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Legal Update

The DOL Embraces Wider Use of Electronic Notices for ERISA Disclosures

On May 21, 2020, the US Department of Labor (DOL) and the Employee Benefits Security Administration (EBSA) issued final regulations expanding the use of electronic disclosures for retirement plans. The regulations provide a new safe harbor that will substantially ease the use of electronic delivery by retirement plan administrators to satisfy the disclosure requirements of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The new regulations were published in the *Federal Register* on May 27, 2020, and they take effect on July 27, 2020 (though the DOL will not take enforcement action against a plan administrator that relies on the regulations' new safe harbor before that date).

The new safe harbor contained in the final regulations includes two significant improvements over the safe harbor created by regulations issued in 2002 (the "2002 safe harbor"). The first is the adoption of an "opt-out," as opposed to an "opt-in," procedure for retirement plan e-disclosures. In other words, under the new safe harbor, retirement plan administrators can distribute essentially all required Title I ERISA disclosures (save for those that must be furnished only upon request) *electronically*, even if a participant is neither "wired at work" nor has affirmatively consented to receive e-notices. Second, under the new safe harbor, e-notice can be accomplished either via the "notice and access" method—i.e., sending an email to participants to notify them that a new ERISA disclosure has been posted on a designated website—or by sending ERISA disclosures directly to plan participants, either in the body of, or as an attachment to, an email. Unfortunately, unlike the 2002 safe harbor, the new regulations apply only to retirement plans; they do not apply to welfare plans.

Given that the new regulations can be implemented immediately, they may greatly assist in the provision of retirement plan notifications while many people are still working from home due to the COVID-19 crisis. Even if plan administrators do not take steps to implement the new safe harbor immediately, they may still benefit from the DOL's Notice 2020-01, which it issued on April 28, 2020, in connection with the pandemic. Notice 2020-01 allows plan administrators to use electronic means to satisfy ERISA Title I disclosure requirements for welfare and retirement plans alike, and it does not expressly require satisfaction of the 2002 safe harbor but only applies during the national health emergency.[1]

This Legal Update first addresses the DOL's final 2020 e-disclosure regulations, followed by a discussion of its coronavirus-specific guidance regarding electronic disclosures. The update then discusses the benefits of increased electronic notice and concludes with practical guidance for plan fiduciaries considering whether to adopt the new electronic notice safe harbor.

Final Regulations and Safe Harbor Regarding E-Notice

The final regulations amend part 2520 by adding a new section, § 2520.104b-31, titled "Alternative method for disclosure through electronic media." These regulations introduce a new "notice and access" safe harbor to allow greater use of electronic disclosures: retirement plan administrators may send electronic notice to participants that an ERISA-required disclosure or document has been posted on a website maintained by the employer that is accessible to the participants. Retirement plan administrators may also satisfy the safe harbor by sending ERISA-required disclosures or documents via email, either in the body of the email or as an attachment. Further, the new regulations embrace an "opt-out" as opposed to an "opt-in" structure.[2] According to the DOL, the proposal to expand electronic disclosures would save ERISA retirement plans (and participants, if savings are passed through to them) an estimated $3.2 billion over 10 years. The regulations will apply beginning July 27, 2020, though the DOL explained that it will not take any enforcement action against plan administrators that rely on the safe harbor before that date.

The regulations were long overdue for an update. In 2002, the DOL amended general standards for required disclosures by establishing a safe harbor for the use of electronic media to distribute plan notices for both retirement plans and welfare plans.[3] But the 2002 safe harbor was only available in limited circumstances for certain categories of participants. For example, administrators could provide electronic disclosures to participants who were "wired at work" (i.e., whose integral job duties include regular computer access) without obtaining their consent, but had to obtain affirmative consent from those who did not meet the wired at work standard.[4] This inhibited somewhat the use of electronic disclosure for participants without regular access to computers at work as well as those terminated from employment. In addition, the 2002 regulations generally required that applicable notices, documents, and disclosures be delivered directly to participants (e.g., as an email attachment); they did not permit a plan administrator to provide notice that the document (such as an SPD) had been posted on a company website to which participants have access.[5] While the DOL issued some liberalizations in Field Assistance Bulletins in the intervening years, including permitting a notice and access approach to participant benefit statements and certain other participant level disclosures,[6] it had not proposed a wholesale update to the regulations until it introduced the proposed regulations this past fall in light of "the importance of the ever-evolving changes in technology affecting individuals at home and at work," and the "substantial access to and use of electronic media."[7] The final regulations are discussed in detail below.

