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November 22, 2019

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Attention: Electronic Disclosure by Employee Benefit Plans, RIN 1210-AB90
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

Dear Sir or Madam:

The Investment Company Institute[1] supports the Department of Labor's proposal (the "Proposal") to create a new safe harbor for default electronic delivery by employee benefit pension plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA").[2] We welcome the Proposal and commend the Department for recognizing and seeking to maximize the advantages that electronic modes of communication can offer to ERISA plan participants and beneficiaries, while maintaining necessary participant protections. The Proposal would ensure that participants can receive free paper copies of notices at their request.

The proposed safe harbor would allow retirement plans to shift the default method of delivering participant plan disclosures to electronic delivery, using a "notice and access" structure. The preamble to the Proposal also includes a related request for information (RFI) which seeks comments on whether

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$23.7 trillion in the United States, serving more than 100 million US shareholders, and US$7.1 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] See *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, published at 84 Fed. Reg. 56894 (October 23, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-10-23/pdf/2019-22901.pdf.

and how any additional changes to ERISA's general disclosure framework—focusing on design, delivery, and content—may further improve the effectiveness of ERISA disclosures.[3]

The Department is not alone in seeking to improve the effectiveness of mandated disclosures through use of electronic delivery methods. As the Department notes, numerous other federal agencies are moving financial disclosures online with a notice and access structure consistent with what the Department is proposing.[4] There is now overwhelming evidence that the time has come for the Department to provide retirement plan sponsors the flexibility to establish electronic delivery as the default method for communicating with participants and delivering plan information. Doing so will serve to facilitate the availability and accessibility of important plan information and encourage plan participants and beneficiaries to make greater use of the benefits that electronic modes of communication provide.

Despite the benefits of electronic modes of communication and the recognition that Americans today are getting their information online and increasingly display a preference toward executing transactions electronically, opponents of making electronic delivery the default for plan communications continue to assert a variety of evolving arguments in support of their position. This letter provides an overview of the benefits of electronic delivery and discusses why these criticisms in opposition lack merit and should not cause the Department to change its proposed course. The letter also makes suggestions for modest improvements and clarifications to ensure that the final regulation produces a safe harbor that optimizes plan sponsors' ability to use electronic modes of communication, thereby improving the effectiveness of disclosures and reducing the cost and burden of providing them.

In summary, our comments are as follows:

- ICI strongly supports the Proposal and encourages the Department to finalize it without delay. Making electronic delivery the default method for communicating with participants and beneficiaries (while still allowing participants to opt for paper) will: facilitate positive participant plan engagement and savings behavior; enhance the effectiveness of ERISA communications, particularly for individuals with disabilities or for whom English is not the

[3] Id. at 56908-56910.

[4] As the Department notes, the Social Security Administration, the Federal Thrift Savings Plan, the Securities and Exchange Commission (SEC), and the Office of the Comptroller of the Currency have all expanded their use of electronic delivery. See 84 Fed. Reg. at 56897-56899. In addition to the agencies the Department cites, we also note a similar action by the Consumer Financial Protection Bureau (CFPB), which Congress specifically established to ensure that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are "fair, transparent, and competitive." See 12 U.S.C. § 5511 (Dodd-Frank Act § 1021). The CFPB finalized a rule in 2014 permitting financial institutions under its jurisdiction to satisfy certain privacy notice transmission requirements by posting the privacy notice online and informing consumers annually via US mail about the availability of the notice. *Amendment to the Annual Privacy Requirement under the Gramm-Leach-Bliley Act (Regulation P),* 79 Fed. Reg. 64057 (Oct. 28, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-10-28/pdf/2014-25299.pdf.

primary language; produce significant cost savings for more than 80 million retirement savers; and reduce the environmental impact of tons of discarded paper every year.

- Critics of making electronic delivery the default for plan communications have historically asserted a variety of evolving arguments in support of their position, including a claim that many participants lack internet access. Now that internet access is almost universal, they now claim that broadband access is critical to ensuring that the benefits of electronic modes of communication are obtainable. While we agree the Department should be mindful of internet access considerations for all Americans, the rate of access to broadband internet is not relevant for a number of reasons, including that: (a) access to broadband internet or high-speed mobile LTE services is nearly universal, regardless of urban or rural location; (b) US adults report high rates of internet use, across urban and rural locations; (c) working US adults—the segment of the population participating in workplace plans—have even higher rates of internet use; and (d) high-speed or broadband internet is not necessary for downloading and viewing DC plan disclosures. Finally, of course, under the Proposal, every participant will have the right to opt to receive notices in paper at no cost.

- Our specific suggestions regarding the Proposal are that the Department should:

  - Retain existing guidance, including (1) the Department's existing 2002 regulatory safe harbor, (2) Field Assistance Bulletin 2006-03, and (3) Field Assistance Bulletin 2008-03 (or, with respect to qualified default investment alternative (QDIA) notices, retain the ability to send the QDIA notice with IRS notices relating to automatic enrollment using the IRS's guidance on electronic delivery);
  - Coordinate with IRS regarding its rules on plans' use of electronic media;
  - Modify language to allow for future innovations (e.g., in addition to posting on a website, allow use of an application ("app"); allow text messages in addition to emails);
  - Allow flexibility to send the one-time initial notification of default electronic delivery electronically rather than in paper, using the Department's existing 2002 safe harbor;
  - Allow flexibility to send the Notice of Internet Availability in paper;
  - Eliminate the heightened and prescriptive readability standard for the Notice of Internet Availability; and
  - Modify the provision regarding participant elections for paper to remove the requirement that plans allow participants to maintain different elections on a document-by-document basis.

- Finally, our suggestions in response to the RFI describe ways the Department could increase flexibility for plan sponsors regarding the design, delivery and content of plan communications, rather than require any particular type or prescriptive form of disclosure enhancement.

> Importantly, facilitating electronic modes of communication—as the Proposal would do— will ensure improvements in most of the areas on which the Department has requested input.

Following an overview of the benefits of electronic modes of communication and our support for the Proposal in Section I below, the letter in Section II shows how criticisms of efforts to make electronic delivery the default method for delivering plan notices lack merit. Section III describes specific suggestions for ensuring the safe harbor would be most effective in achieving its intended goal; and Section IV of the letter responds to the RFI on whether and how any additional changes to ERISA's general disclosure framework—focusing on design, delivery and content—could further improve the effectiveness of ERISA disclosures.

I. General Comments and Support for the Proposal

ICI has long touted the benefits of electronic delivery[5] and commends the Department for issuing the Proposal. The proposed safe harbor—if finalized—will enhance retirement plan sponsors' ability to provide information electronically and thereby produce significant improvements in the efficiency and effectiveness of participant disclosures.[6] Making electronic delivery the default method for communicating with participants and beneficiaries (while still allowing participants to opt for paper) will:

- facilitate positive participant plan engagement and savings behavior;
- enhance the effectiveness of ERISA communications, particularly for individuals with disabilities or for whom English is not the primary language;
- produce significant cost savings for more than 80 million retirement savers; and
- reduce the environmental impact of tons of discarded paper every year.

