



PENSION ANALYST

Important information—Plan administration and operation

DOL issues long-awaited electronic delivery rules

Who's affected

These rules apply to sponsors of and participants in qualified defined contribution and defined benefit plans covered by ERISA and ERISA 403(b) plans. They do not apply to 457 plans, governmental plans, or non-electing church plans.

Background and summary

In October 2019, the DOL issued proposed rules to expand the methods available for furnishing required ERISA disclosures. Prudential Retirement provided comments on these proposed rules both directly to the DOL and through industry trade groups.

On May 27, 2020, the DOL published a final safe harbor rule for electronic disclosure of employee benefit plan information to participants and beneficiaries. This final rule establishes new, voluntary safe harbors for retirement plan administrators to deliver disclosures electronically, as a default, rather than sending large, costly volumes of paper documents through the mail.

The new safe harbor options are in addition to the safe harbor provided by the DOL in 2002, which applies to participants and beneficiaries who affirmatively consent to receive documents electronically and those who have the ability to effectively access electronic disclosures where they are expected to perform employment duties and for whom access is an integral part of those duties ("wired at work").

The new DOL rule provides welcome relief for plan sponsors who were unable to satisfy the "wired at work" safe harbor, as well as other plan sponsors who wish to enhance their ability to electronically deliver retirement plan disclosures. See the [attached chart](#) for a comparison of the DOL safe harbor rules, along with the IRS electronic disclosure rules from 2006.

The final rule provides the following two optional safe harbor default methods for electronic delivery:

- The "notice-and-access" safe harbor (website posting); and
- Direct email delivery.

The new safe harbors are limited to ERISA retirement plan disclosures and may be used only for "covered individuals." "Covered individuals" are those who are entitled under ERISA to receive "covered documents" and provides a valid electronic address (e.g., email address or smart phone number). The rules provide several protections for covered individuals, such as the right to request paper copies and certain notices regarding their participant rights.

These rules are effective July 27, 2020. However, as part of its broader response to COVID-19, the DOL will not take enforcement action against a plan administrator that relies on a new safe harbor before the effective date.

Action and next steps

ERISA plan sponsors who are interested in using electronic methods for delivering required participant disclosures should review these rules. Prudential Retirement will provide more information regarding our offering on these safe harbor rules in the near future.

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Overview and scope

The final rules apply only to “covered individuals” and only with respect to “covered documents.” The final rules create two new options for electronically furnishing ERISA-required documents to retirement plan participants and beneficiaries:

- A “notice-and-access” safe harbor. Plan administrators may post covered documents on a website if appropriate notification of internet availability is furnished to electronic addresses of covered individuals; and
- Direct email delivery. Plan administrators may send covered documents directly to the email addresses of covered individuals with the covered documents either in the body of the email or as an attachment. This option was not included in the DOL’s proposed rules, but generally follows the conditions for the website posting, with a few exceptions.

The DOL decided not to expand the scope of the final rule to cover welfare benefit plans at this time but may extend the safe harbor to these plans in the future.

The rules supersede Field Assistance Bulletin 2006-03 (regarding pension benefit statements), Field Assistance Bulletin 2008-03 (regarding QDIA notices), and Technical Release 2011-03R (regarding participant fee and investment disclosure rules). The DOL has included an 18-month transition period from the effective date of the final rules under which plans can continue to rely on the superseded guidance. Prudential Retirement’s preexisting electronic delivery offering is based on the DOL’s 2002 safe harbor rules; therefore, no transition will be required for these documents in plans that use Prudential’s electronic delivery services.

Covered individuals

A “covered individual” is defined as a participant, beneficiary, or other individual entitled to covered documents and who – when he or she begins participating in the plan, as a condition of employment, or otherwise – provides the employer, plan sponsor, or administrator (or an appropriate designee) with an electronic address. The definition of “electronic address” includes an email address or an internet-connected mobile device (e.g., smartphone) number, and is intended to be broad enough to encompass new and changing technology.

Under the safe harbor, there are a number of ways plan administrators may obtain an electronic address. For example, a company may provide plan participants with an electronic address because of their employment. Alternatively, an employee may provide a personal electronic address to the plan administrator or plan sponsor as part of the job application process or on other human resource documents. A plan administrator, or service provider can also request an electronic address in plan enrollment paperwork or to establish a plan participant’s online access to plan documents and account information.

