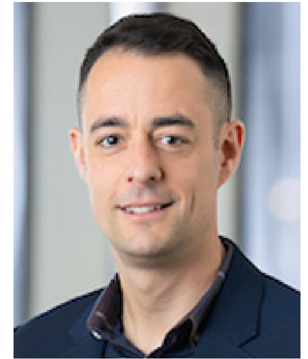
TRUCKER ✦ HUSS

BENEFITS REPORT

DOL Proposes to Formally Regulate ESG Investing



ROBERT R. GOWER

JULY 2020

On June 30, 2020, the United States Department of Labor (DOL) published a Proposed Rule in the Federal Register seeking to formalize guidance concerning environmental, social, and governance (ESG) considerations in selecting investments for plans subject to the Employee Retirement Income Security Act of 1974 (ERISA).

Background

ESG considerations are not new to institutional investing. ESG investments are similar to "socially responsible investments" in that the underlying holdings of funds have undergone some level of ethical and moral review, but ESG funds go a step further to incorporate the ESG component as part of the long-term financial strategy of the fund. ESG investing has become an increasingly popular topic of conversation, in part due to increased awareness by participants and plan fiduciaries that mutual fund investments may include

INDIVIDUAL ARTICLES WILL BE AVAILABLE AT TRUCKERHUSS.COM/PUBLICATIONS

IN THIS ISSUE...

1 DOL Proposes to Formally Regulate ESG Investing

3 IRS Allows for Temporary Flexibility with Long-Awaited Guidance that Expands Mid-Year Election Change Opportunities for Cafeteria Plans

7 Final Rule on E-Disclosures: The DOL Provides Retirement Plans with an Additional Safe Harbor for Electronic Disclosure of Required Plan Notices Under ERISA

12 Firm News

CELEBRATING 40 YEARS
1980 – 2020

SPECIALIZED TALENT & EXPERTISE TO SOLVE THE MOST COMPLEX AND SOPHISTICATED CLIENT CHALLENGES.

With more than 25 attorneys practicing solely in employee benefits law, Trucker Huss is one of the largest employee benefits specialty law firms in the country. Our in-depth knowledge and breadth of experience on all issues confronting employee benefit plans, and their sponsors, fiduciaries and service providers, translate into real-world, practical solutions for our clients.

A DIVERSE CLIENT BASE. We represent some of the country's largest companies and union sponsored and Taft-Hartley trust funds. We also represent mid-sized and smaller employers, benefits consultants and other service providers, including law firms, accountants and insurance brokers.

PERSONAL ATTENTION AND SERVICE, AND A COLLABORATIVE APPROACH. Since its founding in 1980, Trucker Huss has built its reputation on providing accurate, responsive and personal service. The Firm has grown in part through referrals from our many satisfied clients, including other law firms with which we often partner on a strategic basis to solve client challenges.

NATIONALLY-RECOGNIZED. Our attorneys serve as officers and governing board members to the country's premier employee benefits industry associations, and routinely write for their publications and speak at their conferences.

TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617

15821 Ventura Blvd, Suite 510
Los Angeles, California 91436-2964

Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com

www.truckerhuss.com

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

holdings in companies or industries to which they are morally or ethically opposed. As more attention has been drawn to the underlying holdings of mutual funds, participants and fiduciaries are increasingly considering whether investments which take into account greater ethical and moral considerations may be made available under their plans.

Under Section 404(a) of ERISA (the prudent person standard), fiduciaries with discretionary authority over a plan's investments (or investment alternatives in the case of a participant directed defined contribution plan) must act solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. The DOL has long interpreted this prudent person standard to place limitations on plan fiduciaries' consideration of non-pecuniary (collateral) benefits when evaluating a potential investment. Although older guidance allowed limited consideration of collateral benefits, the most recent DOL guidance prior to the issuance of the Proposed Rule, DOL Field Assistance Bulletin 2018-01, provided two restrictive guiding principles in weighing ESG factors when considering investments:

- Fiduciaries cannot accept lower investment returns or higher risks for participants in order to promote collateral social policy goals; and
- Fiduciaries should use collateral factors such as ESG considerations only as a "tie-breaker" when two investments are otherwise economically equivalent with respect to return and risk.