[5] See letter from David M. Abbey, Deputy General Counsel—Retirement Security, ICI and Doug Fisher, Director of Retirement Policy, American Retirement Association, to Preston Rutledge, Assistant Secretary of EBSA, Department of Labor (April 30, 2018), available at https://www.ici.org/pdf/31186a.pdf, transmitting Peter Swire and DeBrae Kennedy-Mayo, *2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery*, available at http://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf ("Swire White Paper"). Also see letter from David M. Abbey, Deputy General Counsel—Retirement Security, ICI and Doug Fisher, Director of Retirement Policy, American Retirement Association, to Preston Rutledge, Assistant Secretary of EBSA, Department of Labor (September 25, 2018), available at https://www.ici.org/pdf/31411a.pdf ("2018 ICI Letter to EBSA").

[6] The Proposal advances the goals of the President's August 2018 executive order directing that the Department review regulatory measures exploring the potential for use of electronic delivery as part of a broader goal of making retirement plan disclosures "more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries responsible for their production and distribution." *Strengthening Retirement Security in America*, 83 Fed. Reg. 45321 (September 6, 2018), available at https://www.govinfo.gov/content/pkg/FR-2018-09-06/pdf/2018-19514.pdf.

A. <u>Participants Are More Likely to Take Positive Actions in Response to Materials Provided Electronically</u>.

Plan sponsors who facilitate participant engagement with their retirement plans through electronic portals[7] have the ability to track when a document is opened, how the participant navigates through the document and any linked documents or other materials, and the total time of engagement.[8] This tracking data provides the plan sponsor and its service providers with valuable information for evaluating the effectiveness of communications.

The tracking data show that participants are more likely to take action in response to materials provided electronically. For example, there is ample evidence that those who interact with the plan online save at higher rates and tend to be more engaged. According to Fidelity, participants who have provided an email address to the plan save 72 percent more than participants without an email address on file, and are three times more likely to be "on plan" with their saving and investing.[9] They are 12 times more likely to go to the plan website to review an account, make changes, or explore a tool or educational content; they are four times more likely to use support tools; and they are twice as likely to attend an educational workshop, compared with participants who do not engage digitally. Similarly, T. Rowe Price's data show that the average balance for participants who in 2017 were engaged online was $119,000 compared with the $49,000 average balance for participants who were not engaged online. T. Rowe Price's data also show that 8.8 percent of participants who were engaged online in 2017 had a discretionary deferral increase compared with 0.8 percent of participants who were not engaged online.[10]

Other large service providers observe similar patterns of participant behavior. For example, Empower's analysis of millions of DC plan participants finds that online interaction improves outcomes.[11]

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[7] Such portals are typically made available by plan service providers as part of their recordkeeping arrangements.

[8] In contrast, when recordkeepers and other retirement plan service providers use paper delivery, they cannot know if a given participant actually opens or reads the materials.

[9] The On Plan Indicator is Fidelity's metric to help employers determine if their employees are saving enough and investing appropriately with respect to equities for their age. This indicator tracks the percentage of employees saving a total of 10 percent or more and who are invested with an age-based equity allocation.

[10] For purposes of this analysis, T. Rowe Price defined "engaged" participants as those who opened T. Rowe Price email concerning a plan recordkept by T. Rowe Price or engaged on T. Rowe Price's website for its plan clients. The analysis excluded small plans recordkept by a subcontractor, and individuals with recent substantial rollovers into a plan recordkept by T. Rowe Price. A related point is that T. Rowe Price data also show participants, specifically older participants, overwhelmingly affirm a preference for electronic engagement. In a 2016 survey conducted by T. Rowe Price, a substantial number of plan participants in all demographic groups reported a preference for accessing content on electronic platforms as opposed to print or "other." The preference was held by 88 percent of terminated Baby Boomers, and 87 percent of active Baby Boomers as well as 93 percent of Millennials (for this purpose, individuals were Millennials if they were born between 1981 and 1996, and Baby Boomers if they were born between 1946 and 1964).

[11] Empower analyzed six years of historical data, covering the time period from December 2010 through September 2016, including nearly 7 million website visits by over 300,000 participants from 569 retirement plans that are recordkept by

Specifically, DC plan participants who engaged with the online Empower retirement income calculator often increased their savings rates in their plans, in some cases spurred onward by an analysis of estimated retirement healthcare costs or peer comparisons. Finally, Vanguard found that average balances are three times higher for digitally engaged participants and that digitally engaged participants have a higher average payroll deferral rate compared to those who are not digitally engaged (an average deferral of 11 percent compared to 6.34 percent).

B. Electronic Delivery Enables Simple, Easy-to-Read Notices While Actually Providing More Detail.

Consumer testing has shown that individuals are more likely to read notices that are simple and provide key context up front.[12] Electronic delivery facilitates this streamlined, less is more approach, allowing for a short, simple notice that provides key context up front, which participants will be more likely to read. The click-through/hyperlink nature of the internet allows participants to see exactly the level of information that is right for them.

C. Electronic Delivery Enhances the Effectiveness for Individuals with Disabilities or for Whom English is Not Their Primary Language.

For certain segments of the population, electronic disclosure plays an even more vital role in the participant's understanding of the notice. Electronic delivery can offer advantages and easier access to plan information for visually impaired individuals and others with disabilities.[13] For example, with electronic delivery, visually impaired individuals can use software to read electronic notices to them or to increase the font size of electronic communications. If a plan uses electronic delivery, individuals with disabilities could access plan communications either via electronic tools or by requesting a paper copy. Electronic notice is also better for participants who do not read English easily or who prefer to read in a language other than English. Participants have access to a number of free translation programs online. It is much easier to use these programs with an online notice than a paper notice which would require them to key in the text before they can apply the software.[14] Further, the quality of translation software also has improved greatly over the last decade: free translation software is now available to translate more than 100 languages, accounting for more than 99 percent of the online population.[15]

Empower. *Experience Matters: The Connection Between Personalized Projected Retirement Income and Retirement Readiness*, Empower Retirement (2017).

[12] See page 14 of Peter Swire and Kenesa Ahmad, *Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery* (June 14, 2011), available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB50/00074.pdf.

[13] See pages 9-10 of Swire White Paper, supra footnote 5.

[14] Id.

[15] Id.

