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OF THE
UNITED STATES OF AMERICA

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VIA ELECTRONIC DELIVERY

November 22, 2019

Office of Regulations and Interpretations,
Employee Benefit Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20201

Re: Electronic Disclosure by Employee Benefit Plans, RIN 1210-AB90

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce (Chamber), this letter responds to the Department of Labor's (DOL) October 23, 2019 request for comments on the proposed regulation entitled "Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA" and the Request for Information (RFI) in the preamble to the proposed regulation.

Introduction

The Chamber supports administrative flexibility in how plan administrators may provide notices required under the Employee Retirement Income Security Act of 1974, as amended (ERISA). Flexibility ensures that participants and beneficiaries receive timely, meaningful and accurate notices while also allowing for cost efficient distribution. In support of such flexibility, the Chamber's response to the DOL's 2011 Request for Information on Electronic Disclosure by Employee Benefit Plans urged the DOL to allow electronic delivery to be the default option for ERISA required notices. We are encouraged by the proposed regulation that would allow for an alternate electronic delivery safe harbor, and we look forward to working with the DOL on this matter.

Comments on the proposed regulation

1. Privacy and security standards

Plan administrators and service providers currently provide participants and beneficiaries with a variety of information through webpages and other electronic mediums. Plan administrators and service providers have adopted national industry standards to ensure the privacy and confidentiality of this information. In implementing the electronic disclosure regulation, plan administrators and service providers will continue to implement current industry standards that protect privacy and that adapt to the data and the medium used for disclosure. As such, the DOL should not address such complex standards in this rulemaking.

2. Delivery method

The proposed regulation references the term “website” as the medium plan administrators will use for electronic delivery. In the preamble, the DOL requests comments on the use of this term. Plan administrators may not necessarily provide notices on a website, but rather through an app or other electronic medium. To ensure the final regulation remains relevant, regardless of technology changes, and to provide flexibility to plan administrators in the electronic platforms that they may use, the term “website” should be replaced with a more generic term such as electronic or other non-print medium.

The DOL could merely reference 29 C.F.R. § 2520.104b-1(b), which requires a plan administrator to

use measures reasonably calculated to ensure actual receipt of the material by plan participants, beneficiaries and other specified individuals. Material which is required to be furnished to all participants covered under the plan and beneficiaries receiving benefits under the plan (other than beneficiaries under a welfare plan) must be sent by a method or methods of delivery likely to result in full distribution.

This standard applies to all methods of distribution, including electronic distribution. The final regulation does not need to reference a specific electronic delivery method, but rather that the electronic method meet 2520.104b-1(b).

3. Application to all employee benefit plans

The proposed regulation only applies to ERISA pension notices. The DOL states in the preamble 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.” The DOL also notes that the DOL shares interpretive jurisdiction over many group health plan disclosures with the Department of the Treasury (Treasury) and the Department of Health and Human Services.

The Chamber urges the DOL to allow all ERISA welfare benefit plans, including group health plans, to use this alternate safe harbor for all notices required under Title I in the same way the regulation applies to pension plans. It is within DOL’s authority to determine the delivery method for ERISA welfare benefit plan notices for which it has sole jurisdiction. Finally, the current claims regulation allows plan administrators to provide group health plan benefit claim notices electronically (including for pre-service claims). See 29 C.F.R. § 2560.503-1(g).

4. FAB 2006-03

FAB 2006-03 allows plan administrators to provide pension benefit statements through one or more secure web sites that has continuous access if participants and beneficiaries are furnished a notices that explains the availability, how to access the statements and the right to obtain a paper version. Technical Release 2001-03R allows, among other things, information required under 29 C.F.R. § 2550.404a-5(c) that is furnished with the pension benefits statement to be furnished in accordance with FAB 2006-03. In footnote 60 in the preamble to the proposed regulations, the DOL states that the proposed regulations would supersede FAB 2006-03 and Technical Release 2011-03R. To the extent that a plan administrator has relied on FAB 2006-03 and Technical Release 2011-03R for current or former employees, a plan administrator should be allowed to continue to rely on that guidance and not be required to provide an initial notice required under the proposed regulations.

5. Subparagraph 2520.104b-31(d)(2)

Under the proposed regulation, the plan administrator is required to provide the notice of internet availability at the time the covered document is made available on the website. The final regulation should include when a plan administrator is required to provide a subsequent notice if the document is later changed. If the change is ministerial or not substantive, the plan administrator should not be required to provide an updated notice of internet availability.

