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October 18, 2023

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U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via Email

Re: *Request for Information—SECURE 2.0 Reporting and Disclosure,* RIN 1210–AC23

Please find below comments from the Pension Rights Center addressing Subsection F of the Request for Information concerning the Paper Statements provision of SECURE 2.0.

F. Requirement to Provide Paper Statements in Certain Cases, Sec. 338

The entire purpose of ERISA's disclosure requirements for participants and beneficiaries is for the sole benefit of workers and retirees, and their beneficiaries. Disclosures keep consumers informed about a crucial part of their deferred compensation, enable them to plan for their own retirement, and ensure that they are aware of their rights and have the documentation needed to prove their entitlement to the benefits they earned. None of this can happen unless participants and beneficiaries *actually receive* these disclosures. This is why ERISA speaks in terms of plans *furnishing* disclosures and documents and in terms of taking reasonable measures to *ensure actual receipt*.

Pension benefit statements are among the most significant of these disclosures. For those in defined benefit plans, they state the total benefits accrued, whether the participant has vested or when that will occur, and other key elements of their benefits. For workers with self-directed individual account plans, benefit statements report on the worker's account balance, the value of each investment, performance, lifetime income illustrations, etc.

I. What Sec. 338 of SECURE 2.0 Requires

A. Sec. 338(a) – In General

Sec. 338(a) requires all plans subject to 29 U.S.C. § 1025(a)(1) to provide pension benefit statements *on paper* – at least once every year for individual account plans and at least once every 3 years for defined benefit plans. SECURE 2.0 provides only two exceptions to this paper requirement for periodic benefits statements: either the participant/beneficiary must request electronic delivery, or the plan must meet the requirements and protections specified in the 2002 safe harbor for electronic delivery under § 2520.104b-1(c) [hereinafter *2002 Safe Harbor*].

1. Applicability of Paper Statement Requirement

The paper statement requirement applies to all plans; there is nothing in sec. 338(a)(2) that limits its applicability only to certain types of plans, and certainly nothing that exempts plans using the notice-and-access regime for electronic delivery under § 2520.104b-1(f) [hereinafter *2020 Safe Harbor*] from

the new paper requirement. In fact, the entire motivation for and purpose of sec. 338 was *in reaction* to notice-and-access – the intent was to create what amounts to a partial statutory override of notice-and-access (and any other contrary guidance on electronic disclosures), to require basic, periodic, retirement plan benefits statements to be furnished on paper, with two limited exceptions.

This means that, under SECURE 2.0, the specified periodic benefit statements may no longer be provided electronically by default using notice-and-access; paper is again the default for these critical disclosures, unless the plan satisfies one of the two specified exceptions, which do not include the 2020 Safe Harbor. **In its proposed regulations under sec. 338(a), DOL should make it clear that sec. 338(a) applies to *all* plans, and it should modify its notice-and-access regulations under § 2520.104b-31 to conform to SECURE 2.0's overriding mandate for periodic paper benefits statements**.

The RFI indirectly raises another question about applicability of sec. 338(a)'s basic mandate for periodic benefit statements. In footnote 7 of the RFI at 54514, DOL observes that sec. 105(a)(3) was not expressly amended by SECURE 2.0. Sec. 105(a)(3), which was adopted as part of the Pension Protection Act of 2006, permits defined benefit plans to get around the requirement to send benefits statements to participants at least once every 3 years, as long as they send an annual notice to participants letting them know of the statement's availability and how to obtain it.