The final regulations permit plan administrators to continue to rely on the 2002 safe harbor for electronic delivery (although the previously issued Field Assistance Bulletins liberalizing that safe harbor would be superseded by the new regulations),[8] or to furnish paper documents by hand-delivery or by mail. This is obviously important for plan administrators of welfare plans for whom the new safe harbor would not be available, but may also be relevant for plan administrators of retirement plans who find certain aspects of the existing safe harbor preferable.

Details of the Final Regulations

COVERED INDIVIDUALS

First, the new rule will apply to any "covered" individual. Covered individuals include:

- participants,
- beneficiaries, or
- other individuals entitled to receive covered documents,

and who,

- as a condition of employment,
- at commencement of plan participation,
- or otherwise,

provide an electronic address to the plan administrator. The electronic address includes both email addresses or internet-connected mobile-computing device numbers—such as a smartphone telephone number—at which the individual may receive a notice of internet availability. (However, for purposes of using the direct email method discussed below, a plan administrator may only send an ERISA disclosure to an email address, not a smartphone number.) Alternatively, if the employer assigns the participant an electronic address for employment-related purposes that include, but are not limited to, the delivery of covered documents, the participant is treated as if he or she furnished an electronic address.

INITIAL NOTICE AND OPT-OUT RIGHT

A key difference from the 2002 safe harbor is that the new regulations contain an opt-out, as opposed to an opt-in, structure.

Prior to utilizing the new notice and access or direct email safe harbor, the plan administrator must first notify each covered individual—via *paper delivery*—that future retirement plan notices will be provided electronically. The paper notification must identify the electronic address that will be used for the covered individual (such that the notice must be tailored to each covered individual), any instructions necessary to access the covered documents, and 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. The paper notification must also inform covered individuals that they have the right to opt out of electronic delivery entirely or to request a paper copy of covered documents, free of charge, and must also explain the procedures for exercising these rights. This initial notification must be written in a manner calculated to be understood by the average plan participant.

The plan administrator must send this notification to all existing employees in order to rely on the new safe harbor, even if those employees had already opted in to electronic disclosure under the 2002 safe harbor. Thereafter, the administrator must send this notice to all new hires. However, plan administrators may continue to rely on the 2002 safe harbor for some or all participants and beneficiaries; in that case, administrators would only need to provide the initial notice to participants who would be covered by the new safe harbor. The DOL presented the following example: if a defined contribution plan covers three employees, only one of whom is wired at work, the plan could take advantage of the new safe harbor for all three participants. In that case, each participant would need to be furnished with the initial paper notification. Alternatively, the plan could take advantage of the new safe harbor with respect to the two participants who were not covered by the 2002 safe harbor, and

continue to rely on the 2002 safe harbor for the "wired at work" participant. In that situation, the plan administrator would only need to furnish the initial notification to these two participants.[9] The employer might prefer the latter approach in order to avoid giving the employee who is "wired at work" the ability to opt out of electronic disclosure. Note, however, that the employer could not use a notice and access approach for the "wired at work" employee because, as noted above, the 2002 safe harbor does not cover such an approach; instead, applicable notices, documents, and disclosures would have to be delivered directly to that participant (e.g., as an email attachment). Further, using the different safe harbors for different groups of employees may create inefficiencies.

Once an individual who was assigned an electronic address by his or her employer that was used to furnish covered documents severs employment with the plan sponsor, the plan administrator must take measures reasonably calculated to ensure the continued accuracy and availability of the electronic address or number (such as by sending notices to the individual's personal email address if the employer has it) or obtain a new electronic address.

COVERED DOCUMENTS

Under the final regulations, plan administrators can furnish access electronically to any documents required to be furnished by pension benefit plans under Title I of ERISA (so-called "covered" documents), except for documents that must be furnished to participants only upon request. This means that the following documents, among others, are covered by the new safe harbor:

- summary plan descriptions (SPDs),
- summaries of material modifications (SMMs),
- summary annual reports (SARs),
- annual funding notices,
- black-out notices, and
- pension benefit statements.