Electronic addresses assigned by an employer to an employee may be used if they are assigned “for employment-related purposes that include but are not limited to the delivery of covered documents.” While the rule permits “employer-assigned”

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electronic addresses, it does not permit plan administrators or service providers to assign them. Additionally, employers cannot assign electronic addresses for disclosure of covered documents to spouses, divorced spouses, and other beneficiaries under ERISA.

The final rule confirms that participants in multiemployer plans may be “covered individuals.” These participants may provide their electronic addresses directly to the plan administrator or trustee, or an employer may provide to the plan administrator or trustee the participants’ personal or employer-assigned electronic addresses.

Covered documents

For employee pension benefit plans, “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 that must be furnished only upon request. Examples of covered documents include:

- Summary Plan Descriptions (SPDs);
- Summary description of Material Modifications (SMMs);
- Summary of latest Annual Report (SARs);
- Individual benefits statements;
- Qualified Domestic Relations Order (QDRO notices);
- Annual funding notices;
- Blackout notices;
- Participant fee disclosures; and
- Qualified default investment alternative (QDIA) notices.

It is important to note that the DOL rules do not apply to disclosures required by the Internal Revenue Code, such as automatic enrollment and safe harbor notices, even though these notices are usually delivered with certain DOL notices, such as QDIA notices. However, the DOL did indicate that the Treasury and IRS intend to issue additional guidance regarding the use of electronic delivery for participant notices and added a provision to the rules regarding combined annual notice of internet availability for any document specifically authorized by the Treasury. Hopefully future IRS guidance will permit the inclusion of those notices.

Initial notice

Before a plan administrator may rely on either new safe harbor alternative, the administrator must provide a paper notice to each individual it intends to cover under the safe harbor. That initial paper notice must include:

- An explanation that covered documents will be furnished electronically to an electronic address;
- Identification of the electronic address that will be used for the individual;
- Instructions necessary to access the covered documents;
- 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 a covered document;
- A statement of the right to request and obtain a paper version of a covered document, free of charge, and how to obtain the paper version; and
- A statement of the right to opt out of electronic delivery and receive only paper versions of covered documents and how to exercise this right.

The rules do not identify a specific time frame that the initial notice must be provided before disclosures may be sent electronically; however, it may be prudent to incorporate mail time between the initial notice and electronic disclosures. The initial notice must be written in a manner calculated to be understood by the average plan participant. It must be provided in paper format, even if individuals were already receiving notices electronically under the 2002 safe harbor. However, if a plan administrator doesn’t intend to rely on the new safe harbor for one or more employees, the plan administrator does not need to send these employees an initial notification.

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For example, an existing defined contribution plan covers three participants, only one of whom is covered under the 2002 safe harbor as an employee who is “wired at work.” This plan could take advantage of the new safe harbor for all three participants, in which case each participant would have to be furnished the initial notification, even the employee who is “wired at work.” Alternatively, this plan could take advantage of this safe harbor only with respect to the two participants who are not covered under the 2002 safe harbor, in which case the plan would provide the initial notice to only those two participants.

Right to paper

The new safe harbor options provide the following safeguards for participants:

- Upon request, the plan administrator must promptly furnish to an individual, free of charge, a paper copy of a covered document. Only one paper copy of any document must be provided free of charge.
- Individuals have the right, free of charge, to globally opt out of electronic delivery and receive only paper versions of covered documents. The administrator must promptly comply with the individual's request.
- The administrator must establish and maintain reasonable procedures governing opt out requests or elections. These procedures may not unduly inhibit or hamper the initiation or processing of an opt out request.

Special rule for severance from employment

When participants with electronic addresses assigned by an employer sever employment, the plan administrator must take measures reasonably calculated to ensure the continued accuracy and availability of such email address or obtain a new electronic address that enables receipt of covered documents following the severance from employment. The DOL states that procedures that include requesting and receiving an updated personal email address for future notifications as part of a company's standard off-boarding process ordinarily would be sufficient to meet this standard.

Notice and access safe harbor

Notice of internet availability

For the notice and access safe harbor, the plan administrator must furnish a notice of internet availability (NOIA) at the time the covered document is made available on the website. (While the direct email safe harbor does not require the administrator to provide a NOIA, it does require much of the same content and furnishing requirements as the NOIA.)