SECURE 2.0 may not have expressly amended this loophole, but it certainly repealed it by implication. There is no way to sensibly read sec. 105(a)(3) and sec. 338 as capable of coexistence; sec. 105(a)(3) states that no periodic benefits statements *ever* need to be automatically provided to defined benefit plan participants, and SECURE 2.0 sec. 338(a)(2) states that a paper pension benefits statement must be provided to them at least once every 3 years. If sec. 105(a)(3) stands, then why did Congress enact a new law that clearly states that defined benefit plans must send out a paper statement every 3 years, and that the *only* exceptions are compliance with the 2002 Safe Harbor or by request? Sec. 105(a)(3) is not listed as one of those exceptions. Quite possibly, SECURE 2.0 contained so many technical changes that Congress just didn't focus on the conflict posed by this provision. In any case, SECURE 2.0 is a subsequent legislative enactment, and to the extent it conflicts with sec. 105(a)(3) – and indeed it completely conflicts with and contradicts the older provision – there is no question that SECURE 2.0 implicitly repeals and overrides sec. 105(a)(3). **DOL should clarify that, under its interpretation of SECURE 2.0, the later enactment controls and sec. 105(a)(3) is a nullity**.

2. What Constitutes a Valid Request for Electronic Benefits Statements

The amendment contained in Sec. 338(a)(2) only allows two exceptions to the paper statement requirement: either the plan complies with the 2002 Safe Harbor, or the participant/beneficiary "actually requests" electronic delivery of benefits statements and the statements are "so delivered." [Request Exception]. The 2002 Safe Harbor itself is also contains a request option for workers who may not be wired at work, as well as retirees and beneficiaries who don't work for the plan sponsor. The affirmative request option under 2002 Safe Harbor contains numerous additional protections and requirements to ensure that consumers have *access in fact* to the electronic system. Compared to the 2002 Safe Harbor request option, the "actually requests" part of the Request Exception under SECURE 2.0 is largely undefined, leaving it open to circumvention.

To the extent there is any confusion about what constitutes a "request" under the Request Exception to paper statements, DOL should clarify what constitutes a valid request under SECURE 2.0. The dictionary defines *request* as "the act or an instance of asking for something."[1] It is an affirmative act expressing a preference or demand, not passive acquiescence in a default. There should be no "request" by default. Providers sometimes pre-check a box on the website consenting to electronic delivery, relying on the consumer not to notice and uncheck it. This sort of trickery, too, should not be considered a valid request for electronic delivery of benefits statements. Moreover, the Pension Rights Center has received many anecdotal reports that those who have elected paper delivery are encountering restrictions on their ability to use websites, access electronic documents, or take advantage of other online services that those who agree to electronic delivery do not encounter. **DOL should define the Request Exception to require the participant/beneficiary to have made an *affirmative* request for electronic delivery, and make clear that deceptive practices and limiting online services for those who elect paper do not constitute a valid "request**."

In addition, requests should be knowingly made, and the logistical pre-conditions for enabling the use of electronic disclosures to be requested should be assured. For instance, to consider an affirmative request/consent valid under the 2002 Safe Harbor, § 2520.104b-1(c)(2)(ii), participants/beneficiaries must receive a notice of the documents to which electronic delivery will apply, be notified of their rights to get paper versions of individual disclosures and/or completely withdraw their consent to electronic delivery, consent in a manner that *demonstrates* their ability to actually access electronic disclosures, and be kept current about the hardware and software requirements needed to access the electronic disclosures. These are the types of requirements that ensure that a consumer has access in fact to an electronic delivery system. **DOL should look to and import most if not all of the access-in-fact and notification requirements that apply to affirmative requests for electronic disclosure in the 2002 Safe Harbor into its proposed rule on what constitutes a valid Request for electronic benefit statements under SECURE 2.0** (to be codified at 29 U.S.C. 1025(a)(2)(E)(ii)).

