

# Understanding the new Department of Labor electronic delivery safe harbors



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In May 2020, the Department of Labor (DOL) released a regulation with additional safe harbors that offer retirement plan administrators more options to deliver required notices and disclosures electronically. These safe harbors build on delivery options included in regulations issued in 2002. Bank of America has offered e-delivery services to our clients for many years, and we strongly believe that getting participants to engage online with interactive tools can lead to better outcomes by encouraging increased savings and investment diversification.

DOL's new rules enhance possibilities for plan sponsors and participants. However, because of a lack of coordination with other regulators, they do not cover every disclosure that participants receive. Timing of when plan administrators will be able to offer the enhanced safe harbors under the DOL's new rules will largely depend on when other regulators issue guidance.

We asked Michael Hadley, a partner in the Washington, D.C., law firm of Davis & Harman LLP, to discuss the history of DOL's e-delivery regulations and explain the 2020 rules. Our discussion is reproduced below.

## **Before we talk about the specific regulations that have facilitated the electronic delivery of required notices and disclosures, could you talk for a minute about what ERISA itself says about how plan sponsors should deliver documents?**

As anyone reading this probably knows, the Employee Retirement Income Security Act ("ERISA") requires plan administrators (typically the sponsoring employer) to furnish various plan-related notices and disclosures to participants and beneficiaries. When ERISA was enacted in 1974, all of these documents would have been furnished on paper either by delivering them to employees at the employer's worksite or sending them by mail. ERISA itself was silent on the method of delivery. In recent years, however, as Congress has created new disclosures, it has started to explicitly say, in the text of enacted legislation, that e-delivery is acceptable. For example, in the case of benefit statements, the law says that they may be delivered "in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant."

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By the late 1990s, it was becoming obvious that much of our economy was moving toward electronic media, and, in 2000, Congress passed the Electronic Signatures in Global and

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National Commerce (“E-SIGN”) Act. The E-SIGN Act, which was a landmark law, states that electronic signatures and records are generally considered to be as valid as paper for all transactions affecting interstate commerce. The law also

kicked off a self-review across federal agencies to determine how each of the respective agencies could update their own rules to facilitate electronic commerce.

### **So how did DOL respond to the E-SIGN Act and the push to facilitate electronic means of communication?**

In 2002, DOL updated its regulatory standards to promote the use of e-delivery. Specifically, the DOL amended its regulations to create two e-delivery safe harbors: (1) the “affirmative consent” safe harbor; and (2) the “wired at work” safe harbor. While these safe harbors are not the exclusive methods for satisfying ERISA’s document delivery standards, plan administrators can be assured that they have satisfied ERISA’s standards if they meet all of the conditions of either safe harbor.

### **What is the “affirmative consent” safe harbor?**

The “affirmative consent” safe harbor, as the name suggests, deems electronically delivered documents as satisfying ERISA’s furnishing standards as long as the participant or other recipient affirmatively consents to receiving ERISA-required notices and disclosures in electronic form, and the document delivery system satisfies certain conditions. This method is relatively straightforward and easy to implement, but it makes paper delivery the default method for delivering ERISA-required documents unless a recipient affirmatively elects otherwise.

### **What is the “wired at work” safe harbor?**

The “wired at work” safe harbor permits plan administrators to electronically deliver documents to certain groups of current employees who use a computer (or other electronic information system) as an integral part of their employment duties. Unlike the “affirmative consent” safe harbor, the “wired at work” safe harbor allows plan sponsors to make e-delivery the default delivery method for furnishing ERISA-required disclosures. However, it cannot be used to deliver materials to

employees who do not use a computer at work, retirees and other former employees. Furthermore, as a practical matter, it can be difficult for employers to identify employees who use a computer “as an integral part of their employment duties,” as opposed to employees who may simply have access to a computer at their job. These limitations have made it virtually impossible for employers to utilize the “wired at work” safe harbor as a comprehensive solution for their entire plan population.

### **This year, DOL released new e-delivery rules. What was behind this effort?**

The need to update the 2002 rules has, honestly, been in the works for a long time. The Obama administration released a “request for information” on the topic in 2011 to gather input on how the use of, and access to, the internet has changed, and how electronic communication might improve participant outcomes. President Trump issued an executive order in August 2018 that directed DOL and other agencies to explore the potential for broader use of e-delivery as a way to improve the effectiveness of disclosures and to reduce their associated costs and burdens. There has even been bipartisan legislation in Congress on the topic. In October 2019, DOL issued a proposed update, which it finalized in May 2020.

