



# Washington Pulse

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## More Options for Delivering Retirement Plan Disclosures

Nearly seven months after releasing proposed regulations, the Department of Labor (DOL) has released [final regulations](#) on default electronic delivery of retirement plan disclosures. These final regulations provide an additional safe harbor that may make it easier for plan administrators and their service providers to electronically deliver (either through email or by posting online) certain required disclosures to participants and beneficiaries in ERISA-covered plans. In addition to these final regulations, the DOL also released an accompanying [News Release](#) and [Fact Sheet](#).

### Overview

The new safe harbor created by the final regulations is simply meant to provide employers an additional option for delivering DOL-required disclosures. Employers are not required to follow the new regulations.

The final regulations apply only to disclosures (i.e., “covered documents”) under Title I of ERISA that pension benefit plan administrators must provide to covered individuals; they do not apply to IRS disclosures or to welfare benefit plan disclosures at this time. A covered document does not include a document provided only upon the participant’s written request (e.g., a request for a copy of the plan’s trust agreement). Examples of covered documents include

- a summary plan description,
- a summary of material modifications,
- a summary annual report, or
- an annual funding notice.

A covered individual is defined as a participant, beneficiary, or another individual (e.g., alternate payee) entitled to covered documents. A covered individual must either provide an electronic address (e.g., an email address or smartphone number) or, in the case of a covered individual who is an employee, have one assigned to them by the employer. The electronic address assigned by an employer must be for employment-related purposes that include, but are not limited to, the delivery of covered documents under the new safe harbor.

## What Has Changed From the Proposed Regulations?

The final regulations contain some welcome changes from the proposed regulations (see our previous [Washington Pulse](#) for more information on the proposed regulations.) The major changes contained in the final regulations are summarized below.

### ***New Initial Notice Requirements***

Plan administrators must provide an initial paper notice to participants who are defaulted into receiving covered documents electronically under the new safe harbor. In addition to the requirements in the proposed regulations, the final regulations require the notice to identify the specific electronic address that will be used to provide the covered documents to a covered individual. While this new requirement may make it more difficult for plan administrators to create the initial notice, it should enhance the long-term prospect of individuals receiving required disclosures.

### ***New Email Delivery Option***

In addition to posting covered documents on a website, plan administrators may now send covered documents directly to the email addresses of covered individuals, with the covered documents included either in the body of the email or as an attachment to the email. Whether using email or posting documents online, employers must ensure that the delivery method protects the confidentiality of personal information relating to any covered individual.

### ***More Generalized Requirements for “Opt Out” Election***

The proposed regulations allowed participants to opt out of receiving *some* documents electronically. Under the final regulations, a right to globally opt out must be provided free of charge. Plan administrators may also decide to offer recipients a “pick and choose” option (also free of charge) to receive some documents in paper form and some electronically. Similarly, a plan administrator that uses electronic means to deliver some covered documents need not use electronic means for all.

The final regulations also clarify that plan administrators need only provide one copy of any specific covered document free of charge.

### ***New Website Requirements***

- **Flexibility in definition of “website”** The final regulations acknowledge the importance of including new and developing technologies in applying the guidance, as long as the safe harbor requirements can be met. For example, mobile applications now qualify as a website.
- **Reasonable procedures for website maintenance:** These final regulations add “technical maintenance” of websites as a reason why disclosure documents may be unavailable for a reasonable amount of time.
- **Clarification on availability of web-posted documents:** A covered document posted to a website must remain available on the website until it is superseded by a subsequent version, if applicable, but in no event less than one year after the date it is posted to the website. The annual Notice of Internet Availability (NOIA) must inform participants that the covered document may not be available past this time frame.
- **Plan administrators are not required to monitor website use:** Plan administrators that choose to post covered documents on a website are not required to monitor whether covered individuals visit the website and view the information. The DOL also noted a recent court case that addressed whether a recipient has read, understood, and has “actual knowledge” of the information posted. The DOL did not, however, provide any further guidance on this issue.