Taking these factors into account, plan fiduciaries have been advised to tread cautiously when evaluating an investment with an ESG component for addition to a plan's investment lineup, and to focus on financial return as central to the decision-making process.

Proposed Rule

The Proposed Rule, "Financial Factors in Selecting Plan Investments" would amend the regulations under Section 404(a) of ERISA to provide regulatory guidelines for applying the prudent person standard to ESG investment selection, which the DOL considers "a growing threat to ERISA's fiduciary standards." As the DOL states in the preamble to the Proposed Rule, it "is designed in part to make clear that ERISA plan fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-pecuniary objectives." To achieve this objective, the Proposed Rule provides the following guidance:

- The duty of loyalty and prudence under Section 404(a) of ERISA is satisfied in connection with a fiduciary's investment decision if the investments or investment courses of action are selected based solely on pecuniary factors and not on the basis of any non-pecuniary factor.
- ESG or other similar considerations are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. Such factors should reflect a prudent assessment of their impact on risk and return.
- The duty of loyalty under Section 404(a) of ERISA requires that fiduciaries do not subordinate the interests of participants or beneficiaries to the fiduciary's or others' interests.
- Where investment alternatives are determined to be economically indistinguishable, and one of the investments is selected on the basis of a non-pecuniary factor, the fiduciary must document specifically why the investments were determined to be indistinguishable and why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries. Importantly, the DOL notes that "economically indistinguishable" investments rarely exist, if ever, indicating a potential for increased scrutiny.
- In the context of defined contribution plans, prudently selected ESG funds will not violate

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

ERISA if: only objective criteria are used to select and monitor investment alternatives (benchmarks, expense ratios, fund size, historic returns, etc.), the process of applying such criteria is documented, and ESG is not a component of the plan's qualified default investment alternative (QDIA).

Impact of Proposal

The Proposed Rule seeks to solidify the DOL's current position that ERISA does not allow plan fiduciaries to sacrifice return or assume any additional risk in order to incorporate non-pecuniary goals. In so doing, the Proposed Rule makes it clear that financial return is paramount by imposing a burden on fiduciaries to carefully document their investment decision-making process whenever a potential investment has a non-pecuniary or collateral objective. This documentation requirement puts fiduciaries on notice that ESG investments will be subject to considerable scrutiny for possible breach of fiduciary duty. This burden and compliance challenge will undoubtedly have some degree of chilling effect on ERISA plan ESG investing, at least for the foreseeable future.

Looking Toward a Final Rule

Given that it is a presidential election year, the current administration is likely to attempt to finalize a regulation prior to the election — since an effective final rule would require more effort to undo in the event of a new administration with a differing view on ESG investing under the prudent person standard. As such, the DOL has established a short 30-day public comment window for the proposed rule (expiring July 30, 2020) — and will probably work swiftly to issue a final rule within the coming months, likely before year end.

IRS Allows for Temporary Flexibility with Long-Awaited Guidance that Expands Mid-Year Election Change Opportunities for Cafeteria Plans

GISUE MEHDI AND BRIANA B. DESCH

JULY 2020

In response to the COVID-19 pandemic, the U.S. Department of Treasury and the Internal Revenue Service (IRS) issued Notice 2020-29 and Notice 2020-33 (the "Notices") on May 12, 2020. Notice 2020-29 provides increased flexibility for participants to make mid-year health plan, health flexible spending account ("Health FSA"), and dependent care flexible spending account ("Dependent Care FSA") election changes. Notice 2020-33 increases the carryover limit permitted for Health FSAs. This guidance is permissive, so employers are not required to make these plan changes.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Expanded Mid-Year Election Changes for Section 125 ("Cafeteria") Plans

Generally, once a participant makes a cafeteria plan election, that election is "irrevocable" for the entire plan year unless the participant experiences a Treasury Regulation Section 1.125-4 "permitted life event" (e.g., marriage, divorce, birth, etc.), which allows the participant to make certain plan changes that are consistent with that event.