B. Sec. 338(b) – Implementation

1. New Initial Notice under 2002 Safe Harbor

For plans that wish to avoid SECURE 2.0's paper statement requirement and utilize electronic delivery for benefits statements, sec. 338(b)(1) states that compliance with the 2002 Safe Harbor constitutes one way to do it. In addition to fulfilling all of the preexisting requirements of the 2002 Safe Harbor, SECURE 2.0 has expanded them to add one more condition for using electronic delivery: an initial paper notice. But this new initial paper notice only applies to participants who first become eligible to participate and beneficiaries who first become eligible for benefits after Dec. 31, 2025. Prior to delivering any pension benefit statement electronically, the plan must furnish the new participants/beneficiaries with a one-time initial notice, on paper, of their right to globally elect paper delivery for *all disclosures under Title I*, not just benefit statements. Sec. 338(b)(1).

The 2002 Safe Harbor already provides that workers who are "wired at work" under the first prong of that safe harbor are entitled to be notified in each and every electronic disclosure of their right to a paper version of that particular document. § 2520.104b-1(c)(2)(iii). But, they don't currently receive

[1] *Merriam-Webster Dictionary*, at https://www.merriam-webster.com/dictionary/request (last updated, Oct. 9, 2023).

anything *on paper* notifying them a right to elect to receive *all* disclosures on paper. This new provision will be especially important to the workers who are "wired at work" who currently receive electronic communications by default under the 2002 Safe Harbor. (Those who affirmatively consent to electronic disclosures under the 2002 Safe Harbor can ask for a paper version of a particular document or simply withdraw their consent at any time in order to receive all disclosures on paper.) Additional discussion of the initial notice is below under Question 19.

2. New Provisions under 2020 Safe Harbor

The second implementation provision in SECURE 2.0 applies to all guidance regarding electronic disclosure *except* for the 2002 Safe Harbor. As DOL explains in the RFI (at 54514), sec. 338(b)(2) is referring to the 2020 Safe Harbor allowing electronic disclosures under notice-and-access. Some have argued that sec. 338(b)(2) only applies to plans taking advantage of the 2 exceptions to the paper statement requirement set forth in 338(a). Nothing in sec. 338(b)(2), however, limits it to electronic communications by request, and the statutory provision expressly excepts the 2002 Safe Harbor from 338(b)(2). The 2020 Safe Harbor at 29 CFR § 2520.104b-31 is the *main* "applicable guidance governing electronic disclosure" by DOL that exists. DOL's interpretation of the applicability of sec. 338(b)(2) to the 2020 Safe Harbor is correct.

Sec. 338(b)(2) directs DOL to update the 2020 Safe Harbor regulations to require five measures that appear to be intended mainly to ensure that participants and beneficiaries are better apprised of their delivery options. For instance, the first two provisions ensure that participants and beneficiaries are aware they can choose global *electronic* delivery, including for benefits statements, and how to request it. The fifth provision also facilitates access to electronic statements; it allows (but doesn't require) plans to provide a "duplicate" electronic benefits statement even when they provide paper benefit statements. The third and fourth provisions address paper benefit statements – disallowing any charge for paper, and requiring every electronic disclosure to explain how to execute a global election for paper. Additional discussion of these requirements is below under Question 20.

II. Response to RFI Questions 19-21

Question 19 – What modifications or updates to the 2002 safe harbor are needed to implement section 338 of SECURE 2.0?

Our first recommendation for updating the 2002 Safe Harbor to implement SECURE 2.0 is to delete the unnecessary and structurally confusing internal cross-reference to the 2020 Safe Harbor that is currently embedded in the 2002 Safe Harbor (in § 2520.104b-1(c)(1)). When DOL created the 2020 Safe Harbor (in § 2520.104b-1(f)) as an alternative to the 2002 Safe Harbor, it included a cross-reference to paragraph (f) *within* paragraph (c)(1). Since (c) is the basis for the longstanding 2002 Safe Harbor, and especially since it is now integral to the paper statement exception requirement in sec. 338(a), it makes no sense to refer to the other safe harbor within that subsection – it adds nothing and simply causes confusion. It is sufficient that paragraph (f) of § 2520.104b-1 already states that the 2020 Safe Harbor is an alternative to the 2002 Safe Harbor for meeting the disclosure requirements (of § 2520.104b-1(b)(1)), and that paragraph (f) then cross-references the new 2020 Safe Harbor provisions at § 2520.104b-31. **In § 2520.104b-1(c)(1), delete "including the alternative methods for disclosure through electronic media in paragraph (f) of this section,".**

