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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: Final rule.

SUMMARY: The Department of Labor is adopting in this document a new, additional safe harbor for employee benefit plan administrators to use electronic media, as a default, to furnish information to participants and beneficiaries of plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The rule allows plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that certain disclosures will be made available on a website, or to furnish disclosures via email. Individuals who prefer to receive disclosures on paper can request paper copies of disclosures and opt out of electronic delivery entirely. The Department expects the rule to enhance the effectiveness of ERISA disclosures and significantly reduce the costs and burden associated with furnishing many of the recurring and most costly disclosures. In addition to benefiting workers, this rule will immediately assist employers and the retirement plan industry as they face a number of economic challenges due to the COVID-19 emergency, including logistical and other impediments to compliance with ERISA's disclosure requirements.

DATES: *Effective date*: The final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: The final rule is applicable on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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) *Original 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.[1] Plan administrators must use delivery methods reasonably calculated to ensure actual receipt of information by participants, beneficiaries, and other individuals.[2] For example, in-hand delivery to an employee at his or her workplace is acceptable, as is material sent by first class mail. In response to developing internet, email, and similar technologies, the Department of Labor (Department) first amended ERISA's delivery standards in 2002 by establishing a safe harbor for the use of electronic media to furnish disclosures (the 2002 safe harbor).[3] The 2002 safe harbor was not

[1] *See* 29 CFR 2520.104b-1.
[2] *See* 29 CFR 2520.104b-1(b)(1).
[3] *See* 29 CFR 2520.104b-1(c).

and is not the exclusive means by which a plan administrator may use electronic media to satisfy the general standard. However, plan administrators who satisfy the conditions of a 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, applies only to two categories of participants and beneficiaries: first, employees who are "wired at work" – those with the ability to effectively access electronic disclosures at any location where they are reasonably expected to perform their employment duties and for whom access to the employer's electronic information system is an integral part of those duties; and second, individuals entitled to documents under Title I of ERISA who do not fit into the first category, but who affirmatively consent to receive documents electronically. The 2002 safe harbor also specifies additional requirements that must be satisfied in order to furnish ERISA disclosures electronically. The preamble to the Department's proposal of this regulation included a comprehensive summary of the 2002 safe harbor's requirements.[4] As explained in detail below, the new, additional safe harbor adopted today does not supersede the 2002 safe harbor; the 2002 safe harbor remains in place as another option for plan administrators.

In addition to the 2002 safe harbor, the Department occasionally has issued interpretive guidance allowing different electronic delivery methods in limited circumstances. For example, Field Assistance Bulletin 2006-03 (FAB 2006-03) allows plan administrators who meet specified criteria to provide continuous website access to pension benefits statement information required by ERISA section 105.[5] Similarly, Field Assistance Bulletin 2008-03 (FAB 2008-03), which provides supplementary interpretive guidance on the Department's qualified default investment

[4] 84 FR 56894, 56895 (Oct. 23, 2019).
[5] Field Assistance Bulletin No. 2006-03 (Dec. 20, 2006).

alternative (QDIA) regulation,[6] allows plan administrators who want to send required QDIA notices electronically to rely on either the Department's 2002 safe harbor 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.[7] The impact of this final rule on these Field Assistance Bulletins and other interpretive guidance is discussed below, in the section titled "*Transition Issues*."

(2) *Regulatory Background*.

The Department is issuing a final rule today following an extensive and thorough evaluation not only of the public record for this regulatory initiative, but also of other agencies' disclosure rules; economic and policy research concerning electronic disclosure; and information submitted by, and recommendations of, a variety of stakeholders. This evaluation has been ongoing, as electronic disclosures and modes of delivery have developed over time and as the Department over the years has released additional disclosure requirements and interpretive guidance following issuance of the 2002 safe harbor. The Department consistently receives feedback about compliance with the 2002 safe harbor and suggestions for how the safe harbor could be improved, sometimes in response to other regulatory projects, sometimes in response to ERISA Advisory Council proceedings, and otherwise. A first formal step, however, was the Department's 2011 publication of a Request for Information (RFI) Regarding Electronic Disclosure[8] in response to Executive Order 13563, "Improving Regulation and Regulatory

[6] *See generally* 29 CFR 2550.404c-5.
[7] *See* Field Assistance Bulletin No. 2008-03, (Q&A7), quoting 72 FR 60458 (Oct. 24, 2007).
[8] 76 FR 19286 (Apr. 7, 2011).

Review," issued on January 18, 2011.[9] The RFI asked 30 questions soliciting views, suggestions, and comments from employee benefit plan stakeholders, their representatives, and the general public on whether and how to expand or modify the 2002 safe harbor. The Department carefully evaluated responses to this RFI to better understand the benefits, challenges, and costs of electronic delivery and other disclosure-related issues.[10]

Since publication of the 2011 RFI, the Department has analyzed whether there are more effective ways to regulate the disclosure and delivery of information to ERISA plan participants and beneficiaries. Stakeholders routinely ask the Department to recognize ongoing changes in technology, as some other federal agencies have done, and to take advantage of those changes by updating and modernizing ERISA's electronic delivery standards in the 2002 safe harbor. The Department has had numerous discussions with staff of other federal government agencies after reviewing their guidance and standards for electronic delivery of required information, including the Treasury Department, IRS, and the Securities and Exchange Commission (SEC). The preamble to the Department's proposed regulation discussed at length the Department's review of these agencies' guidance, all of which informed the Department in publishing the proposed rule, as did standards and practices of the Social Security Administration, the Comptroller of the Currency, and the Federal Thrift Savings Plan (TSP).[11] Commenters agreed that it is important for the Department to continue coordinating with other agencies, especially the Treasury Department, IRS, and SEC.[12] Plan administrators and service providers may have to comply

[9] *See* 76 FR 3821 (Jan. 21, 2011). The Executive Order stresses the importance of achieving regulatory goals through the most innovative and least burdensome tools available.
[10] The Department received approximately 78 comments on the 2011 RFI, which are available at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50*.
[11] 84 FR 56894, at 56897 *et seq*.
[12] One commenter recommended that the Department coordinate with the Federal Communications Commission (FCC) to ensure that the use of smartphones to comply with this rule will not conflict with FCC guidance. The FCC

with other federal and state requirements in administering their plans, and commenters therefore encouraged as much coordination as possible to limit the regulatory burden that may result from inconsistent standards.

The Department also met with stakeholders and reviewed recent studies and policy and economic analyses concerning disclosure practices, as well as changes in internet access and usage across different populations. Entities such as the ERISA Advisory Council[13] and the U.S. Government Accountability Office[14] also have made recommendations to the Department concerning possible changes to ERISA's electronic delivery rules to improve participants' disclosure experience and reduce administrative burdens. And the Department continues to closely monitor Congressional interest in expanding the use of electronic media for ERISA disclosures.[15]

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was included as part of the Executive Order 12866 review process and raised no objection to the requirements of this final rule.

[13] *See, e.g.*, *Mandated Disclosure for Retirement Plans - Enhancing Effectiveness for Participants and Sponsors*, ERISA Advisory Council (Nov. 2017); 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*; 2007 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*; and 2006 ERISA Advisory Council Report Working Group on Prudent Investment Process, at *https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2006-prudent-investment-process*.

[14] *See* GAO-14-92, Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved, p. 40, GAO (Nov. 2013), *https://www.gao.gov/assets/660/659211.pdf*.

[15] For example, the Setting Every Community Up for Retirement Enhancement Act of 2019, enacted December 20, 2019, Pub. L. 116-94 ("SECURE Act"), reflects Congressional interest in expanding electronic delivery of ERISA disclosures and other information. Specifically, section 101(c) of the SECURE Act, which amended section 3 of ERISA, requires the terms of a pooled employer plan to provide that certain disclosures and other information may be provided in electronic form. *See also* 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 web site for a participant or beneficiary who has access to the web site"); Secretary of Labor's 2018 Testimony before the Senate Appropriations Subcommittees on Labor, Health and Human Services, Education, 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*; and 2017 and 2018 legislative activity concerning the Receiving Electronic Statements to Improve Retiree Earnings Act (RETIRE) Act, at H.R. 4610 (Dec. 11, 2017) and S. 3795 (Dec. 19, 2018).

A final important development, prior to the Department's issuance of the proposed regulation in October 2019, was the President's issuance of Executive Order 13847 on August 31, 2018.[16] In relevant part, the Order instructed the Department, in consultation with the Treasury Department, to review whether regulatory or other actions could be taken to improve the effectiveness of required disclosures and ease the costs and regulatory burdens given the number and complexity of ERISA notices. In compliance with the Order, the Department worked with Treasury Department staff throughout the regulatory process and, within the required one-year period, completed a review of actions that could be taken "to make retirement plan disclosures required under ERISA 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."[17] The Order directed that the Department consider proposing appropriate regulations or other guidance, if a determination is made that action should be taken. The Department's proposed regulation, issued October 23, 2019 and finalized herein, directly responds to the mandate set forth in Executive Order 13847.[18]

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[16] E.O. 13847, *Strengthening Retirement Security in America*, 83 FR 45321 (Sept. 6, 2018).
[17] *Id*.
[18] A few commenters suggested that the proposed regulation inadequately responded to the Executive Order 13847, because the proposal focused on delivery, as opposed to other methods of improving the effectiveness of disclosures. The Department does not agree with these commenters. At the outset, the Executive Order does not require the Department to issue any proposed or final rule, but only to review policies and, if warranted, "consider proposing appropriate regulations or guidance." *Id.* section 2(c). The Executive Order also does not create any enforceable rights against the Department. *See id.* section 3(c). Regardless, the Department is confident that the new safe harbor substantially responds to both prongs of the Executive Order. As discussed in the Regulatory Impact Analysis section of this document, a notice-and-access framework will significantly reduce plan costs. Further, 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, even though this rule does not mandate such practices. These features may be used to improve participants' and beneficiaries' disclosure experiences. Further, the RFI (published with the proposed rule) solicited information, data, and ideas on additional measures (beyond the electronic delivery safe harbor in 29 CFR 2520.104b-31) that the Department could take in the future (either as part of finalizing the proposal in this document, or a separate

In the preamble to the proposal, the Department described in detail the standard of the Treasury Department and the IRS for notices using electronic media, which was issued in 2006 at 26 CFR 1.401(a)-21.[19] Affected parties, including the ERISA Advisory Council, had previously encouraged the Department to allow plan administrators to rely on this standard, which they generally interpret as more flexible than the Department's 2002 safe harbor, when furnishing ERISA disclosures.[20] The Department has, in limited circumstances and pursuant to temporary guidance, allowed plan administrators to rely on the Treasury Department's electronic media regulation for applicable notices at 26 CFR 1.401(a)-21(c) as an alternative to reliance on the 2002 safe harbor.[21] In light of Executive Order 13847 requiring consultation with the Treasury Department, the preamble to the proposal explained that the Department's new proposed safe harbor was intended to align with the Treasury Department's electronic media regulation. The Department invited interested parties to share their views on whether this objective is desirable and what other steps might be needed to achieve it. Commenters consistently took the position that it was unclear whether an "intention to align" meant that a plan administrator's use of the notice-and-access framework in the proposal for Code disclosures would satisfy the applicable Treasury Department electronic media regulations. Commenters encouraged the Department to obtain confirmation of this position from the Treasury Department

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regulatory or appropriate guidance initiative) to improve the effectiveness of ERISA disclosures, especially with respect to design and content of ERISA disclosures.

[19] 84 FR 56894 at 56897, 56898.

[20] 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-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-levine-and-winters-written-statement-06-07.pdf.*

[21] *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] 1.401(a)-21, as good faith compliance with the requirement to furnish pension benefit statements to participants and beneficiaries" under ERISA.

to eliminate any uncertainty.[22] The Department provided these comments to the Treasury Department for its consideration. The Treasury Department and the IRS have indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices. This final rule is considered to be an Executive Order 13771 deregulatory action. Details on the estimated cost savings of this final rule can be found in the Regulatory Impact Analysis, below.

(3) ***Purpose of Regulatory Action*.**

The Department's principal objective in finalizing this rule is to carefully update, based on a comprehensive public record, ERISA's electronic delivery rules for required disclosures to better leverage ongoing improvements in online and mobile-based technology and communications and to provide a structure that will be appealing to, and workable for, today's workers. In doing so, the Department believes the framework of this final rule strikes an appropriate balance between competing policy goals – on the one hand taking advantage of the innovations and reduced costs that may be achieved through enhanced use of electronic communication, and on the other hand ensuring suitable safeguards for participants and beneficiaries who may be less ready to move to electronic communication (or who simply prefer paper).

The final rule reflects the Department's reliance on a wide variety of sources of evidence concerning individuals' access to, and use of, electronic media in the United States:

[22] A few commenters suggested that the Treasury Department also should explicitly adopt a notice-and-access framework. The Department provided these comments to the Treasury Department for its consideration.

- A 2019 survey found that 90 percent of U.S. adults use the internet, representing a substantial increase from 2000 when 52 percent of U.S. adults reported using the internet.[23]
- A 2017 survey by the U.S. Census Bureau estimated that 87 percent of the U.S. population lives in a home with a broadband internet subscription.[24]
- A 2019 survey found that among non-broadband users, 45 percent cite their smartphone as a reason for not subscribing to high-speed internet service at home.[25]
- A 2018 study concluded that 93 percent of households owning defined contribution accounts had access to, and used, the internet in 2016.[26]
- 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.[27]
- A 2015 report observed 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

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[23] Monica Anderson, Andrew Perrin, et al, *10% of Americans don't use the internet. Who are they?*, Pew Research Center (Apr. 22, 2019). Available at *https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/*.

[24] "Types of Internet Subscriptions by Selected Characteristics," U.S. Census Bureau American Community Survey 1-Year Estimates (Table S2802) (2017).

[25] *See* Monica Anderson, *Mobile Technology and Home Broadband 2019*, Pew Research Center (June 13, 2019), *https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2019/06/PI_2019.06.13_Mobile-Technology-and-Home-Broadband_FINAL2.pdf*.

[26] 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., *See Also* ICI Research Perspective, "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2018" (November 2018), finding among households with defined contribution plans, 92% had access to the internet in 2016 and 93% had access in 2018.

[27] 2015 Telephone Survey Conducted by Greenwald & Associates for the SPARK Institute. *Improving Outcomes with Electronic Delivery of Retirement Plan Documents*, Quantria Strategies, (June 2015), *https://www.sparkinstitute.org/content-files/improving_outcomes_with_electronic_delivery_of_retirement_plan_documents.pdf*.

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.[28]

The Department believes that these trends have continued to the present and will into the future, increasing the number of individuals for whom electronic delivery of ERISA disclosures is appropriate or preferred.

(4) *2019 Proposed Regulation and Request for Information*.

In October 2019, the Department published in the Federal Register a proposed rule and RFI intended to expand the methods by which required ERISA disclosures may be furnished electronically.[29] The proposal would allow plan administrators who satisfy certain conditions to notify participants and beneficiaries that certain disclosures will be made available on a website, while preserving the right of these individuals to opt out of electronic delivery and to request paper copies of disclosures. The Department invited interested persons to submit comments on the proposed rule and RFI and, in response to this invitation, the Department received 257 written comments from a variety of parties, including plan sponsors and fiduciaries, plan service and investment providers, and employee benefit plan and participant representatives, as well as 210 submissions in response to a petition. These comments are available for review on the "Public Comments" page under the "Laws and Regulations" tab of the Department's Employee

[28] Aaron Smith, *Smartphone Use in 2015*, Pew Research Center, (April 1, 2015), *https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/*.
[29] 84 FR 56894 (Oct. 23, 2019).

Benefits Security Administration website.[30] This Notice includes a detailed discussion of the provisions of the final rule, the public comments received by the Department, and how these comments impacted the Department's decision-making when adopting the final rule.

The Department also issued the RFI on electronic disclosure based on the Department's conclusion, at the time the proposed rule was published, that further information from stakeholders is necessary before proposing any substantive regulatory additions, deletions, or changes to ERISA's disclosures themselves, as opposed to changes in the means of delivery for such disclosures. The RFI, which was included in the preamble to the proposed rule (as opposed to being a stand-alone document), contained a series of questions to elicit views from all interested parties on additional ways to improve the usefulness and effectiveness of ERISA disclosures, for example with respect to the design or content of disclosures. The Department is analyzing responses to the RFI to determine whether regulatory or other action, in addition to today's final rule on electronic delivery of disclosures, should be taken to further enhance the effectiveness of ERISA's disclosures.[31]

B. Final Rule – Alternative Method for Disclosure Through Electronic Media.

[30] *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB90*. A few commenters on the proposal requested an extension, arguing that the 30-day comment period for the proposed rule was unreasonable and insufficient to adequately address the many complex issues presented by the proposal. One commenter further requested that the Department hold a hearing on the proposal prior to issuing final guidance. The Department declined these requests, in part because so few commenters raised the objections, and also because most issues relevant to electronic disclosure have been analyzed and reviewed by the Department and the public for many years, especially after the 2011 RFI and temporary guidance issued by the Department. A substantial and comprehensive public record exists, supplemented and updated with comments on the proposed rule. The Department disagrees that a public hearing is necessary to supplement an already comprehensive public record. The scope and depth of the public record that has been developed belies arguments that a 30-day comment period was insufficient.

[31] Review of comments on the RFI also is responsive to Executive Order 13847, which directed the Department to improve the effectiveness of plan disclosures, in addition to exploring reductions in employer costs and administrative burden, through expanded use of electronic delivery. *See generally* E.O. 13847, 83 FR 45321 (Sept. 6, 2018).

The Department is amending part 2520 by adding a new section, § 2520.104b-31, entitled "Alternative method for disclosure through electronic media." This section is a regulatory safe harbor that provides a new, optional method for compliance with ERISA's general standard for furnishing or delivering disclosures to participants and beneficiaries. A number of commenters on the proposed rule asked about the relationship between the new safe harbor and the existing 2002 electronic delivery safe harbor. Some commenters indicated satisfaction with the existing safe harbor. The new safe harbor is an additional method of delivery and does not substantively change the 2002 safe harbor.[32] Plan administrators, therefore, have additional flexibility with the rule in selecting the electronic delivery method that works best for the plan and its participants and beneficiaries. Plan administrators who wish to continue to rely on the 2002 safe harbor for electronic delivery, or to furnish paper documents by hand-delivery or by mail, can continue doing so.

Most commenters on the rule, as a general matter, believe that the new framework is a welcome addition to the 2002 safe harbor, which they argue is difficult for them to satisfy with respect to many participants and beneficiaries. In support of this position, these commenters cited with approval the many prior recommendations of the ERISA Advisory Council, the U.S. Government Accountability Office, and other parties.[33] These commenters also argue that electronic disclosure is both feasible and preferred; that paper disclosure is very costly; that participants' disclosure experiences can be improved online; that data obtained online enables

[32] In response to comments, non-substantive conforming amendments are being made to the 2002 safe harbor to facilitate the new safe harbor. For example, in response to commenters' requests, the Department is adding a cross reference to the new safe harbor in paragraph (f) of § 2520.104b-1 to improve regulatory clarity. Similar conforming amendments were made to §§ 2520.101-3(b)(3) and 2560.503-1.

[33] These recommendations also are set forth in the preamble to the proposed rule. *See* 84 FR 56899, 56900.

plans to improve disclosures; that online activity may improve participants' savings rates and retirement outcomes; that participants can access information online at any time; and that web-based disclosures have the capacity to serve diverse populations better than traditional paper disclosures.

Commenters who object to the new safe harbor, on the whole, believe that the 2002 safe harbor is sufficient on its own and is a preferable rule because it retains paper delivery as the default.[34] The principal argument of these commenters against the proposal is that some participants and beneficiaries lack reasonable access to the internet and others simply prefer paper, and the proposed rule, if finalized, would fail to adequately protect the interests of both categories of individuals. The Department disagrees with this argument. The statistics cited above, under the heading "*Purpose of Regulatory Action*," show nearly universal access to the internet among individuals who participate in an ERISA covered plan. These statistics also demonstrate significant and upward trends in both access to, and usage of, the internet by individuals covered by ERISA plans, including for banking, research, and other non-browsing functions. Despite these statistics, however, the Department understands that some people prefer paper documents for a variety of legitimate personal reasons, including improved reading comprehension, distrust of electronic storage solutions, computer illiteracy, difficulty navigating websites, username and password fatigue or forgetfulness, and the cost of computer hardware and establishing and maintaining access to the internet or managing files electronically. The final rule, therefore, honors the preference of these individuals by including several key provisions to ensure that if covered individuals desire paper documents, plans must

[34] One of these commenters requested that, to prevent the misuse of any cost savings attributable to this final rule, the Department require plan administrators to document all savings attributable to their reliance on this safe harbor and apply these savings directly to participants' accounts or benefits. Such a request is beyond the scope of this safe harbor and ERISA's disclosure requirements, which are the subject of this rulemaking.

accommodate these individuals with minimal friction. The first, and perhaps most important, of these conditions in the final rule is the provision that guarantees covered individuals a right to request and receive paper copies of specific covered documents or to globally opt out of electronic delivery altogether. This provision alone addresses commenters' major concerns with a plan administrator's decision to change the default mode of delivery from paper to electronic media. Second, not only are plan administrators prohibited from charging covered individuals a fee in connection with their exercise of these rights, plan administrators also are prohibited from having procedurally cumbersome or complex processes for exercising these rights. Thus, a covered individual's decision to receive paper disclosures must be respected and cannot be met with economic or procedural hindrances. Finally, the final rule mandates that covered individuals receive multiple reminders, on different mediums, of these rights. Thus, a participant's initial decision against opting out of electronic delivery is not permanent and can be revisited with each reminder or at any time. Collectively these three provisions protect individuals' preference for paper by guaranteeing a right to it and by barring plan administrators from imposing unreasonable burdens on exercising this right.

The final rule adopted today is fundamentally similar to the proposed rule, although modifications were made to reflect a variety of comments from affected parties. As in the proposal, the final rule establishes a safe harbor for compliance with ERISA's general standard for delivery of disclosures to participants and beneficiaries.[35] The general scope of the safe harbor relief is set forth in paragraph (a) of the final rule. Paragraphs (b) through (k) of the final rule set forth the detailed conditions to receiving the relief, and paragraph (l) contains the

[35] Commenters have asked about the application of ERISA's fiduciary standards and other statutory requirements to electronic disclosure in varying contexts. This safe harbor addresses only a plan administrator's compliance with ERISA's standard for the furnishing of covered documents to covered individuals. It neither addresses nor supplants more general fiduciary or other statutory obligations under ERISA.

effective and applicability date. The detailed conditions are discussed below along with public comments on the proposal. The safe harbor applies only to "covered individuals" and only with respect to "covered documents." Over 10 years, the new safe harbor will save plans approximately $3.2 billion net, annualized to $349 million per year (using a 3 percent discount rate).[36]

(1) *Covered individual*.

Paragraph (b) of the final safe harbor defines a "covered individual" for purposes of the rule as a participant, beneficiary, or other individual entitled to covered documents and who—when he or she begins participating in the plan, as a condition of employment, or otherwise—provides the "employer, plan sponsor, or administrator (or an appropriate designee of any of the foregoing)" with an electronic address. This includes an email address or internet-connected mobile- computing-device (e.g., smartphone) number, and is intended to be broad enough to encompass new and changing technology.

The existence of an electronic address for notification to a covered individual is critical to the effective implementation of a notice-and-access framework, much like a mailing address is critical to delivery of a paper document. The existence of a valid email address is similarly essential for a plan administrator who will deliver ERISA disclosures by complying with the requirements of new paragraph (k) of this final rule, which allows plan administrators to send documents via email. The final rule continues to require, as a condition of reliance on the safe

[36] *See* the Regulatory Impact Analysis in Section D of this preamble for a fuller discussion of net cost savings.

harbor, including the new paragraph (k), that a plan administrator possess an electronic address that enables electronic communication with a covered individual.

The final rule offers plan administrators a variety of ways to comply with the condition to obtain an electronic address for each covered individual. This provision, for example, is satisfied if the company provides plan participants an electronic address because of their employment. This requirement also is satisfied if an employee provides a personal electronic address to the plan administrator or plan sponsor, for example, as part of the job application process or on other human resource documents. In addition, a plan administrator or service provider can request an electronic address in plan enrollment paperwork or to establish a plan participant's online access to plan documents and account information.