Documents that must be provided to participants only upon request, such as the latest Form 5500, the plan document, and other instruments under which the plan is established or operated (in the case of a request under ERISA Section 104(b)(4)), do not fall under the new safe harbor.

While the final regulations provide that covered documents *only* include documents furnished in relation to pension benefit plans, the DOL reserved a section of the "covered document" provision and indicated that it may eventually expand the new safe harbor to include documents furnished in relation to welfare plans as well.[10]

NOTICE AND ACCESS STRUCTURE AND CONTENT

Under the new safe harbor's "notice and access" structure, plan administrators are required to notify covered individuals when a new document is made available online (insofar as plan administrators are not sending notices directly via email, discussed further below). Notice of internet availability must be provided electronically, such as via email, and not physically, such as by postcard. The notice of internet availability must be provided: (1) by the date that the covered document is posted; and (2) no later than the date on which the document must be furnished under ERISA.

The new regulations provide that the notice of internet availability must contain a prominent statement—for example, as a title, legend, or subject line—that reads, "Disclosure About Your

Retirement Plan." Additionally, the notice must state, "Important information about your retirement plan is now available. Please review this information." The notice must also contain:

- an identification of the covered document by name (e.g., "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,
- the website address (or hyperlink) where the covered document is available that is sufficiently specific to provide ready access to it, in that the address or link leads directly to the covered document or to a login page that provides, either on the login page itself or immediately thereafter, a prominent link to the covered document,
- a statement and explanation of the participant's right to request a paper version of the covered document, free of charge,
- a statement and explanation regarding the right to opt out of receiving all covered documents electronically, free of charge,
- 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, and
- a telephone number for the plan administrator or other designated plan representative.

The notice of internet availability may contain a statement as to whether the covered individual is required or invited to take any action in response to the covered document and, if so, how, or that no action is required, so long as this statement is not inaccurate or misleading.

The DOL emphasized that the purpose of the notice is to "provide very concise and clear notification to covered individuals about covered documents available on the website."[11] It must be written in a manner calculated to be understood by the average plan participant. The notice must be limited to the required content specified in the regulations, and it may only contain logos or other design elements if the content is clear and not misleading.

If the plan administrator becomes aware of any inoperable electronic address for a given covered individual (e.g., if an email is bounced back), the plan administrator must promptly take steps to cure by taking steps such as sending the notice to a secondary electronic address that has been provided by the covered individual, or obtaining a new email address. If the issue is not promptly cured (or in lieu of curing), the plan administrator must treat the covered individual as if he or she opted out of electronic delivery entirely.

As noted, one of the biggest changes from the 2002 safe harbor is the elimination of an affirmative "opt-in" requirement for those not wired at work. Instead, the new regulations provide for a broad opt-out right, allowing individuals to opt out of receiving electronic documents entirely, or to receive a copy of any covered document upon request in paper form, free of charge. (After providing one paper notice for free, plan administrators may charge for subsequent copies of the same notice.) Plan administrators are required to establish and maintain reasonable procedures to process these opt-out and paper copy requests. Such procedures will not be "reasonable" if they contain any provision or are administered in any way that unduly inhibits or hampers the initiation or processing of a request or an election.

WEBSITE STANDARDS

The new regulations contain specifications for the website as well. Plan administrators must "take measures reasonably calculated" to ensure certain protections for participants. For example, plan

administrators must keep a covered document available online for at least one year after the document is published, or, if later, until it is superseded by a subsequent version. Covered documents must also be presented in a format that would be easily readable both online and if printed, and the documents must be electronically searchable by numbers, letters, or words. The plan administrator must also take measures reasonably calculated to ensure that the website protects the confidentiality of personal information relating to any covered individual.

Otherwise, the covered documents' content are still subject to the same statutory and regulatory requirements governing ERISA Title I notices and disclosures, and they must be presented in a manner calculated to be understood by the average plan participant.

The website may be maintained by the plan administrator itself or another service provider, though the plan administrator has the fiduciary duty to prudently select and monitor any third-party website provider. The regulations provide some leeway in the case of technical issues: a plan administrator will not fail to be in compliance with the regulations if the covered documents are temporarily unavailable due to unforeseeable events, technical maintenance, or circumstances beyond the administrator's control. However, the administrator must implement reasonable procedures to ensure access to covered documents and must take prompt steps to cure any unavailability as soon as practicable.