D. Electronic Delivery Will Reduce Costs.

Paper delivery costs significantly more than electronic delivery, and the government norm in other settings has become electronic delivery.[16] The incremental cost of paper delivery is higher than electronic delivery. An update to a 2017 survey of DC plan recordkeepers finds that the average cost for printing and mailing a single notice of four pages to one person is roughly $0.83, which if mailed, just once, to all 82.7 million 401(k) plan participants[17] would add up to $68.6 million (Figure 1). With an average of a minimum of six mailings per year, total printing and mailing costs could exceed $400 million. If eight mailings occur, the cost approaches $550 million. The Department found similar results regarding cost savings in the regulatory impact analysis, finding that the Proposal would save an estimated $2.4 billion net cost over the next 10 years for ERISA-covered retirement plans by eliminating materials, printing, and mailing costs associated with furnishing printed disclosures.[18]

Figure 1
Survey of a Cross-Section of 401(k) Plan Recordkeepers
Averages

	Average
The cost of printing and mailing a single notice of four pages to one person.	$0.83
Memo: Cost if mailed once to 82.7 million 401(k) plan participants	*$68.6 million*
The average number of disclosure deliveries in a year.	6 to 8 deliveries
Memo: Cost for six deliveries to 82.7 million 401(k) plan participants	*$411.9 million to $549.2 million*
The average number of pages of all required notices to one person in a year.	18 to 20 pages
Memo: Number of pages used if sent to 82.7 million 401(k) plan participants	*1.5 to 1.7 billion pages*
Memo: Number of trees used if sent to 82.7 million 401(k) plan participants	*179,000 to 199,000 trees*

Note: Survey respondents provide recordkeeping services for more than 40 million 401(k) plan participant accounts in 2017. Responses were weighted by number of participant accounts. Not all participants are mailed paper-copies of their disclosures and not all disclosures are provided by the recordkeeper (some are provided by the plan sponsor). Cost reflects 2019 metered postage rates and 2016 number of 401(k) plan participants.
Sources: Investment Company Institute Survey of a Cross-Section of 401(k) Plan Recordkeepers and US Department of Labor Form 5500 data; update of Swire and Kennedy-Mayo, "2018 Update to Delivering ERISA Disclosure for Defined Contribution Plans: Why the Time Has Come to Prefer Electronic Delivery," (April 2018) https://peterswire.net/wp-content/uploads/2018-Update-to-Delivering-ERISA-Disclosure-for-DC-Plans-002.pdf

[16] Id. at pages 7-8. See also footnote 4, supra.

[17] Based on Department of Labor summary statistics on 401(k) plans for plan year 2016, the total number of participants—including active participants and those who have separated from employment but still have accounts in the plan—was 82.7 million in plan year 2016. See US Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2016 Form 5500 Annual Reports* (December 2018; Version 1.0) available at https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2016.pdf.

[18] 84 Fed. Reg. at 56915.

E. Electronic Delivery Is Better for the Environment.

The environmental impact of moving toward greater use of electronic communications and away from paper serves as an additional consideration in the case for the proposed safe harbor. Reducing reliance on paper reduces pollution of our air, water, and land. Paper manufacturing emits nitrogen dioxide, sulfur dioxide, and carbon dioxide, contributing to acid rain and greenhouse gas effects. Paper mills discharge wastewater that may contain heavy metals, chlorine, alcohols, and other materials that can severely harm the ecology of our waterways. A significant portion of the paper produced through this ecologically harmful process results in paper waste. In fact, paper waste accounts for up to 40 percent of total waste in the United States.

The proposed safe harbor aligns with important national and global environmental initiatives. With an average of 18 to 20 pages delivered to each 401(k) plan participant in a year, between 1.5 billion to 1.7 billion pages would be used. Therefore, the Proposals could save 179,000 to 199,000 trees each year (Figure 1).[19] It also would reduce the air, water, and land pollution associated with the production of paper products.

II. Criticisms of Electronic Delivery as the Default Method Lack Merit

The Department's Proposal would allow retirement plans to make electronic delivery the default method for communicating with participants, while ensuring that participants can opt for paper copies at no charge at any time. Certain critics of making electronic delivery the default method for participant notices have a history of raising objections to similar proposals and legislation. There are several reasons to question the validity of concerns raised in response to these proposals, as we explain below.

A. Critics' Claim that the Department's Existing Rules are Sufficient to Allow Plans to Electronically Communicate with Employees Denies Common Sense Logic.

Critics have argued that current delivery rules are sufficient because they allow plans to use electronic delivery. These claims ignore that the Department's rules governing the use of electronic delivery date to 2002 and severely restrict the circumstances in which electronic means of communication can be used instead of paper. In fact, the Department's existing standard restricts the use of email as a means of delivery for many categories of employees and former employees, even in circumstances where the employer has email addresses and routinely communicates with these individuals electronically. Among other requirements, written affirmative consent is required to receive documents electronically, but inertia keeps most participants from affirmatively consenting to electronic delivery even where it is clear that such means of communication are preferred.

[19] According to Conservatree statistics available at http://conservatree.org/learn/EnviroIssues/TreeStats.shtml, one tree makes 16.67 reams of copy paper or 8,333 sheets.

B. Critics' Claims that Certain Population Segments (e.g., Seniors and Individuals with Lower Incomes or Less Education) Have Less Internet Access and Will Be Harmed by the Proposal Are Based on Dated and Cherry-Picked Data.

Critics' claims are dated and ignore pervasive use of the internet for day-to-day activity. In fact, as of 2019, Pew Research Center found that 9 in 10 American adults use the internet. A recent white paper shows that households that own DC accounts have even higher rates of internet access compared to all US households, even within "lower-access" groups. For example, considering the category of households with income below $20,000, 57 percent have access, but 82 percent of DC account holders with this income level have access.[20] The studies the Department cites in the preamble to the Proposal clearly demonstrate that Americans today have substantial access to and use of electronic media, and this is especially true of the population owning defined contribution plan accounts.[21]

C. Critics Overstate the Relevance of Universal Access to Broadband and High-Speed Internet in Opposing Electronic Delivery.

For years, the refrain from critics has been that too few people had internet access to make electronic delivery the default. Now that nearly everyone has internet access, critics point to data to show that not everyone has access to broadband or high-speed internet. In other words, they are moving the proverbial goalposts to serve their own agenda. It is simply not necessary to have broadband internet to view the types of documents required to be provided to 401(k) participants.[22] While ICI has not collected data regarding broadband access, the fact that 88 percent of households owning DC accounts engage in online banking suggests that any potential lack of broadband is not preventing DC plan participants from actively engaging online for financial matters. In any event, the Proposal preserves the ability to receive paper notices for any individual who prefers it—whether that preference is due to slow internet access, no internet access, or simply a preference to review documents in paper.

[20] See page 13 of Swire White Paper, supra footnote 5.

[21] See 84 Fed. Reg. at 56896. For example, a 2015 survey of retirement plan participants' online habits indicated that 99 percent reported having internet access at home or work, and 88 percent of respondents reported accessing the internet on a daily basis. Id. at footnote 15. While it remains possible that a small percentage of defined contribution plan owners do not have internet access, this should not cause the Department to change its proposed course. First, any such individuals are unlikely to provide an electronic address to the plan administrator nor to be assigned one by their employer and therefore would be required to receive paper copies. Second, under the protections provided by the safe harbor, they will be able to easily opt out of all electronic delivery.