Second, in updating the 2002 Safe Harbor to include SECURE 2.0's requirement for an initial paper notice to new participants and beneficiaries, **we recommend that the proposed regulation specify details as to the timing, contents, and formatting.** The regulation should:

- Require the initial paper notice *itself* to be provided in a conspicuous manner to ensure it is actually received and seen. Ideally, it should be sent to the participant/beneficiary in the mail rather than allowing it to be buried in a pile of onboarding papers or in open enrollment season packets (as is permitted under the current initial notice requirement under the 2020 Safe Harbor);
- Specify that the one-time initial paper notice be given to participants/beneficiaries before the plan relies on electronic communications, and when it would be most relevant and meaningful, i.e., for participants when they are first eligible to participate in the plan (e.g., via auto-enrollment or vesting), and for beneficiaries when they are first eligible for benefits;
- Make clear that the notification of the right to globally elect all Title I disclosures on paper, free of charge, should be conspicuously displayed on the notice; and
- Spell out the required contents of the initial paper notice, which should be similar to the content requirements for the initial paper notice under the 2020 Safe Harbor, but with the following modifications:
    - Instructions for how to exercise the global opt-out for paper should be conspicuous and unambiguous (e.g., not just "contact HR"), and include contact information, including a telephone number, for plan officials who can answer questions and execute the election;
    - Rather than identification of the email address *assigned by the plan* like under notice-and-access, the initial notice should specify that the email address to be used for electronic communications should be provided by the participant/beneficiary, as it is under § 2520.104b-1(c)(2)(ii)(B) for *requests* for electronic delivery;
    - Initial notices should warn participants/beneficiaries to keep the plan informed of changes in their mailing and email addresses; and
    - The notice should include a caution to the consumer that various documents such as benefit statements and the Summary Plan Description may later be key to being able to claim their entitlement to benefits in retirement, and so they should make sure to save paper copies of these documents for safekeeping.

Question 20 – What modifications or updates to the 2020 safe harbor are needed to implement section 338 of SECURE 2.0?

In our discussion above, we have already stated that DOL needs to amend the 2020 Safe Harbor to account for the changes made by the paper statements provision in sec. 338(a). It should be amended to state that **the notice-and-access regime may not be used for periodic benefits statements, which must be provided on paper at the intervals specified, unless the plan complies with the 2002 Safe Harbor or the consumer makes a valid affirmative request (as further defined by DOL) for electronic benefit statements.**

Here, to determine if updates are needed, DOL asks commenters to compare SECURE 2.0's five new measures required under the 2020 Safe Harbor related to apprising consumers of their delivery options with the requirements for initial notices under the 2020 Safe Harbor. Since under sec. 338(b)(2)(B)(ii), the paper benefits statement must contain a telephone number for switching to electronic delivery, it would only be equitable to **amend the 2020 Safe Harbor's provision on**

initial notices (§ 2520.104b-31(g)) to require them also to include a telephone number along with the explanations for how to opt *out* of electronic delivery, both globally and for how to request a paper version of a particular document. In both the paper benefits statement and initial paper notice, **the telephone number should be conspicuously displayed** so that consumers can easily seek out further information and change their election if they so wish.