In response to comments the DOL received on the proposed regulations, the final regulations provide that covered documents may be posted on a traditional website or another internet or electronic-based information repository, such as a mobile application (i.e., an "app"), so long as covered individuals have been provided reasonable access. Notably, the DOL did not include any other protections specifically related to the use of mobile apps, e.g., to ensure that the app is downloaded. Nor did the preamble to the new safe harbor address other considerations for plan administrators considering an app, such as the relative mobile-savviness of participants.

CONSOLIDATED NOTICE RULE

While the regulations generally require plan administrators to provide notice of availability for each covered document, plan administrators may furnish a combined notice of availability 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. The following documents may be included in a combined notice of availability:

- SPDs,
- 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 (including a summary annual report, annual funding notice, QDIA notice, annual—but not quarterly—pension benefit statement or annual investment-related information required by DOL Reg. § 2550.404a-5(d)(2), and information required to be furnished annually regarding plan fees, as required by DOL Reg. § 2550.404a-5(c)),
- any covered document that does not fall into the first two categories, if authorized in writing by the Secretary of Labor, by regulation or otherwise, in compliance with ERISA section 110, and
- any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury.

In a departure from its proposed regulations, the Department's final regulations do not allow an annual notice of internet availability to cover quarterly benefit statements within the meaning of ERISA section 105(a)(1)(A)(i).

DIRECT DELIVERY VIA EMAIL

The biggest change between the final regulations and the proposed regulations from October 2019 is the addition of a new section allowing the delivery of covered documents to covered individuals via email. The DOL explained in commentary accompanying the final regulations that it had received comments that direct delivery is preferable because website access may require multiple steps (log-ins, passwords, opening hyperlinks, etc.), which could result in a burdensome process that some individuals may not pursue.[12] Conversely, direct email delivery means immediate access to covered documents. Direct delivery will also enable plan administrators to take advantage of the new safe harbor if they cannot support, or have logistical concerns with supporting, a website.[13]

The final regulations provide that a plan administrator who opts for direct delivery via email must send the covered document to the covered individual's email address (*not* a smartphone number) no later than the date on which the covered document must be furnished under ERISA. If an administrator provides covered documents directly via email, the administrator does not need to provide a notice of internet availability. Instead, the plan administrator must send an email that:

- includes the covered document in the body of the email or as an attachment,
- includes a subject line that reads, "Disclosure About Your Retirement Plan,"
- if the covered document is an attachment, identifies the document or contains a brief description thereof,
- contains a statement of the right to receive a paper copy of the covered document,
- contains a statement of the right to opt out of electronic delivery,
- includes a telephone number for the plan administrator or other designated plan representative, and
- is written in a manner calculated to be understood by the average plan participant.

Like any covered document posted on a website or app (and the cover email itself), a covered document that is emailed directly must be written in a manner reasonably calculated to be understood by the average plan participant, presented in a format that is suitable to be read online or printed clearly on paper, and searchable electronically by numbers, letters, or words. And, like plan administrators who opt for the notice and access model, administrators who send covered documents directly must also take measures reasonably calculated to protect the confidentiality of a covered individual's personal information, comply with the regulations' opt-out rules, provide the initial notification of default electronic delivery, and comply with severance from employment rules. However, administrators who use direct email delivery are not required to include the cautionary statement regarding the amount of time that a covered document will be available online, given that these administrators are not required to maintain a website at all.

Because plan administrators who opt to send documents directly need not provide a notice of internet availability, the regulations relating to combining notice of multiple covered documents into one email do not apply either. The DOL's text accompanying the final regulations notes that plan administrators may wonder whether more than one covered document can be attached to an email, especially for annually required or other covered documents that the plan administrator wishes to send at the same time. Ultimately, the DOL adopted the same standard that would apply if the documents were to be

furnished on paper. For example, the DOL noted that it often permits plan administrators to furnish required disclosures at the same time, e.g., in the same envelope. In that case, plan administrators may treat the email to the covered individual as the "envelope" and attach more than one document.[14]