[22] For general browsing and email, the Federal Communications Commission (FCC) recommends a minimum download speed of 1 Mbps—far lower than the 25 Mbps necessary to be considered broadband for the FCC's purposes. See pages 10-14 of 2018 ICI Letter to EBSA, supra footnote 5. Further, the FCC data indicate that access to broadband internet or high-speed mobile LTE services is nearly universal. Id.

D. Critics' Claim that There Is Overwhelming Support for Paper Disclosure Is Based on a Dated Study.

Critics often cite to an AARP study from November 2012, "Paper by Choice: People of All Ages Prefer to Receive Retirement Plan Information by Paper" to support the claim that a preference exists for paper disclosure. Seven years is not only a lifetime in internet years, but a recent white paper shows significant changes in internet use from 2012 to 2018, with 93 percent of DC plan participants with internet access and 88 percent of households owning DC accounts engaging in online banking.[23] Simply put, actions say a lot more than the AARP study's words that survey respondents prefer paper.

Our experience with similar claims made in opposition to SEC's Rule 30e-3 is also instructive. As the Department recognizes in the preamble to the Proposal,[24] the SEC recently voted to approve Investment Company Act Rule 30e-3, which will modernize fund shareholder report delivery to the benefit of 100 million US fund shareholders.[25] The rule allows funds[26] to make shareholder reports available on their websites rather than having to deliver printed paper reports to shareholders via US mail, provided the fund satisfies certain conditions. Funds are required to deliver a paper version of the full shareholder report to any investor requesting it.

The response to Rule 30e-3, based on its implementation, has been overwhelmingly positive. Currently, a transition period applies regarding the rule's implementation. A fund may rely on Rule 30e-3 to transmit a report to shareholders beginning on January 1, 2022, or if earlier, if the fund has included a required statement on specified disclosure documents (including on each prospectus, summary prospectus, annual report, and semi-annual report required to be delivered or transmitted to shareholders) for over a full two-year period. We understand that most ICI members (97 percent of ICI members) intend to rely on the rule and all funds who intend to rely on the rule have added the appropriate legends to their regulatory documents (i.e., prospectus, semiannual, and annual reports). Most significantly, funds report very few shareholders (less than 0.5 percent) opting into receiving hard copy reports.

E. Critics' Claims that Individuals Read and Retain Paper Information Better than Electronically Delivered Documents Are Based on Dated or Irrelevant Reports.

Opponents cite various similar studies, including a report commissioned by the Canada Post (the postal delivery service in Canada), to support their claim that individuals read and retain information better

[23] See pages 13-14 of Swire White Paper, supra footnote 5.

[24] 84 Fed. Reg. at 56898.

[25] *Optional Internet Availability of Investment Company Shareholder Reports*, 83 Fed. Reg. 29158 (June 22, 2018).

[26] We use the term "fund" to refer to mutual funds. Note that Rule 30e-3 applies to registered investment companies.

when it is provided via paper. The Canada Post report, entitled "Breaking Through the Noise,"[27] focused on direct marketing materials. That report took what they refer to as a qualitative approach, doing an ethnographic examination of how a group of participants sort through physical mail, email and direct marketing on Facebook, with a primary focus on promotional messages. This was done with a small camera that tracked the participant's eye movements. To no surprise, that study found (based on tracking eye movements) that directly-addressed mail tended to be read before randomly provided Facebook ads. The study did not consider directly-addressed internet provided communications and, if anything, suggests that the key preference trigger relates to whether the communication is actually directed to the recipient, not whether it is provided in paper rather than digital form.

F. Critics Wrongly Claim that Expanding Electronic Delivery Prioritizes Cost Savings Over Protecting Participants' Rights.

Opponents acknowledge that facilitating electronic delivery would produce cost savings but point to the fact that the legislation or proposals do not specifically require that these savings be documented and credited to participants' retirement accounts. As discussed above, the costs associated with printing and mailing paper notices could exceed $400 million per year.[28] Because 401(k) participants typically bear the costs associated with the plan,[29] the cost savings would flow directly to them. In cases where these costs are borne by the employer, such employers could use such savings in a variety of ways that could benefit participants (for example, freeing up capital for employee contributions or other benefits.) Of course, even apart from the cost savings, encouraging the use of more electronic disclosure will benefit participants by harnessing the advantages of the internet to provide more effective disclosure.

G. Some Critics of Electronic Delivery Are Motivated by Self-Interest.

Finally, and most unfortunately, many of the commenters who have been critical of electronic delivery, and who have already criticized the Department's Proposal have significant business and financial interests in paper products and therefore in maintaining the current delivery rules that favor paper-

[27] The Canada Post (the postal delivery service in Canada) issued a report entitled *Breaking Through the Noise*, available at https://www.canadapost.ca/assets/pdf/blogs/CPC_BreakThruNoise_EN1Print_150709.pdf. This report took what they refer to as a qualitative approach, doing an ethnographic examination of how a group of participants sort through physical mail, email and direct marketing on Facebook, with a primary focus on promotional messages.

[28] See text accompanying footnotes 16 through 18, supra.

[29] According to a survey performed in connection with a 2013 Fee Study, on average, participants pay 87 percent of total plan fees while employers pay 9 percent and the plans cover 3 percent. See Exhibit 14 of Deloitte Consulting LLP and Investment Company Institute, *Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A study assessing the mechanics of the 'all-in' fee* (August 2014), available at https://www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf.

based delivery.[30] The Department should consider these commercial interests as it weighs comments seeking to retain reliance on the manufacture, purchase, and delivery of paper.

III. Comments Regarding Proposed Safe Harbor

ICI strongly supports the proposed safe harbor, and we urge the Department to finalize it without delay. We do have a number of suggestions that will ensure that the safe harbor would be usable by the maximum number of plans desiring to implement it. In this spirit, we provide comments below.

A. Amendments Regarding the Structure and Application of the Safe Harbor.

ICI supports the framework of the safe harbor as proposed. Based on plans' experience providing participant benefit statements electronically under Field Assistance Bulletin (FAB) 2006-03[31] as well as our members' experience so far implementing Rule 30e-3, the "notice and access" model works well for both those providing the notices and those receiving them.

1. *Retain Existing DOL Guidance*

We support the Department's decision to leave in place the existing safe harbor adopted in 2002 (the "2002 Safe Harbor") and agree that it may be helpful to amend the 2002 Safe Harbor to reference the new proposed safe harbor. We applaud the Department for allowing needed flexibility by allowing plans to use either or both safe harbors within a single plan.