The DOL also should clarify that a covered document should remain available until it is superseded, or, if applicable, no longer relevant. For example, a blackout notice would no longer be relevant after the blackout is lifted.

6. Subparagraph 2520.104b-31(d)(3)

The proposed regulation lists seven items that must be included in the notice of internet availability. The DOL should provide a model notice of internet availability. Subparagraph 2520.104b-31(d)(3)(iii) requires the notice contain a brief description of the covered document(s). Because the names and description of the covered documents are technical terms that generally are not used outside of the context of employee benefit plans, the DOL should provide model descriptions of each ERISA required notice. The DOL could use its Reporting and Disclosure Guide for Employee Benefit Plans as a starting point for the model language, but the DOL will need to simplify the descriptions to meet the standard of understandability by the average plan participant.

Some descriptions will contain terms that need to be defined (such as defined benefit plan, defined contribution plan, self-directed individual account plan, accrued benefit, nonforfeitable, etc.). The final regulation should allow plan administrators to use hyperlinks or other formats in the notice of internet availability to cross-reference such items.

7. Subparagraph 2520.104b-31(d)(3)(iv)

This subparagraph provides the notice of internet availability must include the internet website address where the covered document is available. This assumes that plan administrators always will provide notices through a website rather than through other electronic medium. The final regulation should only require this if notices are provided only through a website.

8. Subparagraph 2520.104b-31(d)(3)(vii)

Under the proposed regulation, a website address must be sufficiently specific to provide ready access to the covered document. A plan administrator would meet this standard if the address leads the covered individual directly to the covered document. The address may lead the individual to a separate login page, which, after logging in, will allow immediate access to the document. In the preamble, the DOL requests whether the notice of internet availability should also address secure login procedures. Such procedures should not be addressed in the final regulation because, as a matter of practice and as noted above, plan administrators and service providers currently address secured login procedures when providing confidential or other personal information to participants and beneficiaries. Furthermore, given the complexity of this matter, the final regulation is not the appropriate venue.

9. Subparagraph 2520.104b-31(d)(3)(vii)

This subparagraph requires the notice of internet availability to include a telephone number to contact the administrator or other designated plan representative. The final regulation should allow a plan administrator to provide either a telephone number or other manner that would allow immediate contact

with the plan administrator or its representative. For example, allowing live chat, rather than only a telephone number, would provide more immediate access.

10. Subparagraph 2520.104b-31(d)(3)(iii)

This subparagraph requires the notice of internet availability “Be written in a manner calculated to be understood by the average plan participant.” This is the current standard relating to Summary Plan Descriptions (SPD) under ERISA section 102, and it has been the widely accepted standard for ERISA disclosures for over 40 years. The DOL uses this same standard in Technical Release 2011-03, which was the basis for the proposed regulation.

The proposed regulation redefines the current standard by requiring the notice of internet availability “[use] 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...”

This new standard will be extremely difficult and costly to meet. The notice of internet availability is required to contain a brief description of the covered document. The names of each covered document are technical and legal terms. In fact, when a list of the names of 17 notices was run through the Flesch Reading Ease standard, the score was 12.1, which is very difficult to read. If these names are not included in determining the readability under this standard, it likely will result in a lower score; however, the lower score will not mean that it is easier to understand. Because the names alone are technical and legal terms and cannot come close to a Flesch Reading Ease score of 60, these additional standards will discourage plan administrators from using this notice.

The proposed readability standard also is an invitation to litigation. Recent COBRA notice litigation bears light on this. Over the past three years, there has been a spate of class action litigation over COBRA notices alleging that the participants suffered damages because the notices did not meet each and every minute regulatory requirement, regardless of the applicability of a particular section or any actual harm.¹ In an age of increased ERISA class action lawsuits, the standard in the proposed regulation invites litigation because of the impossibility of meeting this standard.²

Finally, in the preamble to the proposed regulation, the DOL requests comments on the readability of the current notices. As such, the DOL should not add additional, substantive standards to the delivery method before receiving comments on the RFI.

11. Subparagraph 2520.104b-31(e)(3)

The Chamber supports the provision in the proposed regulation requiring the administrator to take measures reasonably calculated to ensure the website protects the confidentiality of personal information related to any covered individual. Plan administrators and services providers take this matter very seriously, and they have taken significant actions to make sure that participant information is protected. The Chamber does not believe the final regulation should include specific confidentiality requirements related to log in to obtain disclosures because this regulation is not the appropriate venue for such matter.