As a result of the COVID-19 pandemic, employees may have experienced unanticipated changes to their health plan and childcare needs. Other employees may have put elective medical visits and procedures on hold during the pandemic and, therefore, have not incurred expenses under their Health FSAs. Generally, these COVID-19–related health plan changes in participant circumstances did not fall into any of the permitted life event categories, so employees were stuck with their pre-COVID-19 plan elections.

Accordingly, to address these unexpected circumstances, Notice 2020-29 permits employers to amend their cafeteria plans to allow for the following prospective mid-year election changes.

Mid-year enrollment in employer sponsored medical, dental, or vision coverage.

1) An employer, in its discretion, may amend its Internal Revenue Code Section 125 Plan ("Section 125 Plan") to allow employees who previously waived employer sponsored medical, dental, and/or vision plan coverage the opportunity to elect employer sponsored medical, dental, and/or vision plan coverage on a prospective basis, for the remainder of the 2020 calendar year.

Change plan options or add dependents.

2) An employer, in its discretion, may amend its Section 125 Plan to allow an employee to revoke his or her existing election for employer sponsored health coverage and to make a new election to enroll in different health coverage sponsored by the employer (e.g., changing from an HMO to a PPO plan, or changing enrollment from self-only coverage to family coverage).

Revoke health plan coverage.

3) An employer, in its discretion, may amend its Section 125 Plan to allow an employee to revoke an existing election for employer sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other comprehensive health coverage not sponsored by the employer.[1] There is a model attestation form provided in Notice 2020-29 for employees who want to drop coverage.

Note: This permissive guidance does not require employers to provide unlimited election changes. An employer may determine the extent to which the election changes above are permitted and applied (provided that the employer considers any nondiscrimination concerns). For example, an employer may wish to limit the potential for adverse selection of health coverage by employees. To prevent adverse selection of health coverage, an employer may choose to only permit employees to make election changes that will result in increased or improved coverage (e.g., by only allowing election changes from self-only coverage to family coverage, or from a low option plan covering in-network expenses only to a high option plan covering expenses in and out of network).

Ultimately, the employer has flexibility in its approach to offer these expanded mid-year election change opportunities.

Flexible spending account election changes.

Notice 2020-29 also permits an employer to amend its Section 125 Plan to allow employees to make mid-year flexible spending account changes for any reason on a prospective basis for the remainder of the 2020 calendar year. For example, an employer may amend its Health FSA to allow an employee to revoke an election, make a new election, or decrease or increase an existing election.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Note: Employers may also decide to limit the extent to which the flexible spending account election changes are allowed. For example, to prevent over-spent flexible spending accounts, an employer could choose to limit mid-year election changes to amounts no less than the amounts already reimbursed. For ease of administration, employers may also consider limiting the time period during which these changes are allowed.

Extended Period to Incur Claims for Health FSAs and Dependent Care FSAs

In order to provide another way to help employees who may have trouble incurring medical or dependent care expenses during the COVID-19 pandemic, Notice 2020-29 also provides flexibility for Section 125 plans by extending the permissible period to incur Health FSA and/or Dependent Care FSA expenses. Specifically, an employer may now amend its Section 125 plan to permit employees to apply unused amounts remaining in Health FSAs or Dependent Care FSAs as of the end of a grace period ending in 2020 or a plan year ending in 2020, to pay or reimburse qualified expenses incurred through December 31, 2020. (Usually, the IRS rules only allow a maximum grace period up to 2.5 months after the end of the plan year.)

Under the normal carryover rule, a Section 125 plan may permit the carryover of unused amounts remaining in a Health FSA as of the end of a plan year to pay or reimburse a participant for medical care expenses incurred during the following plan year, subject to the carryover limit (prior to Notice 2020-33, discussed below, this amount was limited to $500). Under the IRS rules, for a Health FSA, a Section 125 plan may adopt *either* a carryover or a grace period (or neither).

How would this work?