A few commenters raised a pragmatic concern with the use of electronic addresses that are phone numbers (as opposed to an email, for instance). They asked what would happen if a notice of internet availability (hereinafter "NOIA") inadvertently is sent to a landline number, rather than a smartphone or similar number. It is not always readily apparent, given a ten-digit phone number, whether the number belongs to a landline or not. Exacerbating this potential problem, a plan administrator who sends an NOIA to a landline may not receive a bounce-back or any other notification that the recipient's phone address is a landline that cannot receive text messages. If the plan administrator did receive such a notification, it would trigger the substantive protections in paragraph (f)(4) of the safe harbor, which require a plan administrator to take curative steps if the electronic address of a covered individual is invalid or inoperable. The inability of an electronic address to receive, for example, a text message that is intended to be an NOIA, would mean that the address is in fact inoperable for purposes of the rule. Some phone carriers offer a landline service that converts a text message into a voice message, instead

of returning a bounce-back notification. ERISA generally mandates that disclosures be in writing. Thus, the Department does not consider receipt of a voice-based message to be operable for purposes of this rule; the electronic address must be able to accept text (rather than audio) messaging. To address this concern, the final rule clarifies that an electronic address that will be used to satisfy paragraph (b) for a covered individual must be an address at which the individual may receive and inspect a written NOIA. Plan administrators who use internet-connected mobile computing device numbers, as opposed to email addresses, for example, will have to take steps to confirm with plan participants and beneficiaries, or through other reasonable means, such as using mobile phone carriers' validator services, to distinguish landline numbers from mobile or similar numbers that enable the receipt and inspection of written messages.

The final rule continues to recognize the validity of employer-assigned electronic addresses. Paragraph (b) of the proposal, in relevant part, provides that "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." The proposal specifically solicited comments on whether this provision of the proposal, as distinguished from the provision authorizing participants to affirmatively provide a personal electronic address to receive covered documents, should impose additional or different conditions to ensure that participants receive their disclosures.

Many commenters supported the proposal's recognition of the validity of employer-assigned electronic addresses. These commenters believe the provision is a common-sense technique to facilitate default electronic delivery: employers routinely assign employees electronic addresses as part of their employment, for a variety of business purposes including human resource management, work-related assignments, and routine communications. Commenters also noted that the Department's 2002 safe harbor allows for electronic delivery of

disclosures to employer-assigned electronic addresses without the affirmative consent of participants, and called attention to the lack of reported problems or harm to participants caused by or attributable to that provision in the 2002 safe harbor.

Other commenters, however, raised objections to the proposal's recognition of the validity of employer-assigned electronic addresses. These commenters were particularly concerned about the language in the proposal that permitted an employer-assigned address to be created *solely for purposes* of using the proposed safe harbor. These commenters were concerned that ineffective disclosure will result if employers, or service providers or third-party technology firms hired by employers, create and assign electronic addresses with unclear or unfamiliar URL components solely to comply with the new safe harbor. In these circumstances, such attenuated or ambiguous electronic addresses (e.g., email accounts) may be unfamiliar to, ignored, overlooked, or forgotten by covered individuals. One commenter asserted that an employer-assigned electronic address for purposes of this rule could, in some jurisdictions, constitute a breach of fiduciary duty.

Based on these concerns, the Department eliminated the phrase "for this purpose" from the final rule. Paragraph (b) now provides that participants will be treated as if they provided an electronic address to an employer if the electronic address is assigned by an employer to an employee "for employment-related purposes that include but are not limited to the delivery of covered documents." Thus, to satisfy the rule's definition of a covered individual, the electronic address assigned by an employer for an employee must be assigned for some employment-related purpose other than the delivery of covered documents under the new safe harbor. An employer could not, for example, establish for an employee a personal electronic address (e.g., a Google or Yahoo email account) that will be used by the plan's administrator only to send

notices required by this safe harbor. The employer-assigned address must have an employment-related purpose other than to comply with the safe harbor. Whether such an assignment meets ERISA's furnishing standard is a matter to be determined based on the facts and circumstances of the particular situation.

Although the safe harbor recognizes the validity of employer-assigned electronic addresses, it does not permit plan administrators to assign them. A few commenters explicitly agreed with the Department's concern, expressed in the preamble to the proposal, about the assignment of electronic addresses by plan administrators and third-party service providers. These believe that misuse could result from allowing these individuals and entities to assign electronic addresses, for example, citing a practice under which a plan's service provider would use commercial locator services or similar people-finder tools to acquire electronic addresses of plan participants. The Department agrees, and paragraph (b) of the final rule continues to prohibit plan administrators or their service providers from assigning electronic addresses under the new safe harbor. To ensure effective access to electronic media, paragraph (b) confers this authority only on an employer with respect to its employees. Accordingly, in response to one commenter's request for clarification, a plan administrator could not use a commercial locator service to acquire, and then use, personal electronic addresses under this safe harbor.

Similarly, a few commenters raised concerns about application of the proposed safe harbor to spouses, divorced spouses, and other beneficiaries who may be entitled to disclosures under ERISA. Specifically, these commenters believe that it would be inappropriate for employers to assign electronic addresses for disclosure of covered documents to these individuals, because, unlike employees participating in an employer's plan, spouses and other beneficiaries may not have any real relationship with the employer. The Department agrees with

this concern. Although paragraph (b) of the final rule allows employers to assign electronic addresses for their employees, employers cannot assign electronic addresses for non-employee spouses or other beneficiaries of their plans' participants. For a spouse or other beneficiary that is entitled to ERISA disclosures to be a covered individual for purposes of the final rule, the spouse or other beneficiary must affirmatively provide (or must have provided) the employer, plan sponsor, or administrator (or appropriate designee) with an electronic address; otherwise the plan administrator cannot furnish disclosures to these individuals pursuant to this rule.

The definition of "covered individual" in the final rule does not exclude participants in multiemployer plans. Commenters representing multiemployer plans requested confirmation that these individuals could be covered individuals for purposes of paragraph (b) of the rule. Their concern stemmed from the proposal's use of the phrase "as a condition of employment," as a predicate for providing the plan administrator an electronic address because, according to the commenters, multiemployer plan sponsors do not have the ability to establish employment conditions, unlike plan sponsors generally. In this regard, they argue, multiemployer plans are very different from single-employer plans. The Department confirms for affected parties that the final rule's definition of covered individual in paragraph (b) is intended to include multiemployer plan participants. This necessarily follows from paragraph (c) of the final rule, which defines the scope of "covered documents" to include all pension benefit plans under ERISA. If the Department had intended to exclude from this safe harbor a subset of pension plans, such as multiemployer plans, the exclusion would have been set forth in paragraph (c) of the final rule. Nevertheless, the Department has slightly rephrased paragraph (b) to clarify that providing an electronic address as a condition of employment is only one way that an individual might supply an electronic address. The individual might supply it as part of their initial participation in the

plan, or they might supply it otherwise: through other means and for other reasons. In addition, in response to one commenter's question regarding the source of an electronic address, the definition of "covered individual" includes multiemployer plan participants who provide their electronic addresses directly to the plan administrator, as well as plan participants whose personal or employer-assigned electronic address is provided to the plan administrator by an employer.

(2) ***Covered documents*.**

(i) *Employee pension benefit plans*.

Paragraph (c) of the proposal defined the "covered documents" to which the rule would apply. It provided that the safe harbor may be used by the administrator of 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 only upon request. The proposal clarified that a plan administrator would not be required to furnish all of these documents, as applicable for a particular plan, pursuant to the safe harbor if the plan administrator prefers a different method of furnishing for some of the documents. The Department requested 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.

Commenters generally supported the scope of the definition of covered documents as including disclosures for pension benefit plans. The final rule does, however, include two minor

revisions. First, in response to numerous commenters, the Department added the words "or information" to this paragraph to clarify that certain "information" required to be disclosed pursuant to 29 CFR 2550.404a-5, the Department's participant-level fee disclosure regulation, is covered by the final rule. Second, the Department added the word "only" to this paragraph to clarify the scope of the definition's exception for documents that must be furnished upon request (the exception now applies to documents "that must be furnished *only* upon request," emphasis added).

Commenters disagreed about this exception. Some commenters argued that the final rule should not exempt documents that are available upon request by a covered individual, particularly if the individual agrees or has not objected to the rule's method for delivery. Other commenters did not object to the exception, but requested that it be revised to ensure that the safe harbor's exclusion from covered documents is limited to documents that are available *only* upon request. Under ERISA, some documents must be furnished automatically and others only upon request by an eligible person.[37] However, these commenters point out that in certain cases (including pursuant to this safe harbor) participants may request copies of many different documents – even documents that must be furnished automatically, such as the summary plan description (SPD). The Department's intention, as reflected in the preamble to the proposed regulation and unchanged for purposes of the final rule, is that the exception applies to documents that are furnished only upon request (i.e., the exception does not apply to, and therefore the final rule includes as covered documents, documents for which the plan

[37] *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 SPD, 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.

administrator has an affirmative obligation to furnish but that are also, for various reasons, requested by covered individuals).[38] The 2002 safe harbor, if satisfied, remains available for plan administrators to furnish ERISA disclosures that are excluded from this safe harbor.

(ii) *Employee welfare benefit plans*.

The proposed safe harbor did 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. The Department instead reserved paragraph (c)(2) of the proposal so that it could continue to study the future application of the new safe harbor to documents that must be furnished to participants and beneficiaries of employee welfare benefit plans. In the proposal, the Department noted that this reservation accords with Executive Order 13847, which focuses the Department's review on retirement plan disclosures. The Department further explained that it does not interpret the Order's directive as limiting the Department's ability to take future 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. The Department noted in the preamble of the proposal that 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

[38] 84 FR 56894, 56901 n. 63 ("The proposed safe harbor does not apply to documents that are furnished only upon request.").

delivery safe harbor for group health plan disclosures in the future, the Department would consult with these other Departments.

Many commenters agreed with the Department's reasoning as set forth in the preamble to the proposed rule. These commenters urged the Department not to include welfare plans in the final rule, the most common reason being that welfare plans present unique issues as compared to other types of employee benefit plans. These commenters also acknowledged the necessity of the tri-agency consultation process for any such rule.

Other commenters, by contrast, encouraged the Department to expand the final rule to apply to disclosures for welfare plans or begin immediately the formal process of doing so. These commenters argued that there is no sound legal or policy basis for excluding welfare plans, and that significant additional reductions in regulatory costs and burdens would follow if the safe harbor were expanded to cover welfare benefit plans, especially group health plans. A few of these commenters estimated that even extending the safe harbor only to routine health care denials (e.g., "Explanation of Benefits" or "EOBs") would save millions of dollars annually for health plan administration.

The Department understands that there could be significant cost savings if the safe harbor were extended to cover welfare plan disclosures. At the same time, such an extension warrants careful consideration and analysis that goes beyond the scope of this final rule. The Department, therefore, has decided not to expand the scope of the final rule to cover welfare benefit plans at this time. The Department will continue exploring whether, and under what circumstances, to extend the safe harbor in the final rule to welfare benefit plans, and may undertake rulemaking in the future.

(3) ***Notice of internet availability.***

As a general rule, the proposal required that plan administrators furnish to each covered individual an NOIA for each covered document in accordance with the requirements of this section. A special rule, in paragraph (i) and discussed below, allowed plan administrators to combine the content of the required notices for certain covered documents. Paragraph (d) of the final rule, as in the proposal, continues to require that plan administrators furnish an NOIA and sets forth the conditions for satisfying this requirement, as modified to reflect the Department's response to commenters' views on the notice requirement.

(i) *Timing of notice of internet availability*.

Paragraph (d)(2) of the final rule continues to provide that the plan administrator must furnish an NOIA at the time the covered document is made available on the website described in paragraph (e). One commenter argued that, due to the flexibility of online posting, covered documents should be posted earlier than required by law, for example that any disclosures affecting covered individuals' benefits should be posted as soon as reasonably possible after the decision affecting benefits is made. The Department disagrees that it would be appropriate, in a rule focused on the acceptable methods for delivering required ERISA disclosures, to alter the timing requirements for the disclosures themselves. As set forth in the preamble to the proposal, the rule is not intended to alter the substance or timing of any of ERISA's required disclosures. The rule merely expands the possible delivery methods for disclosures. ERISA and the regulations thereunder include thoughtfully prescribed timelines for each required disclosure; the

Department maintains that any changes to those substantive, legal standards would have to be made on a disclosure-by-disclosure basis, subject to the regulatory process, including public notice and comment. The Department does agree with this commenter, however, that, for similar reasons, it would not be necessary or appropriate to include any extensions to the timing requirements for covered documents that are posted online.

As in the proposal, the final rule continues to allow plan administrators to furnish a combined NOIA each plan year for more than one covered document. If a combined NOIA was furnished in the prior plan year, the next plan year's combined NOIA must be furnished no more than 14 months later. As discussed below, however, the covered documents that may be combined pursuant to paragraph (i) of the final rule have changed. The final rule continues to provide plan administrators with a 14-month period to comply with the annual NOIA requirement. The Department does not want plan 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, and the Department acknowledges that actual disclosure dates can vary slightly from year to year. The two-month grace period should offer sufficient flexibility without compromising individuals' receipt of an NOIA on a periodic, essentially annual, basis. The Department did not receive any comments disagreeing with this approach or arguing that different timing requirements would be preferable.

The Department also reminds plan administrators that if they choose to furnish a consolidated NOIA once a year under paragraph (i) of the rule, doing so will not change the date on which the covered documents must be made available on the website. Each covered document described in the consolidated NOIA must be made available on the website no later than the date it must be furnished to participants and beneficiaries by law.

(ii) *Content of notice of internet availability*.

Paragraph (d)(3)(i) through (vii) of the proposal listed the content requirements for the NOIA. Paragraph (d)(3)(i) of the proposal required a prominent statement, for example as a title, legend, or subject line that reads, "Disclosure About Your Retirement Plan." Paragraph (d)(3)(ii) required this statement: "Important information about your retirement plan is available at the website address below. Please review this information." Paragraph (d)(3)(iii) required a brief description of the covered document. Paragraph (d)(3)(iv) required "the internet website address where the covered document is available." Paragraph (d)(3)(v) required 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. Paragraph (d)(3)(vi) required a statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right. Finally, paragraph (d)(3)(vii) required a telephone number to contact the plan administrator or other designated representative of the plan.

The Department requested comments on these content requirements and whether the NOIA would adequately serve its intended purpose, which is to provide very concise and clear notification to covered individuals about covered documents available on the website. As a general matter, some commenters believe that the content requirements are excessive, while others merely stated that the Department should be less prescriptive about the content requirements, and allow plan administrators greater flexibility for innovation. Commenters also provided significant feedback on specific content provisions in the proposal. Although not all of these suggestions were implemented in the final rule, the Department is persuaded by

commenters that its intention for the NOIA may be better achieved by adopting some revisions to the NOIA's content requirements. Due to these revisions, the Department also restructured paragraph (d)(3), making non-substantive changes to the lettering and numbering of subsections. The following paragraphs set forth commenters' views with respect to each of the specific NOIA content provisions and, where applicable, changes that have been made for purposes of the final rule.

The Department has adopted the first two content requirements today with only minor revision from the proposed rule. As in paragraph (d)(3)(i) of the proposal, now (d)(3)(i)(A) in the final rule, the NOIA must include a prominent statement—for example as a title, legend, or subject line—that reads: "Disclosure About Your Retirement Plan." Commenters did not object to this statement or its prominence. The statement required by paragraph (d)(3)(ii) of the proposal, now (d)(3)(i)(B) in the final rule, has been revised to be technologically neutral. As finalized, the NOIA must include the following statement: "Important information about your retirement plan is now available. Please review this information." A few commenters disagreed with the use of the word "Important" and the Department's provision of required language for this statement. As one commenter explained, the word "important" may become meaningless as NOIAs are regularly received. The Department disagrees that the use of the word "Important" is problematic. Even as covered individuals become accustomed to this framework for disclosure and receive notices over time, there is no harm in highlighting what the Department believes to be "important" retirement plan information; federal law, after all, does require disclosure of this information for a reason. The Department also is not persuaded that the rule's required language for the statement in (d)(3)(i)(B) is problematic, especially as revised to more broadly apply to different electronic delivery methods. Very few commenters objected to this language, and a

number of commenters expressly stated that they would not object to model language for some of the safe harbor's notice requirements. The statement is brief and straightforward, and plan administrators often prefer to have specific guidance when making such statements to reduce risk that language drafted at their discretion will be insufficient.

The Department has decided to make a few revisions to paragraph (d)(3)(iii) of the proposal, now (d)(3)(i)(C), in response to public comments. An NOIA, under the final rule, must include "[a]n identification of the covered document by name (for example, a statement that reads: 'your Quarterly Benefit Statement is now available') and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document." Many commenters on the proposal requested additional guidance on what would be expected as a "brief description" of a covered document and worried that this requirement could result in too much information on what is supposed to be a very short notice. Suggestions included requiring that the brief description be limited to no more than a sentence or two, or even consolidating the first few content requirements and merely requiring identification of the covered document. The Department agrees that it may not always be necessary, to the extent the nature of a covered document is clear by its name, to include a brief description and that inconsistent application of the standard could result in longer, and more complex, NOIAs. The final rule requires a brief description only when identifying a covered document by name would not reasonably convey the nature of the covered document. Otherwise, only identification of the covered document by name is required. For example, an NOIA for a quarterly benefit statement ordinarily would not need a brief description. Quarterly benefit statements are furnished every three months and their content, which includes periodic personalized benefit account information for a covered individual, generally is well understood by individuals. Alternatively, the

Department expects that a plan administrator furnishing an NOIA for a blackout notice would need to include a brief description to comply with this requirement. Blackout notices typically are not furnished on a recurring basis, and the circumstances surrounding the provision of a blackout notice may not be clear to many covered individuals. It is not unlikely, for example, that some covered individuals will have never before received a blackout notice. The Department believes that these modifications are responsive to commenters' concerns without undercutting the important message NOIAs are intended to convey.

Paragraph (d)(3)(iv) of the proposal, now (d)(3)(i)(D) in the final rule, also reflects limited revision in response to commenters' questions about whether plan administrators could use a hyperlink on an NOIA, rather than simply a website address. The Department did not intend to limit NOIAs to including only website address citations: plan administrators are encouraged to use hyperlinks that take covered individuals directly to a website address. The rule has been revised explicitly to include hyperlinks.[39]

A few commenters addressed the standard in paragraph (d)(3)(iv) of the proposal, now (d)(3)(i)(D), 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 NOIA, covered documents).[40] A website address (or hyperlink) will satisfy this requirement if it leads the covered individual directly to the covered document. A website address (or hyperlink) also will

[39] The Department did not adopt one commenter's recommendation that final guidance require hyperlinks or the ability to hover over words that previously have been defined. Although the rule now explicitly includes hyperlinks in addition to website addresses, the Department is not persuaded that hyperlinks should be mandatory; further, it is unclear whether the commenter's suggestion that covered individuals must be able to hover over defined terms is meant to apply to notices (which are intended to be concise, clear documents notifying of internet availability, rather than substance) or more likely to the covered documents themselves. This rule is not intended to change substantive requirements of covered documents, such as the use of (and hyperlink capabilities associated with) defined terms.

[40] *See, e.g.*, 29 CFR 2550.404a-5(d)(v), which similarly requires disclosure of specified information at "[a]n Internet Web site address that is *sufficiently specific* to provide participants and beneficiaries access to" such information (emphasis added). The Department is not aware of any evidence that plan administrators need further clarification or that this standard is ineffective. The proposal nonetheless included, and the final rule continues to include, two non-exclusive methods for website access that satisfy this standard.

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. Most commenters did not respond with suggestions for how to improve the "sufficiently specific" standard, except for requesting minor clarifications. The very few commenters that did address the standard disagreed with each other on the problem; for example, one commenter believed that the "sufficiently specific" standard is too prescriptive and should allow more flexibility, especially to accommodate future technology, whereas another commenter argued that the standard is not sufficiently protective of covered individuals and that the notice should take individuals straight to the disclosure (following a secure login, as applicable). Similarly, very few commenters addressed whether additional or different security procedures or information about login or similar procedures should be included in the notice. Most believe this additional information will only further clutter the notice and detract from key information, and that security procedures and protocols may become quickly outdated. One commenter asked the Department to require a separate notice including login and security information, but did not offer specific commentary on security or privacy language that should be required. Following its review of commenters' views, the Department decided to retain the "sufficiently specific" standard, which now applies whether the notice includes a website address or a hyperlink to such address, and made other non-substantive revisions to simplify the paragraph.

The next two content requirements proposed in paragraphs (d)(3)(v) and (vi), which are now contained in paragraphs (d)(3)(i)(E) and (F) of the final rule, have been adopted with only minor amendment to clarify that requests for a specific paper version, and requests to opt out are both fulfilled free of charge. An NOIA must include 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 (under (d)(3)(i)(E)); and a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right (under (d)(3)(i)(F)). Commenters overall did not object to requiring that the notice explain covered individuals' rights to request paper or opt out of electronic delivery. The Department continues to believe these are vitally important and protective rights for covered individuals and is not persuaded by the one commenter who requested that these statements be removed. A couple of commenters suggested that these rights should be "prominently" displayed and that the notice should include detailed instructions about how to opt out and any timelines for doing so. The Department did not adopt these suggestions. Given the very limited content of the NOIA, nearly everything arguably is "prominent," and adding more and more content and specifications would only undermine the intended brevity and simplicity of the notice.

The final rule includes one additional content requirement, in paragraph (d)(3)(i)(G), to respond to several commenters' suggestion that covered individuals should be made aware that covered documents may not always be available online. The Department agrees that covered individuals would benefit from such a warning or reminder, so that they can take any desired action to print or save covered documents, or possibly request a paper copy of a covered document. As discussed below in detail, plan administrators are not required to maintain covered documents online indefinitely for purposes of satisfying this electronic delivery safe harbor. Thus the final rule now requires an NOIA to include a cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document. This requirement

will ensure that covered individuals understand that covered documents will not be available online indefinitely. Plan administrators could, for example, draft the cautionary statement in a manner that encourages covered individuals to print, save, or otherwise preserve covered documents.

A few commenters found paragraph (d)(3)(vii) of the proposal, now (d)(3)(i)(H), requiring a contact telephone number to be deficient, for example suggesting that the rule should mandate toll-free telephone numbers both for the employer or plan administrator and for the Department. The Department did not adopt a requirement that the telephone number must be toll-free, because such a requirement would place a costly and unnecessary burden on plan sponsors, particularly for sponsors of small plans that might be located in the vicinity of most of their participants without the need for any long-distance calling. Further, the Department is unaware of any problems or objections from plan participants with the telephone number that is required as contact information in the participant-level fee disclosure regulation (which similarly does not require a toll-free number).[41] In any event, the safe harbor does not preclude plan administrators from providing (and including on the NOIA) a toll-free number. The Department was not persuaded that this final content requirement from the proposal should be revised. Paragraph (d)(3)(i)(H) of the final rule continues to require a telephone number to contact the plan administrator or other designated representative of the plan.

The Department declined to adopt a number of additional content requirements suggested by some commenters.[42] For example, one commenter on paragraph (d)(3)(vii) of the proposal,

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[41] *See* 29 CFR 2550.404a-5(d)(2)(i)(A).

[42] Examples of additional statements that commenters suggested for the NOIA include that it is the covered individual's responsibility to notify the plan administrator of a new electronic address; where historical versions of documents can be obtained; the significance of the covered document and what has changed since the last version; that there will be no retaliation for choosing paper; that notices and covered documents should be printed and saved

now (d)(3)(i)(H), argued that the notice's content should be expanded to include an explanation that the number may be used for paper and opt-out requests as well as other questions, with a required response time of no more than 72 hours. Covered individuals will not necessarily be better informed by, and are more likely to ignore, a long and detailed notice that they receive repeatedly. The purpose of the NOIA is to highlight for covered individuals that a retirement plan document is available online, not to become a new and comprehensive disclosure of ERISA rights and responsibilities in itself.

Based on additional feedback from commenters and analysis of the circumstances that may in fact warrant additional content on an NOIA, however, the Department adopted one more provision to the final safe harbor in paragraph (d)(3)(ii). As opposed to the preceding content requirements for the notice in paragraph (d)(3)(i), the information described in paragraph (d)(3)(ii) (ii) is not required. An NOIA furnished pursuant to the safe harbor may (but is not required to) contain a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that such statement is not inaccurate or misleading. The Department included this new provision because it was persuaded by commenters that covered individuals may find it advantageous to be notified whether some action on their part is (or is not) invited or required in response to the notice. The rule does not preclude plan administrators' discretion to include this information, although it is not required. Plan administrators, however, must ensure that any statement about action that may or must be taken, or that no action is needed, is not inaccurate or misleading. For example, in the Department's view, it would ordinarily be inaccurate and misleading for a plan administrator to state on an NOIA for a benefits claim denial under section

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for personal records; the right to print covered documents at an employer's place of business; and the availability of the plan administrator to assist with passwords.

