes that removing existing delivery options would not serve the policy goals of reducing costs and burdens imposed on plans and participants and making disclosures more understandable for participants and beneficiaries. Finally, in those situations where an employer transitions to the new safe harbor to meet its disclosure obligations, we suggest that employers not be required to provide paper copies of the notice of default

² Available at

www.asppa.org/sites/asppa.org/files/PDFs/White%20Papers/2018%20Update%20to%20Delivering%20ERISA%20Disclosure%20for%20DC%20Plans.pdf

electronic delivery and right to opt out under Prop. Rul. 2520.104b-31(g) (Initial Notice) to employees who currently receive electronic disclosures under the existing safe harbor. We believe that the employee's existing affirmative consent to receive disclosures electronically ought to mean that electronic delivery of the Initial Notice suffices. In other words, we do not think that participants who are "wired at work" and who have agreed to receive disclosures electronically should have to be furnished paper copies of the Initial Notice.

Additionally, in the preamble to the Proposal, the DOL invites comment on whether a technical amendment to the existing regulation for the purpose of directing readers to the new safe harbor is warranted. The DOL also asks whether, in the absence of such a cross-reference, affected parties would know about the additional safe harbor. The ARA believes that such a cross-reference would be non-controversial and will help plan sponsors and retirement plan professionals navigate compliance alternatives for meeting their ERISA disclosure obligations. Moreover, such a cross-reference would not pose foreseeable harm to plans and participants.

Specific Provisions

The Proposal reflects the DOL's effort to fulfill the Executive Order's call for improved effectiveness of ERISA disclosures and reduced costs. We believe the DOL's approach of sending an initial paper notice of the right to opt to paper as reinforced by including an opt out right in each notice of internet availability (Notice of Availability) is appropriately protective of people who prefer paper disclosures.

It is clear that the DOL expects that some participants and beneficiaries will prefer to receive paper copies of their ERISA disclosure documents and that the opt-out provisions of the Proposal are designed to accommodate this preference. The ARA supports the availability of a global opt-out and the right of participants to receive a paper copy of a particular disclosure upon request. The ARA believes, however, that opt-outs should, indeed, be global – that the choice to opt-out should apply *in toto* to all required notices and disclosures furnished to a particular individual. We do not believe that participants should be permitted to choose a blend of some electronically-delivered documents and some paper ones. Nearly three-quarters of respondents to our recent survey of plan sponsors (described in more detail below) expressed a preference for a single delivery method for all notices over a regime that could allow for certain notices to be electronic and other notices to be paper. Finally, we believe that an a la carte disclosure system would be overly burdensome for plan sponsors and not needed when employees can receive paper copies of documents appearing on a website.

Our conclusions are drawn in part from a "flash poll" recently conducted by the PSCA, part of the ARA, of its plan sponsor members over a ten-day period (November 10–November 20, 2019) to get a sense of their perspective regarding the Proposal. While the sampling was limited, we received responses from 56 plan sponsors, representing a variety of plan and participant demographics; approximately a third (35%) had \$50 million in plan assets or less, 21% had between \$250 million and a billion in assets, and a third (32%) represented plans with more than \$1 billion in assets. Nearly all (97%) of responding employers felt that providing participants (with a valid email address) with an initial paper disclosure that states they agree to receive some or all future disclosures via electronic format was sufficient to protect the ability of participants to receive paper disclosures. With regard to a website where participants could access required documents, the majority of plan sponsors already had that type medium available, either in-house (70%) or via their provider (62.5%) – and many had both. This was more common among larger plans than smaller employers, however. A majority of survey respondents (72.5%) expressed a preference for a single delivery method for all notices, 17.5% favored allowing the participant to

choose, as written in the proposed rule, and the remaining 10% preferred to retain the ability to determine a delivery medium for individual notices.