In the preamble to the Proposal, the Department indicates that the Proposal would supersede certain subregulatory guidance, including the relevant portions of FAB 2006–03.[32]

A large number of plans currently rely on FAB 2006-03 to provide pension benefit statements, and we urge the Department to retain the electronic delivery provisions in FAB 2006-03. The Department

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[30] See e.g., Letter from the Coalition for Paper Options to Paul Ray, Acting Administrator, Office of Information and Regulatory Affairs (October 8, 2019). The Coalition for Paper Options also recently circulated anti-electronic delivery materials on Capitol Hill to counter the Department's Proposal. We have not yet seen any comment letters posted on the Department's website. We note, however, that in response to the SEC's proposed Rule 30e-3, several individual commenters posed as concerned senior citizens without disclosing their paper industry ties. See pages 12-13 of letter from Paul Schott Stevens, President and CEO, ICI, to Brent J. Fields, Secretary, US Securities and Exchange Commission, (March 14, 2016), available at https://www.ici.org/pdf/16_ici_sec_reporting_modernization_ltr.pdf.

[31] FAB 2006-3, issued on December 20, 2006 and available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2006-03. This FAB provides guidance for compliance with the pension benefit statement requirements, including the ability to deliver the statements by making them available on a continuous basis through a secure plan website.

[32] See footnote 60 of 84 Fed. Reg. at 56900.

points out in the preamble that the structure of the Proposal is "similar" to that of FAB 2006-03.[33] However, there are in fact important differences between the two that limit the Proposal's facility as a replacement for FAB 2006-03 in all circumstances.[34] While technical in nature, these differences would create administrative burdens and would result in increased transition costs for plans if the guidance is not retained.[35] We urge the Department to retain FAB 2006-03. At a minimum, however, the Department should include a substantial transition period to allow sufficient time for the systems changes that would be needed if the guidance is rescinded.[36]

2. *Expand Coordination with IRS Rules on Plans' Use of Electronic Media*

In 2006, the IRS issued guidance relating to plans' use of electronic media to furnish notices required under the Internal Revenue Code (the "Code").[37] We urge the Department to confirm with the IRS that a plan that meets the standards in the Department's Proposal is deemed to meet the "effective ability to access" test in the IRS's guidance on electronic media.[38]

In FAB 2006-03, the Department indicated that plans may use the IRS's rules relating to the use of electronic media to furnish pension benefit statements to participants and beneficiaries. Similarly, in

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[33] 84 Fed. Reg. at 56900.

[34] For example, FAB 2006-03 does not require plan sponsors to collect participant emails or keep track of whether participants have provided emails. The FAB only requires that the plan provide "continuous access to benefit statement information through one or more secure websites" and that "participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries." See page 4 of FAB 2006-03. Like the Proposal, the FAB requires that the notice apprise participants and beneficiaries of their right to request and obtain a paper version of the benefit statement, free of charge.

[35] The rescinding of the subregulatory guidance may be an attempt to comply with the President's recent executive orders on subregulatory guidance and enforcement. *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55235 (Oct. 15, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-10-15/pdf/2019-22623.pdf; and *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55,239 (Oct. 15, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-10-15/pdf/2019-22624.pdf. We do not believe, however, that removing a piece of subregulatory guidance on which plan sponsors greatly rely and benefit from meets the spirit of these two executive orders. Further, it does not advance the goals of another executive order, *Strengthening Retirement Security in America*, supra at footnote 6.

[36] It is not clear from footnote 60 of the Proposal whether the three pieces of subregulatory guidance would be superseded immediately upon the effective date of the final rule. We assume, however, that the Department does not intend to revoke the relevant portions of the subregulatory guidance prior to the applicability date. Otherwise, the Department would inadvertently create a gap period, during which neither the new safe harbor nor the subregulatory guidance would be available.

[37] See 26 CFR 1.401(a)–21(e)(1), published at 71 Fed. Reg. 61877 (October 20, 2006).

[38] While it would be helpful if the preamble to the final rule included this confirmation from the IRS, this point is not meant to suggest that the Department should delay its final rule in an effort to obtain this confirmation from the IRS. Rather, the Department could include this in a notice at a later date.

FAB 2008-03, the Department confirms that plans may opt to use the IRS's rules on electronic media to furnish the QDIA notice.[39] This is particularly important because plans that use an automatic enrollment feature typically send the ERISA-required QDIA notice together with the Code-required automatic enrollment notice. Different standards for electronic delivery could result in plans sending these two notices separately. This could confuse participants and would cause the QDIA notice to lose important context. To provide maximum flexibility and to prevent interruptions for those plans who do not wish to use the new safe harbor, the Department should confirm that plans may continue to use the IRS guidance for delivery of these notices—particularly if the Department fails to retain the relevant portions of FAB 2006-03 (and FAB 2008-03) as we request above.

3. *Retain Broad Scope of Covered Documents*

Under the Proposal, the scope of ERISA-required documents that may be sent using the proposed safe harbor is broad, excluding documents that must be provided only when requested by the participant (e.g., the plan document or trust document). We urge the Department to retain this broad scope.

The Department asks whether certain disclosures are better suited for electronic delivery. We believe that all of the ERISA-required notices are well-suited for electronic delivery. We note that the more complex notices (e.g., the summary plan description and fee disclosure) are particularly well-suited because they can be provided on a website in a layered format to allow participants to easily access additional information. Further, participants are free to request any document in paper, if there is a document they would prefer to read in paper copy.

4. *Allow Flexibility for Future Innovation*

One of the Department's stated goals is to not inhibit innovation in the delivery of required disclosures, especially as forms of internet-based communication continue to expand.[40] We strongly support this goal and encourage the Department to use language that would allow flexibility as technology develops. One specific suggestion relates to the requirement that the Notice of Internet Availability (discussed in more detail in Section II.B below) include an internet website address where the covered document is available. The Department should clarify that the "internet website address" can include a plan specific website as well as an app made available by a plan sponsor that includes an individual messaging mechanism where a participant can receive secure electronic plan messages and notices only accessible by the participant.

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[39] FAB 2008-03 at Question 7 refers to the preamble to the QDIA regulation. In the preamble, the Department states its view that, "in the absence of guidance to the contrary," plans may rely on the IRS guidance on electronic media in delivering the QDIA notice. *Default Investment Alternatives Under Participant Directed Individual Account Plans*, 72 Fed. Reg. 60452, at 60458 (October 24, 2007).

[40] 84 Fed. Reg. at 56901.

The Proposal should also provide flexibility for less "high tech" delivery. For example, the Proposal does not seem to envision that plan sponsors may send certain documents in a pdf attachment to an email where the size of the document file is not large and the document does not contain any sensitive or personal information. This is not unusual to occur today when plans send, for example, the summary annual report.

B. Amendments Regarding the Notices Required by the Safe Harbor.

A key aspect of the Proposal's notice and access structure is the Notice of Internet Availability (NOIA). A plan "furnishes" an ERISA-required notice by making the document accessible online and by providing a NOIA to participants and beneficiaries to alert them that the document is available online. The Proposal allows plans to use a combined NOIA to alert participants of several documents that will be available online throughout the year. A combined NOIA must be sent once every plan year and not more than 14 months after the prior NOIA is sent.