503 of ERISA that no action is invited or required. Even if a covered individual chooses to ignore the NOIA and not initiate an appeal, a benefits claim denial, by its very nature, is an invitation to take action, and requires such action within a specific timeframe or else the claimant may forfeit a right to a benefit.

Finally, as to the content required for the NOIA, the Department requested comments on whether affected parties believed that a model NOIA would be useful, and asked that parties submit sample models for the Department's consideration. Although a few commenters stated that they did not necessarily object to the provision of a model NOIA, many commenters responded that a model is not necessary, for example because the NOIA content and other requirements are sufficiently clear, or more explicitly that the Department should not adopt a model, because, given the large variety in retirement plan features and designs, a model could be insufficiently flexible and ultimately interfere with the ability of plan administrators to appropriately prepare NOIAs for their plans.[43] The public record, therefore, did not demonstrate a meaningful level of interest in having a model NOIA published with the final rule. The Department also did not receive any sample models from commenters. Given this overall lack of interest, and in light of changes made to improve the required content of the NOIA in response to commenters' concerns, the Department has not included a model NOIA in the final rule.[44]

(iii) *Form and manner of furnishing notice of internet availability*.

[43] One commenter supported the Department's development of a model notice, and explained that to do so properly would require as long as six months. For the reasons stated herein, however, the Department has declined to adopt a model NOIA at this time.

[44] The Department similarly did not adopt a model for the initial notification required under paragraph (i) of the rule, discussed in detail below. As with the NOIA, commenters did not necessarily object to a model, but there was not consistent or strong support for a model for either notice.

The Department intends the NOIA to be a succinct, understandable disclosure that will convey its importance and easily call the recipient's attention to the availability of a covered document. With this goal in mind, paragraphs (d)(4)(i) through (iv) of the proposed rule set forth standards for the form and manner of furnishing the notice. As proposed, an NOIA had to 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 plan administrator could include pictures, logos, or similar design elements, so long as the design was not inaccurate or misleading; third, be furnished separately from any other documents or disclosures furnished to covered individuals, except as permitted under paragraph (i) of the proposal (which addressed the consolidation of certain notices of internet availability on an annual basis); and fourth, be written in a manner calculated to be understood by the average plan participant. The proposal elaborated on this fourth condition, explaining that 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 would satisfy the fourth requirement.[45]

The proposal required that the NOIA be furnished by itself. The NOIA contains important information alerting covered individuals that retirement plan disclosures are available online. This information should not be obscured by commercial advertisements or even other ERISA-required disclosures. The second and third requirements in paragraph (d)(4) of the proposal were intended to achieve this objective. Any additional information or content had to be limited; to permit otherwise would have frustrated the Department's goal of a clear, concise

[45] *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* (Rudolf Flesch).

notice. To the extent design elements could enhance the appearance of the NOIA and possibly increase the likelihood that it would draw the desired attention of covered individuals, however, the proposal did not exclude the use of pictures, logos, and similar design elements, so long as the design was not inaccurate or misleading and the required content was clear.

Plan administrators must write clear and understandable notices of internet availability, and to that end the proposal relied 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." Due to the concise nature of the NOIA, however, paragraph (d)(4)(iv) of the proposal included additional guidelines for plan administrators to satisfy the readability requirement, and plan administrators were encouraged to apply the plain language concepts described above (including the Flesch Reading Ease test). The Department incorporated these concepts to further improve individuals' comprehension of the information on the NOIA and to provide plan administrators a safe harbor, essentially, to satisfy the readability standard for purposes of the proposed safe harbor.

Commenters had a variety of general observations about the form and manner by which an NOIA must be furnished. For example, some commenters asked the Department to provide flexibility in how the notice may be furnished, not just by email but by text messages, mobile application notifications, and future innovations. Alternatively, some commenters requested that the rule be revised to allow plan administrators to furnish the NOIA in paper form, or electronic form, based on a determination by the plan administrator. Allowing paper disclosure would, these commenters explained, somewhat alleviate their concerns about the revocation of FAB 2006-03, discussed below in the section titled "*Transition Issues*." Other commenters argued

that allowing paper would reduce their concern that disclosures may not be received by covered individuals, winding up in a spam folder or otherwise buried.

The Department notes that, similar to the discussion below with respect to the concept of a "website," the final rule is intended to apply to a broad range of technologies in addition to emails and internet browser websites. Indeed, the Department specifically designed the rule to accommodate future technological innovations that can be used in compliance with the standards of the safe harbor. By its terms, the rule does not limit furnishing of the NOIA to email; the notice could, for example, be sent by text message. The Department did not, however, adopt certain commenters' suggestion that plan administrators should be able to furnish the NOIA in paper form.[46] One of the goals in adopting this safe harbor is to advance the use of electronic tools to enhance the effectiveness of, and reduce the costs associated with, ERISA disclosures. The Department maintains that it is important for covered individuals to receive an initial notice, on paper, alerting them that disclosures will be furnished using different procedures. But after that, the safe harbor will create consistency by requiring plan administrators to communicate electronically. As to ensuring the receipt of electronic notices, the rule includes a specific provision in paragraph (f)(4) requiring that action be taken in response to invalid or inoperable electronic addresses. Accordingly, paragraph (d)(4)(i) of the final rule adopts the proposal's requirement that an NOIA must be furnished electronically to the address referred to in paragraph (b) of the safe harbor.

[46] The Department believes that commenters' support for paper NOIAs was due, in part, to the fact that some plan administrators currently rely on Field Assistance Bulletin 2006-03, which permits a paper notice, to furnish pension benefit statements. The Department understands that for these administrators, reliance on this final rule will require them to modify their procedures with respect to notices for benefit statements and consequently is providing an 18-month transition period during which plan administrators can implement such modifications. FAB 2006-03 and the transition period are discussed further below, under the heading "*Transition Issues*."

The Department also received more specific comments on the requirements of section (d)(4) of the proposal. In response to paragraph (d)(4)(ii) of the proposal, limiting the content of the NOIA but permitting specified design elements, a few commenters requested clarification that covered individuals will not be forced to wade through what are essentially marketing communications as purported "design" elements that could overtake the actual content of the notice. And more importantly to these commenters, covered individuals should not be confused by suggestible endorsements and advertising. The Department appreciates commenters' concern that the content of the required NOIA must be clear and direct, and that the NOIA should not be used as marketing or sales material to the extent the NOIA is prepared by a plan service provider. However, the Department believes that these concerns are mitigated by the requirement in paragraph (d)(4)(ii) that design elements not be inaccurate or misleading and that the required content be clear. The purpose of the notice is to communicate the availability of an online disclosure, and plan administrators are responsible for ensuring that this purpose is not obscured.

Paragraph (d)(4)(iii) of the final rule requires that an NOIA must be furnished separately from any other documents or disclosures except as permitted, and discussed below, by paragraph (i) of the final rule. Some commenters questioned whether the NOIA must be furnished separately if it accompanies the covered document (e.g., an email notice with an attached PDF version of the covered document); this matter is addressed by the addition to the final rule of paragraph (k), discussed below, permitting such direct delivery of covered documents.

The Department received significant commentary on the readability standard in paragraph (d)(4)(iv) of the proposal with its references to short sentences, active voice, and the Flesch reading ease score. Most commenters strenuously objected to the inclusion of these additional, more specific measurements to assess the readability of NOIAs. These commenters

argued that the Department's existing standard, "written in a manner calculated to be understood by the average plan participant," is sufficient and well understood. They asserted that, in their view, including additional standards, particularly standards based on the application of a Flesch reading ease score, would increase the costs of compliance with the safe harbor without obvious benefits. Even though the new standards were proposed as examples of compliance with the general standard, rather than as independent requirements, the commenters argued that there is a good chance the standards would be interpreted as a new legal standard, not only for this final rule's notices but for other ERISA disclosures, such as the SPD. The Flesch reading ease score was especially problematic for commenters, who suggested that perhaps it could be used as a goal, but is not appropriate as a required score.[47] If the Department retained this standard, they argued, it would have to be clear that it applied only in the context of this safe harbor, even though such a statement would not necessarily preclude its expected application in other contexts. Only one commenter supported these additional criteria, and that commenter suggested that their inclusion should only be a first step and that additional standards, including for the design and layout of notices, should be included. The same commenter cautioned that the Department should also test NOIAs to ensure they are understandable.

In response to commenters' concerns, the Department has removed from paragraph (d)(4)(iv) the more detailed guidelines for meeting the general readability standard. The final rule requires that the NOIA must be written in a manner calculated to be understood by the average plan participant. Although those additional guidelines may be helpful tools suitable for drafting clear and simple notices under this rule, the Department agrees with commenters that it would not be desirable to imply that these guidelines are mandatory for ERISA disclosures or

[47] One commenter suggested that, if the Department wishes to include additional standards for plan administrators to achieve "readability," the final rule should include only the Flesch reading ease score, an objective standard.

notices in general. The Department also acknowledges some of the more specific objections that commenters raised. For example, it may not be possible to consistently achieve a Flesch reading ease test score of at least 60, especially for NOIAs that consolidate content for more than one covered document, as permitted by paragraph (i) of the rule. Some experts posited that using "one-size-fits-all" scoring programs does not always result in effective communications.[48] Although the Department has declined to include the proposal's specific guidelines in the final rule, it will continue to analyze readability and other measures in connection with the responses to the RFI on general disclosure issues that was published with the proposed rule. In the meantime, plan administrators may look to the Department's SPD regulations for guidance on the meaning of "written in a manner calculated to be understood by the average plan participant."[49]

(iv) *Standards for internet website*.

The proposed safe harbor included minimum standards concerning the availability of covered documents on a website, which were set forth in paragraphs (e)(1) through (3) of the

[48] *See, e.g.*, Janan, D., Wray, D., "Readability: The limitations of an approach through formulae" (2012) (readability formulae found to be inadequate), at *http://www.leeds.ac.uk/educol/documents/213296.pdf*. *See also* Crossley, S.A., Allen, D., & McNamara, D. S., "Text readability and intuitive simplification: A comparison of readability formulas" (Apr. 2011, Vol. 21, No. 1, pp. 84-101) (traditional readability formulas weak due to reliance on overly simplistic mechanisms), at *http://nflrc.hawaii.edu/rfl*. *But compare* Federal Plain Language Guidelines, (March 2011, Rev. 1, May 2011*)* (federal agencies should apply user testing techniques to aid compliance with The Plain Writing Act of 2010 (P.L. 111-274) (Oct. 13, 2010),)), at *https://plainlanguage.gov/guidelines/*.

[49] *See* 29 CFR 2520.102-2(a) ("The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references and a table of contents.").

proposal. Generally these standards remain intact. The principal changes, discussed below, include revisions to the website retention requirement, in paragraph (e)(2)(ii) of the final rule, and a new provision, in paragraph (e)(4), to address the application of the safe harbor to mobile apps.

Paragraph (e)(1) of the proposal stated the general requirement that plan administrators must ensure the existence of an internet website at which covered individuals are able to access covered documents. This provision is adopted without change. This paragraph holds the plan administrator responsible for ensuring the establishment and maintenance of the website. The Department understands that, in many cases, some or all of the responsibilities associated with the website may be delegated to plan service or investment providers or other third parties, as frequently occurs now for other aspects of plan administration. Any such delegation is subject to the plan administrator's compliance with paragraph (j) of the safe harbor, "Reasonable procedures for compliance," discussed below, and the plan administrator's general obligation as a plan fiduciary under ERISA section 404 to prudently select and monitor such parties.[50]

A few commenters argued that paragraph (e)(1) of the proposal sets a higher, strict liability, standard for plan administrators that is not appropriate. The Department disagrees with these commenters. The existence of an internet website is integral to the successful execution of the notice-and-access framework adopted in the final rule. Without an accessible website that includes the covered document, the plan administrator has not effectively "furnished" the

[50] One commenter specifically expressed concern about service providers' potential misuse of plan and account information, for example covered individuals' personal financial information, that is obtained in connection with their provision of plan services, including furnishing information and disclosures, or maintaining a website, to comply with this rule. The commenter suggested that the Department should prohibit the use of any such information to market or sell non-plan products and services to covered individuals. This commenter's concern is beyond the scope of this safe harbor, which addresses only a plan administrator's compliance with ERISA's standard for the furnishing of covered documents to covered individuals.

document under the notice-and-access portion of this safe harbor.[51] Consequently, the Department cannot accept a lesser standard, for example that the plan administrator must "take measures reasonably calculated" to ensure the website's existence, as was suggested by a few commenters. The Department also disagrees that this standard results in strict liability. The final rule explicitly provides relief in paragraph (j), discussed below, for reasonable events that may interrupt the availability of covered documents on the website. Temporary interruptions due to internet connectivity problems, routine maintenance, or network disturbances do not necessarily mean that the plan administrator failed to ensure the existence of the website pursuant to this safe harbor.

One commenter requested that the Department modify paragraph (e)(1) of the proposal to prohibit website addresses from changing for at least some specified period of time, because website addresses can shift over time. The Department declines to adopt this suggestion. The final rule, in paragraph (e), relating to minimum standards for the website, contains a new provision requiring that covered documents remain available on the website for a specified time. In addition, paragraph (d)(3)(i)(D) of the final rule requires each NOIA to contain a sufficiently specific website address or hyperlink to provide ready access to the covered document. Collectively, these two provisions provide for easily locatable content available for a long enough time. At this time, the Department therefore declines to establish additional prescriptive mandates on website management or website maintenance, such as hyperlink redirects or hyperlink expiration rules, in response to this comment.

Paragraph (e)(2) of the proposal contained six paragraphs. Paragraph (e)(2)(i) of the proposal provided that the covered document must be available on the website no later than the

[51] Other methods of furnishing covered documents electronically do not require the existence of a website. *See* paragraph (k) of the final rule.

date on which the covered document must be furnished under ERISA. Paragraph (e)(2)(ii) required that a covered document remain available on the website until it is superseded by a subsequent version of the covered document. Paragraph (e)(2)(iii) required that a covered document be presented on the website in a manner calculated to be understood by the average plan participant. Paragraph (e)(2)(iv) of the proposal provided that the covered document must 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. Paragraph (e)(2)(v) provided that the covered document must be searchable electronically by numbers, letters, or words. Finally, under paragraph (e)(2)(vi) of the proposal, 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). Paragraph (e)(2)(vi) of the proposal was included to enable covered individuals to keep a copy of the covered document, for example, by saving it to a file in electronic format, on a personal computer.

A significant number of commenters focused on the requirement, in paragraph (e)(2)(ii) of the proposal, relating to how long covered documents must remain available on the website. This provision in the proposal required that a document must remain available until "it is superseded by a subsequent version of the covered document." This provision was intended to ensure that covered individuals have readily available the information they need to protect and enforce their rights under ERISA and the plan, especially the SPD for example. The Department requested comments as to 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. The Department

also invited comments 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 cease to have continued relevance to covered individuals (e.g., a blackout notice).

The Department received a wide range of comments on paragraph (e)(2)(ii) of the proposal. A few commenters, who were generally opposed to the new safe harbor, argued that all covered documents should be retained on the website indefinitely, regardless of continued relevance. Many more commenters, however, supported the proposed retention provision, but even these commenters suggested a need for a clearer standard for the category of covered documents that technically do not become superseded by reason of a subsequent version of the covered document, such as blackout notices under section 101(i) of ERISA or notices of the right to divest employer securities under section 101(m) of ERISA. For this subset of covered documents, commenters offered a variety of suggestions for how long such documents should be retained on the website. A number of commenters, for example, suggested that such documents should be retained on the website "until they cease to have relevance," leaving it to the plan administrator to determine whether and when a document ceases to be relevant. Other commenters, however, strongly preferred that the Department set a defined length of time, with comments ranging from one to three years. These commenters emphasize that there is a benefit to having a bright line standard for compliance purposes.

After considering the comments received, the Department has decided a one-year posting requirement strikes the appropriate balance between ensuring participants have reasonable electronic access to current documents and the appropriate scope of this regulation, which provides a safe harbor for *furnishing* requirements, not underlying *retention* requirements. The

one-year period in paragraph (e)(2)(ii) of the final rule is responsive to both of the principal observations by most commenters: first, by specifically addressing the fact that not all covered documents are in fact superseded by another version; and second, by providing clear time limits for website retention of these covered documents. Affected parties will benefit from the administrative simplicity and consistency of a bright-line test to follow when managing, or accessing, covered documents on a website. Accordingly, paragraph (e)(2)(ii) of the final rule now provides that a covered document must remain available on the website until it is superseded by a subsequent version of the covered document, if applicable, but in no event less than one year after the date the covered document is made available on the website pursuant to paragraph (e)(2)(i) of the rule.[52] Under this standard, all covered documents must remain on the website for at least one year from the date they were first posted on a website. This will protect participants from confusion and uncertainty about how long their documents will be available on a website. Some covered documents, for example, the SPD, must remain on a website until they are superseded by a subsequent version of themselves, even if longer than one year from the date they were originally posted on a website.

The following examples illustrate how paragraph (e)(2)(ii) of the final rule applies to several different covered documents.

Example 1. A plan's SPD is furnished under the new safe harbor on January 1, 2025 ("2025 SPD"). Thus, it is first posted on the website on the same date. The plan is materially amended in 2026, and a summary of material modifications (SMM) was timely furnished. A new SPD is furnished via posting on the website on January 1, 2030 ("2030 SPD"), reflecting the

[52] These safe harbor requirements are not retroactive. Plan administrators are not required to go back and post historical versions of covered documents, dated prior to the effectiveness of this final rule, on the website. The Department intends these website retention provisions to be prospective in nature.

2026 amendment. The 2025 SPD must remain on the website at least until January 1, 2030, the date the updated 2030 SPD is furnished superseding the 2025 SPD. In this example, the 2025 SPD is superseded by a subsequent covered document more than one year after the date it was first made available on the website.

Example 2. A pension benefit statement for a participant in a defined benefit pension plan is furnished on January 1, 2030 ("2030 PBS"), via posting it on the website on the same date. Subsequently, the plan furnished the same participant the next pension benefit statement on January 1, 2033 ("2033 PBS"), via posting it on the website on the same date. The 2030 PBS must remain on the website until January 1, 2033, when it is superseded by the 2033 PBS. In this example, the 2030 PBS was superseded by a subsequent covered document more than one year after the date it was first made available on the website.

Example 3. A pension benefit statement for a participant in a participant-directed defined contribution pension plan was furnished on January 1, 2030, via posting it on the website on the same date ("Q1 Benefit Statement"). Subsequently, the plan furnishes the same participant the next pension benefit statement on April 1, 2030, via posting it on the website on the same date ("Q2 Benefit Statement"). The Q1 Benefit Statement must remain on the website until January 1, 2031, one year after it was first posted to the website. In this example, even though the Q1 Benefit Statement was superseded on April 1, 2030, the date on which the Q2 Benefit Statement is posted, the Q1 Benefit Statement must remain on the website for at least one year, i.e., at least until January 1, 2031.

Example 4. A blackout notice is furnished to all plan participants on January 1, 2029, via posting it on the website. The blackout notice, among other things, announced an upcoming 30-day blackout period ending on March 15, 2029. The blackout notice must remain on the website

until at least January 1, 2030. In this example, even though the blackout period ended on March 15, 2029, the blackout notice must remain on the website for at least one year, i.e., at least until January 1, 2030.

The Department does not agree that covered documents must be available online indefinitely, as suggested by several commenters, but paragraph (e)(2)(ii) of the final rule reflects the Department's determination that covered documents must, at a minimum, be available on the website for at least one year. Covered individuals will benefit from having covered documents available to them for a reasonable period of time. For example, participants in a participant-directed individual account plan will, at any time, have access to at least a year's worth of quarterly pension benefit statements, which may be accessed throughout the year for a variety of reasons, including to verify contributions, review and revise asset allocations, or otherwise manage their retirement assets. This also provides ample time for covered individuals who wish to print or download covered documents to do so.

The new website retention provision in paragraph (e)(2)(ii) of the final rule does not preclude the ability of plan administrators to retain historical documents on the website longer than the minimum term required, if they choose.[53] Plan administrators may prefer to archive or similarly preserve prior covered documents on the website for a longer period of time than is required by paragraph (e)(2)(ii). Nor do these new website retention requirements alter a plan administrator's general recordkeeping requirements under ERISA. For example, ERISA sections 107 (retention of records) and 209 (recordkeeping and reporting requirements) separately specify

[53] One commenter argued that including numerous historical documents on the website could create unnecessary confusion. The Department disagrees. Any such confusion should be minimal to the extent that the current version of any covered document must be presented on the website in a manner calculated to be understood by the average plan participants pursuant to paragraph (e)(2)(iii) of the final rule. A covered document that is buried or obscured on the website is not, in the Department's view, presented on the website in a manner that satisfies this standard.

retention periods.[54] Thus, participants may continue to request covered documents that are older than one year. Plan terminations, benefit determinations, and many other circumstances and events naturally will arise during, and following, an employer's sponsorship of a pension benefit plan that require special attention to the proper management and retention of documents.[55] Plan administrators' (and other plan fiduciaries') responsibilities with respect to retaining plan records and documents and responding to participant requests are unchanged from existing law. The new safe harbor adopted today is not meant to alter ERISA obligations with respect to the maintenance of plan records or otherwise. This is an optional safe harbor available to plan administrators that provides a new method for plan administrators to furnish covered documents to plan participants.

Some commenters asked the Department to include standards for the design of the website, such as requiring that information be presented in a simple and direct form, and that the rule should prevent covered individuals from having to click through various levels to find documents. The Department disagrees that any changes to the rule are necessary to manage these concerns. The rule already requires, in paragraph (e)(2)(iii), that covered documents must be presented on the website in a manner calculated to be understood by the average plan participant. Further, the rule requires, in paragraph (d)(3)(i)(D), that a website address or hyperlink must be "sufficiently specific" to provide ready access to a covered document. A link that requires a covered individual to click through an unreasonable number of webpages to find a covered document would not satisfy the standard. The Department also believes that plan

[54] 29 U.S.C. 1027, 1059.

[55] As one commenter pointed out, maintaining historical versions of covered documents not only is necessary for plan administrators to satisfy their ERISA recordkeeping obligations and this final rule, but may be in plan sponsors' own interest to the extent they wish to rely on such covered documents in later litigation or enforcement matters.

administrators and their service providers, rather than the Department, are better equipped to address the technicalities involved in designing websites to disclose required information.

Paragraph (e)(3) of the proposal required that the plan administrator take measures reasonably calculated to ensure that the website protects the confidentiality of personal information that could be included in covered documents. The Department explained that given the industry's increasing reliance on and use of electronic technology, many plans already have secure systems in place to protect covered individuals' personal information, as is generally required by section 404 of ERISA. The Department requested comments on whether this standard is sufficient to protect covered individuals' personally identifiable information. Commenters disagreed on the sufficiency of this standard. Some commenters asserted that the proposal adequately addressed information privacy and security concerns and that the approach taken in the proposal, which included a principles-based standard, is preferable to specific standards, requirements, and certifications, which can quickly become obsolete with rapidly-changing technology. Other commenters do not believe the Department sufficiently addressed privacy concerns in the proposal, especially for inactive or unused electronic addresses, which, in the view of some commenters, are likely to result for participants who are assigned an electronic address by their employer. These commenters suggested that the more devices on which the Department allows electronic delivery of information, the more complex security issues become, and that security requirements may need to vary from covered document to covered document.

The Department in the final rule has maintained the principles-based standard included in the proposal, agreeing with commenters that efforts to establish specific, technical requirements would be difficult to achieve, given the variety of technologies, software, and data used in the retirement plan marketplace. The commenters requesting more specific standards themselves

point to this difficulty, insofar as these issues become more complex as innovations occur and the same standards may not be appropriate for all covered documents, all systems, or in all circumstances. Therefore, the final rule continues to require that the plan administrator, possibly in coordination with plan service providers, take measures reasonably calculated to protect the security and privacy of covered individuals' information.[56]

Paragraph (e)(4) of the final rule is new. It was added in response to a range of questions from commenters about what constitutes a "website" for purposes of the safe harbor. In the preamble to the proposed rule, the Department explicitly asked for commenters' views on whether, and how, the rule should be modified to include other web-based mechanisms, such as messaging and mobile "apps." Although some commenters recommended a narrow application of the rule to traditional websites accessed with a browser, most commenters on this issue encouraged the Department to broadly define what constitutes a website, or at least to clarify that the term covers any appropriate electronic source for accessing information. These commenters want to ensure that the rule accommodates advances in technology and permits the use of mobile applications, texting, and other internet-based mechanisms and, in some cases, these commenters suggested specific language for the rule or that the Department adopt a good faith or similar standard in the rule to allow plan administrators to use new technology without having to revisit the regulatory process. The Department agrees that the rule should more clearly state its inclusion of additional and new technologies, as long as those technologies are not inconsistent with a plan administrator's ability to satisfy the requirements of the safe harbor. The Department does not want to inhibit innovation in the delivery of required ERISA disclosures, especially as

[56] Some commenters raised issues regarding liability for security breaches. This safe harbor only establishes an optional method for delivery of covered documents. Issues pertaining to liability for security breaches are beyond the scope of this safe harbor.

forms of communication improve and expand. Thus, for purposes of the safe harbor, the term "website" means an internet website, or other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.