DOL's Guidance on Electronic Notices During COVID-19 Pandemic

In Notice 2020-01, the DOL acknowledged that COVID-19 poses particular difficulties for plan administrators in fulfilling their obligations to provide plan participants with statutorily-required notices that may come due during the crisis. To address this, the DOL extended deadlines for furnishing certain notices, disclosures, and other documents required by Title I of ERISA over which the DOL has authority, with respect to *both* retirement and welfare plans. Further information regarding these extensions can be found in our May 5 blog post, "DOL Issues COVID-Related Disaster Relief." In addition, the DOL specified that plans and plan fiduciaries would not violate ERISA for failure to timely furnish a notice, disclosure, or other document required to be sent out between March 1, 2020, and 60 days after the end of the COVID-19 national emergency, so long as the plan and its responsible fiduciary act in "good faith" and furnish the document "as soon as administratively practicable under the circumstances."[15]

The good news regarding electronic communications lies in the Notice's definition of "good faith." "[G]ood faith" acts include "electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, *including email, text messages, and continuous access websites*."[16] The guidance does not provide any further details on permitted electronic notice, nor does it specify that a participant must affirmatively opt-in to receive electronic—as opposed to paper—notice.

Potential Benefits of the New Regulations and DOL Guidance Regarding Coronavirus Relief

Plan administrators and participants stand to benefit from both the DOL guidance regarding the COVID-19 pandemic and new regulations.

First and foremost, the coronavirus-specific DOL guidance allows plan administrators to use electronic delivery for *both* retirement and welfare plans so long as they reasonably believe that participants have effective access to electronic communication. There is no express requirement of obtaining consent or notifying participants that disclosures will be provided electronically unless the participants opt out, but establishing that the effective access standard is satisfied for those not at work would likely require reaching out to participants anyway to the extent the employer has not already done so. Participants will also benefit insofar as the DOL guidance facilitates the provision of essential plan-related notices to them during and immediately after the pandemic. Plan administrators may also take advantage of the new safe harbor immediately without facing potential DOL enforcement actions, though, as discussed above, plan administrators will need to provide an initial notification to participants of the safe harbor's implementation via paper delivery first.

Second, outside of the DOL's coronavirus-related guidance, the new regulations and safe harbor could result in significant cost savings for plans and participants alike. While many plans already take advantage of the 2002 safe harbor to distribute notices electronically, use of electronic disclosures more globally has the potential to reduce costs further (for plan participants, who subsidize mailing costs through recordkeeping fees, and/or for plan sponsors, to the extent that the latter have assumed financial responsibility for plan administrative fees).

Third, the use of electronic disclosures may further facilitate confirmation that plan participants are not only receiving, but actually reading, plan notices for purposes of defending against breach of fiduciary duty lawsuits. The new safe harbor does not require that plan administrators monitor whether covered individuals actually review a notice of internet availability or log onto the applicable website. Collecting this data, however, could assist in any future litigation. Under ERISA, a fiduciary breach action must be commenced by the earlier of six years after the date of the last action that constituted a part of the breach, or three years after the earliest date on which the plaintiff had *actual knowledge* of the alleged breach or violation (except in the case of fraud or concealment).[17] The Supreme Court recently held that "actual knowledge" means that constructive knowledge through *receipt* of information is insufficient. In other words, proving that a plaintiff had actual knowledge of an alleged breach more than three years prior to filing suit "requires more than evidence of disclosure alone . . . the plaintiff must in fact have become aware of that information."[18]

If plan administrators using the notice and access process retain data regarding which participants actually accessed an online disclosure and the online disclosure asks participants to confirm that they actually read the document and understood each of its terms and conditions, plan fiduciaries may have an easier time making out a limitations defense if the disclosure contained evidence of the alleged "breach." For example, if a plaintiff alleges that a 401(k) plan paid excessive fees for investment options, it may be easier to establish that the plaintiff's claim is untimely if there is proof that he or she both accessed and read fee disclosures provided under 29 C.F.R. § 2550.404a-5 online more than three years before filing suit. The Supreme Court foreshadowed this possibility, noting that "[e]vidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response to the information contained in them."[19]

Of course, plaintiffs' lawyers will likely still argue that simply accessing a disclosure and clicking on a confirmation that a participant read and understood it does not mean that he was "necessarily . . . aware of all facts disclosed to him."[20] This may also prove to be far more difficult to the extent that plan administrators send out covered documents directly via email; even a "read receipt" would only demonstrate that a covered individual opened a given email, not that he or she actually read or understood its contents. However, tracking which participants access e-disclosures and confirm having read and understood it may assist in establishing this defense in a subsequent litigation.