### **Please give us an overview of these 2020 e-delivery rules.**

The 2020 rules essentially involve two new safe harbors that can be used to electronically deliver plan-related information in accordance with ERISA’s furnishing standards: (1) the “notice and access” safe harbor; and (2) the “direct email” safe harbor. Both new safe harbors permit plan administrators to deliver documents electronically, by default, provided the safe harbor conditions are satisfied.

### **What is the 2020 “notice and access” safe harbor?**

Under the “notice and access” safe harbor, plan administrators send a “notice of internet availability” to the recipient’s email address (or smartphone number) and post the relevant plan-related documents online. Documents posted online must remain online for at least one year or, if later, until the date the document is superseded by a subsequent version.

Essentially, what happens is that when a new notice or disclosure is available, rather than mailing the documents to the recipient, he or she receives an email that says “X document has been posted online for your review. Here is how you can access it.” Besides being more efficient, this framework drives participants to their accounts, where we can provide them with more information and tools to help drive better outcomes.

The key to using the “notice and access” safe harbor is having either an electronic address provided by the recipient to the plan administrator or an employer-provided email address that is used for employment-related purposes unrelated to the electronic delivery of plan-related documents.

### **What is the 2020 “direct email” safe harbor?**

The “direct email” safe harbor permits plan administrators to deliver documents directly to a recipient’s email address, by default, provided that the safe harbor’s conditions are satisfied. Like the “notice and access” safe harbor, the “direct email” safe harbor is conditioned on the plan administrator having either an email address provided by the recipient to the plan administrator or an employer-provided email address that is used for employment-related purposes unrelated to the electronic delivery of plan-related documents.

### **What conditions must plan administrators satisfy in order to rely on the 2020 safe harbors?**

In addition to obtaining the right kind of electronic address, the 2020 safe harbors require plan administrators to meet a series of conditions that are intended to ensure that various notices and disclosures are actually being received by participants and beneficiaries. For example, the 2020 safe harbors condition relief upon plan administrators furnishing a one-time paper notice to any individuals who will be receiving documents electronically. This paper notice must inform the recipient that notices and disclosures will be furnished electronically, identify the electronic address that will be used, provide any instructions necessary to access the documents, and inform recipients of their rights to receive documents in paper. Additionally, the new safe harbors require plans to implement systems that alert administrators of invalid email addresses and to take additional measures to ensure the continued accuracy and availability of electronic addresses when employees leave their employers.

### **What about participants who just prefer paper disclosures, or retirees who don’t feel comfortable with email or the internet?**

At all times, recipients must be given the option to receive all documents, or a copy of a specific document, on paper at no additional charge. And it is important to understand that the 2020 safe harbors cannot be used by default unless the plan’s records include a specific type of email or smartphone address to communicate with the individual. For example, unless a retiree provides an email address to the plan administrator, they will continue to receive paper. Finally, as I mentioned

earlier, an important protection in the 2020 rules is that a plan administrator cannot default a participant or beneficiary into e-delivery until the plan administrator sends a notice in paper giving the individual the opportunity to opt out.

### **Do the 2020 safe harbors replace the 2002 safe harbors?**

No, the 2020 delivery safe harbors do not replace the 2002 “affirmative consent” and “wired at work” safe harbors. Thus, the 2020 delivery safe harbors are available to plan administrators in addition to the 2002 “affirmative consent” and “wired at work” safe harbors. If a plan sponsor has the necessary electronic addresses to use the new safe harbors, it can choose to implement the 2020 delivery safe harbors for its entire participant population. Alternatively, a plan sponsor could use the 2020 safe harbors for some participant populations, while continuing to rely on the 2002 safe harbor methods or paper delivery for other participant populations.

In a similar regard, if a plan administrator uses the “wired at work” or “affirmative consent” safe harbors, it may continue to rely on those safe harbors without taking any additional actions. For example, if a participant or beneficiary has already affirmatively elected to receive disclosures electronically, the administrator can continue to send plan-related materials electronically under that safe harbor, without sending a one-time notice in paper format.