(4) ***Right to copies of paper documents or to globally opt out of electronic delivery*.**

The Department believes that it is essential that any enhanced use of electronic disclosure permitted under ERISA respects the preferences of covered individuals who want to receive covered documents on paper, mailed or delivered to them. To that end, the proposal contained two safeguards, in paragraph (f), for these covered individuals.

The first safeguard, in paragraph (f)(1) of the proposal, provided that upon request from a covered individual, the plan administrator must promptly furnish to such individual, free of charge, a paper copy of a covered document. Commenters overwhelmingly supported protecting covered individuals' rights to request a free paper copy of a required ERISA disclosure. A few commenters focused on the number of paper copies a covered individual could request, and receive, free of charge. These commenters were concerned about potentially abusive practices in which a covered individual makes several requests for different covered documents. The Department is not persuaded that this is a legitimate concern. The 2002 safe harbor permits paper copies, free of charge, and the Department is unaware of abusive practices of this nature. The final rule allows covered individuals to request more than one covered document pursuant to this provision. For instance, a participant could contact the plan 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. In response to commenters concerns about repeated requests for the same version of the covered document, however, paragraph (f)(1) of the final rule clarifies that only one paper copy of any specific covered document must be provided free of charge under this safe harbor. Beyond that, whether the plan charges for additional copies of the same covered document depends on the terms of the particular plan and other applicable provisions of ERISA and regulations thereunder, and is outside the scope of this regulation.

A few commenters focused on how quickly plan administrators must respond to requests under the safe harbor. Some suggested time limits for responses, like those adopted by the SEC for shareholder reports, i.e., within three business days.[57] The Department is not persuaded that strict time limits are needed. The 2002 safe harbor does not contain time limits for responses and the Department is unaware of harm or exploitation in this area. The safe harbor requirement to respond to requests rests with the ERISA plan administrator. The Department expects that the plan administrator will furnish the copy to the covered individual as soon as reasonably practicable after receiving the request. This overarching standard of reasonableness is sufficient to protect covered individuals' right to paper. The statute itself also provides a civil enforcement remedy, when appropriate.[58]

The second safeguard, in paragraph (f)(2) of the proposal, provided covered individuals with the right to opt out of electronic delivery and receive some or all covered documents in paper form. Commenters overwhelmingly supported this provision and, thus, it was adopted with only two minor changes. As proposed, this provision allowed covered individuals to "globally" opt out, in the sense that individuals would be able to opt out of electronic delivery

[57] 17 CFR 270.30e-3(e).
[58] 29 U.S.C. 1132(c)(1).

entirely. In addition, the provision granted covered individuals the right to opt out of electronic delivery on a document-by-document, à la carte basis. Commenters universally supported the right of covered individuals to globally opt out of electronic delivery. Many commenters, however, objected to requiring plan administrators to offer a document-by-document opt-out right. Current recordkeeping systems, they explained, generally apply an "all or nothing" approach to paper versus electronic delivery. An à la carte system, by contrast, would require difficult and costly system modifications to keep track of paper preferences on a document-by-document basis for each covered individual. Commenters explained that it is highly atypical for plan administrators to offer a "pick-and-choose" approach to opting out of electronic delivery. It would be rather cumbersome and complicated for plan administrators to track opt-outs participant-by-participant, and document-by-document, over time, they added. In addition, the fact that the rule permits plan administrators to provide a combined annual NOIA for multiple covered documents would exacerbate this problem, and potentially create confusion for covered individuals. For example, the commenters question whether an NOIA would have to include an explanation that a covered individual can opt out for one, more than one, or all of the combined covered documents and a detailed explanation of how to do so for each possible opt-out variation. Commenters also pointed out that even if the rule were limited to a global opt out, covered individuals under the rule always may request a paper copy of any specific covered document. Thus, according to these commenters, accommodating an à la carte opt-out right would be burdensome and result in costs that could deter plan administrators from using the safe harbor. At least one comment letter can be interpreted as support for requiring plan administrators to offer a document-by-document opt out right, in that it identifies practices

showing that some participants might prefer a combination of paper and electronic communications.

The Department is persuaded that the critical protection for covered individuals is the right to globally opt out of electronic delivery. Therefore, the final rule strikes the phrase "some or all" from paragraph (f)(2), retaining (and making clearer by adding the term "globally") only the global opt-out as a requirement. This global opt-out requirement in paragraph (f)(2) of the final rule is the minimum; plan administrators may offer additional opt-out election options, such as a document-by-document opt out or one based on categories or classifications of covered documents. For example, some participants might be comfortable knowing that certain documents, such as the SPD, are available on the website, but prefer to receive paper versions of other documents, such as their quarterly pension benefit statements. This provision also was revised to include the words "free of charge," clarifying that covered individuals may not be charged an opt-out fee.

Paragraph (f)(3) of the proposal required that the plan administrator establish and maintain reasonable procedures governing requests or elections under paragraphs (f)(1) and (2) of the safe harbor. This provision also provided that 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. This paragraph is adopted without change in the final rule, although a few commenters raised concerns with this provision.

The principal concerns related to the provision's lack of specificity, lack of prescriptiveness, and level of discretion afforded plan administrators. These commenters were worried that the provision would not adequately protect covered individuals who prefer paper documents, either because plan administrators would establish onerous procedures designed to

frustrate requests or because covered individuals would find it difficult to follow such procedures. The suggested solution, according to these commenters, would be the establishment of required, uniform procedures for all plans. Ideas for elements of such procedures included, among other things, mandatory written procedures for tracking opt-outs; and a requirement that plan administrators permit covered individuals to submit opt-out elections either electronically or in writing.

These ideas may be perfectly reasonable with respect to certain plans, and the Department does not wish to discourage the establishment of such procedures under this safe harbor. The Department does not believe, however, that it is appropriate to set forth a single set of procedures to govern all requests or elections for all plans, in all circumstances. The general, principle-based approach in paragraph (f)(3) of the final rule provides stringent and protective guardrails to protect covered individuals' rights, while avoiding the pitfalls of adopting strict one-size-fits-all procedural requirements that must be applied by all plans in all circumstances, and that might inhibit innovation in the implementation of this notice-and-access framework. Finally, the Department finds unpersuasive the assertions that some covered individuals may be unaware of their plan's procedures for making requests or elections. Paragraph (g) of the final rule, discussed in more detail below, requires these procedures to be set out in writing in an initial paper notice to all individuals to whom the plan administrator intends the safe harbor to apply, before the safe harbor can be used.

A couple of commenters also asked for confirmation that paragraph (f)(3) of the safe harbor does not preclude plan administrators from continuing to make online information available to covered individuals who globally opt out of electronic delivery under the safe harbor. One commenter, for example, noted that some plan administrators may post covered

documents online and continue to send NOIAs to covered individuals that have decided to opt out of electronic delivery. The safe harbor provides plan administrators with an optional method of furnishing covered documents through electronic media, and paragraph (f)(3) provides a mechanism for individuals to override a plan's decision and select paper delivery. When an individual makes an election under paragraph (f)(2) of the safe harbor, the plan administrator must return that individual to paper delivery, at which point the conditions of the safe harbor no longer apply with respect to that individual. Once a plan respects the individual's election and satisfies its obligation to furnish paper documents, the plan may continue to provide online access to covered documents that are available as well. The safe harbor has no effect on optional action in this context by plan administrators.

Finally, paragraph (f)(4) of the proposal is adopted in the final rule with one minor change for clarification. This paragraph requires that the system for furnishing the NOIA must be designed to alert the plan administrator of an invalid or inoperable electronic address. If a plan administrator learns of an invalid or inoperable electronic address (e.g., the email is returned as undeliverable or "bounces back" and the problem is not promptly cured), the plan administrator must treat the covered individual as if he or she had elected to opt out of electronic delivery under paragraph (f)(2). One way to cure the problem would be to furnish the NOIA to a valid and operable secondary electronic address that had been provided by the covered individual 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. Some commenters offered additional remedies for promptly curing an invalid electronic address. The Department agrees that other acceptable cures exist depending on the particular facts and circumstances surrounding an NOIA that cannot be delivered.

Regardless of the procedures that a plan administrator implements to cure an invalid electronic address, if the problem is not promptly cured, the deemed election of paper delivery will persist until the plan administrator is able to obtain a valid and operable electronic address for the covered individual.

Paragraph (f)(4) is solely a safeguard to ensure that covered individuals actually receive their pension plan disclosures by requiring different treatment of a covered individual when his or her electronic address is invalid or inoperable. As long as the plan administrator is not alerted to such a problem, and the other conditions of the safe harbor are satisfied, the plan administrator is considered to have furnished the covered 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.[59] 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.

Some commenters recommended that paragraph (f)(4) should include additional safeguards, such as a requirement that plan administrators monitor, using electronic tracking tools, whether covered individuals actually receive, open, read, or access online the NOIA or covered documents. These commenters argued that without a monitoring requirement, NOIAs could end up in a spam folder or be buried or otherwise misfiled, resulting in a covered individual never actually accessing a covered document online. A few commenters questioned whether application of the safe harbor would adequately result in covered documents actually being received and whether the conditions of this rule are sufficient to satisfy the general standard for furnishing documents under ERISA.

[59] *See Intel Corp. Inv. Policy Cmte. v. Sulyma*, 140 S. Ct. 768 (2020).

Other commenters strongly opposed the imposition of tracking or monitoring obligations on plan administrators. These commenters did not necessarily challenge the existence of tracking or monitoring technology to learn about participants' electronic engagement; indeed some commenters pointed to tracking capabilities when citing the benefits of electronic delivery, possibly even correlating to higher deferral rates. Rather, these commenters opposed a tracking or monitoring obligation on the grounds of economic burdens. One commenter, for example, stated that "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." In support of this position, they maintained that the safeguards in paragraph (f)(4) of the proposal are reasonably crafted and sufficient to resolve potential electronic delivery failures, and that any additional obligations would be unnecessary and unsupported from a cost-benefit perspective. These commenters also opposed a tracking or monitoring obligation on policy grounds, arguing that it would be inconsistent for the Department to impose a tracking or monitoring requirement on plan administrators using electronic delivery when they currently are unable to determine if individuals open and read paper disclosures sent by U.S. mail. In this regard, they asserted that it would be poor and inconsistent policy to regulate electronic delivery more stringently than traditional paper delivery methods.

The Department disagrees that compliance with this final rule, which includes a variety of protections and safeguards for covered individuals, in addition to this paragraph (f)(4), fails to satisfy ERISA's standard for delivery. The Department does agree, however, that imposition of a monitoring requirement could be very expensive, especially for small plans, to the extent technological systems have to be replaced or altered significantly, or additional, potentially

costly, plan services have to be procured. Even the most basic requirement for website monitoring, for example tracking the instances of users visiting a particular page on a website or views of a screen on an app, would require a web analytics tool, according to the commenters. Even for plan administrators that already, as suggested by a few commenters, engage in some level of monitoring, transitioning their systems and procedures to comply with a specific, technical requirement in this safe harbor would not be without some burden and cost. It is unlikely in all cases that the capabilities or functioning of existing monitoring systems would align precisely with a new regulatory requirement. Further, the Department believes that the rule's protections for covered individuals, not only paragraph (f)(4) but, for example, the clear and timely communication of website activity and paper and opt-out rights to preserve individuals' delivery preferences, taken together, provide a method of furnishing documents that is more than reasonably calculated to ensure actual receipt of covered documents. Thus, the Department does not see a compelling reason to establish a stricter standard for monitoring covered individuals' use of disclosures furnished electronically than for paper deliveries. The practical effect of paragraph (f)(4) of the final rule is analogous to the circumstances that arise when a plan is alerted to an invalid physical mailing address when a letter is returned as undeliverable. Of course, this final rule does not prevent plan administrators who already engage in some level of monitoring from continuing to do so.

(5) ***Initial notification of default electronic delivery and right to opt out.***

Paragraph (g) of the proposal provided that the plan administrator must furnish to each individual, prior to the plan 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.

The Department is adopting paragraph (g) with a few modifications in response to commenters' suggestions, which are explained below. The final rule continues to require that each individual with respect to whom a plan administrator intends to rely on the new safe harbor, be furnished a notification, on paper, that some or all of the plan's covered documents will be furnished electronically to an electronic address. The initial notice, as proposed, also required a statement of the right to request and obtain a paper version of covered documents and of the right to opt out of receiving covered documents electronically, free of charge, and an explanation of how to exercise these rights. The Department continues to believe that it is important for all participants and beneficiaries, who are accustomed to the current ERISA delivery rules, to be notified, on paper, that the plan administrator is adopting a new method of electronic delivery. If the plan administrator does not intend to rely on this new safe harbor for one or more employees, however, the plan administrator does *not* need to send these employees an initial notification. 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 this safe harbor only with respect to the two participants who are not covered under the 2002 safe harbor, in which case the plan would furnish the initial notification only to these two participants.

Many commenters requested an exception to the requirement that the initial notice must be furnished on paper for individuals who already receive disclosures electronically under the 2002 safe harbor. Commenters were concerned that, in this context, participants and beneficiaries who are accustomed to receiving electronic disclosures may be confused by a paper notice, or might ignore it altogether. Some of these commenters suggested that individuals covered by the 2002 safe harbor should not be required to receive an initial notice at all. On the other hand, the Department received comments supporting the requirement that an initial notice must be furnished on paper to all intended covered individuals, without exception. The Department believes that commenters' concern about potential confusion on the part of individuals receiving an initial notice is speculative at best. Further, even if an individual has been receiving electronic disclosures pursuant to the 2002 safe harbor, the logistics of electronic disclosure likely will work differently under the new safe harbor, for example with respect to the right to globally opt out. Therefore, the Department continues to believe that application of this new safe harbor warrants an initial notification, in paper, advising participants at the outset how covered documents will be furnished and their rights under the new electronic delivery framework and that confusion or other harm is highly unlikely. To that end, a plan administrator may not rely on the 2002 safe harbor to furnish the initial notice electronically to any participant or beneficiary that will be a covered individual under the new safe harbor.

A few commenters questioned the sufficiency of providing only one initial notice to warn participants and beneficiaries about the transition from paper to electronic delivery. Commenters made various suggestions, including that the Department require plan administrators to send two such notices before relying on the safe harbor, and that additional notices should be provided annually and at termination of employment. The Department declines to adopt these

suggestions. These commenters offered no basis to conclude additional paper notices would be significantly more effective, particularly in light of the additional costs such a requirement would entail. In addition, the Department notes that the initial notice is not the only protection for participants and beneficiaries who will be transitioned to notice-and-access electronic disclosure. The specific purpose of the initial notice is to alert covered individuals to the coming change and of their rights under the new disclosure framework. Covered individuals, however, will continue to be informed of these rights in all future NOIAs. The Department drafted this safe harbor mindful of important periods of transition for covered individuals, not only requiring an initial notice before electronic delivery begins for a particular individual, but also requiring all future NOIAs thereafter to contain similar information, and a special rule to address the time at which covered individuals sever from employment.

Although a number of commenters supported the proposed content requirements, without modification, other commenters recommended a variety of additional content requirements for the initial notice required under paragraph (g) of the proposal. For example, commenters suggested that it would benefit covered individuals if the initial notice included instructions for how to access covered documents and the electronic address that will be used to furnish NOIAs under the safe harbor. Commenters point out that a covered individual's electronic address plays a crucial role under the new safe harbor, especially with respect to situations in which the employer will assign an electronic address (and here, especially if an employer assigned a commercial electronic address, such as a Google email account (or "gmail.com")). Additional suggestions for required content included a list of disclosures the plan intends to provide electronically, a statement that individuals who request paper will be protected from retaliation,

the right of individuals to print covered documents at the employer's office, and a toll-free number to contact the plan for password and other assistance.

Although the Department disagrees with the appropriateness and necessity of each item on the broad list of additions offered by these commenters, the Department was persuaded by commenters that the initial notification could be improved, and the transition to electronic delivery made smoother, by requiring certain additional items of information. First, the final rule now provides, in paragraph (g), that plan administrators identify the electronic address that will be used for a particular individual and any instructions necessary to access the covered documents. The Department agrees that it would be helpful for a plan administrator to identify the specific electronic address that will be used to furnish covered documents to a covered individual and that the additional burden, if any, of including this personalized information will be more than offset by the benefit to both the plan administrator and covered individuals of stating, up front, the electronic address that will be used. This requirement will help to identify and rectify potential mistakes for an individual's preferred electronic address and to clearly identify electronic addresses assigned by the employer. Second, the Department agrees that individuals will benefit from the inclusion of any instructions that will be necessary to access covered documents, for example whether individuals will have to use passwords, download a mobile application, or set up an online account to view secure documents. Third, the Department added to the final rule a requirement that the initial notice include a cautionary statement that the covered document is not required to be available on the website for more than one year; or, if applicable, after it is superseded by a subsequent version of the covered document. This addition is to make sure that covered individuals are put on notice as they transition to a notice-and-access disclosure framework that covered documents may not be available online indefinitely.

The Department did not adopt, as requirements, any of the other content suggested by commenters; the Department notes, however, that the content requirements for initial notices in the final rule, unlike for NOIAs, are not limiting. As long as additional content on the initial notice is relevant and not inaccurate or misleading, plan administrators may personalize and further enhance the initial notice to better communicate the plan's transition to electronic disclosure under the safe harbor. Finally, the Department added one additional, non-content, requirement to paragraph (g), that the initial notice must be written in a manner calculated to be understood by the average plan participant; this change is intended merely to confirm that the initial notice must satisfy the same general readability standard as the NOIA and other required ERISA disclosures.

One commenter raised an issue with respect to the prominence of the initial notification required by paragraph (g) of the proposal. This commenter was concerned that initial notifications might be packaged or combined with other disclosures, including non-ERISA employment materials, distributed during the onboarding process and that newly hired individuals might lose track of them. This commenter requested that the final rule include a requirement that an initial notice be furnished alone and not, for example, with enrollment or other materials. Others disagreed with this commenter and believed that initial notices should be contained in plan enrollment materials, or for instance in a new employee packet or with other onboarding human resource documents. The Department understands the concerns of the former commenter, but believes it may be impractical to mandate that the initial notice be furnished alone. The Department agrees with the latter commenter that it makes common sense for plan administrators to distribute initial notices with standard enrollment materials. It is customary for plan administrators to consolidate or package different documents or disclosures into a single

enrollment package for organizational purposes and for the sake of efficiency. The requirement in paragraph (g) that the initial notification be in writing is sufficient protection against the possibility that covered individuals will overlook such notices. Accordingly, no change to paragraph (g) of the proposal is made in response to this comment.

(6) ***Special rule for severance from employment with plan sponsor*.**

Paragraph (h) of the final rule continues, as proposed, to include a special requirement for plan administrators who wish to use the safe harbor for furnishing ERISA pension plan disclosures to employees who have severed from employment.[60] As explained in the proposal, this special rule focuses on circumstances when there is a heightened concern about the accuracy of electronic contact information in connection with an employee's severance from employment. As proposed, paragraph (h) provided that, at the time a covered individual who is an employee severs from employment with the employer, the plan administrator must take measures reasonably calculated to ensure the continued accuracy of the electronic address described in paragraph (b) of the rule or to obtain a new electronic address that enables receipt of covered documents following the employee's severance from service.

Many commenters suggested eliminating this provision in its entirety, arguing that it is unnecessary and duplicative, because paragraph (f) of the proposal, which required a plan administrator to take curative steps if the electronic address of a covered individual becomes

[60] As explained in the preamble to the proposal, the phrase "severance from employment" in paragraph (h) is intended to have its ordinary meaning. 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.

invalid or inoperable (i.e., the "bounce back" provision) will remedy problems with electronic addresses of former employees. The Department intends to ensure a seamless transition for the dissemination of ERISA pension plan information when an employee leaves employment. And as such, the Department disagrees that paragraph (f) will address every circumstance in which an electronic address becomes inoperable or no longer associated with a covered employee who severs from employment. For example, emails sent to employer-provided email addresses of employees who have severed employment will not necessarily bounce back in a timely fashion, or ever, as would be necessary to give the plan administrator time to furnish documents within applicable timeframes. As a result, the Department is retaining the "severance from employment" rule, subject to a few revisions.

Other commenters recommended limiting the rule to severing employees who are receiving covered documents through an employer-provided electronic address, not a personal electronic address. These commenters argued that a special provision for severance is necessary only for employees who have an employer-assigned electronic address. If the electronic address being used by a terminated employee is not one that has been assigned by their employer, these commenters argued, there is no obvious reason that the address would cease to be valid or used by the individual merely because of cessation of employment. That is not the case with employer-provided addresses, which are likely to cease working at termination of employment or at some point thereafter, either because the employer deletes the email account or the severing employee no longer uses or has access to the employer-provided email account. The Department agrees that the special severance provision is not necessary when a personal electronic address is being used to provide covered documents to a covered individual. Therefore, the Department has revised paragraph (h) to read as follows: "At the time a covered individual who is an

employee, and for whom an electronic address assigned by an employer pursuant to paragraph (b) of this section is used to furnish covered documents, severs from employment with the employer, the plan administrator must take measures reasonably calculated to ensure the continued accuracy and availability of such electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual's severance from employment."

This revision also addresses concerns raised by representatives of multiemployer plans. These representatives stated that the Department should adjust paragraph (h) to better reflect and accommodate the experiences of individuals covered by a multiemployer plan, who may work for multiple different employers in the same year, if not the same month. These representatives also stated that it is not typically the case that employees are provided email addresses through their employers in the multiemployer sector and that those multiemployer plans who do deliver notices electronically, do not typically use employer-provided emails. Thus, this revision in practice will usually exclude plan administrators of multiemployer plans from the requirements of paragraph (h) of the final rule.

The special rule for "severance from employment" requires a plan administrator to take measures reasonably calculated to ensure the continued accuracy of the electronic address following a severance from employment, or to obtain a new address that enables receipt of covered documents following the severance. Many commenters requested clarification on what types of procedures would constitute such reasonable measures. One commenter suggested that the Department should require plan administrators to furnish, on paper, an additional, post-termination notice, with content similar to the NOIA. Covered individuals terminating their employment should already be familiar with their plan's notice-and-access framework for

delivery, so the Department disagrees that the rule should include an additional notice requirement at termination. Requiring another notice, especially in paper form, would increase the costs of compliance with the safe harbor overall, and, in the Department's view, unnecessarily. Employees separating from service are sufficiently protected under this provision to the extent the rule requires plan administrators to have procedures in place to ensure they have a correct electronic address to which notices will be furnished. As an example, procedures that include requesting and receiving an updated personal email address for future notifications as part of a company's standard off-boarding process ordinarily would be sufficient to meet this standard. If these measures fail, the participant or beneficiary is no longer a "covered individual" under paragraph (b) of the final rule.

(7) *Special rule for annual combined notices of internet availability*.

Although the proposal generally required, in paragraph (d)(1), that a plan administrator furnish an NOIA for each covered document, a special rule in paragraph (i) of the proposal allowed a plan administrator to furnish one annual combined NOIA (combined NOIA), 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 included, as applicable (1) a SPD; (2) a SMM; (3) a summary annual report (SAR); (4) an annual funding notice; (5) an investment-related disclosure under 29 CFR 2550.404a-5(d); (6) a QDIA notice; and (7) a pension benefit statement. The Department proposed a special rule for these covered documents because they represent the most common

and recurring disclosures that are made to pension plan participants, and are triggered by no event other than the passage of time.[61]

The Department excluded other required ERISA disclosures from this special rule, because, for example, they are event-specific disclosures and might communicate information that requires or invites specific and timely action on behalf of a participant or beneficiary. The special rule excluded 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 their 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 they similarly must act within defined periods of time. In either example, the timing of the annual combined NOIA may not align with, and may even post date, the timing of the specific act required or invited by the covered document. Additional examples include a qualified domestic relations order determination under ERISA section 206(d)(3)(G)(i)(II), and a notice of failure to meet minimum funding standards under ERISA section 101(d).

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 combination into one annual NOIA. The

[61] The proposal included the SMM even though it does not technically fit under the passage-of-time descriptor. An SMM'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"). In response to negative commentary on its inclusion in this paragraph, the SMM is excluded from the special rule in paragraph (i) of the final rule. Despite this exclusion, the SMM remains a covered document and may be furnished under the safe harbor, but it must have its own NOIA.