In addition, before a plan may begin sending ERISA disclosures in reliance on the new safe harbor, the plan must provide a one-time paper notice (the "Initial Notice") to each individual to alert the individual that the covered documents will be provided electronically. ICI agrees that the Initial Notice is sufficiently protective of employees to make sure they understand their rights with respect to electronic delivery.

1. *Allow Flexibility in Delivery of NOIA*

The proposed new safe harbor appears to require that plans send the NOIA electronically. We urge the Department to modify the Proposal to allow flexibility to send the NOIA either electronically or in paper.[41] As indicated above, some of our members are currently using a similar notice and access model to deliver participant benefit statements using FAB 2006-03 and are using a postcard or other paper mailing to provide notice that benefit statements are available online. We urge the Department to retain FAB 2006-03; however, if the Department does rescind the FAB, making this change would greatly ease the transition to the new safe harbor and may allow more plans and service providers to use the systems they currently have in place.

2. *Allow Flexibility in Delivery of Initial Notice*

While it may be useful to send the Initial Notice in paper to individuals who are currently receiving plan information in paper to explain the shift to electronic delivery, it is not necessary for plan participants who communicate with their employer electronically. The Department should modify the Proposal to permit plans to use the 2002 Safe Harbor to send initial notifications of electronic delivery (e.g. for sending notices to employees who are "wired at work").

[41] See section (d)(4)(i) of the Proposal.

3. *Clarify Documents that May Be Covered by a Combined NOIA*

We appreciate the flexibility the Department provided in permitting several notices to be covered by a single combined NOIA and the flexibility in timing requirements for sending it each year. The Department specifies exactly which documents may be covered by this combined NOIA. As the Department explains, the list represents the most common and recurring disclosures that are made to pension plan participants, and which are triggered by no event other than the passage of time.[42] With respect to participant fee disclosures (i.e. "investment-related disclosure"), the Proposal specifies that only a portion of the information required to be furnished to plan participants may be covered by the combined NOIA. The Proposal should be revised to confirm that the entire participant disclosure notice under DOL's regulation section 2550.404a-5 may be furnished to participants using the combined NOIA, provided that the administrator separately provides timely notice of any subsequent changes.

4. *Simplify the Readability Standard for the NOIA*

In section (d)(4)(iv) of the Proposal, the Department indicates that the NOIA must be written in a manner calculated to be understood by the average plan participant and then lists a number of factors that will satisfy the readability standard (e.g., language that results in a Flesch Reading Ease test score of at least 60). ICI and our members share the goal of simplifying notices and enhancing participants' understanding of all information provided to them. By listing these specific factors, however, the Department appears to apply higher, more stringent requirements to the NOIA than to any other notice required under ERISA. Further, reference to the Flesch Reading Ease test is too prescriptive a requirement, one that DOL's own model notices would fail to meet.[43] We recommend that the Department instead only apply the same principle-based readability standard that applies generally to ERISA-required notices, that is, that it must be written in a manner calculated to be understood by the average plan participant. This standard allows more flexibility and allows plan administrators to determine what is right for their plan participants. If the Department retains this readability

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[42] 84 Fed. Reg. at 56907.

[43] The Flesch Reading Ease test is designed to measure a passage's level of difficulty, using word length and sentence length. A lower score indicates a more difficult passage. Academics have noted the limitations of such tests. See Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations* (January 2008). According to Sirico, "practically everyone in the readability field understands that the comprehensibility of a document depends on a number of factors that do not lend themselves to numerical testing, for example, the intellectual complexity of the contents and the syntactical complexity of the writing style" and "common sense tells us that sometimes a sentence with few words and syllables can be difficult to read and a sentence with many words and syllables can be quite comprehensible." Id. at pages 103 and 124. Sirico further notes that "[t]he National Council of Teachers of English discourages the use of readability formulas in selecting materials for English language arts programs." and "[b]ecause readability formulas tend to be simplistic measures, such formulas should be used cautiously, if at all. Teachers' judgments about the difficulty of a work are more soundly based on complexity of plot, organization, abstractness of the language, familiarity of vocabulary, and clarity of syntax." Id. at pages 117 and 122.

requirement as proposed, then we urge the Department to provide a model NOIA that will meet the requirement.

C. Amendments Regarding Provisions Aimed at Consumer Protections.

ICI believes that the Department's Proposal strikes the right balance between making it easier to use electronic delivery while ensuring that sufficient participant protections are in place. We offer some suggestions for simplification to better ensure the efficiency and functionality of the protective provisions, as discussed below.

1. *Simplify Requirements to Allow Opting for Paper*

The Department has drafted section (f) of the Proposal to allow individuals to request any specific document in paper (section (f)(1)) or to opt out of electronic delivery and receive only paper versions of *some or all* covered documents (section (f)(2)). This wording appears to require plans to allow individuals to maintain different elections on a document-by-document basis. This requirement makes administration of the safe harbor much more complex and could prevent some plans, particularly smaller plans, from benefiting from the safe harbor.

While some plans may ultimately permit more complex delivery elections, we urge the Department to simplify this section in the final rule. Participants will be sufficiently protected if a plan allows an individual to request any particular document(s) in paper or to opt out of electronic delivery completely. Plans should not be required to maintain different preferences on a notice-by-notice basis.

2. *Special Rule for Severance from Employment*

In paragraph (h) of the Proposal, the Department provides a special rule that applies when plan participants sever from employment. Upon an employee's severance from employment, the plan administrator must take measures reasonably calculated to ensure the continued accuracy of the electronic address or to obtain a new electronic address from the participant.

ICI agrees with the Department's observation that use of electronic delivery can serve as a protection against plan participants becoming missing participants, and generally agrees that section (h) as drafted, provides an appropriate standard for addressing the situation when a plan administrator is using a work-provided electronic address. Section (h) could be read, however, to require action in every instance of a participant's severance. We would appreciate confirmation from the Department that when a plan is already using an employee's personal email address or personal cell phone number, provided by the participant, the plan administrator will not need to take any additional actions if that participant terminates employment from the plan sponsor.

IV. Comments Responding to Request for Information

The preamble to the Proposal also includes a related RFI which seeks comments on whether and how any additional changes to ERISA's general disclosure framework—focusing on design, delivery, and content—may further improve the effectiveness of ERISA disclosures.

ICI has made a number of suggestions on the design, delivery, and content of disclosures, some of which we shared with the ERISA Advisory Council in 2017.[44] Our suggestions describe ways the Department could increase flexibility for plan sponsors, rather than require any particular type of prescriptive disclosure enhancement.[45] Plan sponsors understand the unique characteristics of their particular workforce and are in the best position, working with their service providers, to determine what design, delivery and content criteria will best serve their workforce. In contrast, we believe that the issuance of rigid design and content criteria for plan communications risks stifling innovation and efforts to determine—through consideration of participant behavior—what design and content elements work best to achieve the goals of increasing participant understanding of the plan and producing better outcomes. Importantly, facilitating electronic delivery—as the safe harbor would do— will ensure improvements in most of the areas on which the Department has requested input. To that end, we strongly urge the Department to finalize the Proposal without delay (as modified by our earlier recommendations), and to separately consider additional changes it could make, as described below in response to the specific questions the Department poses in the RFI.