### **What is a NOIA? How frequently does it have to be sent? Can it be sent electronically?**

NOIA is the acronym for the “notice of internet availability” that must be sent to plan participants and beneficiaries before a document can be posted online in accordance with the “notice and access” safe harbor. As a general rule, a NOIA must be sent before each document is posted. However, in the case of certain documents that must be furnished annually, rather than upon the occurrence of a particular event, a plan administrator has the option to use a consolidated NOIA that is sent to participants and beneficiaries annually. In other words, rather than sending a NOIA every time a document is posted online, these documents can be posted in a timely fashion online as long as the plan sends a single notice listing all of the documents annually. A NOIA — whether a regular or consolidated NOIA — can be sent electronically to the recipient’s electronic address.

### **Can the 2020 safe harbors be used to deliver participant benefit statements?**

Yes, plan administrators can use the 2020 safe harbors to deliver participant benefit statements electronically. However, plan administrators cannot use a consolidated NOIA to deliver

quarterly benefit statements in accordance with the “notice and access” safe harbor. This means that, in order to satisfy the “notice and access” safe harbor, a NOIA must be sent to a participant or beneficiary each time a quarterly benefit statement is posted online.

**A question that we get frequently is whether DOL’s new rules can be used to deliver documents required by the Internal Revenue Code. Can they?**

This is, unfortunately, a detail that regulators still have to work out. As I’m sure your readers know, many of the documents we must send to participants are required not by Title I of ERISA (which is under the jurisdiction of the DOL) but by the Internal Revenue Code (which is under the jurisdiction of the Internal Revenue Service (IRS)). And in some cases, plan administrators will send disclosures intended to satisfy both sets of rules. For example, imagine a plan with automatic enrollment that uses the special “safe harbor” contributions to satisfy the nondiscrimination tests. Such a plan will likely send the safe harbor notice (required by the Code) and qualified default investment alternative, or QDIA, notice (required by ERISA) together.

The 2020 safe harbors describe the circumstances under which a retirement plan administrator will be deemed to have satisfied the document delivery standards for ERISA-required notices and disclosures. The IRS, by comparison, has its own regulatory standards for electronically delivering documents required by the Code — e.g., individual tax reporting forms and safe harbor plan notices. While a plan administrator delivering documents in accordance with DOL’s new safe

harbors would apparently also satisfy the IRS’s e-delivery standards in many cases, the IRS has not yet issued guidance directly addressing this issue. Accordingly, plan administrators should not assume that documents delivered in accordance with DOL’s new safe harbors will satisfy the IRS’s standards.

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The preamble to DOL’s 2020 safe harbor regulation said that Treasury and IRS “intend to issue additional guidance relating to the use of electronic delivery for participant notices.” We are hopeful that Treasury and IRS will issue this guidance without delay, but there is currently no timetable for such guidance. And that’s unfortunately preventing some plan administrators from fully implementing new e-delivery procedures.

**Let’s discuss some practical issues. Do plan sponsors need to amend their plan documents to take advantage of the new safe harbors?**

No. Unless a plan document specifically references how notices and disclosures will be delivered to participants and beneficiaries, plan sponsors can implement the 2020 safe harbors without adopting a plan amendment.

**Can plan sponsors use the 2020 safe harbors if an employee has a participant email address assigned for work?**

Yes, as long as the email is used for employment-related purposes unrelated to the electronic delivery of plan-related documents. However, the plan cannot assign an email address to a former employee or beneficiary; the former employee or beneficiary would need to provide an email address.

**If plan sponsors have a participant email acquired in a job application, can they use that email?**

Yes, the 2020 safe harbors can be used with any email that is provided by the employee to the employer.

**What about emails acquired from other sources?**

It depends. A plan administrator can use any electronic address provided by the participant to the employer, plan sponsor, or plan administrator; or an employer-provided email address that is used for employment-related purposes unrelated to the electronic delivery of plan-related documents. This does not include, for example, emails obtained through a commercial locator service.

**What can plan sponsors do to be best positioned to use the 2020 safe harbors?**

In order to be best positioned to use the 2020 safe harbors, plan sponsors can do two things. First, plan sponsors should speak with their service providers to discuss potential approaches for implementing the new safe harbors. Second, plan sponsors can collect a roster of electronic addresses from current and newly hired employees. As I mentioned earlier, this means an email address in most cases, but the rules anticipate that in the future there may be other electronic addresses that are more commonly used, such as smartphone numbers. These electronic addresses will be needed to use the new 2020 safe harbors. For plans interested in using the 2020 safe harbors for all of their participants and beneficiaries, the goal should be to collect as many electronic addresses as possible.

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