



DOL Announces e-Delivery Final Rule

Plans have two new, optional default e-delivery methods.

June 2020

KEY POINTS

- Plans may use the new default electronic delivery methods after sending an initial printed notification.
 - This rule supersedes previous DOL guidance allowing for Benefit Statements and QDIA notices to be distributed electronically. There is an 18-month period to transition away from the previous guidance.
 - Plans may continue to use the 2002 Safe Harbor Rule allowing for electronic delivery using “wired at work” or using affirmative consent.
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The Department of Labor (DOL) issued a Final Rule on May 21, 2020, that would allow plan sponsors to send disclosures with a default delivery through digital channels. The rule allows disclosures to be sent to a Covered Individual's electronic address, which includes:

- Personal or work email address
- Smartphone number

The DOL projects that optional default electronic delivery will save approximately \$3.2 billion over the next decade in net costs for retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA).

While the Final Rule is not technically effective until 60 days after May 27, 2020 (the date the final rule was published in the Federal Register), the DOL indicated that it would not take enforcement action against a Plan Administrator that relies on this safe harbor before that date. This means plan sponsors can immediately begin mailing the one-time printed notice to Covered Individuals.

Note: Plans may use the new default electronic delivery methods after sending an initial printed notification.

Background

As background, on October 22, 2019, the DOL released a proposal regarding “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” that also includes a Request for Comments and a Request for Information (RFI). The proposal was drafted in response to an executive order issued on August 31, 2018, that directed the DOL to explore “the potential for broader use of electronic delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens.”

COVERED INDIVIDUALS AND COVERED DOCUMENTS

Covered Individuals

The Final Rule did not change the definition of a “Covered Individual.” A Covered Individual is a participant, beneficiary, or other individual entitled to Covered Documents who provides the employer, plan sponsor, or administrator with an electronic address when beginning participation in the plan, as a condition of employment, or otherwise. As in the Proposed Rule, an electronic address is intended to include an email address, smartphone number, and future technologies.

The preamble to the Final Rule reflects that an appropriate email address includes:

- A company-provided email address; or
- An email address provided by the employee as part of the job application process or on other human resource documents, in plan enrollment paperwork, or to establish a plan participant’s online access to plan documents and account information.

The Final Rule clarifies that an employer-provided electronic address must be assigned for some employment related purpose in addition to the delivery of Covered Documents under the new safe harbor.

Spouses, alternate payees, and beneficiaries must affirmatively provide the employer, plan sponsor, or administrator with an electronic address; otherwise, the plan sponsor cannot furnish disclosures to these individuals pursuant to this rule. In other words, an employer cannot simply assign an electronic address to a spouse, beneficiary, or alternate payee.

Plans that wish to use this disclosure delivery method to employees who sever from employment need to have procedures in place to ensure that they will have a correct electronic address to which disclosures will be sent. For example, procedures that include requesting and receiving an updated personal email address for future notifications as part of a company’s standard severance process would meet this standard. The Final Rule clarifies that if an employee’s email address for purposes of delivering covered documents is a personal email address, these special procedures are not required.

Covered Documents

Covered Documents include “any document or information that the administrator is required to furnish to participants and beneficiaries pursuant to Title I of [ERISA], except for any document or information that must be furnished only upon request.” Covered Documents include, but are not limited to, the following:

- 404a-5 Participant Disclosures
- Summary Plan Description (SPD)
- Summary of Material Modifications (SMM)
- Summary Annual Report (SAR)
- Blackout Notice
- Participant Benefit Statements
- Qualified Default Investment Alternative (QDIA) Notice
- Automatic Contribution Arrangement (ACA) Notice

Electronic Delivery Method 1: Notice-and-Access

As in the Proposed Rule, the Final Rule requires plan sponsors to furnish to each Covered Individual a Notice of Internet Availability (NOIA) for each Covered Document.

Combined NOIAs

The Final Rule continues to allow plan sponsors to furnish a combined NOIA each plan year (i.e., within a 14-month period of furnishing the prior year’s combined NOIA) for more than one Covered Document. Specifically, the Final Rule permits one annual combined NOIA for the following four categories of documents and information:

1. **The SPD.**
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 deadline.**

This includes many of the Covered Documents that were listed in the proposal—for example, a SAR, an annual funding notice, a QDIA notice, an annual pension benefit statement, and annual investment-related information required in the participant fee disclosure regulation. This category was added in response to public comments and includes information that must be furnished annually to comply with the participant fee disclosure regulation requiring the disclosure of plan-related information—for example, the general plan information or the description of fees for plan administrative services.

3. **Any other Covered Document the DOL permits in the future.**
- The third category is intended to provide the DOL with flexibility to accommodate additional or future Covered Documents that do not fit in the second category but that may be beneficial to include to reduce

A Word About Statements

- Annual participant benefit statements for non-participant-directed plans may be included in a combined annual NOIA.
- Separate NOIAs must be furnished to participants in participant-directed plans for each quarterly statement that is posted to the website.

In contrast to the proposal, the Final Rule does not permit a combined annual NOIA to include quarterly benefit statements. The Final Rule requires that a participant be provided a separate NOIA each time a quarterly benefit statement is posted. Annual statements applicable to non-participant directed plans, however, may be included in a combined annual NOIA.

administrative burdens on plans and improve the effectiveness of disclosures to Covered Individuals.