In addition, under SECURE 2.0, Congress reasonably contemplated that some, possibly many, who receive paper benefits statements may also want to get an electronic copy as well (the fifth new measure), yet for some inexplicable reason, Congress framed this provision as permissive. Sec. 338(b)(2)(E) states that plans are "*permitted* to furnish a duplicate electronic statement in any case in which the plan furnishes a paper pension benefit statement" (emphasis added). The 2020 Safe Harbor already contains a similar asymmetry for disclosures in general, whereby those who receive electronic disclosures are entitled to request a paper copy, but for those who choose paper disclosures, nothing forbids the plan from denying them access to electronic versions on the website. The preamble to the 2020 Safe Harbor states "Once a plan respects the individual's election and satisfies its obligation to furnish paper documents, the plan *may* continue to provide online access to covered documents that are available as well."[2] It seems to us that permitting plans to penalize those who choose paper by denying them electronic access is to allow plan administrators to "unduly inhibit or hamper" consumers' right to opt out of electronic delivery, contrary to the intent behind § 2520.104b-31(f)(3). DOL may not be able to change the fifth "access" measure in SECURE 2.0, but it can certainly change the notice-and-access regulations. Plans that are set up for electronic delivery under the 2020 Safe Harbor likely have the same individualized information that they provided on paper already available on their website. **DOL should amend § 2520.104b-31(f) to require plans utilizing notice-and-access to provide access to the website, online accounts, and online transactions to individuals who choose to receive paper disclosures.**

Finally, the RFI asks to what extent periodic benefits statements under 105(a)(2) – presumably whether delivered on paper or electronically – should contain the information now specified for initial notices under the 2020 Safe Harbor. **We recommend that the contents of the initial notice under the 2020 Safe Harbor *not* be included in benefits statements**. Benefits statements and initial notices regarding electronic delivery are two very different documents and serve very specific purposes. Benefits statements give participants and beneficiaries fundamental information about the type of benefit they have earned, how much it is worth, when the consumer has a nonforfeitable right to that benefit, and other individualized information to help plan for retirement. The initial notice under the 2020 Safe Harbor, on the other hand, notifies participants and beneficiaries that they will be defaulted into an electronic delivery system for all disclosures unless they opt-out, warns them of the fact that electronic documents will disappear from the website, etc. We are concerned that adding the initial notice information to the benefits statements would overload the benefits statements with so much additional information that the fundamental benefits statement information would get lost.[3]

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[2] DOL, Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, Final Rule, 85 Fed. Reg. 31884, 31899 (May 27, 2020) (emphasis added), *at* https://www.govinfo.gov/content/pkg/FR-2020-05-27/pdf/2020-10951.pdf.

[3] In our original comments on the Notice-and-Access regime when it was proposed, the Pension Rights Center also raised significant objections to the provisions allowing plans to consolidate and combine lots of different disclosures into one big electronic disclosure and Notice of Internet Availability. See, Comments of Pension Rights Center Re: Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA, RIN 1210-AB90, at 7 (Nov. 22 2019), *available*

Question 21 – Should both safe harbors be modified such that their continued use by plans is conditioned on access in fact?

Our short answer to this question is yes, absolutely, as long as "access in fact" is defined to require access in fact to the *actual disclosure* – not merely access in fact to the website where it is posted. DOL should insist upon confirmation of access in fact *to the actual disclosure* – aka actual receipt – as a condition of continued use of both safe harbors.

The ERISA disclosure regime is supposed to be structured around informing workers and retirees of their benefits and rights, not around the administrative convenience or maximum profits of the financial services industry. As we have consistently pointed out, none of the required disclosures under ERISA mean anything unless they are *actually received* by the Participant/Beneficiary. This is why all plan administrators are commanded to "furnish" disclosures and utilize "measures reasonably calculated to *ensure actual receipt* of the material…." § 2520.104b-1(a) and (b).

The 2002 Safe Harbor has served participants and beneficiaries well for over two decades. We would argue that this is due to the fact that it *already* requires *effective access in fact* to electronic communication systems. For workers, the 2002 Safe Harbor requires them to be "wired at work" – they must have effective access to a computer in a work location and use of a computer must be integral to their duties. § 2520.104b-1(c)(2)(i). These two requirements ensure real functional access in fact to electronic delivery by workers as a predicate for allowing it under the 2002 Safe Harbor.