### ***New NOIA Requirements***

- **Combined notices of online postings:** Certain notices of online postings can be combined in a single annual NOIA, including the following.
  - Summary plan description (SPD)
  - Documents or information that must be provided annually (e.g., summary annual report (SAR))

- Other documents authorized by the Secretary of Labor
- Notices required by the IRS if authorized by the Secretary of the Treasury (e.g., automatic contribution arrangement (ACA) notice)

Unlike the proposed regulations, the final regulations clarify that plan administrators may not include a summary of material modifications or quarterly benefit statements in a combined NOIA. These covered documents must have their own NOIAs.

The NOIA, if applicable, must be sent to the covered individual's electronic address. If the address is a phone number, it must be capable of receiving written text messages, and plan administrators must confirm this. Delivery of a NOIA by voice message does not meet this requirement.

- **NOIAs may contain an “invitation to take action” statement:** A NOIA may contain a statement explaining that 1) the covered individual is invited or required to take action in response to the covered document and how to take such action, or 2) no action is required, provided that such statement is not inaccurate or misleading. For example, a NOIA may include a statement that a benefits claim denial delivered to a covered individual is an invitation to take action and requires action within a specific time frame or else the covered individual may forfeit a right to a benefit. In this example, it would be misleading for a plan administrator to suggest on a NOIA that no action is invited or required.
- **Document description accompanying a NOIA:** Under the final regulations, a NOIA must include a brief description of a covered document if a covered document's name does not reasonably convey the nature of the covered document. For example, a NOIA for a quarterly benefit statement ordinarily would not need a brief description, but a NOIA for a blackout notice would.

### **More Flexible Readability Requirements**

Detailed guidelines for readability in the proposed regulations (using the Flesch reading ease score) were removed, and are not included in the final regulations. The final regulations simply require that communications under this guidance be “written in a manner calculated to be understood by the average plan participant.”

### **Special Rule for Severance from Employment**

Procedures must be in place to ensure that a plan administrator will continue to have a valid electronic address to which notices can be provided after a covered individual's severance from employment. The DOL revised this provision in the final regulations so that it applies only when an electronic address assigned by an employer is used to furnish covered documents. These particular procedures are not required when a personal email address is used to furnish covered documents.

### **Previous Guidance Still Applies**

In 2002, the DOL created a [safe harbor](#) for electronically delivering any plan disclosures required by ERISA. Although the 2002 safe harbor is not the only permissible way that an employer may use electronic media, those using it may treat the notice or other document sent by email or other electronic means as having been properly delivered.

In March 2020, the DOL, Treasury Department, and the Department of Health and Human Services released [EBSA Disaster Relief Notice 2020-01](#). This guidance extends deadlines for providing notices, disclosures, and documents that are due to plan participants and beneficiaries between March 1, 2020, and the end of a 60-day period following the close of the COVID-19 National Emergency (known as the Outbreak Period), which has yet to be announced.

Under this notice, plan fiduciaries will not violate ERISA as long as they act in good faith and provide required information as soon as practicable. Acting in good faith includes sending the information electronically when the plan fiduciary reasonably believes that the intended recipient has effective access to the information.

Although the DOL has yet to comment, it does not appear that plans have to rely on either one of the safe harbors in order to take advantage of Disaster Relief Notice 2020-01.

### **Transition Relief Granted**

For an 18-month period following the effective date of these final regulations, plan administrators can also rely on prior guidance for the delivery of certain covered disclosures. This guidance includes [FAB 2006-003](#), [FAB 2008-003](#) (Q&A 7), and [Technical Release 2011-03R](#). Thereafter, the relevant portions of the prior guidance are superseded by the final regulations.

Plan administrators may also rely on previously obtained electronic addresses—in existence on the effective date of the final rule—provided that they reasonably, in good faith, comply with the requirements of the safe harbor.

### **Effective Date**

This guidance officially becomes effective on July 27, 2020. Plan administrators may, however, rely on these regulations immediately because the DOL will not take any enforcement action against those relying on the safe harbor before its effective date because of the COVID-19 pandemic. This approach, it is hoped, will help support the government's overall response to the pandemic.

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