¹ See “COBRA Notice Litigation Resulting in Big Dollar Claims”, Suzanne G. Odam, September 23, 2109 available at <https://www.benefitslawadvisor.com/2019/09/articles/cobra/cobra-notice-litigation-resulting-in-big-dollar-claims/>.

² See “\$28 Trillion and Personal Liability: ERISA Roars Back”, David McFarlane, Crowell and Moring, January 9, 2019 available at <https://www.crowell.com/NewsEvents/Publications/Articles/Corporate-28-Trillion-and-Personal-Liability-ERISA-Roars-Back>.

12. Subparagraph 2520.104b-31(g)

The proposed regulation requires the plan administrator provide an initial notification of default electronic deliver and the right to opt out “on paper”. First, requiring a plan administrator to provide the initial notice is redundant of the notice of internet availability, which also explains the participant’s rights, including the right to opt out. Second, assuming the DOL intends to keep this initial notice, the plan administrator should be allowed to provide this in the same manner it provides the notice of internet availability to avoid confusing plan participants. Specifically, a participant who receives a paper notice would not expect any subsequent notices would be electronic. Finally, for administrative ease, a plan administrator should be allowed to require a participant to either opt in or opt out of a particular delivery method for all notices. Allowing participants to opt in to receive some notices electronically and others in paper could create an administrative hassle that would discourage plan administrators from using this safe harbor.

13. Paragraph 2520.104b-31(h)

Under the proposed regulation, a plan administrator must take measures reasonably calculated to ensure the continued accuracy of the electronic address of a covered employee who severs employment. In the preamble, the DOL requests whether this process will provide a seamless transition. Each employer’s off-boarding process should be sufficient to meet this standard, and the DOL does not need to impose any substantive requirements.

14. Paragraph 2520.104b-31(i)

The proposed regulation adopts the notice and access model for providing ERISA required notices. In the proposed regulation, the DOL allows plan administrators to provide a consolidated notice of internet availability for seven common documents. In the preamble, the DOL asks whether instead of providing a finite list of items that can be in the consolidated notice, the DOL should have a principal based approach to what can be included in a consolidated notice. The final regulation should contain a principal-based approach to the consolidated notice to provide plan administrators with the flexibility to include more or less documents in the consolidated notice.

15. Paragraph 2520.104b-31(k)

The final regulation would be applicable on the first day of the calendar year following the date of publication in the Federal Register. Because the using the final regulation would be optional, the applicability date should be upon publication. Also, given the timing, plan administrators should be allowed to use this method as soon as possible. Specifically, because comments are due on November 22, 2019, it is likely the DOL will not publish a final regulation until after January 1, 2020, which would mean that as currently drafted, plan administrators could not use the alternate method until on or after January 1, 2021.

Comments on the RFI

Timing for responses

The Chamber appreciates the DOL’s work and efforts in drafting the proposed regulation and the extensive questions and queries in the RFI. However, the DOL only provided 30 days notice and comment for both the proposed regulation and the RFI, which includes 21 questions, many of which are multiple questions and requests within one question.

In the preamble to the proposed regulation, the DOL notes it needs further information from stakeholders before proposing any substantive regulatory additions, deletions or changes to ERISA's disclosures as opposed to the delivery method. The Chamber agrees with this position. The current ERISA disclosure requirements are extensive. For example, DOL's Reporting and Disclosure Guide for Employee Benefit Plans is 30 pages, and it merely lists the requirements, but does not include actual notices. In addition, many of these requirements are decades old and need to be updated. However, 30 days to comment on such extensive and important issues is not adequate. The Chamber requests the DOL extend the notice and comment period for the RFI to at least 90 days (if not longer), but also allow for further input as needed.

Question 2: assessment of use, effectiveness and impact of disclosures

ERISA requires plan administrators to provide certain information to plan participants and beneficiaries. However, nothing in ERISA requires that a plan administrator provide assessments and responses to the notices. As such, it is beyond the DOL's regulatory authority to require plan administrators to do so.

Question 4: Personalized disclosure

The DOL requests whether personalize disclosures could enhance engagement. ERISA does not require a plan administrator personally to engage each participant or personalize required notices for each individual. Courts also have found ERISA does not require personalized disclosure.³ Requiring personalized notices through regulations is beyond DOL regulatory authority.