Moreover, everyone else – such as workers without meaningful or regular access to the employer's computer system, deferred vested participants, and beneficiaries – must either receive paper disclosures or may affirmatively request that they receive disclosures electronically. For this group, the 2002 Safe Harbor contains numerous, highly protective elements to be in place to ensure effective access in fact to the electronic communications system. For instance, they must have consented in a way that "*demonstrates* the individual's ability to access information in the electronic form that will be used to provide the information…," and the individual must be given prior notice of any "hardware and software requirements" (including material changes) necessary to *access and retain* the electronic disclosures. § 2520.104b-1(c)(2)(ii) (emphasis added). In essence, the 2002 Safe Harbor already provides standards that constitute access in fact to an electronic delivery system. Notice of these requirements also serve an educational function to inform consumers about what electronic access really involves.

Importantly, the 2002 Safe Harbor also already comes close to requiring confirmation of actual receipt of the disclosure itself. It states that the plan administrator must take "appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents — … [r]esults in actual receipt of transmitted information…." And then it gives illustrative examples of how actual receipt might be confirmed, e.g., "…by conducting periodic reviews or surveys to confirm receipt of the transmitted information." § 2520.104b-1(c)(1)(i)(A). Technology has become far more advanced and sophisticated since 2002, now enabling plan administrators to routinely confirm actual receipt. Thus, **it wouldn't take much for DOL to strengthen § 2520.104b-**

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at https://pensionrights.org/wp-content/uploads/2019/11/prc_comments_on_proposed_e-disclosure_safe_harbor_rin_1210-ab90_11-22-2019_.pdf.

1(c)(1)(i)(A) of the 2002 Safe Harbor to ensure that participants/beneficiaries have actually received their electronic disclosures.

The 2020 notice-and-access Safe Harbor, on the other hand, doesn't come anywhere close to ensuring access in fact to electronic communications let alone actual receipt of the disclosure, *but it can and should*. The 2020 Safe Harbor was a giant step backward from the statutory touchstones of "furnished" disclosures that are "actually received." Whether one calls it access in fact or actual receipt, the most glaring failure of the notice-and-access rule was its disregard for actual receipt of disclosures by consumers. Instead, it allows plans to fulfill their disclosure obligations with a meager "one and done" email or text that is easily diverted to spam, overlooked, or put off until the busy consumer can: find the time to drop whatever else they are doing to read the email; find their credentials and go through multifactor authentication to log in to a website; and then go find, read, and download/print the actual disclosure, assuming they even have a computer and printer to do all that. Under the 2020 Safe Harbor, the plan administrator's responsibility begins and ends with sending out a Notice of Internet Availability that doesn't bounce back as undeliverable. There is no "furnishing" of disclosures, no "actual receipt."

The RFI asks whether plan administrators can accurately and reliably ascertain whether an individual has actually accessed (opened or downloaded) an electronically furnished disclosure. The answer is yes. The capacity to monitor and confirm actual receipt is *built in* to the technology that plan administrators and/or their service providers use to communicate electronically with plan participants and beneficiaries. Plans that use technology to send emails and maintain websites are already able to tell whether and when an email was opened, whether the participant ever logged on to the website, and whether she or he ever opened or downloaded the disclosure posted there. The web analytics tools and algorithms that are built into the software can even detect how long one's cursor lingers in a particular place on the website.