“Notice and Access” Approach

The ARA supports the Proposal’s “notice and access” approach to electronic disclosures. It provides an efficient way for plan administrators to satisfy their document and disclosure obligations by posting required disclosures on a website and furnishing an electronic Notice of Availability. While the ARA supports protecting the rights of participants who prefer paper disclosures, we believe there are compelling reasons to permit electronic delivery to be the default method for ERISA disclosures. Many government functions (including the Social Security Administration), and commercial enterprises (including many banks and health care organizations) have defaulted to electronic delivery, heightening awareness of the electronic medium more than ever before. Further, we are aware of data supporting the view that the majority of plan participants prefer electronic delivery. For example, Greenwald & Associates found 84 percent of plan participants “were agreeable” to making electronic delivery, with a free option to opt-out, the default delivery option.³ Participants also may benefit from visiting their plan’s website, simply by being re-directed from a link on a disclosure or via the website to access disclosures, where they often may take advantage of plan information or financial education, things which may improve their retirement readiness.

As discussed in the preamble to the Proposal, through technology, a notice and access framework facilitates, among other things, engagement monitoring. But the ARA does not believe that employers should be required to ensure that participants have received the Notice of Availability. Rather, these notices should be subject to existing standards for furnishing required ERISA documents, which regardless of delivery method, require a reasonable certainty of receipt. That is, current rules do not require employers to determine whether someone has opened a document or read it. Rather, plans must use delivery methods reasonably calculated to ensure actual receipt of the required information. This is the same standard contained in the Proposal and we believe it is appropriate. The ARA believes requiring employers to ensure that a required document is received and read – when this has not been required for paper documents -- would surely substantially increase cost, time and liability for plan fiduciaries.

Technical Neutrality and Innovation

The Proposal relies heavily on e-mail addresses and access to a website. We support this approach but also recognize that the pace of technological advances is swift and reliance on hand held devices in particular is on the increase. As such, the ARA believes that the Proposal should provide for future incorporation of technological developments in a manner that will not automatically require additional rulemakings. That is, regulatory language should flexibly accommodate inevitable advancements in technology through a standards-based approach. The rule should be written to promote objectives rather than narrowly defining how the website must operate (steps from log in to notice for example). To this end, we believe that any electronic form of disclosure should be permitted so long as specified qualitative criteria are met, similar to those found, for example, in the bipartisan RETIRE Act, H.R. 4610, introduced in the 115th Congress (i.e., the method should be designed to result in effective access, notice should be provided if relying on a posted document, the method is reasonably calculated to ensure actual receipt and protect the confidentiality of personal information). Further, security and log in

³ As reported in “Improving Outcomes with Electronic Delivery of Retirement Plan Documents,” prepared for the SPARK Institute (June 2015) p. 20, at https://www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf

procedures should be subject to a reasonable or prudent standard rather than dictated by specifics set forth in a regulation that may become outdated.

We believe that the standards for the website in subsection (e) of the Proposal should apply regardless of the type of technology the participant uses to access the disclosure. In other words, different types of mobile computing devices or technologies do not warrant different conditions for ensuring that participants can receive, review and take appropriate action on disclosures. The ARA suggests that the language of subsection (e) of the Proposal setting forth the standards for a website be broadened to include technologies other than a website.

The Proposal also requires administrators to take measures reasonably calculated to protect the confidentiality of personal information, the same standard that applies under the current safe harbor for e-delivery. Since the “notice and access” approach does not increase the risk of a data breach as compared to the approach used in existing safe harbors, we believe the approach taken by the DOL in the Proposal is appropriate for protecting personal data of plan participants and beneficiaries.

Finally, given the pace of technological change and the increased reliance on hand held devices, the ARA also encourages the DOL to allow plans to rely on the new safe harbor when delivering documents via e-mail (for example, by attaching a PDF document to a Notice of Availability). While it is very common for participant-directed 401(k) plans to maintain a website for participants, not all ERISA plans do so. Allowing the use of email (and applying the same standards that would apply for use of a website) would allow ERISA plans of all sizes and types to rely on the new safe harbor. This flexibility would also be helpful when participants may have inadvertently not been furnished a Notice of Availability.