For example, an employer that sponsors a Section 125 plan with a Health FSA that currently includes a grace period ending on March 15, 2020 (for the 2019 calendar plan year, the time to incur claims would normally end 2.5 months after the end of the plan year) may optionally extend this grace period to December 31, 2020. This would allow employees to apply unused amounts remaining in an employee's Health FSA as of March 15, 2020 to reimburse the employee for medical care expenses incurred through December 31, 2020.

Note: If an employer chooses to extend its 2019 plan year general purpose Health FSA grace period through December 31, 2020, this will impact an employee's Health Savings Account (HSA) eligibility. If an employee has unused amounts remaining at the end of the plan year (e.g., as of December 31, 2019) and the employer extends the 2019 general purpose Health FSA grace period through December 31, 2020 — the employee will be HSA ineligible for all of 2020.

Health FSA Examples

Below are two examples explaining how the extended claim period can apply to Health FSAs with a grace period or with a carryover provision:

Example 1 — with a grace period: Employer A sponsors a Section 125 plan with a Health FSA that has a calendar year plan year and provides for a grace period ending on March 15th immediately following the end of each plan year. Employer A may now amend its Section 125 plan to permit employees to apply unused amounts remaining in their Health FSAs as of March 15, 2020, to reimburse the employee for medical care expenses incurred through December 31, 2020.

Example 2 — with a carryover provision: Employer B sponsors a July 1st through June 30th plan year Health FSA with a $500 carryover limit, and employees have more than $500 remaining in their Health FSA at the end of the plan year ending June 30, 2020 (i.e., the "2019 plan year"). Employer B may now amend the Section 125 plan to permit employees to incur Health FSA claims through the end of calendar year 2020, allowing for claims incurred through December 31, 2020, to be paid with carryover amounts from the 2019 plan year.

Increased Carryover Limit for Health FSAs

As discussed briefly above, the IRS generally permits a Health FSA to include a carryover provision that unused

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

amounts remaining in an account as of the end of a plan year may be used to pay or reimburse a participant for medical care expenses incurred during the following plan year, subject to the carryover limit (which was previously $500).

Notice 2020-33 now permits Health FSAs under a Section 125 plan to be amended to increase the prior maximum $500 carryover limit for plan years starting in 2020 to $550, which is 20 percent of the current inflation-adjusted $2,750 limit on Health FSA contributions.

Note: This is a permanent change.

COVID-19 Relief for HDHPs Is Further Clarified

In one of the earliest pieces of COVID-19 guidance, the IRS issued Notice 2020-15 on March 11, 2020, stating that a High Deductible Health Plan (HDHP) will not lose its qualifying HDHP status because COVID-19 treatment and testing are covered prior to the participant satisfying the applicable plan deductible (i.e., on a "first-dollar basis").

Notice 2020-29 clarifies that diagnostic testing for influenza A&B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV) are included as part of the "testing and treatment for COVID-19" that may be provided on a first-dollar basis without jeopardizing a plan's HDHP status.

Notice 2020-29 further clarifies that telehealth and other remote care services may be provided on a first-dollar basis through an HDHP without jeopardizing an individual's HSA eligibility retroactively to January 1, 2020.

Employer Takeaways

These new permissive rules provide both temporary and permanent relief to employees and employers. Employers should consider whether, and to what extent, to offer these temporary mid-year election change opportunities, whether to offer extended Health FSA or Dependent Care FSA periods to incur claims, and whether to offer the increased carryover amount for Health FSAs.

If an employer decides to implement any of the changes provided for under the Notices, the Section 125 plan must be amended by December 31, 2021. Even though the IRS guidance is generous with respect to the timing of the plan amendments, employers should inform employees of these changes through an ERISA Summary of Material Modification as soon as possible.

Before making any final decisions, employers should also coordinate with their third-party administrators and insurance carriers to determine whether they can administer such plan changes.