What's more, *they already do it*. We know this because these practices are disclosed in the fine-print privacy policies posted on their websites. For instance, Fidelity's Privacy Policy states:

> When you use or interact with us via our digital offerings, or interact with us via electronic communications, we (or our service providers on our behalf) may *automatically collect* technical and navigational and location information, such as device type, browser type, Internet protocol address, *pages visited, and average time spent on our digital offerings*. … Cookies help us to collect information about users of our digital offerings, including *date and time of visits, pages viewed, amount of time spent using our digital offerings*, or general information about the device used to access our digital offerings.[4]

Vanguard's Privacy Policy is similar:

> We use a variety of online technologies, as described further below, to collect information that helps us understand how our website and our mobile application are used. Specifically, when you visit Vanguard online, we or our service providers may *automatically collect* a variety of technical and navigational information about you via these technologies, including …[the] date and time of your visit; time since your last visit; *pages you view*; *links you select;* [and]

[4] Fidelity, Privacy Policy, *available at* https://prime.fidelity.com/app/item/RD_13569_19515/privacy-policy.html (last updated Aug. 2022) (emphasis added).

> searches you conduct…. *We also may use similar tracking technologies in emails* that we or our service providers send to you…. Web beacons allow us, directly or through our service providers, to collect information used for website and mobile application analytics, such as how many users have visited particular pages or *downloaded documents* …, [and] *to determine whether and when you receive and open our emails, and whether you select any links in an email.*[5]

And this is merely what is disclosed in the privacy policies; the metrics collected by these companies about the use of their websites are likely far more extensive. If a plan administrator is using the 2020 Safe Harbor, it is a good bet their software already includes all these capabilities. The ability to confirm opening/downloading of disclosures is inherent, automated, effortless, and most likely costless for the plan administrator/service provider.

The RFI also asks whether, if plans can ascertain whether a disclosure has actually been accessed, they should be required to monitor whether individuals have actually logged on and visited the website as a condition of being considered effective disclosure. We strongly urge DOL to propose and adopt such a requirement, but it needs to be structured to require much more than merely opening an email or visiting the website or logging in, none of which are the equivalent of accessing the disclosure. **The 2020 Safe Harbor should be amended to require plans utilizing it to confirm that the participant/beneficiary actually opened or downloaded the disclosure – confirming that they had access in fact/actual receipt of the *disclosure itself*, not merely access to a website – before electronic delivery should be considered effective disclosure under this safe harbor.**

Finally, the RFI asks whether, in the event that the plan's electronic tracking shows that the consumer has not actually visited or logged into the website, the safe harbors should require the plan administrator to revert to paper. We think this conclusion is right, but again, the predicate is inadequate. Accessing a website should not be the test of effective disclosure. For example, logging into a website to check one's 401(k) balance has nothing to do with whether the consumer actually received their required fee disclosure. Under the 2020 Safe Harbor, failure to actually receive a disclosure could be due to any number of factors, including inertia on the part of the participant/beneficiary. This is especially a concern if a disclosure requires action or is time-sensitive. Certainly, the plan could first send a reminder or confirm the accuracy of the email address. Ultimately, however, **in the event that the plan determines that a participant/beneficiary has not opened or downloaded a mandated disclosure within a reasonable amount of time under the circumstances, the plan should be required to send a paper copy to the participant/beneficiary**.

Some have argued that confirmation of actual receipt should not be required because it is not required with paper mail. It is true that a plan cannot confirm that a consumer received and opened their paper mail. However, mail that isn't deliverable gets returned, and research by the direct mail industry indicates that paper mail has a 90% open rate, compared with only a 23% open rate for email.[6] Presumably, home-delivered mail from one's employer or retirement plan would have an

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[5] Vanguard, Vanguard's Online Privacy Notice, available at https://investor.vanguard.com/trust-security/privacy-center/online-privacy-notice (last updated Sept. 6, 2023) (emphasis added).

[6] Compu-Mail, *Direct Marketing Statistics for 2022* (posted June 14, 2022), *at* https://www.compu-mail.com/statistics/30-direct-mail-statistics-you-can-use-right-now. *See also*, Intuit Mailchimp, *Email Marketing Statistics and Benchmarks by Industry*, (average open rate in 2019 was 21.33%), *at* https://mailchimp.com/resources/email-marketing-benchmarks**.** Other

even higher open rate (so would email, but not as high as paper mail). In any case, the technology used for notice-and-access CAN confirm opening/downloading – confirmation that a consumer has actually opened a disclosure is one of the few real advantages of electronic delivery over snail mail – and it is in the interest of workers and retirees for each delivery system to be required to be as effective as it possibly can.