Special Rules

The Proposal’s special provision applicable to terminated vested participants demonstrates the DOL’s awareness that unique issues sometimes arise after severance from employment. If the email address being used by a terminated employee is not one assigned by their employer, ARA believes that there would not be a need to update it. If the email address in question was an employer assigned e-mail address then the language in the safeguard found in subsection (f)(4) of the Proposal, which requires administrators to have a system in place to alert participants of an invalid email address and to take steps to cure it, appropriately addresses this issue. The ARA shares the view that severance from employment should not interrupt a covered individual’s access to ERISA information if they continue to participate in the plan. The safeguard found in subsection (f)(4) of the Proposal, would work in the context of a severance from employment and ensure a seamless transition with respect to the dissemination of ERISA plan information. Accordingly, we recommend that the special rule under subsection (h) of the Proposal be eliminated as unnecessary.

The Proposal also provides that the plan administrator will not fail to be in compliance with the safe harbor if the covered documents become temporarily unavailable due to unforeseeable events or circumstances beyond the control of the plan administrator, provided the plan administrator has procedures in place to ensure the documents are available and the plan administrator takes acts promptly to cure any unavailability as soon as practicable following knowledge of the problem. The ARA believes that the approach taken by the DOL to address this reality of modern times strikes the right balance. Moreover, in cases of urgency, plans have alternative means to satisfy their obligations under ERISA’s disclosure rules, such as providing paper copies.

Covered Documents and the Required Notices

The ARA believes that the documents covered by a final rule should not be limited to a list of specified required disclosures. Rather, the scope of documents covered by the regulation should include both required notices and those that are available upon request. In other words, we support the DOL's inclusion of all documents required to be delivered under Title I of ERISA, whether upon request or automatically.

Although the Proposal generally envisions providing a new Notice of Availability in connection with each new covered notice posted on a website, the Proposal permits certain regular recurring disclosures to be described in a single notice, to be provided annually. Specifically, the plan administrator may announce the availability of the certain required disclosures in a single Notice of Availability provided once within a 14-month period

Similar to the views we expressed regarding the scope of documents covered by the Proposal, we believe in a principles-based approach to which documents may be consolidated in a single Notice of Availability. The list provided in the Proposal could serve as examples of the types of recurring disclosures that are appropriate for consolidated presentation. This approach would allow certain disclosures required today that arguably should have been included in the list (for example, plan-related information or the explanation of fees required under 404(a)(5)) to be included. It would also allow annual disclosures that may be contained in future rulemaking to be included without the need for a conforming amendment to the safe harbor. Finally, providing the plan administrator with 14 months in which to announce the availability of the consolidated disclosures strikes the right balance of interests and generally is a process already imbedded in record keeping systems.

In the experience of ARA members, there are circumstances in which the relevance of superseded ERISA disclosure documents wanes as well as cases in which a document is never outdated. For documents that may be superseded, we recommend that a "time certain" be identified for maintaining them (for example, one year from its expiration). For documents of ongoing relevance, we suggest that the maintenance on a website until superseded by a minimum standard be required by a final rule.

Finally, the ARA supports the development of a model for the Initial Notice. Many plan sponsors appreciate the certainty provided by model notices. We also believe that any model notice should not include elements that are likely to change with technology. On the other hand, we do not believe that a model notice for each Notice of Availability required by subsection (d) of the Proposal would be quite as useful. Based on the content of the Notice of Availability, these will sufficiently vary from plan to plan that a model notice will be of limited utility and even confusing to plan administrators. Last, the ARA requests additional guidance regarding the meaning of the required content of a "brief description of the covered document" as required by subsection (d)(3)(iii) of the Proposal.

Applicability Date

Because the safe harbor is voluntary, the ARA believes that there is not a need for a transition period prior to general applicability. The rule should be effective and applicable as soon as the date of publication in the Federal Register, or have an applicability date paralleling the effective date (60 days after publication of a final rule). If, however, the DOL does not agree to maintain the guidance under FAB 2006-03 or 2008-03, the ARA respectfully requests a sufficient

transition period following the effective date of a regulation in order to implement necessary changes.

Conclusion

The ARA very much appreciates the DOL's commitment to reducing the costs and burdens imposed on employers by ERISA's disclosure requirements as well as to making retirement more understandable for participants and beneficiaries. We believe that these steps support our shared goal of expanding access to workplace retirement savings plans for America's workers. The ARA looks forward to working with the DOL on these important issues.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob, Esq.
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