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

The fourth category was added in response to commenters who requested a safe harbor that aligns with the Treasury Department's electronic media rules for certain notices, such as auto-enrollment notices that are typically combined with QDIA notices.

Other NOIA Requirements

While the DOL did not provide a model NOIA, the content of the NOIA was modified slightly in the Final Rule based upon the feedback provided by commenters.

- **Description.** The Proposed Rule required that the NOIA identify the Covered Document by name and include a brief description of the Covered Document.

The Final Rule modified this requirement by indicating that the brief description would be required only if the identification by name "would not reasonably convey the nature of the Covered Document." In making this change, the DOL agreed with some commenters that it may not always be necessary to include a brief description of the document, and that inconsistent application of the standard could result in longer, and more complex, NOIAs. For example, a blackout notice would need a description accompanying the NOIA, but a quarterly statement would not require a brief description.

- **Website address.** The Proposed Rule required a website address to be included in the NOIA. In the Final Rule, the DOL indicated that it did not intend to limit NOIAs by only including website notations—rather, hyperlinks directly to the Covered Document may be included instead.

- **Reading score.** While the Proposed Rule reflected that a NOIA that meets a certain "Flesch reading score" would be viewed as written in a manner that would be understood by the average plan participant, the Final Rule dropped this standard and instead requires that the NOIA to be written in a manner calculated to be understood by the average plan participant.

- **Availability of paper versions of disclosures.** The NOIA must clearly indicate that requests of paper versions of the disclosures are available and must be provided free of charge. In response to concerns raised regarding repeated requests for paper copies, the Final Rule clarifies that only one paper copy of any specific Covered Document must be provided free of charge. Recipients also have the right to request a global opt-out of all electronic disclosures. While not required, plan sponsors may allow recipients to opt out of electronic delivery of certain documents and not others.

- **Website retention.** The Final Rule 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. The DOL noted that these website retention requirements do not alter a plan sponsor's general recordkeeping requirements under ERISA.

STANDARDS OF INTERNET WEBSITE

Like the Proposed Rule, the Final Rule continues the general requirement that plan sponsors must ensure the existence of an internet website through which Covered Individuals are able to access Covered Documents.

The DOL acknowledged that this provision holds the plan sponsors accountable for ensuring the establishment and maintenance of the website, and that many

plan sponsors may have delegated some or all of these website responsibilities to third parties. As with any delegation, the DOL notes it is the Plan Administrator's duty under ERISA to prudently select and monitor such third parties because without an accessible website that includes the Covered Document, the plan has not effectively "furnished" the document under this Notice and Access safe harbor.

If the plan has reasonable procedures in place to ensure that the Covered Documents are available, but, due to unforeseeable events or circumstances beyond the control of the plan sponsor such documents are temporarily unavailable for a reasonable period of time, plan sponsors may be relieved from liability if they take prompt action when they knew or should have known that such documents were unavailable.

Note that the Final Rule's website accessibility, maintenance and other requirements do not apply to direct delivery by email.

ELECTRONIC DELIVERY METHOD 2: DIRECT DELIVERY THROUGH EMAIL

To the extent that a plan sponsor decides to send a Covered Document to a Covered Individual via direct delivery through email, a NOIA is not required to be sent with that document. Rather, the plan sponsor 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";
- Includes an identification or brief description of the Covered Document if it is attached to the email, a statement of the right to paper copy of

Covered Document, and a statement of right to opt out of electronic delivery, and a telephone number; and

- Complies with the readability requirements.

Certain provisions of the Notice and Access safe harbor also apply to this delivery method, including the content, format and procedural conditions. For example, the Covered Individual must be furnished with a one-time notification in paper form that notifies the Covered Individual that Covered Documents will be sent to their electronic address and explain their right to receive paper copies and their right to opt out, as well as how to exercise those rights.

Impact on Prior Electronic Delivery Guidance

As with the Proposed Rule, the Final Rule does not impact a plan sponsor's ability to use the 2002 regulatory safe harbor for electronic delivery to participants and beneficiaries:

- Employees who are "wired at work," or 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
- Individuals entitled to documents under Title I of ERISA affirmatively consent to receive documents electronically.

The 2002 safe harbor remains in place as another option for Plan Administrators.

However, this new Rule will supersede prior interpretive guidance regarding the electronic delivery of benefit

statements, qualified default investment alternative notices, and participant fee and investment disclosures. In noting that Plan Administrators who wish to disclose information electronically follow a consistent standard, the DOL recognized that not allowing administrators to continue to rely upon this guidance would be costly and disruptive. Accordingly, the Department noted that it would not take action against administrators who continue to follow this guidance during the Transition Period (e.g., a period of up to 18 months following the effective date (July 27, 2020) of the Final Rule).

OUR RESPONSE TO THE DOL'S FINAL RULE

We strongly supported the DOL's proposed safe harbor for e-delivery of disclosures, lauding the goal of improving effectiveness of disclosures while significantly reducing the cost or burden of providing them. We are very pleased to see the DOL adopt the Final Rule. It has the potential to make disclosures much more accessible by current participants and by future generations of "digital native" participants who are much more comfortable with digital information than traditional hard copy print.

Our transition efforts are focused primarily on migrating Covered Individuals to our currently available digital communication channels. We also are actively reviewing initiatives to enable edelivery for a broader set of disclosures

We'll be proactively communicating as we know more.

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