A requirement for plan administrators to confirm access in fact/actual receipt of the disclosure wholly within DOL's jurisdiction. As DOL notes, the RFI is focused on SECURE 2.0 provisions that principally impact, directly *or indirectly*, ERISA's reporting and disclosure requirements. RFI at 54511. Confirming actual receipt of statutorily mandated disclosures in electronic form is clearly directly or indirectly related to implementing sec. 338. In any case, DOL is not *restricted* to making regulatory changes specified in SECURE 2.0. The law's inclusion of sec. 338 may have prompted DOL to take this opportunity to determine whether the 2020 Safe Harbor needs some other adjustments as well. In addition to any updates it deems related to implementing SECURE 2.0, DOL can always propose and make regulatory changes within its jurisdiction.

Finally, in addition to more effectively implementing sec. 338 of SECURE 2.0, there is another SECURE 2.0-related benefit in DOL proposing to make confirmation of actual receipt a condition of using the 2020 Safe Harbor. Although DOL says in the RFI that it is not yet focused on the study and report required by sec. 319 and due in late December 2025, that report to Congress must contain an analysis of the effectiveness of disclosure requirements, including "how participants and beneficiaries are providing preferred contact information, the methods by which plan sponsors and plans are furnishing disclosures, and the rate at which participants and beneficiaries are *receiving, accessing*, understanding, and retaining disclosures." Sec. 319(b)(2) (emphasis added). To obtain this information and make this report, sec. 319(b)(3) contemplates that DOL, Treasury, and the PBGC will need to "conduct appropriate surveys and data collection." This task will be much more doable if plans are already confirming and tracking data on actual receipt. In fact, ***right now*, plan administrators should be required to collect and keep this data, preferably broken down by key factors such demographics and size of accrued benefit, so that when DOL and the other agencies conduct the data collection called for in 319(b)(3), plans will already have and be able to report it.**

The Pension Rights Center recommends one more modification for further consideration. The ERISA disclosure delivery regime specifies both paper and electronic defaults, along with rights and procedures for opting out of whatever default applies. However, **DOL should give serious consideration to whether and to what extent defaults are even needed in this arena**. The now-established body of behavioral economics research teaches that using defaults as part of "choice architecture" is extremely powerful and makes a major difference in people's behavior and choice outcomes. The force of inertia with defaults produces the absolutely predictable consequence that the vast majority of participants and beneficiaries will never see the disclosures ERISA says plans are obligated to provide, nor have them available when needed to prove rights to benefits decades later.

Consumers can easily be asked to choose their preferred delivery system, to fill out an election form whether they'd like to receive retirement plan disclosures on paper or electronically. The election form can make clear that asking for global paper delivery doesn't preclude access to one's

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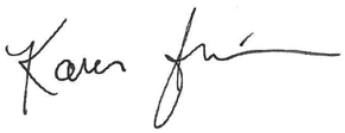
research finds that "mail connects in ways other media can't match," USPS, *The Mail Moment*, at https://www.pb.com/docs/US/pdf/Microsite/Nonprofit/ed_np_getyourmailopened_05MailMoment.pdf.

information also on the website, and asking for global electronic delivery doesn't waive one's right to also ask for paper, selectively or globally. Employers can collect this election form the same way it collects other election forms from employees such as the W-4, health insurance enrollment, etc. Enabling participants and beneficiaries to file a simple this-or-that election form would better respond to people's preferences, avoid the excessive influence of defaults and inertia, and also have the effect of resolving a longstanding controversy in a way that is true to preferences and needs of participants and beneficiaries.

Respectfully submitted,



Karen D. Friedman
Executive Director