Key Considerations Moving Forward

We advise that plan fiduciaries keep several considerations in mind in light of the COVID-19 DOL guidance and the regulations:

- Regarding the DOL's coronavirus-specific guidance, the DOL did not articulate what qualifies as a "reasonabl[e] belie[f]" that participants and beneficiaries have effective access to electronic means of communication. We advise plan fiduciaries to take a conservative view of this phrase. For example, plan fiduciaries should conduct a careful review of their records to ensure that they are not sending email notices to employees' work email address if those employees were not provided with a laptop through work or the ability to access their work email account on their smartphone or if the employee has terminated employment.
- Plan administrators should be mindful of the fact that while the COVID-19 DOL guidance covers "employee benefit plans" in general, the new regulations apply only to pension benefit plans under ERISA section 3(2), not welfare plans under section 3(1).

- We advise plan administrators intending to take advantage of the new safe harbor to collect both professional and personal email addresses or smartphone numbers for covered individuals to the extent possible. This will allow for a simpler "cure" procedure if an email from one address is bounced back, to avoid running afoul of the safe harbor. It will also facilitate continued notice when an employee severs employment. Plan administrators may consider sending email notices to *both* personal and professional email addresses. This could also assist plan administrators in proving that they are making good faith efforts to ensure the continued viability of participant email addresses.
- Plan administrators using the notice and access process should ensure that the applicable website stays up-to-date and that documents are presented in an easily readable and searchable form. One relatively easy way to accomplish the readability standard is to post ERISA disclosures as PDFs that have optical character recognition (OCR).
- Plan administrators using the notice and access process should consider collecting data, to the extent possible, on participants' access of covered documents on the applicable website to assist in any future litigation, including the participant's identity, the document accessed, and the date of access. Plan administrators should also ask participants to confirm that they both read and understood the terms and conditions of the disclosure by, for example, clicking a confirmation button or typing in their name. This data may also assist in ensuring participants receive proper education regarding their plans. Likewise, plan administrators using the direct email process should request a "read receipt" for all emails of covered documents.
- Insofar as plan administrators intend to outsource website maintenance and electronic notices to a third party, plan administrators should be mindful of their fiduciary obligations to select and monitor the website provider. We advise plan administrators to conduct a careful search for the third-party service provider, such as through an RFP. Similarly, we advise plan administrators to review website providers' performance on a regular basis. For example, plan administrators may choose to conduct regular audits to review information such as how often a website is unavailable, or how often electronic notices/direct emails are sent to non-working email addresses.
- Plan administrators should work with the website providers to implement reasonable procedures to ensure that covered documents are available consistently. They should also work with website providers and the third-party service provider distributing emails to protect the confidentiality of all covered individuals' information. Plan administrators may consider attempting to negotiate indemnification provisions in any contracts with their third-party service providers in the case of, for example, a data breach or a preventable website accessibility issue.
- Plan administrators should also keep in mind that the electronic notice must be written in a manner calculated to be understood by the average plan participant. In language from the proposed regulations that was deleted in the final regulations, the DOL advised 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 will satisfy this requirement. In practice, this means that the notice must be easily understood by the average eighth grade student. Although this language is not in the final regulations, plan administrators should consider ways to ensure notices are easily understandable, such as by avoiding highly technical language.
- Plan administrators—especially those who do not already have a website established for the retirement plan at issue—should consider whether to take advantage of the direct email provisions as opposed to the notice and access model. The direct email model would obviate the need to comply with certain provisions of the final regulations, such as the requirements regarding the length of time

that a covered document must be posted online, and would likely facilitate participant access to the covered documents. Conversely, plan administrators who choose the direct email model should consider technological issues, such as ensuring that the size of any attachment is sufficiently small so that the email can be delivered.