Department solicited 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 asked for commenters' views on whether, instead of an explicit list of the covered documents to which paragraph (i) applies, any final safe harbor should adopt a principles-based or categorical approach, describing the type or nature of covered documents that may be combined.

Paragraph (d)(2), as proposed, required that a combined NOIA for more than one covered document under paragraph (i) be furnished at least once each plan year, and, if the combined NOIA was used for the prior plan year, no more than 14 months following the prior year's notice. The Department intended this combined NOIA to be an annual disclosure; to provide flexibility to plan administrators and avoid potential compliance issues associated with a strict 12-month standard, however, the proposal provided that an "annual" combined NOIA may be furnished up to 14 months following the prior "annual" combined NOIA. Commenters did not object to the timing standard for this notice, and paragraph (d)(2) has been adopted as proposed to provide for this "annual" combined NOIA.

The special rule in paragraph (i) of the proposal elicited a large number of comments. Some of the commenters opposed paragraph (i) and argued that permitting consolidation is insufficient because it fails to provide notice to participants about important documents that are due at different times. Without an NOIA each time a document is posted online, these commenters worry that covered individuals will have no reason to go to the website. One commenter pointed out that the very documents that may be consolidated are the documents that are most critical to covered individuals understanding their most basic retirement plan rights and benefits. Another commenter asserted that this concern is heightened for covered individuals in

a participant-directed individual account plan who would receive only one notice per year that covers all four of their quarterly pension benefit statements. This commenter argued that this framework may not, as a legal matter, constitute adequate "furnishing" of the quarterly pension benefit statements. Further, since the cost of sending an NOIA by email, for example, is or should be insignificant, argued one commenter, plans will realize very little savings under the proposed special rule.

Other commenters, however, not only supported the consolidation of notices permitted by paragraph (i) of the proposal, but in some cases requested that the Department expand the consolidation permitted for the final rule to include additional disclosures. Commenters offered a variety of suggestions, including any information that must be furnished annually (e.g., the general plan information required by paragraph (c) of the Department's 404a-5 participant-level fee disclosure regulation[62]) or any covered documents that would be furnished at the same time, such as disclosures based on plan events.[63] Several commenters also requested inclusion of specified plan-related notices required by the Internal Revenue Code, such as the Code automatic contribution arrangement notices that currently may be furnished with the Department's QDIA notice.[64]

Other commenters responded favorably to the concept of a principles-based category of documents that may be consolidated, beyond the seven included in the proposal, and that might

[62] 29 CFR 2550.404a-5, "Fiduciary requirements for disclosure in participant-directed individual account plans" (Oct. 20, 2010).

[63] For example, one commenter suggested if a plan administrator changes investment providers, a required blackout notice, pursuant to 29 CFR 2520.101-3, and the disclosure of changes to plan investment options, pursuant to 29 CFR 2550.404a-5(c)(1)(ii), should be permitted to be announced in a combined NOIA. The Department did not accept this suggestion. The final safe harbor's special rule generally is intended to apply to routine disclosures that are furnished on a regular basis and that do not invite action in response to the disclosure. The blackout notice and disclosure of changes to plan investment options do not satisfy these criteria; in the Department's view these disclosures warrant separate notice.

[64] *See* Code sections 401(k)(13)(E), 414(w)(4), and 401(k)(12)(D); *see also* FAB 2008-03 as to furnishing the Code notices with the Department's QDIA notice.

be flexible enough to accommodate future disclosure requirements. A different commenter argued that a principles-based standard for covered documents that may be consolidated is not workable, because plan administrators may interpret the language differently creating unnecessary confusion, including for covered individuals. Commenters also disagreed on whether plan administrators should be able to consolidate notices of more than one plan when offered by a plan sponsor and asked for clarification on this point. In this connection, the Department notes that the final rule applies to "an" employee benefit plan, and its requirements must be satisfied with respect to each such plan, even if sponsored by the same employer. Allowing covered documents for more than one plan to be included on a combined NOIA could create confusion for covered individuals and would result in an even longer, less concise notice, especially to the extent notices for multiple covered documents for each plan already may be consolidated.

Paragraph (i) of the final rule is appreciably different than the paragraph as proposed, based on the Department's reevaluation of the combined NOIA concept in light of commenters' many ideas and points of view. Paragraph (i) continues to provide that plan administrators can furnish one annual NOIA that incorporates or combines the content required by paragraph (d)(3) of the rule with respect to more than one document. As opposed to the proposed list of seven covered documents, though, the group of documents for which a single annual combined NOIA is permitted has been revised.

As revised, paragraph (i) of the final rule permits one annual combined NOIA that incorporates the content required by paragraph (d)(3) with respect to four categories of documents and information. The first category is the SPD, as required pursuant to section 104(a) of ERISA. The second category is any covered document or information that must be furnished

annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline. The third category is any covered document, not in the first and second categories, if authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with section 110 of ERISA. The fourth category is any applicable notice required by the Code if authorized in writing by the Secretary of the Treasury.

Paragraph (i)(1) of the final rule deals with the first category of permissible documents, which consists solely of the SPD. The Department finds that the SPD lends itself to inclusion on an annual, combined NOIA, especially because its inclusion generally will remind covered individuals as to its availability more often than it otherwise would have to be furnished. Most commenters supported inclusion of this document.

Paragraph (i)(2) of the final rule deals with the second category of permissible documents and information. This category includes certain annual disclosures meeting certain conditions. Rather than listing the covered documents, however, the final rule describes this category as "any covered document or information that must be furnished annually, rather than upon the occurrence of a particular event, and that does not require action by a covered individual by a particular deadline." The NOIA for any covered document meeting this description may be consolidated onto an annual combined NOIA. This category includes many of the covered documents that were listed in the proposal, for example, an SAR, an annual funding notice, a QDIA notice, an annual (but not quarterly) pension benefit statement, and annual investment-related information required by paragraph (d)(2) of the Department's § 2550.404a-5 regulation. In response to public comments, this new category also includes information that must be furnished annually to comply with paragraph (c) of the 404a-5 regulation, for example the

general plan information in paragraph (c)(1)(i) or the description of fees for plan administrative services in paragraph (c)(2)(i)(A).

Paragraph (i)(3) of the final rule deals with the third category of permissible documents. This category includes any covered document "if authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with section 110 of the Act." This category is intended to provide the Department with flexibility to accommodate additional or future covered documents that do not fit in the second category in paragraph (i)(2), but that may be beneficial to include, for example to reduce administrative burdens on plans and improve the effectiveness of disclosures to covered individuals.[65]

The fourth category, in paragraph (i)(4) of the final rule, deals with applicable notices required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury. This category was added in response to the many commenters who requested a safe harbor that aligns with the Treasury Department's electronic media regulation for applicable notices at 26 CFR 1.401(a)-21(c), especially for disclosing Code automatic contribution arrangement notices and ERISA QDIA notices.

Unlike the proposal, the special rule no longer permits an annual NOIA to cover quarterly benefit statements within the meaning of section 105(a)(1)(A)(i) of ERISA. The Department was persuaded by commenters that an annual NOIA, for example furnished on January 15 of a

[65] Section 110 of ERISA permits the Secretary to prescribe for pension plans alternative methods of complying with any of the reporting and disclosure requirements if the Secretary finds that (1) The use of the alternative method is consistent with the purposes of Title I of ERISA, provides adequate disclosure to plan participants and beneficiaries, and provides adequate reporting to the Secretary; (2) application of the statutory reporting and disclosure requirements would increase costs to the plan or impose unreasonable administrative burdens with respect to the operation of the plan; and (3) the application of the statutory reporting and disclosure requirements would be adverse to the interests of plan participants in the aggregate. Section 110 provides both procedural and substantive requirements that the Department incorporates by reference.

given year, may be insufficient to adequately alert covered individuals as to the availability of subsequent benefit statements furnished later in that same year, for example, on April 15, July 15, and October 15. That view was not unanimous among the commenters, however, with many commenters suggesting that a single annual notice of availability is likely a very common practice, if not the norm, for plan administrators relying on FAB 2006-03. Given the lack of consensus among the commenters, and the Department's concern that an annual NOIA may not effectively promote covered individuals' access to and review of covered documents that will not be posted until months later, it makes sense to treat these recurring covered documents differently than other recurring documents. Accordingly, a separate NOIA must be furnished for each of these covered documents. The Department intends, however, to give further consideration to this issue in the future, and reserves the ability to take action pursuant to paragraph (i)(3) of the final rule, discussed above.

(8) ***Reasonable procedures for compliance*.**

The Department included a provision in the proposal to ensure that plan administrators would not violate their disclosure obligations under ERISA when, for a variety of reasons beyond the control of the plan administrator, there may be temporary interruptions in the availability of covered documents on a website. Paragraph (j) of the proposal explained that, if certain requirements are satisfied, the conditions of the safe harbor are also 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 plan administrator. The plan 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 plan 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 plan administrator knows or reasonably should know that the documents are temporarily unavailable. Commenters generally agreed that, by including this relief from potential liability, the Department fairly recognized the practical reality of temporary technical disruptions in modern times while at the same time including sufficiently rigorous standards to make sure that, as a general matter, important ERISA information is available to participants and beneficiaries when they need it.

A few commenters nonetheless made practical suggestions relating to the circumstances under which this relief should be triggered, and for how long the relief should be available. One commenter pointed out that covered documents also may periodically be offline for technical maintenance, upgrades, or similar activities to maintain or improve the website. The Department agrees that plan administrators should not fail the safe harbor during such times, and added the concept of "technical maintenance" to paragraph (j) to address these reasonable situations in which systems staff and other providers perform tasks necessary to maintain and improve the website on which covered documents are posted. These situations for the most part will be foreseeable, however, so plan administrators should take care to ensure that resulting service disruptions are reasonable. Another commenter suggested that the Department include a more specific parameter for how long the documents may be "temporarily" unavailable; for example, what if the problems occur during a blackout or similarly critical timeframe? The Department agrees that consideration should be given to facts and circumstances surrounding failure and that

covered documents may be unavailable for only a "reasonable" period of time. The final rule has been modified accordingly.

(9) ***Direct delivery via electronic mail.***

In response to a considerable amount of commentary on the proposal, the Department is persuaded that the proposed framework for disclosure would be enhanced by allowing the delivery of covered documents to covered individuals via email, with the covered document attached, in addition to allowing plan administrators to furnish covered documents on an internet website. As proposed, the safe harbor required that covered documents be posted on a website; the proposal did not specifically provide for (and its requirements did not accommodate), for example, the furnishing of an email to a covered individual that includes an attached PDF or similar version of a covered document. Providing covered individuals with an email that includes an attached covered document is, however, functionally similar to providing covered individuals with an email that includes a website link to a covered document. For the reasons discussed below, the Department has decided that direct delivery will provide covered individuals with comparable access to covered documents.

A large number of commenters asked the Department to clarify, in the final rule, that the safe harbor also applies to the direct furnishing of documents in electronic form. These commenters believe the rule would be improved if plan administrators are not limited to sending to covered individuals an email with a website address or a hyperlink to a covered document that is posted on a website, but instead could also send an email to covered individuals with covered documents in the body of or as an attachment to the email. Commenters believe that this form of

delivery is equally effective, and, for some individuals, perhaps preferable to hyperlinks and website postings. In fact, even commenters who generally oppose electronic disclosure as a default, nonetheless argue that directly sending covered documents is preferable to, and more protective than, a notice-and-access framework. According to these commenters, direct delivery is preferable because website access may require multiple steps (logons, passwords, opening hyperlinks, etc.) which, in their opinion, could result in a burdensome process that some individuals may not pursue. A significant benefit of direct delivery is immediate access to covered documents, while avoiding accessibility issues such as firewalls and forgotten passwords. Further, some plan administrators also may want to provide electronic delivery but cannot support, or have logistical concerns with supporting, a website.

The Department is persuaded by the broad range of commenters supporting the direct delivery of covered documents. Therefore, the final rule includes a new provision, in paragraph (k), which allows plan administrators to furnish covered documents directly to covered individuals using email, in contrast to the proposal, which permitted emails to covered individuals with links to covered documents. As explained below, although it is set forth in paragraph (k), the direct delivery provision relies on cross-references to other provisions of the final rule to ensure that it maintains the applicable requirements and protections of the notice-and-access framework.[66] The Department believes that this new provision better addresses commenters' requests for a direct delivery alternative, while ensuring that there are sufficient safeguards and other requirements necessary for application of the final rule when a plan

[66] The final rule's website accessibility, maintenance, and other requirements do not apply to direct delivery by email. Paragraph (k) does, however, incorporate the relevant substantive requirements of paragraph (d), as well as the requirements of paragraphs (f), (g) (except the cautionary statement), and (h). Paragraph (k)(3) also includes formatting and searchability requirements similar to those imposed by paragraph (e). These cross-references are discussed in greater detail in this section.

administrator prefers delivery by email of the actual covered documents (as opposed to delivery by email of hyperlinks to a website that includes the covered documents).

Paragraph (k) provides that, notwithstanding any other provision of the safe harbor, a plan administrator will satisfy ERISA's general furnishing obligation by using an email address to furnish a covered document to a covered individual provided that the requirements of paragraph (k) are satisfied. Although an electronic address for purposes of defining a "covered individual" in paragraph (b) of the rule is broader, for example encompassing mobile telephone numbers, paragraph (k) is limited to delivery to an electronic address that is an email address. Specifically, paragraph (k)(1) requires that the covered document be sent to a covered individual's email address no later than the date on which the covered document must be furnished under ERISA. Paragraph (k)(2) clarifies that, because the covered document will be furnished directly, the plan administrator does not need to comply with paragraph (d) and send an NOIA. Rather, the plan administrator must send an email that (i) includes the covered document in the body of the email or as an attachment; (ii) includes a subject line that reads: "Disclosure About Your Retirement Plan"; (iii) includes the information described in paragraph (d)(3)(i)(C) if the covered document is an attachment (identification or brief description of the covered document), paragraph (d)(3)(i)(E) (statement of right to paper copy of covered document), paragraph (d)(3)(i)(F) (statement of right to opt out of electronic delivery), and paragraph (d)(3)(i)(G) (a telephone number); and (iv) complies with paragraph (d)(4)(iv) (relating to readability). Paragraph (k)(2) ensures that the substantive information required by paragraph (d) is provided in a clear manner to those covered individuals who receive disclosures directly under paragraph (k).

Similar to paragraph (e)'s requirements for covered documents posted on a website, paragraph (k)(3) requires that the covered document be (i) written in a manner reasonably calculated to be understood by the average plan participant; (ii) presented in a widely-available format or formats that are suitable to be read online, printed clearly on paper, and permanently retained in electronic format that satisfies the preceding requirements in this sentence; and (iii) searchable electronically by number, letters, or words. Finally, paragraph (k)(4) mandates that the plan administrator (i) take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual; and (ii) comply with paragraphs (f) (relating to copies of paper documents or the right to opt out); (g) (relating to the initial notification of default electronic delivery), except for the cautionary statement; and (h) (relating to severance from employment) of the rule. Administrators who use direct email delivery pursuant to paragraph (k) are not required to include the cautionary statement required in paragraph (g) (i.e., a statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document), because plan administrators who use paragraph (k) are not required to maintain a website that would retain the covered documents that are delivered directly via email.

The Department notes that because this method of delivery does not require that plan administrators furnish an NOIA, the corresponding provision of the rule in paragraph (i) does not apply either. Paragraph (i), discussed above, allows the combination of content of certain covered documents on one, annual NOIA. The Department anticipates that, although the annual NOIA concept does not apply when covered documents are delivered directly, plan administrators may wonder whether more than one covered document can be attached to one email, especially for annually required or other covered documents that the plan administrator

wishes to send at the same time. Plan administrators should apply the same standard in this case that would apply if documents were to be furnished on paper. In some cases documents must be furnished separately, the required timing for different documents does not align, or the content of a particular document may not be combined with other documents. But the Department often permits plan administrators to furnish required disclosures at the same time (e.g., in the same envelope, the "envelope rule"). In that case, plan administrators may treat the email to the covered individual as the "envelope" and attach more than one document, as would otherwise be permitted.

(10) ***Dates; Severability*.**

The Department proposed in paragraph (k)(1) of the rule that the new alternative method for disclosure through electronic media, as finalized, would be effective 60 days following publication of a final rule in the **Federal Register**. The proposal included a separate applicability date in paragraph (k)(2), providing that the new safe harbor would 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 requested 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 plan administrators rely on the safe harbor too soon.

Nearly all commenters on this provision asked the Department to allow plan administrators to rely on the safe harbor as soon as possible. Further, since publication of the proposal, governments, industries, and workers globally have had to respond to the coronavirus

disease 2019 (COVID-19) outbreak, which President Donald J. Trump declared a National Emergency on March 13, 2020. The ability of plan administrators to use this rule will greatly assist employers, workers, and the retirement plan industry in managing the effects of COVID-19. Specifically, enhanced electronic delivery will immediately alleviate some of the current disclosure-related problems being reported by a great many retirement plans. Many retirement plan representatives and their service providers, for example, have indicated to the Department that they are experiencing increased difficulties and, in some cases, an inability to furnish ERISA disclosures in paper form. The reported problems, which are likely to persist for the foreseeable future, include temporary or permanent closure of printing and mailing centers, and disruptions in paper supply chains, among others. The infrastructure necessary to deliver information electronically in this country, however, remains largely intact.

Given that it is a safe harbor, and that plan administrators must be in compliance with all requirements before relying on the safe harbor, there is no harm, and considerable benefits, associated with moving up the applicability date, especially for employers and plan service providers as they work toward economic recovery from COVID-19. To the extent reliance on the rule results in cost savings and other benefits, the Department should not delay these benefits. Commenters on the proposal suggested that the rule be applicable on the same day that the final rule becomes effective: sixty days after its publication in the **Federal Register**. Only one commenter explicitly requested a delay in the application of the safe harbor, suggesting that a more appropriate timeline would be January 1 of the second year, rather than the first year, following the final rule's publication.

The Department is persuaded that there is no sound reason to delay the anticipated benefits of this rule, especially because it is a safe harbor, rather than a requirement, and it has

now been revised based on rigorous analysis and thoughtful stakeholder input to ensure that it adequately addresses appropriate policy goals and concerns. Therefore, the Department has aligned the effective and applicability dates to be 60 days following today's publication in the **Federal Register**. This has been done in paragraph (l)(1), rather than paragraph (k), due to the addition of a new provision in paragraph (k). Further, although the rule is not effective or applicable until 60 days after its publication, the Department, as an enforcement policy, will not take any enforcement action against a plan administrator that relies on this safe harbor before that date. The Department's decision to provide this non-enforcement policy supports the Federal government's broader effort to respond to COVID-19. The Department understands the far-reaching effects of COVID-19, and the non-enforcement policy provides flexibility and may reduce administrative burden on employers and pension plan service providers during this unprecedented time.

The final rule also includes, in paragraph (l)(2), a severability provision, which provides that if any provision in the final rule is found to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, such provision shall be severable and the remaining portions of the rule would remain operative and available to plan administrators. Thus, if a federal court were to find a specific provision, for example one of the NOIA content requirements, to be legally insufficient, then the remaining content requirements of the NOIA would remain applicable and in place.

(11) ***Changing Recordkeepers.***

Several commenters representing recordkeepers and plan administrators raised questions about whether and how certain provisions of the final rule would apply when a plan changes its recordkeeper, plan administrator, or both. For example, a number of commenters asked whether the safe harbor allows a new recordkeeper to rely on a list of electronic addresses and opt-out elections that are transferred from the old recordkeeper, or whether the new recordkeeper must independently solicit or verify electronic addresses and furnish new initial notifications under paragraph (g) of the rule. Correspondingly, would covered individuals have to resubmit an opt-out request? Commenters also asked whether a plan's safe harbor status is lost if there are changes in business structure (e.g., mergers, consolidations, closings, acquisitions) of the plan sponsor, plan administrator, or plan recordkeeper, in any case resulting in a new recordkeeper. These commenters requested guidance on how plan administrators and other plan fiduciaries could navigate these issues under ERISA and maintain compliance with the new safe harbor.

A change in recordkeeper or plan administrator is a rather common and very fact-specific event that may raise a variety of issues under ERISA, including record retention, fiduciary, reporting, and disclosure issues, that are generally beyond the scope of this safe harbor regulation, which addresses only a plan administrator's obligation under ERISA to furnish required disclosures. This becomes apparent when one considers that these questions apply upon a change in recordkeepers regardless of whether the disclosures are furnished to a physical address (in paper copy) or to an electronic address (in electronic copy). The same ERISA fiduciary obligations that apply when changing recordkeepers responsible for furnishing paper disclosures will apply when changing recordkeepers responsible for furnishing electronic disclosures. Accordingly, the Department in this document declines to render an opinion on the impact that changing a recordkeeper or plan administrator could have, as a general matter, on the

status of a plan under ERISA and the safe harbor. Nothing in this safe harbor, however, prohibits a plan administrator from relying on the safe harbor in circumstances when the plan's recordkeeper transfers accumulated lists of electronic addresses and opt-out elections to a successor recordkeeper. This makes sense because changing a recordkeeper would seem to have little or no effect on the validity or operability of a covered individual's electronic address, in much the same way that changing recordkeepers would have no effect on a participant's physical mailing address or other contact information. To the contrary, it is the Department's belief that confusion to covered individuals, as well as economic inefficiencies, are likely results if participants lose their status as covered individuals, resulting in a return to paper delivery, solely because of the plan's decision to change its recordkeeper.[67] Similarly, the Department is of the general view that, to the extent a plan participant or beneficiary is a "covered individual" who already is receiving disclosures electronically pursuant to the safe harbor (and therefore already received an initial notice and is accustomed to the notice-and-access delivery method permitted by this safe harbor), a new initial notice is not necessary.

(12) ***Transition Issues*.**

(i) *Delay in superseding prior subregulatory guidance.*

Although the 2002 safe harbor remains in effect, the Department occasionally has issued guidance in limited circumstances allowing, as a non-enforcement policy or otherwise, the use of

[67] The Department nonetheless cautions that, to the extent a plan administrator changes the plan's recordkeeper based on incompetence, negligence, or fraud on the part of the current recordkeeper, a plan administrator (or other responsible plan fiduciary supervising the change in recordkeeper) may, as a fiduciary matter, have to intervene and take reasonable steps to ensure that the transfer of all plan records (not limited to electronic addresses and opt-out records for purposes of this safe harbor) adheres to the duties set forth in ERISA section 404.

electronic delivery methods other than the 2002 safe harbor. In the preamble to the proposed rule, the Department stated that although the new safe harbor would have no impact on the current electronic delivery rule at 29 CFR 2520.104b-1(c), the new safe harbor would, if finalized, supersede the relevant portions of this prior interpretive guidance. Specifically, the relevant documents are FAB 2006-03, FAB 2008-03 (Q&A 7), and Technical Release 2011-03R (Dec. 8, 2011) (TR 2011-03R).[68]

The Department issued FAB 2006-03 to help plan administrators comply with amendments to ERISA's pension benefit statement requirements made by the Pension Protection Act of 2006. In relevant part, FAB 2006-03 provides that plan administrators may satisfy their obligation to furnish pension benefit statements by providing continuous access to benefit statement information through one or more secure websites. FAB 2006-03 included a variety of conditions, including notification to participants and beneficiaries explaining how to access their statements online. FAB 2008-03 later provided interpretive guidance on the Department's final QDIA regulation, which includes an initial and annual notice requirement. The QDIA notice may be combined with the Code's notice requirement for automatic contribution arrangements in Code sections 401(k)(13)(E) and 414(w)(4). This FAB 2008-03 allows plan administrators that wish to furnish QDIA notices electronically to rely on either the Department's 2002 safe harbor or the Treasury Department's rule at 26 CFR 1.401(a)-21(c), relating to use of electronic media. Finally, TR 2011-03R 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. TR 2011-03R allows plan administrators to furnish this information

[68] 84 FR 56894, at 56900, footnote 60.

through electronic media (including through a continuous access website) if participants voluntarily provide an email address and other conditions are satisfied.

Many commenters objected to the Department's statement that this prior guidance would be superseded. They argued that the Department should codify and permanently preserve the guidance to avoid unnecessary disruptions to systems already in place in reliance on such guidance. Further, commenters urged, if the Department is not willing to codify and permanently preserve the guidance, then the Department should, at a minimum, provide a transition period during which plan administrators could continue to rely on this prior guidance, while they adjust to the terms of the new safe harbor. A transition period would provide more time for plan administrators and plan service providers to make necessary systems and other changes and thereby reduce the costs and administrative burden that would result from having to do so immediately.