Question 5: Organizing information by life event

The DOL requests whether there are ways through regulation or subregulatory guidance to require, incentivize or facilitate plan administrators to organize information in required disclosures by life events. First, many plan administrators and service providers currently organize disclosures and educational materials by life events, such as initial employment, termination or retirement or include sections by life events in their communications. In addition, by making it easier for plan administrators to disclose required documents electronically, participants will be able to readily search for life event terms, such as divorce, rather than trying to find specific information manually. DOL does not need to provide additional guidance in this area.

Question 10: Too many disclosures

In this question, the DOL asks whether there are too many disclosures or too much information is required to be disclosed. The answer is yes to both. A prime example is the SPD, which is the most common disclosure. Under DOL regulation, the SPD for a retirement plan must contain at least 48 items. See 29 C.F.R. § 2520.102-3. In addition, case law also dictates items that need to be in an SPD.⁴ The SPD is just one of a myriad of disclosures. For example, the DOL Reporting and Disclosure Guide for Employee Benefit Plans lists over 22 possible notices for a single employer retirement plan and 28 notices for a welfare plan that is a group health plan. Given the number of notices, the requirements for each notice and the length of each notice, the DOL and interested parties need time to examine all required

³See *Lorenzen v. Employees Retirement Plan of the Sperry and Hutchinson Co, Inc.*, 896 F.2d 228, 236 (7th Cir. 1990)

⁴See "View From Proskauer: Top 10 Summary Plan Description Issues Not Addressed in the ERISA Regulations", Russell Hirschhorn and Stacey Cerrone, available at <https://www.ERISAPRACTICECENTER.COM/2013/07/view-from-proskauer-top-10-summary-plan-description-issues-not-addressed-in-the-erisa-regulations/>

disclosures to determine what can be eliminated or changed. As noted above, this is why the Chamber requests the DOL increase the time to respond to the RFI.

Question 11: Design elements

In this question, the DOL asks whether it would be appropriate for it to require particular design elements for all plans. The DOL should not require any particular design because plan administrators should be allowed flexibility in their communication design, and they are often in the best position to know how their employee demographics will respond to a particular design and also to determine if one or more designs is more effective for a given demographic.

Question 12: Readability standard

The DOL asks whether there are additional or better standards than the current readability standard, which requires documents to be “written in a manner calculated to be understood by the average plan participant.” As noted in the section on the proposed regulation that would modify this standard, the current standard protects participants while providing flexibility to plan administrators, and it does not overly burden plan administrators in trying to meet an unnecessarily prescriptive standard.

Question 13: Participant input

In evaluating the current notices, it is imperative to receive feedback directly from participants. The Chamber encourages the DOL to work with plan sponsors to obtain input from participants through surveys and focus groups. The Chamber will work with its members and DOL to facilitate this.

Question 14: Disclosure timing requirements

Currently, each ERISA required notice has its own timing requirement. Because of this, a participant is bombarded throughout the year with different disclosures. To the extent it is within DOL’s authority, the DOL could devise one day on which all common disclosures should be made, regardless of the plan year (e.g. July 15 would be ERISA disclosure day for all plans for all common disclosures).

Question 15: Education

Plan sponsors are dedicated to educating their employees about their plan benefits because benefits are an integral part of employee compensation. However, plan sponsors are leery of providing too much education because crossing the line from education to advice could be viewed as a fiduciary act and give rise to litigation risks. Currently, the definitive DOL guidance on education versus advice is Interpretive Bulletin 96-1, which the DOL issued 23 years ago. Given the time since the last guidance and the vast changes in ERISA, plan design and the economy, at the very least, the DOL should review this guidance to determine what updates are needed and how changes could encourage plan sponsors to provide education. Because of the complexity of this topic, it should be considered as a separate regulatory agenda item.

Question 18: Cyber risk assessments and security measures

In addition to numerous other cyber-related question, the DOL asks whether risk assessments and security measures should be required by regulation. Many plan sponsors and their service providers currently are implementing such measures, but there is a variety of ways of doing this and no “one size” fits any plan sponsor or service provider. As such, the DOL should not require such assessments, but rather allow plan sponsors to work with their service providers in carrying out this function.

Question 20: Coordination with the Internal Revenue Code

The Treasury, Internal Revenue Service and DOL should all have the same disclosure standard for employee benefit plans. The current patchwork of requirements is inefficient and costly for plans to implement.

Conclusion

We thank you for your consideration of these comments, and we applaud the efforts that have gone into the proposed regulation and the RFI. Ensuring effective, cost-efficient participant notices is a top priority for Chamber members, and allowing more flexibility for electronic disclosure will ensure plan administrators can meet these standards.

Sincerely,

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