The NOIA must include:

- A prominent statement, for example as a title, legend, or subject line that reads, “Disclosure About Your Retirement Plan;”
- A statement that reads, “Important information about your retirement plan is now available. Please review this information;”
- An identification of the covered document by name (for example, a statement that reads, “your Quarterly Benefit Statement is now available”) and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document. For example, a quarterly benefit statement would generally not require a brief description, but a blackout notice would require the brief description;
- An internet website address, or a hyperlink to such address, where the covered document is available. The website address or hyperlink must be sufficiently specific to provide ready access to the covered document and will satisfy this standard if it leads the covered individual either directly to the covered document or to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document;
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right;
- A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right;
- 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; and

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- A telephone number to contact the administrator or other designated representative of the plan.

The NOIA may, but is not required to contain, a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that the statement is not inaccurate or misleading. *For example, it would be inaccurate or misleading to state that no action is invited or required on a benefits claim denial.*

The NOIA must contain only the content listed above, but may include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear. It must be written in a manner calculated to be understood by the average plan participant. The NOIA must be furnished electronically to the email address or smartphone number identified for the covered individual, and it must be furnished separately from any other documents or disclosures, except those permitted to be combined.

The system for furnishing a NOIA must be designed to alert the administrator of an individual's invalid address. The administrator must take reasonable steps to cure the problem. These steps may include furnishing a NOIA to a valid and operable secondary electronic address, obtaining a new valid electronic address, or treating the covered individual as if he or she opted out of electronic delivery, in which case a paper version of the covered document identified in the NOIA must be provided to the individual as soon as reasonably practicable.

A combined NOIA may be provided each plan year for more than one covered document. If a combined NOIA was provided in a prior plan year, the next year's NOIA must be furnished no more than 14 months later. An administrator may provide one NOIA that incorporates or combines the required content with respect to one or more of the following:

- A summary plan description;
- Any covered document or information that must be provided annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline;
- Any other covered document as authorized by the Secretary of Labor; and
- Any applicable notice required by the Internal Revenue Code as authorized in writing by the Secretary of the Treasury.

Standards for internet website

To satisfy the notice and access safe harbor, the administrator must ensure the existence of an internet website at which a covered individual is able to access covered documents. The administrator must take measures reasonably calculated to ensure that the covered document:

- Is available on the website no later than the date on which the covered document must be furnished under ERISA;
- Must remain available on the website for at least one year, or if later, until the date the document is superseded by a subsequent version;
- Must be presented on a website in a manner calculated to be understood by the average plan participant;
- Must be presented on a website in a widely-available format or formats that are suitable to be both read online and printed clearly on paper;
- Can be searched electronically by numbers, letters, or words; and
- Is presented on the website in a widely-available format or formats that allow the covered document to be permanently retained in an electronic format.

The administrator must also take measures reasonably calculated to ensure the website protects the confidentiality of personal information relating to any covered individual.

Direct email alternative

In a change from the proposed rules, the final rules permit an alternative safe harbor, under which a plan administrator may email a copy of the "covered document" directly to a "covered individual."

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The following conditions apply to covered documents provided directly through email:

- The document must be provided no later than the due date it must be provided to the participant;
- In lieu of an NOIA, the administrator sends an email that includes the covered document(s) in the body of the email or as an attachment and the email includes:
 - A subject line that reads, "Disclosure About Your Retirement Plan;"
 - If the document is included as an attachment, identification or brief description of the document;
 - A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right;
 - A statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right;
 - A telephone number to contact the administrator or other designated representative of the plan.

Like documents posted on a website, documents sent directly by email must also be:

- Written in a manner reasonably calculated to be understood by the average plan participant;
- Presented in a widely-available format or formats that are suitable to be read online, printed clearly on paper, and permanently retained in electronic format that satisfies these requirements; and
- Searchable electronically by number, letters, or words.

The plan administrator must also take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual, comply with initial notice rules, the right to paper requirements, and the severance from employment rule.