The Department disagrees that this prior guidance should be maintained permanently. In the interest of creating uniformity in the delivery of ERISA disclosures electronically, the Department believes that, rather than a piecemeal approach permitting different standards for different documents in a variety of subregulatory documents, a sounder approach is to require that, over time, plan administrators who wish to disclose information electronically follow a consistent standard. The final rule is intended to be such a standard, which, unlike the prior guidance, benefits from the regulatory process in which the Department engaged, including public notice and comment. The Department is persuaded, however, that it may be unnecessarily disruptive and costly, as well as harmful, or at least confusing, to participants and beneficiaries, if established disclosure procedures are suddenly invalid as of the applicability date of the final rule. The Department agrees with commenters that a reasonable transition period, during which

plan administrators may continue to rely on prior guidance as they make necessary system changes and acquire electronic addresses to comply with the final rule, is appropriate. Accordingly, for 18 months following the effective date of this final rule, plan administrators may continue to rely on the guidance set forth above. Thereafter, the relevant portions of such guidance are superseded. Commenters suggested transition periods generally ranging from one to two years. It makes sense that a transition period should be greater than one year, because many plan and participant communication cycles are annual; allowing one full communication cycle will enable plan administrators to rely on their general communication cycle to solicit electronic addresses from plan participants and beneficiaries. An 18-month extension accommodates this cycle and adds a reasonable cushion for unanticipated events. The Department will take no enforcement action against plan administrators who comply with the requirements of such guidance to satisfy their delivery obligations for the specified disclosures during this transition period.

(ii) *Electronic addresses obtained prior to the effective date of this final rule*.

Some commenters raised an additional issue as to whether and how plan administrators may use electronic addresses already in the plan's possession before transitioning to the new safe harbor. These commenters explained that plan administrators and sponsors in many cases already have extensive lists of email addresses, which they have compiled over time for various employment-related reasons and in the normal course of business operations. These addresses most likely were provided to the plan administrator or sponsor directly by the employee, or assigned by the plan administrator or sponsor for employment purposes. However, prior to this

new safe harbor, plan sponsors and administrators have had no reason, at least in the context of ERISA disclosure requirements, to document the precise source of any particular electronic address. Commenters were concerned that paragraph (b) of the proposal, which required that an electronic address be provided by the individual, would prevent plan administrators from using such electronic addresses if they do not have records that definitively indicate where or from whom the plan obtained the electronic address. These commenters asked whether a plan administrator may treat electronic addresses already obtained as having been provided by the participant, beneficiary, or other individual entitled to covered documents for purposes of treating such person as a covered individual under the safe harbor, even in the absence of documentation that such previously attained address was, in fact, provided by such person to the employer, plan sponsor, or plan administrator.

The requirement in paragraph (b) of the final rule is intended to prevent plan administrators from obtaining and using unreliable electronic addresses from sources that are too far removed from the covered individual. The Department nonetheless appreciates the concern raised by commenters as to the potential challenge of verifying the source of electronic addresses that a plan administrator already has in a plan's records. For transition purposes, therefore, a plan administrator may rely on these electronic addresses, provided that the plan administrator acts reasonably, in good faith, and otherwise complies with the requirements of the safe harbor. This includes compliance with the new provision in paragraph (g) of the final rule, which requires the initial notice to identify the electronic address to which NOIAs (or emails pursuant to paragraph (k)) will be furnished under the safe harbor. The plan administrator also would have to comply with the protections in paragraph (f)(4) of the safe harbor, which require a system to alert the plan administrator of an invalid or inoperable electronic address. Absent

compliance with these provisions, the Department has less assurance of the reliability of the electronic addresses at issue, in which case the Department may have a different view about relying on such addresses. Under these circumstances, and only as a transition matter, a plan administrator may rely on a preexisting list of electronic addresses that is in existence on the effective date of this final rule.

A plan administrator would not satisfy the good faith condition of this transition policy with respect to the use of any particular electronic address from such a list if the plan administrator has reason to know that such address is or may be invalid, inoperable, or obtained from a person or entity other than the participant, beneficiary, or employer, or acquired outside of the employment context in which the plan exists. For example, many commercial entities with diversified lines of business and affiliations serve as recordkeepers and plan administrators, within the meaning of section 3(16) of ERISA, for multiple retirement plans. These entities may acquire an electronic address for a person, who is plan participant, in the routine course of a business transaction unrelated to his or her retirement plan participation. The person for instance may have purchased an investment or insurance product in his or her personal capacity. Although the address may be valid and operable, it was not provided to the entity in the entity's capacity as a plan administrator under section 3(16) of ERISA. Therefore, this address may not be used under this transition policy. Commenters also explained that these commercial entities sometimes use one or more locator services or technologies to find and obtain electronic addresses for individuals. Although addresses located through these services may be valid and operable, they were obtained from a person other than the participant, beneficiary, or employer, and perhaps without the participant's knowledge. In these examples, the electronic addresses

were obtained in a manner or from a source that is too far removed from the covered individual and the employment relationship to be sufficiently reliable for use under the safe harbor.

C. E-SIGN Act.

For the reasons discussed below, covered documents for purposes of this final rule are exempt from the consumer consent requirements of the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (114 Stat. 464) (2000) (E-SIGN Act), and this rule provides 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. The final rule published today is an alternative method of compliance which would satisfy section 104(d)(1) of

the E-SIGN Act and, in accordance with section 104 of the E-SIGN Act, the Department has determined that there is substantial justification for this 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 rule will not pose a material risk of harm to consumers. In the preamble to the proposed rule, the Department requested comments as to whether there are additional, or different, steps it could take to ensure that these proposal was consistent with the requirements of section 104(d)(1) of the E-SIGN Act. The Department stated that it was particularly interested in receiving comments that provided suggestions or evidence related to whether the proposed rules would (or would not) impose unreasonable costs on the acceptance and use of electronic records. The Department did not receive substantive commentary on these questions in response to the proposed rule. The Department has determined that this final rule will not require (or accord greater legal status, or effect to) the use of any specific technology and that the rule is exempt from the consent requirements of the E-SIGN Act.

D. Regulatory Impact Analysis.

(1) *Relevant Executive Orders for Regulatory Impact Analyses*.

Executive Orders 12866[69] and 13563[70] 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

[69] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).
[70] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

importance of quantifying 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 any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely and materially affect 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) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise 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 final regulatory action will 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 Executive Order 12866. Therefore, the Department has provided an assessment of the potential benefits, costs, and transfers associated with this final rule. In accordance with Executive Order 12866, this final rule was reviewed by OMB. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA has designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

(2) *Need for Regulatory Action*.

Technology has changed substantially since the Department first published the 2002 safe harbor.[71] Broadband and wireless networks have expanded. More people rely on email. Servers and personal computers have improved. Smartphones, tablets, and other mobile devices have become predominant modes of communication. In 2003, one year after the existing safe harbor was established, approximately 62 percent of households had one or more computers.[72] In 2016, about 89 percent of households had a computer, smartphone, or tablet.[73] The share of U.S. adults who own a smartphone increased from 35 percent in 2011 to 81 percent in 2019.[74] The share of households with internet access at home also increased, from 55 percent in 2003[75] to 82 percent in 2016.[76]

Consumers use the internet, smartphones, and other electronic devices for a wide range of activities, including for conducting financial transactions. According to a 2018 survey, a majority of banked households used electronic banking services. Slightly fewer than two-thirds accessed their accounts online in the past 12 months, and about two in five accessed their accounts through their mobile phones.[77] The most common mobile banking activities were checking emails from banks (44 percent) and checking account balances or recent transactions online (35 percent).

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[71] 29 CFR 2520.104b-1(c) (2002).
[72] Jennifer Cheeseman Day, Alex Janus, and Jessica Davis, *Computer and Internet Use in the United States: 2003*, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau (2005).
[73] Camille Ryan, *Computer and Internet Use in the United States: 2016*, American Community Survey Reports, ACS-39, U.S. Census Bureau, August 2018.
[74] Monica Anderson, *Mobile Technology and Home Broadband 2019*, Pew Research Center (June 13, 2019).
[75] *See* Cheeseman Day et al., *supra* note 72.
[76] *See* Ryan, *supra* note 73.
[77] *2017 FDIC National Survey of Unbanked and Underbanked Households*, Federal Deposit Insurance Corporation, October 2018, https://www.fdic.gov/householdsurvey/.

As technological capabilities, internet access, and internet use have increased, other government agencies have issued rules encouraging wider use of electronic disclosure. The Social Security Administration no longer sends paper statements to most workers. Instead, workers register on the Administration's website for a "*my* Social Security" account to access their statements.[78] The TSP uses paperless delivery as the default for its quarterly statements.[79] Annual TSP statements are available both on a website and delivered by mail unless an individual requests only electronic annual statements. TSP reported that electronic paperless delivery saved about $7 to $8 million in 2006.[80] On October 20, 2006, the Treasury Department and the IRS published 26 CFR 1.401(a)-21, setting forth standards for electronic notices and participant elections with respect to retirement plans and similar employee benefit arrangements.[81] Similarly, the SEC has issued several regulations on electronic disclosure.[82]

The ERISA Advisory Council has, over the years, recommended improving the 2002 safe harbor. The Council's 2017 report recommended a move toward electronic delivery.[83] Electronic delivery, according to the report, is more helpful to participants and reduces

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[78] *See Frequently Asked Questions*, Social Security Administration, .https://faq.ssa.gov/en-us/Topic/article/KA-01741. The Social Security Administration does, however, mail paper social security statements to workers age 60 and older if they do not receive social security benefits and they have not yet set up a "*my* social security" account.

[79] 5 CFR 1640.6 (2003) ("The TSP will furnish the information described in this part to participants by making it available on the TSP Web site. A participant can request paper copies of that information from the TSP by calling the ThriftLine, submitting a request through the TSP Web site, or by writing to the TSP record keeper"). *See also Federal Thrift Savings Plan: Customer Service Practices Adopted by Private Sector Plan Managers Should Be Considered*, U.S. Government Accountability Office, GAO-05-38, Jan. 2005, at 12, n. 21, http://www.gao.gov/new.items/d0538.pdf (providing statistics on cost savings experience with TSP).

[80] *See Minutes of the Meeting of the Board Members*, Federal Retirement Thrift Investment Board (Feb. 20, 2007), https://www.frtib.gov/MeetingMinutes/2007/2007Feb.pdf.

[81] Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, 71 FR 61877 (Oct. 20, 2006).

[82] *E.g.*, Optional Internet Availability of Investment Company Shareholder Reports, 83 FR 29158 (June 22, 2018); Internet Availability of Proxy Materials, 72 FR 4148 (Jan. 29, 2007); *and* Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Investment Company Act Release No. 33814 (Mar. 11, 2020).

[83] *Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors*, ERISA Advisory Council on Employee Welfare and Pension Benefit Plans, Nov. 2017, at 34, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf.

disclosure costs.[84] The Council's 2009 report recommended that the Department adopt electronic disclosure regulations more aligned with 26 CFR 1.401(a)-21(c).[85]

The Government Accountability Office (GAO) has also made recommendations to the Department. In 2013, GAO recommended that SPDs and SMMs be posted on continuous access websites.[86] GAO also recommended adding "clear, simple, brief highlights" of required disclosures.[87] GAO noted that "the quantity of information diminishes the positive effects."[88]

On August 31, 2018, President Trump's Executive Order 13847[89] instructed the Department to make retirement plan disclosures required under ERISA more understandable and useful for participants, while reducing the costs and burdens imposed on plan sponsors. The Executive Order also directed the Department to explore increasing electronic disclosures, to improve their effectiveness and reduce costs and burdens.

In October 2019, the Department responded to Executive Order 13847 by publishing a proposed rule to establish an alternative electronic disclosure safe harbor. The proposed rule does not disturb the Department's 2002 safe harbor for electronic delivery.

According to the Private Pension Plan Bulletin, there were approximately 710,000 private retirement plans, with over 137 million participants in 2017.[90] Many participants were already receiving disclosures electronically under the Department's 2002 safe harbor for electronic

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[84] *Id*. at 17.
[85] *Advisory Council Report on Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries*, ERISA Advisory Council on Employee Welfare and Pension Benefit Plans, 2009, .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.
[86] *Private Pensions: Clarity of Required Reports and Disclosures Could Be Improved*, Government Accountability Office, GAO-14-92, Nov. 2013, at 40, .https://www.gao.gov/assets/660/659211.pdf.
[87] *Id.* at 41.
[88] *Id.* at 29.
[89] 83 FR 45321 (Aug. 31, 2018).
[90] *Private Pension Plan Bulletin, Abstract of 2017 Form 5500 Annual Reports*, Employee Benefits Security Administration, September 2019, at 2, https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2017.pdf.

delivery. Under the Department's new rule, plan administrators will have still more flexibility to electronically deliver covered documents, either by furnishing an NOIA directing participants to a website, or by furnishing covered documents directly by email.

(3) *Impacts*.

The Department expects the final rule to increase electronic delivery and save money by reducing the production and mailing costs associated with paper disclosures. The Department estimates that it costs plans approximately $514 million annually to mail seven specific disclosures.[91] The Department estimates that switching to electronic disclosures will likely save plans $419 million in the first year. Such savings would be partly offset by the estimated $232 million plans may pay to maintain websites, prepare NOIAs, and produce and distribute initial notifications. These added costs bring net savings to $187 million, a 36 percent reduction from the current $514 million burden. In the second year, net savings increase to $338 million, a 66 percent reduction. Over 10 years, the new rule saves approximately $3.2 billion net, annualized to $371 million per year (using a 3 percent discount rate).[92] Using a perpetual time horizon (to allow the comparisons required under E.O. 13771), the annualized cost savings in 2016 dollars

[91] Pursuant to paragraph (i) of the *proposed* rule, seven disclosures could be included in a single annual combined NOIA. Those seven disclosures were the SPD, SMM, SAR, annual funding notice, 404(a)(5)/404(c) disclosure, annual QDIA notice, and pension benefit statement. In response to public comments, however, the Department revised paragraph (i) in the *final* rule. As a result, some of these seven disclosures can be no longer included in a single annual NOIA. For example, a single annual combined NOIA does not include a SMM and a quarterly pension benefit statement. Despite this change in the final rule, for the purposes of estimating cost savings associated with this new safe harbor, the Department included all seven disclosures because all these seven disclosures can still be delivered electronically, just not with one single annual combined NOIA. In its burden estimates, the Department accounted for the fact that some plan administrators will email NOIAs multiple times per year under the final rule instead of emailing one single annual combined NOIA, as would have been permitted under the proposal. The Department updated these burden estimates using 2019 wage rates and 2017 retirement plan-related data.

[92] The net cost savings will be an estimated $2.6 billion over 10-year period, annualized to $365 million per year, if a 7 percent discount rate is applied.

are $319 million at a 7 percent discount rate.[93] Since long-term projections are inherently uncertain, however, the Department cautions against relying on the perpetual annualized cost savings estimate for purposes other than the required analyses under E.O. 13771. The fast pace of technological innovation makes it especially difficult to project cost savings into the distant future.

(i) 10-year Cost Saving Projection.

The Department based its projections on two assumptions: (1) the number of participants will grow at 0.5 percent per year;[94] and (2) the percentage of participants opting out of the default electronic delivery system will gradually decrease, from 18.5 percent to 7.5 percent, over the 10-year period.[95] The Department's 10-year projection may overstate cost savings because the number of participants receiving electronic disclosures could increase on its own under the 2002 safe harbor, even without this final rule. Similarly, plans could cut costs related to producing and mailing paper disclosures even without this final rule. On the other hand, the Department's 10-year projection may understate savings if there are a smaller than assumed

[93] 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.

[94] The U.S. Bureau of Labor Statistics projects that total employment will grow at 0.5 percent annually from 2018 to 2028. Based on this projection, the Department assumes that the total number of participants will also increase at 0.5 percent each year. *See* Kevin S. Dubina, Teresa L. Morisi, Michael Rieley, and Andrea B. Wagoner, *Projection overview and highlights, 2018-2028*, Monthly Labor Review, U.S. Bureau of Labor Statistics, October 2019, .https://www.bls.gov/opub/mlr/2019/article/pdf/projections-overview-and-highlights-2018-28.pdf.

[95] The Department assumes that approximately 18 percent of participants currently receiving disclosures by mail will opt out of default electronic delivery in the first year and 16.2 percent will opt out in the second year. 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). The Department further projects that in the 10th year, only 7 percent of participants currently receiving paper 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 final rule regarding invalid or inoperable electronic addresses for covered individuals. For more detailed discussion, *see* Quantified Costs, below.

number of electronic delivery failures for NOIAs over time, as plan administrators develop and maintain the most up-to-date lists of covered individuals' electronic addresses. (The Department based its current projection on the assumption that the rates of undelivered NOIAs will remain constant over the 10-year period.) If undelivered NOIAs decrease, production and mailing costs for covered documents will decrease and net cost savings will increase over the 10-year period. These cost savings may indirectly benefit covered individuals, as they may defray plan expenses and lower direct or indirect participant fees.

(ii) Cost Savings.

The Department's cost savings estimates understate the potential savings generated from this final rule, because they account for the production and mailing costs of only seven covered documents.[96] The seven documents are among the most costly because they affect a lot of plans and plans must provide them to participants regularly.[97] But the final rule will cover other pension documents, such as blackout notices, which are provided irregularly because they are triggered by certain events. The cost savings associated with these disclosures is relatively small because they affect far fewer plans and individuals. For that reason, the Department estimated cost savings using only the seven regularly distributed, covered documents. If all covered documents are included, the cost savings generated by the final rule will likely be larger.

[96] The seven covered documents are the SPD, SMM, SAR, annual funding notice, 404(a)(5)/404(c) disclosure, annual QDIA notice, and pension benefit statement.

[97] Out of these seven disclosures, all but one (pension benefit statement) have associated information collection requests under the Paperwork Reduction Act. To estimate cost savings attributable to this final 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.

In estimating cost savings, the Department assumes that slightly more than half (56 percent) of disclosures are already delivered electronically under the 2002 safe harbor.[98] According to one commenter, 40 to 50 percent of participants receive disclosures electronically, likely from plans relying on the Department's 2002 safe harbor. One service provider reported 62 percent of participants elected electronic delivery in 2018.[99] Another commenter reported 58 percent of defined contribution (DC) plan participants accessed plan information, including legal notices, electronically.

For its cost savings estimate, the Department used the same methodology it uses to estimate the cost of distributing printed disclosures for information collections subject to the Paperwork Reduction Act.[100] Preparation costs generally include costs required to develop the content and format of disclosures. Distribution costs generally include materials, printing, and mailing costs as well as burden hours associated with providing disclosures to participants and beneficiaries. The Department's estimates assume that preparation costs will be unchanged by the final rule, because the rule does not change the content disclosures.

(iii) Quantified Costs.

While the Department expects the final rule to reduce costs associated with distributing covered disclosures, these savings are partly offset by costs related to the following requirements:

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[98] This is consistent with the assumption used for information collections.

[99] *Default Electronic Delivery Works: Evidence of Improved Participant Outcomes form Electronic Delivery of Retirement Plan Documents*, Quantria Strategies, prepared for The SPARK Institute, November 2019, at 25, .https://www.sparkinstitute.org/wp-content/uploads/2019/12/SPARK-Institute-Default-Electronic-Delivery-Works.pdf.

[100] The distribution costs were estimated using the most recent data available, including updated 2019 wage rates and 2017 retirement-plan related data.

(1) Furnishing the NOIA (paragraph (d) of the final rule);

(2) Providing the website for covered individuals to access covered documents (paragraph (e) of the final rule); and

(3) Distributing the initial notifications of default electronic delivery and right to opt out in paper to each individual before he or she becomes a covered individual (paragraph (g) of the final rule).

The Department assumes plans will incur one-time start-up costs to develop the NOIA and initial notifications. Such costs include ensuring the notifications comply with final regulatory requirements. The Department also assumes that costs for distributing NOIAs will be modest, because they may be distributed electronically. However, the initial notification of default electronic delivery and right to opt out would impose production and mailing costs. Plans that rely on the new email alternative, permitted under paragraph (k) of the rule, will email disclosures to participants rather than furnishing NOIAs. Certain types of plans will furnish NOIAs more often than other plan types, as required under paragraph (i) of the rule. For example, participant-directed DC plans must provide NOIAs more often than non participant-directed DC plans, because they must notify participants quarterly rather than annually.

The initial notification and right to opt out is a transitional notice that informs participants who are existing employees of changes in default delivery system to electronic delivery.[101] Administrators must furnish this notice in paper form to each person before they become a covered individual. The notice informs them that covered documents will be furnished electronically, that they have the right to request paper copies of the covered documents free of charge, and how they may exercise such rights. The Department anticipates that most plans will

[101] For newly hired employees, the Department assumes they will receive the notice required by paragraph (g) of the final rule in their new employee packets; thus, employers will incur only negligible costs in subsequent years.

rely on this final rule, delivering covered documents electronically to participants who were *not* eligible under the existing safe harbor without disrupting the current electronic delivery system under the Department's 2002 safe harbor. Thus, plans are mostly likely to furnish initial notices to those participants who currently receive disclosures by mail.

Retirement plans will incur one-time costs to develop and design an initial notice. Because the final rule clearly describes the specific information required of this notice, the Department expects initial costs to be modest, about $40 million on aggregate assuming all retirement plans decide to rely on this final alternative.[102] The Department estimates that approximately 60 million retirement plan participants received the covered documents by mail in 2017.[103] These participants 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 about $97 million.[104] Therefore, the Department estimates that retirement plans will incur approximately $138 million in one-time costs to develop and mail the initial notice. In subsequent years, the

[102] The Department estimates that attorneys will take approximately 296,000 hours to develop and review the initial notice. Assuming an hourly rate of $138.41 for in-house attorneys, the Department estimates developing the initial notice will cost approximately $41 million (295,636 hours * $138.41). Then $41 million is discounted at three percent, which leads to $40 million.

[103] Information collection requests associated with the SPD, SMM, SAR, and 404(a)(5)/404(c) disclosures assume that approximately 56 percent of participants electronically receive those disclosures from plans that rely on the 2002 safe harbor. According to the 2017 Private Pension Bulletin, there are approximately 137 million participants. Therefore, the Department estimates that approximately 60 million participants (44 percent of 137 million) receive disclosures by mail.

[104] This estimate is based on $36 million mailing costs (approximately 60 million notices * $0.60) and $64 million production costs, assuming an hourly rate of $64.11 for in-house mailing clerks (approximately 998,000 hours * $64.11). Then $36 million mailing costs and $64 million preparation costs are discounted at three percent, which lead to $35 million and $62 million respectively.

Department estimates that retirement plans will incur approximately $12 million each year to deliver the initial notice to new hires.[105]

Paragraph (g) of the final rule provides that the initial notice must identify the recipient's electronic address where NOIAs are to be delivered. Although this revision requires personalization of the notice, the Department does not expect this change to significantly impact costs because many plan administrators already incorporate this process as common business practice.[106]

Paragraph (e) of the final rule requires plan administrators to ensure the existence of a website at which plan participants can access covered disclosures. In the proposed rule, the Department assumed this requirement would impose modest one-time costs. However, the Department was particularly concerned about burdening small plans and so solicited comments regarding the fraction of plans, particularly small plans, that would need to develop or modify a website. One commenter claimed that small plans have websites and not burdened by the proposed "notice and access" approach. However, another commenter suggested that small plans are less likely to have their own websites. A different commenter suggested that the impacts of paragraph (e) would vary by types of plans and that the vast majority of participant-directed DC plans already have access to or actively maintain a website, while many defined benefit plans or nonparticipant-directed DC plans may not.[107]

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[105] According to the Current Population Survey (CPS) in 2018, approximately 16.8 percent of wage and salary workers aged 25 or older stayed with their current employers for a year or less. Based on this information, the Department estimates approximately 13 million workers will receive the initial notice each year as new hires.
[106] Because it contains personally identifiable information, such as email address, the Department assumes employers will mail notice in a sealed letter rather than a postcard, even though a postcard is a less expensive option.
[107] According to a commenter, this is because 29 CFR 2550.404a-5 currently requires that participant-directed individual account plans maintain a website to provide certain information to participants and beneficiaries. Defined benefit and nonparticipant-directed DC plans are not subject to 29 CFR 2550.404a-5.