---

[1] An employer may rely on an employee's written attestation, unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other comprehensive health coverage that is not sponsored by the employer.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Final Rule on E-Disclosures: The DOL Provides Retirement Plans with an Additional Safe Harbor for Electronic Disclosure of Required Plan Notices Under ERISA

YATINDRA PANDYA

JULY 2020

Background

On May 27, 2020, the Department of Labor (DOL) published its final rule on electronic disclosures, creating an additional voluntary fiduciary safe harbor for electronically providing participant disclosures required under the Employee Retirement Income Security Act of 1974, as amended (ERISA). The effective date of this final rule is July 27, 2020, but the DOL stated it will not take enforcement action against plan administrators that rely on the safe harbor prior to that date. The DOL anticipates the new safe harbor will reduce plan costs by an estimated $3.2 billion over the next decade, while making disclosures more readily accessible and useful to plan participants.

The new, additional safe harbor does not supersede the 2002 safe harbor.[1] It goes beyond the 2002 safe harbor by covering all retirement plan participants and beneficiaries who have not opted-out, not just those who are "wired at work" or who affirmatively consent to electronic delivery. The final rule only applies to required retirement plan disclosures that are within the jurisdiction of the DOL and is fundamentally similar to the proposed rule, published on October 23, 2019. For background discussion of the proposed rule, see DOL Proposes New E Disclosure Regulations by Craig P. Hoffman, October 2019. For a webinar to compliment the subject matter of this article, see E-Disclosures—The DOL Regulations are Finally Final!, presented by Freeman Levinrad and Nick White.

Final Rule

The final rule amends Subpart F of 29 C.F.R. Section 2520 to create a new section 2520.104b-31 entitled ***Alternative method for disclosure through electronic media***. The final rule creates a safe harbor for plan administrators to furnish "covered documents" to "covered individuals" (these terms are explained later in this article) through a two-step process:

(1) An initial ***paper*** notice is furnished to covered individuals whom the plan administrator intends to cover under the safe harbor. If the individual does not globally opt-out of electronic disclosure, the plan administrator may commence with either a ***"Notice and Access"*** approach to e-disclosure, or ***"direct delivery"*** via email.

(2) **Notice and Access or Direct Delivery:**

a. ***Notice and Access*****.** The Plan provides an electronic communication called a Notice of Internet Availability (NOIA) for each covered document, or once annually in a combined notice (for certain covered documents), to covered individuals. The NOIA directs covered individuals to the "electronic-based information repository" address (e.g., a website, intranet, or mobile app) where they can access the covered documents.

b. ***Direct Delivery*****.** Alternatively, administrators may provide covered documents via direct delivery, by sending an electronic copy of the covered document to the covered individual's email address. Notably, unlike the Notice and Access approach, the safe harbor does not apply for direct delivery

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

to smartphone numbers or any other non-email based electronic addresses. Under this approach, an NOIA and a website for hosting covered documents are not required.

Global Right to Opt-Out of Electronic Delivery; Per-Document Right to Request a Paper Copy

At any time, a participant may opt-out, free of charge, of all e-disclosure globally and receive paper copies of covered documents. Plan administrators are not required to offer the ability to opt-out of electronic delivery on a per-document basis. However, covered individuals have a right to receive, upon request, one free-of-charge paper copy of each covered document that is provided electronically.

Initial Notification of Default Electronic Delivery and Right to Opt-Out

The final rule requires, as the threshold step, that plan administrators furnish covered individuals with an initial ***paper*** notice informing them that some or all covered documents may be furnished electronically. The final rule expressly states that administrators may not rely on prior compliance with the 2002 safe harbor to furnish the initial notice electronically. Accordingly, participants receiving electronic disclosure under the 2002 safe harbor are subject to the same paper notice requirement under the new safe harbor.

The content requirements of the initial notice are not as restrictive as those of the NOIA. Specifically, the NOIA is limited to content specified in the final rule, whereas administrators may personalize the initial notice as they see fit, so long as content is relevant and not inaccurate or misleading. At a minimum, the initial notice must include the following:

- The electronic address (or addresses) that will be used for the individual;
- A statement of the participants' right to obtain paper copies of covered documents, and the right to opt-out of electronic delivery for all covered documents, free of charge, with a statement explaining how to exercise those rights;
- A cautionary statement saying that covered documents are not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the document; and
- If applicable, the steps necessary to access the website or other electronic address, such as needing a password or downloading an application.