Important considerations and next steps

The new safe harbor rules provide welcome flexibility in sending disclosures electronically as the default. In deciding whether to adopt one of these new rules, plan sponsors may want to consider the following:

- A plan that currently uses the 2002 electronic delivery safe harbor (including either "wired at work" method or the "affirmative consent" method described above) may switch to the new safe harbor rules, but in doing so, must first send the initial paper notice to covered individuals for whom it wishes to rely on the new safe harbor. This is the case even for those covered individuals who are currently receiving disclosures electronically.
- In addition to permitting the use of personal email addresses on file as a default during active employment, the new safe harbor options provide the ability to use of personal email addresses following severance of employment. This is not currently an option under the wired at work safe harbor, unless the participant consents.
- The new safe harbor rules apply to notices required by Title I of ERISA and do not apply to IRS notices. Sponsors that use one of these new safe harbors will have to provide IRS notices, such as automatic enrollment and safe harbor notices, in a manner that complies with IRS electronic delivery rules. The IRS is expected to issue electronic delivery guidance, but timing on that guidance is unknown at this time.

Prudential Retirement has already begun working on implementation of the rules to allow plan sponsors to use these new safe harbors and will provide plan sponsors with more information and updates in the near future.

Pension Analyst by Prudential Retirement

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A comparison between IRS and DOL electronic delivery rules



	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
Types of plans subject to the rules	<ul style="list-style-type: none"> • Qualified defined contribution and defined benefit plans, including governmental and nonelecting church plans • ERISA and non-ERISA Section 403(b) plans • Governmental section 457(b) plans 	<ul style="list-style-type: none"> • Qualified defined contribution and defined benefit plans covered by ERISA (i.e., not governmental or non-electing church plan) • Section 403(b) plans covered by ERISA 		
Notices covered by the rules	<p>Any notice required under the Internal Revenue Code, except those over which DOL or PBGC has regulatory and interpretive authority and tax-reporting records.</p> <ul style="list-style-type: none"> • Section 402(f) rollover distribution notices 	<p>Generally, any document or information that the plan 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 the following:</p> <ul style="list-style-type: none"> • SPDs • SMMs • SARs • Individual benefit statements • Participant fee disclosure information 		

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	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
	<ul style="list-style-type: none"> ERISA section 204(h) notices Safe harbor and automatic enrollment notices QJSA and QPSA notices, elections, and consents Annual pension withholding notices Loan notes Notices to interested parties Notices of available distribution options Beneficiary designations 	<ul style="list-style-type: none"> Suspension of benefit notices QDRO notices Annual funding notices QDIA notices Blackout notices 		
Required vs Safe Harbor	<p>Required to comply for any communication that is required to be in writing (e.g., section 402(f) notices)</p> <p>Safe harbor for any communication not required to be in writing (e.g. beneficiary designation)</p>	<p>Safe Harbor under which participant:</p> <ul style="list-style-type: none"> Affirmatively consents to receiving documents electronically; or Is “wired at work.” 	<p>Safe Harbor for using website posting as the default delivery method</p>	<p>Safe Harbor for using direct email delivery as the default delivery method</p>

	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
Methods available	<p>Consumer consent</p> <p>Participant affirmatively consents to receive the electronic notice unless the participant has the ability to access under the “alternative” rule below.</p> <p>Alternative method</p> <p>Participant is able to effectively access the electronic medium used to provide the notice</p>	<p>Affirmative consent</p> <p>Participant affirmatively consents to receive electronic notice, subject to requirements of the 2002 Safe Harbor.</p> <p>Wired at work</p> <ul style="list-style-type: none"> Participant has the ability to access electronic documents at any location where the participant is “reasonably expected to perform his or her duties as an employee,” and Access to the employer’s information system is an “integral part” of his or her duties as an employee. <p><i>For example, the participant has a work email address that is an integral part of his or her duties as an employee.</i></p>	<p>Notice and access method</p> <p>Administrator posts document to website and provides a notice of internet availability (NOIA) at the time the covered document is available on the website. NOIA provides the website or hyperlink to the website where the document is located.</p>	<p>Direct email method</p> <p>Administrator emails a copy of the document directly to the participant within the body of the email or as an attachment.</p>

