

# The New E-Disclosure Rules For ERISA Retirement Plans

**By Ary Rosenbaum, Esq.**

**I**t's 2020 and for the past 20 years, we have been moving to a paperless "society" for billing, mail, and other forms of communication. Even the retirement plan documents I draft for my clients are sent via email. Unfortunately, the government in terms of required notices under ERISA were very slow in allowing for electronic communication between plan sponsors and participants. Thankfully, it appears the days where retirement plan sponsors and third-party administrators (TPAs) have to rely on paper notices only have ended. Thanks to the Department of Labor (DOL), it seems we finally arrived in the 21st century. On May 27, 2020, the Department of Labor ("DOL") published a final rule that allows retirement plan administrators to use an electronic method of delivery for required disclosures to participants in their retirement plans. This new rule will end saving a lot of paper and hundreds of millions of dollars nationally.

## Which Documents The New Rule Covers

The new disclosure options apply to “covered documents.” Currently, covered documents are limited to those covered under ERISA

§ 3(2). The final regulations don't apply to required disclosures for employee welfare benefit plans, although future guidance on this issue may be forthcoming. Covered documents also don't include any document or information the Internal Revenue Code requires, such as a 401(k) safe harbor notice.

## Covered Individuals

A “covered individual” under the rule is any individual entitled to a covered document who: provides an electronic address

(e.g., an email or smartphone number) to receive a notice of internet availability; or is assigned an electronic address for employment-related purposes that include the delivery of covered documents. Plan sponsors just can't assign an employee an electronic address just for purposes of complying with the electronic notice safe harbor.

## Initial Paper Notice

Before the plan sponsor can rely on the notice-and-access safe harbor about a participant, it must issue an initial paper notice

right of the participant to request a paper copy of the covered document for free, and an explanation of how to do so; and (6) statement of the right to opt-out of electronic delivery, free of charge, and receive only paper copies, and an explanation of how they can do so. The initial paper notice must be written in a manner that the average plan participant could understand.

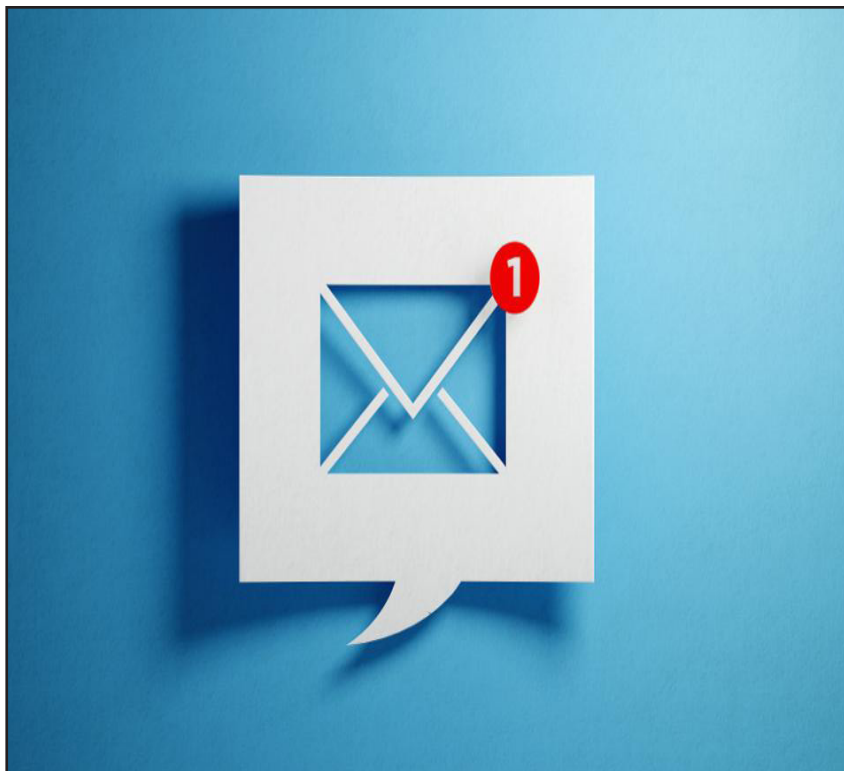
## Required Electronic Notice of Internet Availability (“NOIA”)