A. Investors Prefer Summary Disclosures that Highlight Key Elements.

The Department asks how it can best assess the views of plan participants on the frequency, content, design, delivery, and other aspects of ERISA disclosure.

ICI has worked to gather this type of information about other types of financial disclosures by surveying mutual fund shareholders, a population with significant overlap with the population of defined contribution plan participants. ICI found that investors like summary disclosures that highlight key elements.

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[44] See letter from David M. Abbey, Deputy General Counsel—Retirement Security, ICI and Shannon N. Salinas, Assistant General Counsel—Retirement Security, ICI, to Larry Good, Executive Secretary, ERISA Advisory Council, US Department of Labor, (August 18, 2017), available at https://www.ici.org/pdf/30844a.pdf ("2017 ICI Letter to ERISA Advisory Council").

[45] For example, we encouraged the issuance of guidance facilitating the ability of plan sponsors to (a) streamline and consolidate existing notices in a way that will focus participants on the key information they need for effective decision making under the plan, while ensuring the availability of more detailed information for further reference; (b) consolidate information in the Summary Plan Description (SPD), which should serve as the "owner's manual" for the plan; and (c) encourage the use of a plain language "quick start" guide upon enrollment, consolidating the key information from the SPD, together with information about investment options that participants need to make the core decisions when they enroll in the plan.

In the context of fund disclosure required by the SEC, ICI has conducted household surveys to ask mutual fund owners about their experience with current disclosures and their views on proposed summary disclosures.[46] Specifically, in 2008, ICI surveyed mutual fund owners to gather their views on the SEC's summary prospectus proposal.[47] The 2008 survey work yielded both a very broad positive assessment of the SEC's proposed summary prospectus and information regarding specific ways to present various pieces of information.

More recently ICI surveyed mutual fund shareholders for their views of existing shareholder reports and their reactions to a summary shareholder report.[48] The survey first asked mutual fund investors whether they recall receiving shareholder reports and questioned those who did about their readership and ease of understanding. The survey results demonstrate that mutual fund investors who find the current reports difficult to understand are less likely to read them. The next section of the survey presented mutual fund investors with an electronic copy of a summary shareholder report prototype, which they could view as often and for as long as they wanted in a separate window.[49] Overall, the summary shareholder report prototype was well received. Ninety-five percent of mutual fund investors agree that the summary document is enough to keep investors informed about their mutual fund investments, as long as the longer and more detailed document is available on request, free of charge. Ninety-two percent agree that they would be more likely to read such a summary document. Ninety-two percent agree that such a summary document will make it easier to compare different funds.

As discussed above, facilitating the use of electronic disclosure, as the proposed new safe harbor would do, is one of the most productive steps the Department can take to encourage plan administrators to organize and present disclosures in a more meaningful way for participants.

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[46] ICI's research related to mutual fund shareholders' use of information is available at www.ici.org/research/investors/information.

[47] See John Sabelhaus, *Investor Views on the US Securities and Exchange Commission's Proposed Summary Prospectus* (2008) available at www.ici.org/pdf/ppr_08_summary_prospectus.pdf.

[48] The ICI Summary Shareholder Report Survey collected responses from 1,233 mutual fund investors from late July to mid-August 2018. First, the survey asked mutual fund investors about their experience with current shareholder reports and the extent to which they read the reports. Second, the survey presented a summary shareholder report prototype and gathered mutual fund investors' reactions to the prototype, including investor preferences for each of five key elements that make up the summary prototype. Third, respondents were asked about the usefulness and length of the summary prototype overall. Finally, as a test of the efficacy of the summary prototype, investors were asked to use the summary prototype to answer questions related to fund holdings, fund expenses, and fund returns relative to a benchmark index. For the full results, see Sarah Holden, Jason Seligman, and Daniel Schrass, *Mutual Fund Investors' Views on Shareholder Reports: Reactions to a Summary Shareholder Report Prototype* (2018) available at www.ici.org/pdf/ppr_18_summary_shareholder.pdf.

[49] The survey asked mutual fund investors to rate the importance of keeping each of the five elements included in the summary prototype, as well as their views on the usability of the summary prototype overall, to enable them to stay informed and compare funds. Respondents were informed that the longer and more detailed shareholder report would still be produced and would still be available free of charge.

B. Personalizing Communications Can Be Helpful but It Is Important that Plan Sponsors Be Provided with Flexibility.

The Department asks whether more personalized disclosure would enhance engagement.

A 2013 ERISA Advisory Council report analyzes witness testimony indicating that personalized communications were more successful than providing general communications intended for every participant in the plan and that communications tailored to a particular employee group had better results than the "one size fits all" philosophy.[50] As part of its report, the Council recommends best practices for participant communication and plan design that have been statistically proven to be effective. The Council also warned that the cost of such customization is a factor that must be considered. The Council recommended that the Department provide education to plan sponsors on such techniques and communication practices.

We agree and support the Council's conclusions and recommendation but caution the Department to not mandate or prescribe a particular form of personalized disclosure, format or criteria. Indeed, the Department should ensure that plans have the flexibility to innovate in this manner. As supported by the ERISA Advisory Council's more recent findings, information delivered using electronic modes of communication can be provided in a more consistent, consumable format that is personalized to the intended reader.[51] The provision of information in such a format alone will lead to better methods of communication that should increase the involvement of employees in saving for retirement and ultimately increase retirement savings.

C. Providing a Summary of Key Information (e.g., a Quick Start Guide) Could Enhance Disclosure, and the Department Should Provide Flexibility to Innovate in this Manner.

The Department asks whether it should encourage or require that the plan administrator furnish a brief, clear, and accurate summary of key information for certain ERISA-required documents. The summary would be coupled with access to more detailed information online, on request, or both. As ICI has previously expressed, a summary of key information (a "quick start" guide) is one of the best ways to streamline disclosure.[52]

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[50] See ERISA Advisory Council's 2013 Report, *Successful Plan Communications for Various Population Segments* (November 2013), available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2013-successful-plan-communications-for-various-population-segments.pdf.

[51] See ERISA Advisory Council's 2017 Report, *Mandated Disclosure for Retirement Plans –Enhancing Effectiveness for Participants and Sponsors* (November 2017), available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf.

[52] See 2017 ICI Letter to ERISA Advisory Council, supra at footnote 44.

We suggest consolidating as much information as possible in the SPD, which should serve—as it was originally intended— as an "owner's manual" for the plan. Like any owner's manual, it should contain, in plain language, both the key features of the plan as well as information relevant to special situations that might arise. It should be the basic document to which participants can refer for information about the plan. We recognize that very few people read an owner's manual from cover to cover, but they retain it as a reference tool for locating additional information when needed. We believe this is the function the SPD should serve.