Despite the requirements specified above, the final rule (unlike the NOIA) does not restrict the design of content and the inclusion of graphics for the initial notice; but the notice must, nevertheless, satisfy the general ERISA standard that it be written in a manner calculated to be understood by the average plan participant. The initial notice can also be furnished with other documents, such as with plan enrollment materials.

Safe Harbor Applies Only with Respect to "Covered Individuals"

A "covered individual" is defined broadly as a person who is entitled to receive a "covered document" under ERISA — including participants, beneficiaries, and other individuals entitled to covered documents — who, when he or she begins participating in the plan, as a condition of employment or otherwise, provides the employer, plan sponsor or administrator (or appropriate designee of the foregoing) with an electronic address.

An "electronic address" includes an email address and also an "internet-connected mobile-computing device (e.g., smartphone) number." The final rule defines an electronic address broadly to encompass new technologies, but clarifies that an electronic address must be an "address at which the individual may receive and inspect a written NOIA." As such, a landline that receives a text-message is not a proper electronic address even if the landline uses a text-to-voice service to convert the text message to voicemail. More generally, it may not be readily apparent that a phone number belongs to either a landline or smartphone; for example, a text-message containing an NOIA sent to a landline may not result in a "bounce back" notification. Therefore, administrators are required to take additional reasonable steps to confirm

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

with participants, or use "other reasonable means" to determine that a provided phone number belongs to a smartphone. An example given in the final rule is to use a phone carrier's validator service.

Employer-Assigned Electronic Addresses

An employer-assigned electronic address is deemed to have been provided by the employee for purposes of the safe harbor, but only if the electronic address was provided to the employee for an "employment-related purpose other than the delivery of covered documents under the new safe harbor." Such determination is made under the facts and circumstances of each particular situation, but it is clear that an email address could not be assigned to an employee solely for the purpose of sending covered documents under the safe harbor. Upon severance of an employee, the plan administrator must take measures reasonably calculated to ensure the continued accuracy of the employee's employer-assigned electronic address, or alternately it must obtain a new electronic address that enables receipt of documents following the employee's severance. For example, an employer could obtain personal email addresses and/or smartphone numbers at the same time employees are off-boarded. Alternatively, employers could obtain personal electronic addresses when employees are hired; however, steps should be taken to verify any personal electronic addresses are current at the time of severance.

Employers cannot assign electronic addresses to non-employee participants, for example: beneficiaries, spouses, and ex-spouses. Those individuals must affirmatively provide the employer, sponsor, or plan administrator with an electronic address before such individual falls within the safe harbor.

Plan administrators, unlike employers, are not permitted to assign electronic addresses to employees for purposes of this safe harbor. Such restriction is intended, in part, to curtail potential misuse, including the practice of using commercial locator services to obtain participants' personal electronic address. Additionally, the final rule clarifies that a "covered individual" does not exclude participants in multiemployer plans; and that for multiemployer plan participants, an electronic address assigned by an employer and forwarded to the plan administrator would be considered provided by the employee in compliance with the safe harbor.

Safe Harbor Applies Only to "Covered Documents"

A "covered document" is any document (or information) that ERISA requires be furnished to retirement plan participants and beneficiaries pursuant to Title 1 of ERISA, except for documents that must be furnished ***only*** upon request (such as a copy of the plan document or Form 5500).[2] On the other hand, documents for which the plan administrator has an affirmative obligation to furnish but that also, for various reasons, may be requested by covered individuals (for example, the Summary Plan Description) are covered documents under the definition of the safe harbor. Examples of covered documents include:

- Summary Plan Descriptions,
- Summary of Material Modifications,
- Summary Annual Reports,
- Annual Funding Notices,
- Periodic Benefit Statements,
- Participant Fee Disclosures,
- Blackout Notices,
- 204(h) Notices, and
- Suspension of Benefits Notices.