According to a recent poll of plan sponsors, the majority already have websites, in-house (70 percent) or via service providers (62.5 percent), and many have both.[108] One study suggests that approximately 18 percent of profit sharing and 401(k) plans did not provide any services via internet in 2017.[109] Based on these comments and study, the Department estimates that approximately 25,000 plans currently do not have, directly or indirectly through a plan service provider, a website where they can post the covered documents.[110]

Although approximately 25,000 plans do not currently have a website, the Department expects the impact of paragraph (e) of the final rule to be minimal, in part, because paragraph (k) of the final rule allows plans to furnish covered documents by email. Commenters recommended the direct delivery approach in paragraph (k) for a number of reasons, one being that plans may not currently have a website.[111] The Department assumes plans that do not have a website for posting the covered documents will most likely email the covered documents directly. The direct delivery option will likely ease the burden on small plans, as they are less likely to have, or have access to, a website. However, paragraph (k) of the final rule is still subject to the requirements of paragraph (f)(4) of the final rule, pertaining to invalid or

[108] Plan Sponsor Council of America (PSCA) conducted a poll to plan sponsors in November 2019 to obtain the plan sponsors' perspectives on the proposed rule and received responses from 56 plan sponsors.

[109] *61st Annual Survey, Reflecting 2017 Plan Experience*, Plan Sponsor Council of America, 2018. (In this survey, plan sponsors were asked to indicate if any services–enrollment, plan inquiries, contribution changes, balance inquiries, investment changes, loans, hardship distribution, retirement distributions, or no services–were provided to participants via internet. Responding to this question, about 18 percent of plan sponsors indicated they did not provide any services to participants through the internet. The Department used this as a proxy for plans that do not have a website.)

[110] According to Private Pension Plan Bulletin 2017, there were over 143,000 defined benefit plans and nonparticipant-directed defined contribution plans. Applying an assumption of 18 percent, the Department estimates approximately 25,984 (143,558 * 0.181) plans currently lack websites. This estimate may understate the total number of plans that lack websites because the PSCA study examined profit-sharing plans and 401(k) plans. As discussed, most 401(k) plans are expected to have their own websites. Therefore, the fraction of defined benefit plans and nonparticipant-directed DC plans that lack websites would be likely higher than 18 percent.

[111] The direct delivery provision in paragraph (k) is not subject to the website standards in paragraph (e) of the safe harbor.

inoperable electronic addresses. Therefore, plans that do not have software to detect invalid or inoperable electronic addresses will likely incur costs to add such software.

Paragraph (e)(2)(ii) of the final regulation establishes how long covered documents must remain on a website. It generally requires covered documents to remain on the website for at least one year.[112] Once a covered document is posted on a website, the Department assumes that the storage cost of retaining such document on the website is nominal.[113] The Department requires plan administrators to include a cautionary statement in the NOIA relating to how long the covered document is required to be available on the website. The Department expects this statement can benefit both participants and plan administrators. The statement will encourage participants to download covered documents while they are available on the website rather than contacting plan administrators to request them. Plan administrators will benefit because they will likely receive fewer document requests.

Paragraph (f)(4) of the final rule requires plan administrators to take certain actions when alerted that a covered individual's electronic address has become invalid or inoperable. For example, if an NOIA is returned as undeliverable, the plan administrator must try to locate the correct address. Accordingly, plans may incur costs to detect invalid or inoperable electronic addresses and update them. If an accurate electronic address cannot be found, plan

[112] As discussed above in section B, paragraph (e)(2)(ii) of the final rule does not alter a plan administrator's general recordkeeping requirements under ERISA.

[113] As more documents remain on a website, plans may need more electronic storage. However, storage space prices have decreased substantially as cloud services become more widely available. In terms of adding storage space cloud services are available, on average, at a rate of $0.018 to $0.021 per GB per month. Some estimate that approximately 250,000 PDF files or other typical office documents can be stored on 100GB. Accordingly, the Department does not believe electronic storage will significantly increase cost burden. (For more detailed pricing information of three large cloud service providers, *see* https://cloud.google.com/products/calculator; or https://azure.microsoft.com/en-us/pricing/calculator/; or https://calculator.s3.amazonaws.com/index.html. Augmenting other features such as enhanced security services may increase costs of cloud service. However, plan administrators sometimes may find it appropriate to provide enhanced security features for participants despite increased costs.) Also, plan administrators that currently store documents electronically to satisfy general recordkeeping requirements under ERISA may already have sufficient electronic storage space; thus, the burden increase from this condition would not be significant.

administrators may treat those covered individuals as if they opted out of electronic disclosure and furnish their documents via mail.

To meet the requirements of paragraph (f)(4), plan administrators may purchase software to detect the validity and operability of electronic addresses. The Department invited comments about such costs and received none. The Department assumes that, while most plans already have such features built into their current electronic delivery systems, slightly less than 26,000 plans will purchase software to comply with the provision.[114] The Department estimates these costs will run approximately $8.8 million per year.[115]

The Department assumes that before mailing out covered documents to the recipients of an undelivered NOIA, plan administrators will attempt to resolve issues that are relatively easy to fix, such as redelivering bounced emails or reaching out to covered individuals to update electronic addresses. Plan administrators may treat covered individuals who are more difficult to locate, such as those who have separated from service, as having opted out of electronic delivery. Although the Department acknowledges that plan administrators may 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 assumes, however, that plan administrators will likely select the least costly and most efficient option. Therefore, the Department assumes

[114] 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 automatically re-attempts delivery depending on the reasons of failed delivery. Given the lack of data, the Department used the percentage of plans without their own websites as a proxy for plans that lack email tracking capability.

[115] 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 prices of these five products, the Department assumes that it would cost $28.20 per month ($338.40 per year) to subscribe. Assuming 25,984 plans would purchase this type of product, the Department estimates that the aggregate costs will total $8.8 million (25,984 plans * $338.40).

that plan administrators will mail documents when unable to locate a covered participant's electronic address.

For this regulatory impact analysis, the Department assumes that the requirement to remediate failed delivery will increase the global opt-out rate by 0.5 percentage points.[116] The Department assumes that plan administrators will exercise due diligence by reaching out to participants with invalid or inoperable electronic addresses rather than immediately treating them as having opted out of electronic delivery. If true, the global opt-out rate should not increase 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 final rule provides a comprehensive alternative to the 2002 safe harbor. As a result, many more participants and beneficiaries may be easily covered. Although some plan sponsors using the 2002 safe harbor may switch entirely to the final rule, the Department assumes that most will maintain existing systems and use the final rule to cover individuals that fall outside of the existing safe harbor.

[116] One industry report indicates that a well-targeted and maintained email list yields, on average, a 1.06% bounce rate. (*See Update Email Marketing Benchmarks for 2020: by Day and Time*, Campaign Monitor, https://www.campaignmonitor.com/resources/guides/email-marketing-benchmarks/.) EBSA's newsletter email deliveries yield a 4% bounce rate. Although the Department's assumed 0.5% bounce 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.

(iv) Quantified Net Cost Savings.

The Department's estimates of the net cost savings from the final regulations are summarized in Table 1 below.

TABLE 1 -- ESTIMATED COST SAVINGS ATTRIBUTABLE TO THE FINAL RULE ($ MILLION)

	1st Year	2nd Year	3rd Year	Total Over 10 Years
Cost Savings from Eliminating Printing & Mailing Costs:				
Summary Plan Description	$68	$69	$68	$663
Summary of Material Modification	$18	$18	$18	$172
Summary Annual Report	$61	$61	$60	$585
Annual Funding Notice	$40	$40	$40	$390
404(a)(5)/404(c) Disclosure	$106	$106	$105	$1,021
Annual QDIA Notice	$16	$16	$16	$156
Pension Benefits Statement	$110	$109	$109	$1,058
Subtotal: Gross Cost Savings [1]	$419	$419	$416	$4,046
Costs Imposed by the Final Rule:				
Website	-$27	-$27	-$26	-$240
Initial Notification and Right to Opt Out	-$138	-$12	-$12	-$235
Notice of Internet Availability	-$67	-$42	-$41	-$404
Subtotal: Costs of the final rule [2]	-$232	-$81	-$78	-$880
Total Net Cost Savings: [1]-[2]	$187	$338	$338	$3,166

Note: Totals in table may not sum precisely due to rounding.

Total over 10 years and all other costs and cost savings estimates are discounted at three percent annually.

The estimated cost savings of each covered disclosure reflects an assumption about participant behavior. The Department assumes that approximately 81.5 percent of participants who currently receive paper copies will switch to electronic documents, while the remaining 18.5 percent will choose paper.[117] This assumption is based on the American Community Survey (ACS) estimate that about 82 percent of U.S. households had internet subscriptions in 2016.[118] This assumption may overstate the cost savings because some participants with internet access at home may prefer to receive paper copies, and thus opt out.[119] On the other hand, this assumption may understate the cost savings, because households with DC plans tend to have higher internet access rates and may be more comfortable online, which could lead to a lower opt-out rate.[120] In

[117] Among participants who currently receive paper disclosures by mail (rather than electronically under the existing 2002 safe harbor), the Department assumes 18.5 percent of these participants will opt out of electronic delivery under this final rule and receive paper copies. This 18.5 percent global opt-out rate reflects a 0.5 percentage point upward adjustment due to failed deliveries of internet availability NOIAs, 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.

[118] Ryan, *supra* note 73.

[119] Some commenters argued that individuals, particularly retirees and individuals older than 55, prefer paper and, in certain cases, comprehend better if financial information is presented in paper form.

[120] According to one study, among households owning DC plan accounts, 92 percent used the internet at home, work, or other location in 2018. (*See 2019 Investment Company Fact Book, A Review of Trends and Activities in the Investment Company Industry*, Investment Company Institute (April 2019), https://www.ici.org/pdf/2019_factbook.pdf.). 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* Quantria Strategies, *supra* note 97, at 3, 5.) Note that in these studies, "use the internet" includes access to the internet at home, work or other locations. Thus, the share of households using the internet in these studies are higher than the share of households accessing the internet at home that the Department relies on in estimating opt-out rates.

projecting cost savings for 10 years, the Department assumes that by the 10th year this opt-out rate will gradually decrease to 7.5 percent of participants currently receiving paper.[121]

Table 2 shows the Department's estimates of the number of participants who currently receive disclosures on paper.

TABLE 2 -- ESTIMATED NUMBER OF PARTICIPANTS CURRENTLY RECEIVING PAPER DISCLOSURES

Disclosures	Number of Participants (Million)
Summary Plan Description	19
Summary of Material Modification	17
Summary Annual Report	45
Annual Funding Notice	29
404(a)(5)/404(c) Disclosure	33
Annual QDIA Notice	17
Pension Benefits Statement	50

Table 3 summarizes the Department's projected number of participants who will receive disclosures electronically due to the final rule.

TABLE 3 -- PROJECTED NUMBER OF PARTICIPANTS RECEIVING DISCLOSURES ELECTRONICALLY DUE TO THE FINAL RULE (MILLION)

Disclosures	1st Year	2nd Year	3rd Year	10th Year
Summary Plan Description	16	16	17	19
Summary of Material Modification	14	15	15	17
Summary Annual Report	36	37	38	43
Annual Funding Notice	23	24	25	28
404(a)(5)/404(c) Disclosure	27	28	28	32

[121] 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 opt-out rate projections are based on these two recent years of ACS data and, while the rates gradually decline each year, they do not reach zero at any point in the future. This also reflects the 0.5 percentage point upward adjustment due to bounced emails.

Annual QDIA Notice	14	14	15	17
Pension Benefits Statement	41	42	43	48

Table 4 provides the estimated average per-participant cost of distributing disclosures on paper.

TABLE 4 -- ESTIMATED AVERAGE PER-PARTICIPANT COST OF DISTRIBUTING DISCLOSURES ON PAPER

Disclosures	Per-Participant Cost
Summary Plan Description	$4.48
Summary of Material Modification	$1.28
Summary Annual Report	$1.72
Annual Funding Notice	$1.79
404(a)(5)/404(c) Disclosure	$4.07
Annual QDIA Notice	$1.18
Pension Benefits Statement	$2.79

(v) Non-quantified Costs (Potential Adverse Impacts).

While overall, 82 percent of U.S. households had access to the internet at home in 2016, the following groups had lower rates: limited English speaking households (63 percent), households with income less than $25,000 (59 percent), households where the head of the household is age 65 or older (68 percent), Black households (73 percent), households in nonmetropolitan areas of the South (69 percent), and households where the head of the household obtained a high school diploma or less (56 percent).[122] Responding to these relatively low rates, some commenters pointed out that households with DC plan accounts tend to have

[122] Ryan, *supra* note 73.

higher internet access rates. For example, an ICI report found that among households with DC accounts, 79 percent with income less than $50,000 and 81 percent with a senior (65 or older) head of the household use the internet at home, work, or other locations.[123] Although these internet access figures are only slightly lower than those of all U.S. households (82 percent), they are significantly lower than those of all DC plan account holding households (93 percent).

Another group worth noting is households connected to the internet only through smartphones. Racial/ethnic minorities and low-income households are overrepresented in this group.[124] In 2015, approximately 8 percent of households in the United States were "handheld-device-only" households, but 16 percent of households where the head of the household obtained a high school diploma or less were handheld-device-only households. In contrast, only 3 percent of households where the head of the household obtained a bachelor's degree or higher were handheld-device-only households.[125] Although connected to the internet, these households may not be able to fully harness the efficiency, capacity, and convenience of the internet. Therefore, accessing disclosures online for these households may not be as convenient as for other households.

In response to numerous comments, the Department added paragraph (e)(4) to the final rule, which defines "website" to include internet websites and other electronic-based information repositories, such as mobile applications. With this change, the Department believes that the final rule can better accommodate advances in technology. This change also requires that covered documents delivered through mobile applications be presented in a format that can be

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[123] *2019 Investment Company Fact Book, A Review of Trends and Activities in the Investment Company Industry*, Investment Company Institute (April 2019), .https://www.ici.org/pdf/2019_factbook.pdf.
[124] Ryan, *supra* note 73.
[125] Jamie M. Lewis, *Handheld Device Ownership: Reducing the Digital Divide?* Social, Economic, and Housing Statistics Division, U.S. Census Bureau, Working Paper 2017-04, Mar. 2017, .https://www.census.gov/content/dam/Census/library/working-papers/2017/demo/SEHSD-WP2017-04.pdf.

read using a handheld device. Consequently, these handheld-device-only households will be able to access their plan information with ease. Ensuring handheld-device-only households are able to access the same information as other households may help bridge the digital divide because the gaps in smartphone ownership are less prominent than in home internet access. For example, there is almost no disparity in smartphone ownership rates by race. According to a 2019 survey, Whites, Blacks, and Hispanics own smartphones at nearly the same rate (82 percent, 80 percent, and 79 percent, respectively).[126]

For participants without ready internet access, this final rule may create additional impediments to accessing critical plan information. Those who fail to opt out and request paper documents will have to leave home (e.g., visit a public library or the home of a friend or family member) to access plan information. One of the Department's goals in establishing the final framework was to be certain that, regardless of delivery method, covered individuals who wish to receive paper copies would be able to do so without undue burden. For this reason, the final rule allows for global opt out. That is, a covered individual who prefers to receive *all* covered documents in paper may choose to do so through a single request.

If covered individuals in groups with low internet access rates fail to request paper copies of covered documents or exercise their opt-out rights, the negative impacts they suffer may offset some benefits of this final regulation. The Department does not have sufficient data to quantify these negative impacts. If these unintended consequences occur, plan administrators may take steps to limit their impact. Such steps may include reaching out to these groups; communicating the plan's electronic disclosure policy effectively; providing sufficient time for participant education before implementing electronic disclosure changes; and employing simple processes

[126] *Mobile Fact Sheet*, Pew Research Center, June 12, 2019, https://www.pewresearch.org/internet/fact-sheet/mobile/.

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 is realized without burdening vulnerable groups.

As with all agencies facing heightened cybersecurity concerns, the Department recognizes that increased electronic disclosures may expose covered participants' information to intentional or unintentional data breach. Paragraph (e)(3) of the proposal requires the plan administrator to take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual. As required under ERISA section 404, the Department expects that many plan administrators, or their service or investment providers, already have secure systems in place to protect covered individuals' personal information. Such systems should reduce covered individuals' exposure to data breaches.

Some commenters asserted that the Department should consider participants' preferences for paper disclosures before finalizing the rule. According to these commenters, investors prefer to receive disclosures by mail and comprehend paper documents better than electronic documents. Commenters with opposing views criticized these claims and stated that they are based on dated studies. The Department reviewed several reports concerning the issue as to whether investors prefer paper disclosures. According to a recent FINRA report, investor preference was almost evenly split between paper delivery (36 percent) and electronic delivery (33 percent) in 2018. The share of investors who prefer paper delivery has declined considerably since 2015, however, while the share of investors who prefer electronic delivery has increased.[127]

[127] *See Investors in the United States, A Report of the National Financial Capability Study*, FINRA Investor Foundation, December 2019, p. 1,

(This study is based on a survey of investors who hold nonretirement accounts.) According to a different study performed in 2019, almost half of 401(k) plan participants (49 percent) preferred reviewing 401(k) account information through their 401(k) provider's website, while 13 percent preferred a hard copy of account information.[128] Even the eldest group studied (70 and older) preferred a 401(k) provider website (40 percent) to direct mail (31 percent).[129] Similarly, other studies found that participants prefer to receive communications related to their benefits through electronic media such as personal emails or websites.[130] Based on these studies, the Department reasonably believes that the final rule generally lines up with most participants' preferences. And since participants retain the right to opt out of electronic delivery, those who prefer paper disclosures are adequately protected under the final rule.

(vi) Benefits.

The final rule will not require plan administrators to develop new formats or content beyond what is required in printed form. Nonetheless, some plan administrators may elect to develop new formats and content for electronic disclosures. Such formats could include more interactive content, with hotlinks and multimedia presentations, which might improve the quality and accessibility of information. DC account information often is available continuously and

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https://www.usfinancialcapability.org/downloads/NFCS_2018_Inv_Survey_Full_Report.pdf. (A survey of 2,000 investors shows that, in 2015, 49 percent preferred paper delivery, while 27 percent preferred electronic delivery).

[128] *U.S. Retirement End-Investor 2019, Driving Participant Outcomes with Financial Wellness Programs*, Cerulli Report, 2019, at 18.

[129] *Id*.

[130] *See* Boosting the Effectiveness of Retirement Plan Communications, Empower Institute, January 2019, at 9, https://docs.empower-retirement.com/Empower/institute/Effective-Communication.pdf. *See also* What Your Employees Think About Your Benefits Communication, The Jellyvision Lab, 2016, at 12, https://www.jellyvision.com/wp-content/uploads/Survey-Report_What-Your-Employees-Think-About-Your-Benefits-Communication.pdf.

updated in real-time, which may help participants to effectively manage their accounts. Using assistive technology, such as screen readers, electronic disclosures could be made more accessible to the visually impaired. Online translation may help covered individuals with limited English skills better understand their disclosures. Some plans may provide mobile apps with interactive features, which will allow participants to navigate the site and conduct account transactions with ease.

Some commenters predicted that the final rule might contribute to higher retirement savings. According to these commenters, digitally engaged participants or those with electronic delivery have, on average, higher deferral rates and larger account balances than their counterparts who are not digitally engaged or receive paper disclosures. These commenters seem to attribute this higher retirement savings to electronic delivery. This interpretation, however, requires some caution. Participants who are more motivated to save are also more likely to actively use their plan's website than other participants. This self-selection, with the most motivated savers being the most digitally engaged, may explain their higher deferral rates and larger account balances. One study acknowledged this possibility, yet still contended that electronic delivery could nudge investors towards increased savings.[131] The Department agrees that participants can be nudged to save more as they interact more with various website tools and gain more financial knowledge. The Department is encouraged to find that many plan administrators now offer on their websites various financial education tools, including retirement income planning tools and budgeting tools. However, it is difficult to compare the relative impacts on retirement savings of nudging participants (through electronic delivery and digital engagement) versus self-selection. To the extent that electronic delivery increases retirement

[131] *See* Quantria Strategies, *supra* note 99.

savings and better prepares participants for retirement, this rule will produce even greater benefits.

Several commenters had varying opinions on how cost savings generated by this rule would be distributed. Some commenters estimated that the rule would generate significant cost savings, with most going directly to participants. Others, however, expressed skepticism. Many suggested participants would experience minimal benefit, particularly because the Department does not require plan administrators to pass the cost savings onto participants.

Cost savings in theory could be retained by service providers as profit, or passed on to plan sponsors or participants as lower fees.[132] The disposition of savings is uncertain, in part because in the long run the savings' nominal incidence may differ from its economic incidence. The Department believes that a large portion of the savings will reach participants. Such savings are additional to the benefits participants may realize from improvements in the quality and accessibility of disclosures.

Competition among service providers can ensure cost savings to benefit plan sponsors and participants, in the form of lower fees. One commenter stated that 4,694 establishments offered third-party administrative services in 2016. She described the market as having a high volume of entry and exit, and high concentration.[133] The commenter estimated that, because of the competitive environment, approximately 60 percent of cost savings would be passed to participants in lower fees. (Stickiness in service provider relationships in some cases may slow the flow of savings, however. Large 401(k) plan sponsors (with $250 million or more in assets) most frequently identified "10 years or longer" when asked how long they had been with current

[132] Instead of lowering fees, cost savings can be passed on to plan sponsors or to participants in the form of augmented services.
[133] This commenter indicated that this estimate was based on data from U.S. Census Bureau, County Business Patterns by Employment Size Class, 2010–2016.

recordkeepers.[134] Another study finds a similar pattern: a majority of plan sponsors reported having been with their current recordkeepers for 10 years or longer.[135])

Fees associated with disclosures sometimes are bundled into investment costs, such as the fees internal to mutual funds on DC plan menus. Savings from reductions in such fees generally will accrue to participants. Other times, disclosure and other administrative fees are charged separately. These charges sometimes are allocated to DC participants' accounts, again suggesting that savings will accrue to participants. Other times such separate charges may be allocated to plan forfeiture accounts or paid directly by plan sponsors. In these cases, savings may accrue to plan sponsors rather than directly to participants. Such savings nonetheless may benefit participants in the long run, for example if sponsors pass on savings in the form of richer matching contributions or other means, in response to labor market forces. Surveys and comments help illustrate how frequently common fee arrangements may result in savings to participants.

In one survey, one in three DC plan sponsors reported that administrative fees are bundled into investment costs. This is a smaller fraction than in 2015, when one-half of plan sponsors reported using this arrangement.[136] Another report identifies a similar downward trend for bundled fee arrangements.[137] Such bundled fees may be less transparent than fees that are charged separately, so in some cases service providers may be slower to pass on savings from this rule by reducing such fees. Nonetheless, competition from other service providers, including

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[134] Cerulli, *supra* note 128.
[135] *2019 Defined Contribution Benchmarking Survey Report*, Deloitte, 2019.
[136] *2019 Defined Contribution Benchmarking Survey Report*, Deloitte, 2019, at 20. (In 2015, 50 percent of plan sponsors reported to have this "no additional fee" arrangement, which has declined to 33 percent in 2019.)
[137] *U.S. Retirement Markets 2019, Looking Toward Holistic Solutions for Participants and Plan Sponsors,* Cerulli Report, 2019, at 69.

those offering both bundled and unbundled fee arrangements, will put downward pressure on bundled fees, and savings from reductions in such fees generally will accrue to participants.

Other times administrative fees are charged separately. The most common fee arrangement is a direct fee paid to the recordkeeper, one survey found. A majority (52 percent) of plan sponsors had this arrangement in 2019, up from 41 percent in 2015. An additional 15 percent used separate wrap fees or charges on investment.[138] Separate fees or charges generally are transparent and therefore likely to promote competition, so it is likely that savings from this rule largely will translate into reductions in such fees, benefitting plan sponsors or participants.

Separate administrative fees or charges often are allocated to DC participants' accounts. In 2019, 57 percent of plan sponsors reported that participants pay such fees either based on their account balances (29 percent) or in equal amounts (28 percent).[139] Under such arrangements, savings will likely accrue to participants. Other times such separate charges may be allocated to plan forfeiture accounts (6 percent) or paid directly by plan sponsors (25 percent), according to the same survey.[140] In these cases, savings may accrue to plan sponsors rather than directly to participants. Such savings nonetheless may benefit participants in the long run, for example if sponsors pass on savings in the form of richer matching contributions or other means, in response to labor market forces.

Commenters offered different views on the costs of paper delivery at the participant level and the amount that participants will save from reducing those costs. Some commenters stated the costs of paper delivery, per participant, were minimal, suggesting participants would save little. Others took the opposite view, asserting that savings from electronic delivery would

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[138] Deloitte, *supra* note 135, at 20.
[139] *Id*.
[140] *Id*.

significantly increase participants' account balances. One commenter suggested that a participant in a 401(k) plan receives, on average, 6 to 8 documents per year and the average cost to print and mail a single notice is $0.83. Assuming this is true, mailing disclosures to participants costs between $4.98 and $6.64 per year. If after eliminating these costs, 60 percent of the cost savings flow to participants, as one commenter suggests, participants on average would save $3 to $4 each year.