The Department could encourage plans to provide, in addition to the SPD, the kind of "quick start" guide used successfully by consumer electronic products. The "quick start" guide allows an owner to use the device without having to read the long, detailed user's manual cover to cover. A plan "quick start" guide could provide participants with information in a concise and accessible presentation format, focusing them on the key information relevant to the decisions they need to make at enrollment. Similarly, when a participant leaves employment, the various notices and information that are provided could also be summarized in a "quick start" guide addressing distribution options and tax implications. Such a format would make it more likely that participants will actually read and retain the information and therefore be better able to make good decisions.

The SEC's enhancements to mutual fund prospectuses described in Section IV.A above is instructive. By harnessing the layered nature of the internet, the SEC rules allow for a "less is more" approach without sacrificing or eliminating any of the detailed information mutual funds must provide. We believe a similar solution is possible for the SPD and all the other notices and disclosures plans must provide to participants and beneficiaries.

Many plans already provide this sort of summary information presented in a non-legalese format in enrollment and distribution packets, in addition to all the legal notices required. The Department should find ways to consolidate the information into the "owner's manual" or SPD and encourage the delivery of key information at decision points into "quick start" guides. By providing guidance permitting this type of consolidation, but not requiring it, the Department would encourage plans to innovate in this manner.

D. <u>Certain ERISA-Required Disclosures Have Become Obsolete</u>.

The Department asks whether any required disclosures have become obsolete. In our 2017 letter to the ERISA Advisory Council, we suggested three notices that should be eliminated because they are no longer useful.

- <u>Summary annual report (ERISA section 104(b)(3))</u>. This notice summarizes the annual report (Form 5500) filed by the plan with the Department, IRS, and Pension Benefit Guaranty Corporation. For example, it reports total assets, expenses, and income of the plan, and information on how to obtain the full annual report. The summary annual report is much less useful than the pension benefit statement that participants currently receive. Unlike the annual report, the pension benefit statement provides specific information particular to the participant's account or benefits. For participants who still want to receive a copy of the annual report for their plan, the "quick start" guide described below could alert participants that they can request a copy.

- Deferred vested pension statement (Code section 6057(e)). This section requires plan administrators to provide participants who have separated from service with a statement of deferred vested benefits. In practice, this is now duplicated by the pension benefit statement requirement under ERISA section 105.

- Pension benefit report (ERISA section 209). This section requires a plan administrator to furnish a report to employees sufficient to determine their benefits. This notice likewise is redundant because of the pension benefit statement requirement under ERISA section 105, which requires benefit statements either on a periodic basis or upon request.

E. Streamlining Existing Notices Would Help Focus Participants on Key Information.

The Department asks whether it would be feasible, and advisable, to condense and streamline information into fewer disclosures or less voluminous disclosures.

The number of notices that plan administrators must provide to participants and beneficiaries has grown exponentially since ERISA was enacted in 1974. Originally, it was the intent of Congress that one document—the summary plan description—serve as the notice that informed participants of their rights and obligations. Since then, a significant number of new notice requirements—now numbering more than 30—have been imposed under ERISA and the Code. Many of these notices must be provided upon enrollment and annually thereafter, although the specific timing requirements vary according to applicable regulations.

The proliferation of notices, sent at multiple and different times throughout the year, only serves to confuse and overload many participants. This results in many participants ignoring notices and other information. To provide more effective disclosure to participants, the Department should consolidate these notices, where possible. This consolidation would focus participants on the key information relevant to the decisions they must make, while ensuring that more detailed information is available if needed.[53]

[53] Id.

In our 2017 letter to the ERISA Advisory Council, ICI provided specific examples of duplication and overlap that would be alleviated by consolidation.[54] But again, the best tool for consolidation is using electronic delivery, which enables information to be provided in a layered format to allow participants to easily access additional information.

F. The Department Should Not Require Any Particular Design Elements.

The Department asks whether it would be appropriate for it to require particular design elements (e.g., larger font sizes, greater use of white spaces, colors, or visuals, or the use of audio or visual) for all plans.

The design of disclosures can enhance the likelihood that participants will read and understand the information disclosed. Plan sponsors and their service providers know this well and have, for years, been using design elements to increase engagement and to increase the likelihood that participants will read the information provided to them. Electronic delivery is uniquely suited to provide information in a design format that enhances effectiveness. Electronic delivery allows plans to maximize beneficial design elements, because plans can more easily highlight key information, while making additional information readily available.

While an awareness of the relevance of design elements is important, we caution the Department against requiring any particular design elements. Prescribing specific design elements would make compliance more burdensome and would halt the innovation that is already taking place.

G. The Department Should Not Include Additional Readability Standards.

The Department asks whether there are additional or better standards for improving the readability of the content in disclosures than the Department's general standard (i.e., that documents must be written in a manner calculated to be understood by the average plan participant).

As explained in Section III of this letter, while ICI shares the Department's desire to enhance the readability of ERISA notices, we strongly urge the Department not to require additional readability standards. As the Department has likely found, it is difficult to set any concrete tests to require more simplified language. For example, the Department included the Flesch Reading Ease test in the Proposal. The general reaction of the retirement plan community seems to be that requiring notices to meet any given score on this test would make compliance significantly more difficult and would not necessarily make notices more effective. Plans strive to achieve the right balance of simplifying notices and providing complete and accurate information. The level of language they use will depend on their employee population. For this reason, we suggest that the Department retain its current general standard.

[54] Id. at pages 4-5.

H. The Proposal Would Result in Substantial Cost Savings, Which Would Benefit Participants.

In its regulatory impact analysis, the Department estimates that the Proposal would save an estimated $2.4 billion net cost over the next 10 years for ERISA-covered retirement plans by eliminating materials, printing, and mailing costs associated with furnishing printed disclosures.[55] This estimate is in line with the ICI's $400 million annual cost savings estimate.[56] The Department asks how and to what extent plans share these cost savings with plan participants.

As discussed above, typically 401(k) plan participants bear the costs associated with the plan and therefore most of the cost savings derived from the Proposal would likely flow directly to them.[57] In the more limited cases where these costs are borne by the employer, such employers could use such savings in a variety of ways that could benefit participants (for example, freeing up capital for employee contributions or other benefits.) Of course, even apart from the cost savings, encouraging the use of more electronic disclosure will benefit participants by harnessing the advantages of the internet to provide more effective disclosure.

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ICI appreciates the opportunity to comment on the Proposal and RFI. We urge the Department to finalize the Proposal. Doing so will facilitate plan sponsors' ability to use electronic modes of communication, thereby improving the effectiveness of disclosures and reducing the cost and burden of providing them.

If you have any questions about our comment letter, please feel free to contact David Abbey (david.abbey@ici.org) or Shannon Salinas (shannon.salinas@ici.org).

Sincerely,

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[55] 84 Fed. Reg. at 56915.

[56] See page 7 of Swire White Paper, supra footnote 5. Also see Figure 1, supra.

[57] See footnote 29, supra.