

# Guide to DOL's New "Notice and Access" Proposal for Electronic Delivery

**Employee Benefits & Executive Compensation Blog** on **October 30, 2019**

On October 23, 2019, the Department of Labor published a new proposed regulation that paves the way for "notice and access" electronic delivery of certain disclosures for retirement plans. The proposal is welcome news for plan sponsors and administrators who have been frustrated by the existing "opt-in" regime for electronic disclosure. But the proposal is limited in scope—it covers only notices related to retirement plans, leaving health and welfare plans for another day—and it imposes significant obligations for sponsors and administrators who wish to have safe harbor protection under the proposed regulation.

DOL has requested comments on the proposal and additional issues related to required disclosures. ***Comments are due by November 22, 2019.*** The following are important points about the proposal:

- ***Limited scope: the proposal covers only retirement ("pension") plans, not health or other welfare plans.*** The safe harbor does not apply to health or other welfare benefit plan disclosures. DOL indicated in the preamble that it is considering whether to expand the proposed safe harbor to include welfare plans.
- ***Opt-out regime: the proposal includes a safe harbor for plan sponsors and administrators to furnish notices on a website, unless participants affirmatively request paper disclosure.*** To take advantage of the safe harbor, two notices will be required. First, the proposal requires that an initial paper notice be sent to each person intended to be covered by the safe harbor; the paper notice must explain the documents that will be furnished electronically, the right to request paper copies free of charge, and how to opt out of electronic delivery (either for certain documents or globally). After the initial paper notice is furnished, participants would have to be notified electronically each time a document is posted on the website (unless the document falls under the "consolidated" notice rule, explained below). The proposal requires that the electronic notice include a

website address directing participants to the posted document.

- ***Consolidated notice: exception to requirement to send a separate electronic notice for each document posted online.*** Although the safe harbor generally requires a separate electronic notice be sent each time a document is posted, the proposed regulation permits one “consolidated” notice covering all of the following documents: summary plan description (SPD), summary of material modifications (SMM), summary annual report (SAR), annual funding notice, section 404a-5 investment-related disclosure, notice about default investment alternatives (QDIA notice), and pension benefit statement. The consolidated electronic notice must be furnished annually.
- ***Retention required: documents posted on the website must remain posted until they are updated, changed, or become obsolete.*** Documents posted under the proposed safe harbor would have to be maintained on the website until superseded. In addition, documents posted on the website would have to be searchable electronically.
- ***Existing safe harbor not affected: the proposal is to have a new safe harbor that is in addition to (not a replacement for) the existing safe harbor for participants who opt in and employees who have computers at their desks.*** There is a general obligation to furnish ERISA-required documents by a method “reasonably calculated to ensure actual receipt.” An existing DOL safe harbor provides that this obligation may be satisfied by electronic delivery only if the participant has work-related computer access (such as a computer at their desk) or the participant affirmatively consents to receive notices electronically; that safe harbor has detailed requirements for the consent to be valid. The proposed regulation offers an additional safe harbor for delivery of ERISA-required notices, but it does not replace or supersede the existing DOL safe harbor.
- ***Comments requested: DOL requests comments on the proposal and an assortment of questions about disclosure more generally.*** In addition to its general request for comments in response to the proposed regulation, DOL asked for feedback on 21 separate topics related to disclosure, such as:
  - Whether any ERISA-required disclosures have become obsolete (due to the passage of time or technology);
  - Whether more personalized disclosures would enhance participant engagement;
  - Whether cybersecurity risk assessments and security measures related to plan disclosures should be incorporated into the regulation; and
  - Whether and to what extent plans should share the “substantial” cost savings from electronic distribution of documents with participants.

Employers who have struggled with seemingly endless disclosure obligations that are not widely read should welcome the opportunity to submit comments.

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The proposed regulation will become effective 60 days after the final rule is published in the *Federal Register*, with no option to rely on the proposed regulation before it is finalized.

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