	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
Description of methods	<p>Consumer consent</p> <p>Participant must consent in a manner that demonstrates the ability to access the notice in electronic form or may consent by paper if the participant confirms the consent electronically in a manner that demonstrates the ability to access the notice in electronic form.</p> <p>Before a participant consents to electronic delivery, the plan must provide him with a disclosure statement that describes:</p> <ul style="list-style-type: none"> • The scope of the consent; • The right to withdraw consent to receive the notice electronically; • The right to receive a paper copy upon request; 	<p>Affirmative consent</p> <p>Participant must consent in a manner that reasonably demonstrates the participant’s ability to access the information in the electronic form.</p> <p>Before a participant may consent to electronic delivery, the plan must provide him with a statement that contains the following:</p> <ul style="list-style-type: none"> • Identification of the documents to which the consent applies; • Explanation that the consent may be withdrawn at any time without charge; • Procedures for withdrawing or updating address information; • Explanation of the right to request a paper copy and 	<p>2020 “Notice and Access” Safe Harbor</p> <p>Covers a participant, beneficiary, or other individual who – when he or she begins participating in the plan, as a condition of employment, or otherwise – provides the employer, plan sponsor, administrator (or appropriate designee) with an electronic address.</p> <p>A company may provide plan participants with an electronic address because of their employment, as long as the address is assigned for some employment-related purpose other than the delivery of covered documents. The electronic address may not be assigned <i>only</i> for the delivery of covered documents.</p> <p>Generally, a plan administrator must:</p> <ul style="list-style-type: none"> • Provide an initial paper notice to each individual; and • Provide a NOIA at the time the document is available on the website (not applicable to direct email delivery). <p>Because the direct email safe harbor is based exclusively on email, DOL modified or eliminated some of the notice and access safe harbor conditions as applied to the direct email safe harbor. For example, the direct email safe harbor does not require the administrator to send a NOIA, although it does incorporate many of the NOIA content requirements.</p>	<p>2020 “Direct Email” Safe Harbor</p>

	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
	<ul style="list-style-type: none"> Any hardware/software requirements; and The procedures for updating information to contact the participant electronically. <p>Alternative method</p> <p>Plan advises the participant that he may request and receive the applicable notice in writing on paper at no charge; and</p> <p>Participant is effectively able to access the electronic system used to provide the notice.</p>	<p>whether the document will be provided free of charge; and</p> <ul style="list-style-type: none"> Identification of hardware or software requirements to access and retain documents provided electronically. <p>Wired at work</p> <p>Participant must have the ability to access documents at any location where the participant is “reasonably expected to perform his or her duties as an employee.”</p> <p>Participant’s access to the system must be an “integral part of his or her duties as an employee.”</p>		
General requirements	<ul style="list-style-type: none"> The timing and content rules that otherwise apply to the notice, election, or consent 	<ul style="list-style-type: none"> The documents in electronic form comply with the requirements of 	Documents must:	<ul style="list-style-type: none"> Be available on the website or via email no later than the dates they are required to be furnished under ERISA;

	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
	<p>must be met.</p> <ul style="list-style-type: none"> The electronic system must be designed to provide information in a manner that is no less understandable than if provided on a written paper document. The electronic system must be designed to alert the participant, at the time the notice is provided, to the significance of the information and provide any instructions needed to access the notice. The electronic notice/election must be maintained in a form capable of being retained and accurately reproduced for later reference. 	<p>style, format and content as the paper document.</p> <ul style="list-style-type: none"> The electronic system must be designed to alert the participant to the significance of the information, if it is not reasonably evident from the transmittal. The electronic system must be reasonably calculated to ensure the actual receipt of the document occurs. This could be accomplished by use of return-receipt notice or undeliverable e-mail features, or conducting periodic surveys regarding the receipt. The electronic 	<ul style="list-style-type: none"> Remain on the website for at least one year, or if later, until the date the document is superseded by a subsequent version (not applicable to direct email delivery); Presented in a manner calculated to be understood by the average participant; Presented in a widely-available format suitable to be read online and printed clearly on paper; Searchable electronically by numbers, letters, or words; and Presented in a widely-available format that allows them to be permanently retained in an electronic format. <p>The plan administrator must:</p> <ul style="list-style-type: none"> Take measures reasonably calculated to ensure the confidentiality of personal information; Upon request promptly furnish to an individual, free of charge, a paper copy of a covered document; Comply with an individual’s request to globally opt out of electronic delivery, free of charge, and receive only paper versions of covered documents; Establish and maintain reasonable procedures governing opt out requests or elections. 	

	IRS Rules	DOL Rules		
		2002 Safe Harbor (“Wired at Work” and Affirmative Consent Methods)	2020 “Notice and Access” Safe Harbor	2020 “Direct Email” Safe Harbor
		system protects the confidentiality of personal information.		
Effective date	These rules apply to notices provided and elections made on or after January 1, 2007.	These rules were effective October 9, 2002.	July 27, 2020, but no enforcement action will be taken before that date if a plan administrator elects to implement one of the new 2020 safe harbors before that date.	