The new rule also requires the plan sponsor to furnish an annual notice of internet availability for each covered document that uses this method. The new rule dictates the timing and content of this notice. The notice must be furnished at the time the covered document is made available online, unless the plan sponsor uses a combined notice, as described below. The new rule is very specific about the content of the required notice of internet availability. The notice must contain all of the following: (1) A prominent statement that reads: "Disclosure About Your Retirement Plan"; (2) A statement that reads: "Important information about your retirement plan is now

available. Please review this information”; (3) An identification of the covered document by name; (4) a brief description of the document, if the document’s title isn’t specific as to its nature; (4) the web address (or a hyperlink to it) where the covered document is available; (5) statement of the right to obtain a paper copy of the covered document, and an explanation of how to exercise that right; (6) a statement of the right to opt-out of electronic delivery and obtain only paper copies of covered docu-



ments; (7) a cautionary statement that the covered document isn't required to be available for more than one year or, if later, after it is superseded; (8) a telephone number to contact the administrator or designated representative. The system for providing the NOIA must be designed to alert the plan sponsor if a participant's electronic address is inoperable or invalid. If the plan sponsor is alerted to an invalid address, the plan sponsor must promptly take reasonable steps to cure the problem or treat the participant as having opted out of electronic delivery (so that disclosure needed to be provided in paper form).



### Combined Notice

A combined notice allows the plan sponsor to issue a single notice concerning multiple documents. The notice may incorporate or combine the required content for each of the covered documents. Documents for which a combined notice may be used include the following: Summary Plan Description (SPD); Summary of Material Modification (SMM); Summary Annual Report (SAR); Annual Funding Notice; any Investment Related Disclosures; Qualified Default Investment Alternative Notice (QDIA); Pension Benefit Statement; any document or information that (a) must be furnished annually, rather than after a specified event, and (b) does not require action by a participant by a particular deadline; any document if authorized by the DOL; and any applicable notice required by the Internal Revenue Code if authorized by the IRS. A combined notice must be furnished once every plan year, and no more than 14 months after the date it was last furnished (just like the annual fee disclosures).

### The Website

The plan sponsor needs to ensure that a website is available for participants to access the documents. The plan sponsor needs to make sure that the covered document: is available on the website by the date it's required; must remain online for at least one year or, if later, until superseded;

is presented in a manner that could be understood by the average plan participant; is presented in a widely available format that is suitable both to be read online and to be printed clearly on paper, and in which the document can be permanently retained electronically; and can be searched electronically by numbers, letters, or words. The website needs to protect the confidentiality of participants' personal information.

### Paper Copies and the Right to Opt-Out

The new notice provides two safeguards to ensure proper receipt by participants. Plan sponsors must "promptly" furnish a free paper copy of a covered document upon request. Second, participants have a right to globally opt-out of all electronic delivery, free of charge, and receive only paper documents.

### Termination from Employment

When participants terminate from employment, the plan sponsor must take measures to either: ensure the continued accuracy and availability of the electronic address; or obtain a new electronic address that allows for the electronic delivery of covered documents after the individual's severance from employment.

### New Alternative Email Method

In addition to providing the notice-and-access method of electronic delivery, the Final Rule also allows plan sponsors to deliver covered documents to participants

using an email address. by the date on which it is required to be furnished, and that it be sent to an email that could be used for the notice-and-access method (i.e., an email the individual provides or is assigned, to receive covered documents). If a plan sponsor elects to use the email alternative to notice-and-access delivery, it's not required to provide the annual electronic notice described above. The alternative email method requires the plan sponsor to send the participant an email that: it includes the covered document as the body of the email or as an attachment; includes a subject line that reads "Disclosure About Your

Retirement Plan;" identifies the covered document as required in an electronic notice (above), if the covered document is in an email attachment; states a participant's right to obtain a paper copy, as required in an electronic notice (above); states a participant's right to opt-out of electronic delivery, as required in an electronic notice (above); provides a telephone number to contact the plan sponsors or designated representative, as required in an electronic notice (above); and is written in a manner that could be understood by the average plan participant.

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