A recent study estimated that the per-participant direct fee for recordkeeping services was, on average, $54 in 2019, up from $50 in 2017.[141] Then, eliminating recordkeeping fees would save participants about 6 to 7 percent of direct fees that they pay to recordkeepers.[142] Some commenters characterized this savings as minimal. Others suggested the savings could be considerable, especially for young and newly enrolled participants, who will benefit most from the compounding effects.

(4) *Regulatory Alternatives*.

To conform with Executive Order 12866, the Department considered several regulatory approaches while developing this final rule.

(i) Covering Welfare Benefit Plan Disclosures.

[141] *Id*. at 5. But according to a different, the average recordkeeping/administration costs per participant was $35 in 2017 (*see* Stephen Miller, 401(k) Sponsors Focus on Benchmarking—and Lowering—Fees (Feb. 22, 2018), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/401k-fee-benchmarking.aspx.).

[142] These are calculated by ($3/$54) and ($4/$54) respectively. If the average recordkeeping/administration costs per participant were $35, as one study suggested, participants would save approximately 9 to 11 percent of direct fees. These are calculated by ($3/$35) and ($4/$35).

As discussed in section (B)(2)(ii), the Department received numerous comments about whether to expand this final rule to cover health and welfare plans. After careful analysis and lengthy deliberation, the Department decided not to expand the rule at this time. The Department is reviewing the information provided in response to its RFI, and will continue to explore this option and may undertake rulemaking in the future. The Department has decided to take this two-step approach so that retirement plans can accrue cost savings without delay and to give the Department more time to analyze unique issues about health and welfare plans. Extending the scope of the final rule to health and welfare plans raises unique challenges regarding the tri-agency consultation process that warrant careful consideration. Accordingly, the Department intends to take more time, obtain public comments, and develop a rule that can maximize benefits to health and welfare plans and participants as part of a future project.

(ii) Conforming With Electronic Delivery Approaches Adopted by Other Agency.

Executive Order 13847 directed the Department to coordinate with the Treasury Department to explore expanding electronic delivery. The goal of expanding electronic delivery is to improve the effectiveness of disclosures and to reduce their associated costs and burdens. Following discussions with Treasury Department staff, the Department considered adopting an approach similar to that of 26 CFR 1.401(a)-21, the IRS rule for electronic disclosures.[143] This

[143] The Treasury Department and the IRS have issued a series of guidance on electronic disclosures, beginning with IRS Notice 99-1, and more recently in 26 CFR 1.401(a)-21(c) (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).

rule 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.[144] A number of parties have encouraged the Department to adopt this approach, which they believed to be more flexible than the Department's 2002 safe harbor.[145] The final rule does not adopt 26 CFR 1.401(a)-21(c) verbatim, but it does, however, align with the regulation in large part. The Department considers this a logical outcome, because plan administrators have to comply with requirements of both ERISA and the Code. Thus, the more coordination and alignment among potentially overlapping regulatory requirements, the less regulatory burden overall.

(iii) Keeping a quarterly pension benefit statement in a single annual combined NOIA.

In the final rule, the Department revised the group of covered documents for which a single annual combined NOIA is permitted. In contrast to the proposal, under the final rule some covered documents, such as a quarterly pension benefit statement, can no longer be furnished with a single annual combined NOIA.[146] The Department considered keeping the quarterly pension benefit statement as one of the disclosures that can be included in a single annual combined NOIA. Pension benefit statements must be furnished on a quarterly basis for

[144] *See* 26 CFR 1.401(a)-21(b) and (c) (2006).
[145] *See* Written Statement of Michael Hadley, Partner, Davis & Harman LLP, to the ERISA Advisory Council (June 7, 2017), at 8, *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-hadley-written-statement-06-07.pdf; see also* Written Statement of David N. Levine and Brigen L. Winters, Principals, Groom Law Group (June 7, 2017), at 4, *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans-levine-and-winters-written-statement-06-07.pdf*.
[146] An SMM is another document excluded from a single annual combined NOIA.

participant-directed individual account plans, such as 401k plans. Thus, if an annual combined NOIA is emailed at the beginning of the year, some participants may not appreciate that subsequent quarterly statements also will be made available online. Furthermore, quarterly benefit statements can prompt participants to take actions, such as checking their account balances, increasing deferral rates, or reallocating investments. With one notice at the beginning of the year, covered individuals may less frequently check their accounts and make changes accordingly. In the Department's view, this may have detrimental impacts on participants' retirement savings, although it may bring administrative costs down slightly. Therefore, the Department determined that the approach taken in the final rule is a more balanced approach that provides sufficient protection for participants while generating substantial cost savings.

(5) ***Paperwork Reduction Act.***

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments on its new alternative safe harbor to use electronic media to satisfy the general furnishing requirement under Title 1 of ERISA. At the same time, the Department also submitted an information collection request (ICR) to OMB, in accordance with 44 U.S.C. 3507(d). The Department received no comment that specifically addressed the paperwork burden analysis of the information collections. The Department did, however, receive comments on costs and administrative burdens related to the proposal. The Department reviewed the comments and took them into account when making changes to the final rule, analyzing the economic impact of the proposal, and developing the revised paperwork burden analysis summarized below.

In connection with the new rule, the Department is submitting an ICR to OMB requesting approval of a revised collection of information under OMB Control Number 1210-0121. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *https://www.RegInfo.gov*.

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW, Room N-5718, Washington, D.C. 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*.

As discussed above, the final regulation will create two new information collections that are subject to the PRA: the annual NOIA (29 CFR 2520.104b-31(d)(2)) and the initial notification (29 CFR 2520.104b-31(g)). The final rule will also 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 final new alternative safe harbor. Therefore, for purposes of this analysis, the Department conservatively assumes that all plans will use the final alternative safe harbor for at least some of their covered individuals. As discussed in the Cost Savings section above, the Department estimates that plan administrators using the final rule will incur a one-time start-up cost to prepare and distribute the annual NOIA and the initial notification. The final 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: 710,000.

Responses: 109,440,000.

Estimated Total Burden Hours: 2,388,000.

Estimated Total Costs: $44,737,000.

On April 9, 2002, the Department published a notice of final rulemaking on electronic communication and recordkeeping technologies to establish a safe harbor for electronic disclosures.[147] The 2002 safe harbor generally covers disclosures under Title I. The final regulation also covered the receipt of required disclosures at locations other than the workplace. The 2002 safe harbor requires that plan administrators to obtain affirmative consent, in advance, before distributing electronic disclosures to participants and beneficiaries outside the workplace.[148] In order to gain consent, the plan administrator must provide a clear and conspicuous statement that includes the following: 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.

[147] 67 FR 17263 (April 9, 2002).
[148] This requirement is incorporated at 29 CFR 2520.104b-1(c)(2)(ii)(A), (B), and (C).

The Department revises this information collection by adding the information collections required under the final rule to the 2002 safe harbor. This will increase the number of respondents by 710,000, the responses by 109,440,000, the hour burden by 2,388,000, and the cost burden by $44,737,000.

The final rule will affect the Department's burden estimates for several existing information collections of covered disclosures. Specifically, the rule will reduce the burden associated with the following covered disclosures with information collections covered by the PRA: 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 reduction estimates are based on the current cost and hour burdens for the Department's existing ICRs for the covered disclosures, adjusted for the number of plans and participants the Department assumes will use electronic disclosures. 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: 163,000.

Estimated Total Costs: $235,556,000.

Description: Section 104(b) of ERISA requires the employee benefit plan administrators furnish 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 SPD information requirements are 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 plan administrators to furnish participants and certain beneficiaries with an SMM or summary of material reductions (SMR).[149] The Department has issued regulations providing guidance on compliance with the requirements to furnish SPDs, SMMs, and SMRs. These regulations, codified at 29 CFR 2520.102–2, 2520.102–3, 29 C.F.R. 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 Department estimates that the final alternative safe harbor will reduce the hour burden by 126,000 and the cost burden by $88,464,000.

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: 750,000.

Responses: 166,350,000.

[149] Because SMRs apply only to health plans, not retirement plans, they will not be affected by this new safe harbor.

Estimated Total Burden Hours: 1,185,000.

Estimated Total Costs: $24,358,000.

Description: ERISA Section 104(b)(3) and the regulation published at 29 CFR 2520.104b–10 require, with certain exceptions, that plan administrators furnish participants and certain beneficiaries with a SAR. The regulation prescribes the content and format of the SAR and the timing of its delivery. The SAR provides information about 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 Department estimates that the final alternative safe harbor will reduce the hour burden by 607,000 and the cost burden by $23,661,000.

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: 32,000.

Responses: 65,527,000.

Estimated Total Burden Hours: 197,000.

Estimated Total Costs: $7,080,000.

Description: Section 101(f) of the ERISA sets forth annual funding notice requirements. Before 2006, the year the Pension Protection Act (PPA) was enacted, 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 to change to the annual funding notice requirements. These amendments require plan administrators of all defined benefit plans subject to Title IV of ERISA to provide an annual funding notice to the Pension Benefit Guaranty Corporation (PBGC); plan participants and beneficiaries; labor organizations representing participants or beneficiaries; and, in the case of a multiemployer plan, all plan employers. The annual funding notice must include, among other things, the plan's funding percentage, assets and liabilities, asset allocation, 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.

The Department estimates that the final alternative safe harbor will reduce the hour burden by 454,000 and the cost burden by $12,560,000.

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: 566,000.

Responses: 769,693,000.

Estimated Total Burden Hours: 5,914,000.

Estimated Total Costs: $223,980,000.

Description: Plan administrators must 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 Department estimates that the final alternative safe harbor will reduce the hour burden by 979,000 and the cost burden by $46,360,000.

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: 297,000.

Responses: 39,549,000.

Estimated Total Burden Hours: 76,000.

Estimated Total Burden Costs: $2,074,000.

Description: Section 404(c) of ERISA states that participants or beneficiaries who can hold individual accounts under their pension plans and exercise control over the assets ‘‘as determined in regulations of the Secretary [of Labor]’’ will not be treated as fiduciaries of the plan. Moreover, plan fiduciaries are not liable for any loss resulting from the participants’ or beneficiary’s exercise of control over their individual account assets.

The PPA amended ERISA section 404(c) by adding paragraph (c)(5)(A). The new paragraph requires that participants who fail to make investment elections be treated as having exercised control over their account assets, so long as the plan provides appropriate notice and invests the assets "in accordance with regulations prescribed by the Secretary [of Labor]." As required under ERISA section 404(c)(5)(A), the Department issued a final regulation on the types of investment vehicles that plan fiduciaries may choose as a QDIA. The regulation also outlines two information collection requirements. First, it implements the statutory requirement that a fiduciary must provide annual notices to participants and beneficiaries whose account assets could be invested in a QDIA. Second, the regulation requires fiduciaries 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.

The Department estimates that due to fiduciaries' use of the final alternative safe harbor to provide disclosures to participants who currently are receiving them by mail, the hour burden will be reduced by 117,000 and the cost burden will be reduced by $9,135,000.

(6) *Regulatory Flexibility Act.*

The Regulatory Flexibility Act (RFA)[150] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act.[151] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) for proposals that are likely to have a significant economic impact on a substantial

[150] 5 U.S.C. 601 (2012).
[151] 5 U.S.C. 551 (2012).

number of small entities. Small entities include small businesses, organizations, and governmental jurisdictions.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) considers an employee benefit plan with fewer than 100 participants a small entity.[152] This definition is based on 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 section 104(a)(3), the Department has previously issued simplified reporting provisions and limited exemptions from reporting/disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements.[153]

Further, while some large employers may have small plans, small employers generally maintain small plans. Thus, EBSA believes that assessing the impact of this final 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)[154] pursuant to the Small Business Act.[155] EBSA requested comments on the appropriateness of the size standard used to evaluate the impact of the proposed rule on small entities and received no comment on this issue. In particular, the Department did not receive any

[152] The Department consulted with the Small Business Administration Office of Advocacy in making this determination as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c).
[153] *See* 29 CFR 2520.104-20 (2012), 29 CFR 2520.104-21 (2012), 29 CFR 2520.104-41 (2012), 29 CFR 2520.104-46 (2012), and 29 CFR 2520.104b-10 (2012).
[154] 13 CFR 121.201 (2011).
[155] 15 U.S.C. 631 (2013).

comment stating that it is inappropriate to use size standards different from those promulgated by the SBA.

The Department has determined that this final rule will significantly impact a substantial number of small entities: employee benefit plans with fewer than 100 participants. The Department's FRFA follows.

(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." The final rule offers a voluntary, alternative method for electronic disclosures and, thus, reduces the costs and burdens of related to required disclosures. The final rule will reduce the cost of printing and mailing covered disclosures, benefitting plans regardless of the size. Therefore, the Department expects the final rule to deliver benefits to the participants of many small plans and their families, as well as the plans themselves.

(ii) Affected Small Entities.

The majority of private retirement plans are small plans with fewer than 100 participants. The 2017 Form 5500 filings show that out of total 710,000 private retirement plans, approximately 87 percent, or 619,000, of ERISA-covered retirement plans were small plans with fewer than 100 participants.[156] However, small plans cover only a fraction of total participants.

[156] Private Pension Plan Bulletin 2016, Employee Benefits Security Administration, Department of Labor.

In 2017, over 137 million individuals participated in private retirement plans. Out of these 137 million participants, over 12 million participants, less than 10 percent, were in small plans. The Department estimates that slightly more than half already receive disclosures electronically. The remaining half will likely receive electronic disclosures under this final rule.

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

As discussed above, by allowing more participants who access disclosures online, the final rule will save retirement plans, including small plans, money. These cost savings can in turn be used to defray other plan-related expenses, and thus lower the overall fees charged to participants. In addition, modern technology features may help participants with disabilities or limited English skills better understand the content of disclosures, which will allow them to better manage their plan accounts. Both large and small plans will benefit from the cost savings and other benefits that result from wider use of electronic disclosure.

This final rule is a voluntary safe harbor. Therefore, plan administrators will not be required to make any specific disclosures available on a website. This final rule simply provides an additional, optional method for plan administrators to deliver covered disclosures to participants and beneficiaries electronically and does not change any underlying reporting, disclosure, and recordkeeping requirements. Therefore, the Department does not believe this final rule will impose any additional compliance requirements on small entities.

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

The final rule will provide retirement plan administrators with an alternative method to furnish covered disclosures electronically. In developing this alternative, the Department consulted with other relevant regulators, including the Treasury Department and the SEC. 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 final rule are exclusively in the jurisdiction of the Labor Department. The SEC has jurisdiction over issuers of investment products that often are used as ERISA employee retirement plan investments as well as some service providers to ERISA-covered plans, but it has no jurisdiction over ERISA-covered pension plans.

(v) 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 this final rule to save money for small and large plans by eliminating materials, printing, and mailing costs.

The Department considered keeping the quarterly pension benefit statement as one of the disclosures that can be included in a single annual combined NOIA. Pension benefit statements must be furnished quarterly for participant-directed individual account plans, such as 401k plans. Thus, if a single annual combined NOIA is emailed at the beginning of the year, some participants may not appreciate that subsequent quarterly statements will also be made available online. Furthermore, quarterly benefit statements can prompt participants to take actions such as

checking their account balances, increasing deferral rates, or reallocating investments. With one single notice at the beginning of the year, participants may less frequently check their accounts and make changes accordingly. In the Department's view, this may have detrimental impacts on participants' retirement savings, although it may bring costs down. Therefore, the Department determines that the approach taken in the final rule is more balanced, protecting participants while saving money.

Small plans, like large plans, will incur costs associated with emailing NOIAs and addressing invalid or inoperable electronic addresses quarterly, rather than annually. The Department, however, does not believe this burden will be disproportionally borne by small plans because small plans, having fewer participants, will have fewer electronic addresses to manage and an easier time updating electronic addresses due to the proximity between administrators and participants. The Department, thus, determines that this approach does not disadvantage nor unduly burden small plans.

Paragraph (e) of the final rule requires plan administrators to ensure the existence of a website at which covered individuals can access covered documents. In the proposed rule, the Department solicited comments regarding the fraction of plans, particularly small plans, that would need to develop or modify a website in order to rely on this new safe harbor. The Department was particularly concerned about any potential disproportionate burden on small plans that this condition may inadvertently impose. One commenter suggested that small plans are less likely to have their own websites. In addition, one study suggests that slightly more than a quarter (27 percent) of *small* profit sharing and 401(k) plans (plans with fewer than 50 participants) did not provide any services via internet, whereas only 10 percent of *large* profit sharing and 401(k) plans (plans with 5,000 participants or more) did not provide any services via

internet in 2017.[157] In part to mitigate any potential negative impact on small plans, the Department added a new paragraph, paragraph (k), in the final rule and allows plan administrators to furnish covered documents directly by email as an alternative to the notice and access approach. Therefore, a plan administrator that does not have a website can rely on this new safe harbor to provide electronic disclosure without developing a website. The Department believes this change in the final rule will help more small plan administrators electronically deliver plan-related documents, reducing the administrative burden on small plans.

[157] *See* Plan Sponsors Council of America, *supra* note 109. (Because the Department expects most 401(k) plans to have their own websites, the fraction of small defined benefit plans and non-participant-directed defined contribution plans that lack websites will likely be higher than that of small 401(k) plans.)

(7) *Unfunded Mandates Reform Act*.

Title II of the Unfunded Mandates Reform Act of 1995[158] requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a final 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 final rule does not include any federal mandate that will result in such expenditures. This is because the final rule merely provides an alternative, optional safe harbor for pension benefit plans subject to ERISA to use electronic media to furnish required disclosures to participants and beneficiaries.

(8) *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.

[158] Pub. L. 104–4, 109 Stat. 48 (1995).

In the Department's view, this final regulation does not have federalism implications because it does not have a direct effect on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government.

List of Subjects in 29 CFR Parts 2520 and 2560

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR parts 2520 and 2560 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. Amend § 2520.101-3 by revising paragraph (b)(3) to read as follows:

§ 2520.101-3 Notice of blackout periods under individual account plans.

* * * * *

(b) * * *

(3) *Form and manner of furnishing notice.* The notice required by paragraph (a) of this section shall be in writing and furnished to affected participants and beneficiaries in any manner consistent with the requirements of §2520.104b-1 of this chapter, including § 2520.104b-1(c) or § 2520.104b-31 of this chapter relating to the use of electronic media.

* * * * *

3. Amend § 2520.104b-1 by revising paragraph (c)(1) introductory text and adding paragraph (f) to read as follows:

§ 2520.104b-1 Disclosure.

* * * * *

(c) * * *

(1) Except as otherwise provided by applicable law, rule or regulation, including the alternative methods for disclosure through electronic media in paragraph (f) of this section, the administrator of an employee benefit plan furnishing documents through electronic media is deemed to satisfy the requirements of paragraph (b)(1) of this section with respect to an individual described in paragraph (c)(2) of this section if:

* * * * *

(f) *Alternative disclosure through electronic media.* As an alternative to electronic media disclosure obligations in paragraph (c) of this section, the administrator of an employee benefit plan is deemed to satisfy the requirements of paragraph (b)(1) of this section, provided that the administrator complies with the obligations in 29 CFR 2520.104b-31.

4. Add § 2520.104b-31 to subpart F 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—when he or she begins participating in the plan, as a condition of employment, 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 electronic mail ("email") address or internet-connected mobile-computing-device (e.g., "smartphone") number, at which the covered individual may receive a written notice of internet availability, described in paragraph (d) of this section, or an email described in paragraph (k) of this section. Alternatively, if an electronic address is assigned by an employer to an employee for employment-related purposes that include but are not limited to the delivery of covered documents, 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 or information that the administrator is required to furnish

to participants and beneficiaries pursuant to Title I of the Act, except for any document or information that must be furnished only 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 described in paragraph (e) of this section. 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*. (i) A notice of internet availability furnished pursuant to this section must contain the information set forth in paragraphs (d)(3)(i)(A) through (H) of this section:

(A) A prominent statement—for example as a title, legend, or subject line—that reads: "Disclosure About Your Retirement Plan."

(B) A statement that reads: "Important information about your retirement plan is now available. Please review this information."

(C) An identification of the covered document by name (for example, a statement that reads: "your Quarterly Benefit Statement is now available") and a brief description of the

covered document if identification only by name would not reasonably convey the nature of the covered document.

(D) The internet website address, or a hyperlink to such address, where the covered document is available. The website address or hyperlink must be sufficiently specific to provide ready access to the covered document and will satisfy this standard if it leads the covered individual either directly to the covered document or to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document.

(E) 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.

(F) A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.

(G) A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document.

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

(ii) A notice of internet availability furnished pursuant to this section may contain a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that such statement is not inaccurate or misleading.

(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.

(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 at least until the date that is one year after the date the covered document is made available on the website pursuant to paragraph (e)(2)(i) of this section or, if later, the date 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.

(4) For purposes of this section, the term *website* means an internet website, or other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.

(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. Only one paper copy of any covered document must be provided free of charge under this section.

(2) Covered individuals must have the right, free of charge, to globally opt out of electronic delivery and receive only paper versions of 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 a valid and operable secondary electronic address that had been provided by the covered individual, 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 covered documents will be furnished electronically to an electronic address; identification of the electronic address that will be used for the individual; any instructions necessary to access the covered documents; a cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document; a statement of the right to request and obtain a paper version of a covered document, free of charge, and an explanation of how to exercise this right; and a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right. A notification furnished pursuant to this paragraph (g) must be written in a manner calculated to be understood by the average plan participant.

(h) *Special rule for severance from employment*. At the time a covered individual who is an employee, and for whom an electronic address assigned by an employer pursuant to paragraph

(b) of this section is used to furnish covered documents, severs from employment with the employer, the administrator must take measures reasonably calculated to ensure the continued accuracy and availability of such electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual's severance from employment.

(i) *Special rule for annual combined 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:

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

(2) Any covered document or information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline;

(3) Any other covered document if authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with section 110 of the Act; and

(4) Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury.

(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 reasonable period of time in the manner required by this section due to technical maintenance or 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) *Alternative method for disclosure through email systems*. Notwithstanding any other provision of this section, an administrator satisfies the general furnishing obligation in § 2520.104b-1(b)(1) by using an email address to furnish a covered document to a covered individual, provided that:

(1) The covered document is sent to a covered individual's email address, referred to in paragraph (b) of this section, no later than the date on which the covered document must be furnished under the Act.

(2) In lieu of furnishing a notice of internet availability pursuant to paragraph (d) of this section, the administrator sends an email pursuant to this paragraph (k) that:

(i) Includes the covered document in the body of the email or as an attachment;

(ii) Includes a subject line that reads: "Disclosure About Your Retirement Plan";

(iii) Includes the information described in paragraph (d)(3)(i)(C) of this section if the covered document is an attachment (identification or brief description of the covered document), paragraphs (d)(3)(i)(E) (statement of right to paper copy of covered document), (d)(3)(i)(F) (statement of right to opt out of electronic delivery), and (d)(3)(i)(H) (a telephone number) of this section; and

(iv) Complies with paragraph (d)(4)(iv) of this section (relating to readability).

(3) The covered document is:

(i) Written in a manner reasonably calculated to be understood by the average plan participant;

(ii) Presented in a widely-available format or formats that are suitable to be read online, printed clearly on paper, and permanently retained in an electronic format that satisfies the preceding requirements in this sentence; and

(iii) Searchable electronically by numbers, letters, or words.

(4) The administrator:

(i) Takes measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual; and

(ii) Complies with paragraphs (f) (relating to copies of paper documents or the right to opt out); (g) (relating to the initial notification of default electronic delivery), except for the cautionary statement; and (h) (relating to severance from employment) of this section.

(l) *Dates; severability*. (1) This section is applicable [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(2) If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

PART 2560 --RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

5. The authority citation for part 2560 continues to read as follows:

Authority: 29 U.S.C. 1132, 1135, and Secretary of Labor's Order 1-2011, 77 FR 1088 (Jan. 9, 2012). Section 2560.503-1 also issued under 29 U.S.C. 1133. Section 2560.502c-7 also issued under 29 U.S.C. 1132(c)(7). Section 2560.502c-4 also issued under 29 U.S.C. 1132(c)(4). Section 2560.502c-8 also issued under 29 U.S.C. 1132(c)(8).

6. Amend § 2560.503-1 by revising the second sentence of paragraph (g)(1) introductory text and the second sentence of paragraph (j)(1) to read as follows:

§ 2560.503-1 Claims procedure.

* * * * *

(g) * * *

(1) * * * Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv), or with the standards imposed by 29 CFR 2520.104b-31 (for pension benefit plans). * * *

* * * * *

(j) * * *

(1) * * * Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv), or with the standards imposed by 29 CFR 2520.104b-31 (for pension benefit plans). * * *

* * * * *

Signed at Washington, DC, May 15, 2020.

Eugene Rutledge,

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

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