- If plan administrators choose to build apps on which to post covered documents, then we recommend that the plan administrators also post the documents on a traditional website for internet users who do not have access to a smartphone. We also advise that any apps be made available to covered individuals free of charge.
- Plan administrators should consider whether they wish to continue taking advantage of the 2002 safe harbor instead of adopting the new e-disclosure rules.
  - Employers may determine that it is simpler to continue using the 2002 safe harbor instead of sending the required initial paper notifications in order to take advantage of the new safe harbor.
  - Further, as noted above, the new safe harbor applies only to retirement plans, not to welfare plans. (The DOL indicated in its comments that the possibility of extending the new safe harbor to employee welfare benefit plans is subject to continuing study.) Depending on a plan administrator's process for distributing ERISA-required notices for retirement and welfare plans (and whether the plan administrator has outsourced that function), adopting the notice and access procedure under the new safe harbor for retirement plans may lead to inefficiencies on account of the fact that a different process would have to be used for welfare plans. Plan administrators may wish to consider continuing to use the 2002 safe harbor, which is available to both categories of plans, until the DOL extends the new notice and access procedures to welfare plans as well. To be sure, plan administrators could adopt the new safe harbor for retirement plans and still achieve some symmetry in approach between those and their welfare plans by taking advantage of the direct email provisions in the new safe harbor for retirement plans and using direct email for welfare plans under the 2002 safe harbor. Even then, however, electronic delivery for the retirement plans will be subject only to opt-out requirements, and electronic delivery for the welfare plans will be subject to an opt-in requirement (for those not wired at work). Plan administrators may determine that it is simpler to convert to the new safe harbor with respect to all retirement and welfare plans at the same time.
  - Helpfully, even in the case of a single retirement plan, the final regulations allow plan administrators to rely on more than one safe harbor—they could continue to rely on the 2002 safe harbor for one population of participants, and then rely on the new safe harbor for a population not covered by the 2002 safe harbor.
  - Finally, plan administrators who choose to continue to rely on the 2002 safe harbor for some or all of the participants in a retirement plan should note that the final regulations are meant to supersede certain liberalizations of the 2002 safe harbor that permitted the use of a notice and access-type process for the provision of pension benefit statements, QDIA notices, and disclosures under 29 C.F.R. 404a-5.[21] Plan administrators may rely on those liberalizations only for the 18 months following the effective date of the new final rule.[22]

If you wish to receive regular updates on the range of the complex issues confronting businesses in the face of the novel coronavirus, please subscribe to our COVID-19 "Special Interest" mailing list.

And for any legal questions related to this pandemic, please contact the authors of this Legal Update or Mayer Brown's COVID-19 Core Response Team at FW-SIG-COVID-19-Core-Response-Team@mayerbrown.com.

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Endnotes

[1] The new safe harbor was only proposed at the time of issuance of Notice 2020-01.

[2] *See* 85 Fed. Reg. 31884.

[3] 29 C.F.R. § 2520.104b-1(c).

[4] 29 C.F.R. § 2550.104b-1(c)(1)(i)-(iv).

[5] *See, e.g.*, 29 C.F.R. § 2550.104b-1(c)(1)(i)(A).

[6] *See* Field Assistance Bulletin 2006-03 (Dec. 20 2006); Field Assistance Bulletin 2008-03, Q&A 7 (Apr. 29, 2008); Technical Release 2011-03R (Dec. 8, 2011).

[7] 84 Fed. Reg. at 56,896.

[8] *See* Note 8, *supra*; *see also* 85 Fed. Reg. at 31,908.

[9] *See* 85 Fed. Reg. at 31900-01.

[10] *See* 85 Fed. Reg. at 31890.

[11] *See* 85 Fed. Reg. 31,891.

[12] *See* 85 Fed. Reg. at 31905.

[13] *See id.*

[14] *See* 85 Fed. Reg. at 31906.

[15] Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01, "Guidance and Relief for Employee Benefit Plans Due to the COVID-19 (Novel Coronavirus) Outbreak" (Apr. 28, 2020), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01.

[16] *See id.* (emphasis added).

[17] 29 U.S.C. § 1113.

[18] *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020).

[19] 140 S. Ct. at 779.

[20] 140 S. Ct. at 778.

[21] FAB 2006-03; FAB 2008-03; TR 2011-03R.

[22] *See* 85 Fed. Reg. at 31908.

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