Covered documents do not include documents that fall within the jurisdiction of the Internal Revenue Service (IRS), such as Safe Harbor Notices, QACA/EACA Notices, EPCRS Notices, Notices to Interested Parties, Distribution Notices, QJSA Notices, and Notices of Funding Related Benefit Limitations. The electronic disclosure of these documents is covered by IRS regulations at 26 C.F.R. Section 1.401(a)-21.

Importantly, the safe harbor also does not apply to health and welfare plan documents under ERISA.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Notice and Access Approach

Once an initial paper notice has been furnished to a covered individual, plan administrators may use a Notice and Access approach. Key to this approach is the Notice of Internet Availability (NOIA), which the administrator must furnish to covered individuals for each covered document required under the safe harbor, except if the administrator opts to use a combined annual NOIA. The "Access" component of the Notice and Access approach requires administrators to host the covered document on a website or "other internet or electronic-based information repository," such as a mobile application, and provide participants access to such covered document for a specified time.

Plans may choose to furnish one combined NOIA each year for certain covered documents, no more than fourteen months following the date the prior plan year's NOIA was furnished. Essentially, the final rule built in a two-month grace period to provide administrators with sufficient flexibility without compromising participants' receipt of an NOIA on a periodic basis. A combined annual NOIA may include only the Summary Plan Description and any covered document or information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline. Examples of documents that could be covered by a combined annual NOIA are the: Summary Annual Report, Annual Funding Notice, QDIA Notice, annual pension benefit statement, and annual 404(a)(5) disclosure. Examples of documents that would require separate NOIAs are: quarterly benefit statements, blackout notices, QDRO determinations, and notices of failure to meet ERISA minimum funding standards.

Additionally, the following requirements apply:

- The covered document must be made available on a website on the date specified under ERISA, regardless of whether the plan furnishes a combined NOIA.
- The NOIA must be sent to the electronic address of the covered individual specified in the initial paper notice.
- The NOIA must be sent separately from any other document (except in cases of a combined NOIA).
- Plan administrators are responsible for the establishment and maintenance of the website to the extent required by plan terms and ERISA's general fiduciary obligation, including the obligation to prudently select and monitor third-party vendors.
- The final rule provides reasonable procedures for compliance with the safe harbor. For example, temporarily downed websites are contemplated by the final rule and would not, typically, cause compliance or fiduciary issues.
- The covered document must be available in widely used formats, or formats that are suitable to be read online and printed clearly on paper, searched electronically by numbers, letters or words, and capable of being permanently retained in an electronic format (e.g., PDF).

Notice of Internet Availability Content Requirements

The proposed rule set forth specific requirements for the content of the NOIA to ensure it is a "very concise and clear" communication, as described below:

- ***A Prominent Statement*** (for example, as a title, legend, or subject line) that reads: "Disclosure About Your Retirement Plan."
- An ***Important Information*** statement that reads: "Important information about your retirement plan is now available. Please review this information."
- A brief description of the covered document that would reasonably covey its nature to the reader — but only if the such information is not reasonably discernible from the name of the document.
- The internet address of the website; hyperlinks are optional. Both must be ***sufficiently specific*** enough to provide ready access to the covered document.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

- A statement of the right to request and obtain a paper version free of charge and a statement of the right to globally opt-out of electronic disclosures altogether, with explanations of how to exercise such rights.
- A statement that plan administrators are only required to host covered documents on their website for one year, or, if later, when such documents are superseded.
- The administrator's, or other designated representative's, telephone number.
- Administrators may, but are not required to, include a statement as to whether action by the covered individual is invited or required with respect to the covered document (as long as such a statement is not misleading).
- Pictures, logos, and other design elements are permitted, so long as the design is not inaccurate or misleading and the required content is clear, but information contained within the NOIA must not be obscured by commercial advertisements or other documents required under ERISA (not covered by the safe harbor).
- The final rule does not include any of the specific readability standards[3] mentioned in the proposed rule, and merely requires the standard measure for readability for ERISA disclosures.

The DOL clarified that plan administrators are encouraged to include hyperlinks in the NOIA, leading covered individuals directly to the website containing the covered document or a login page, but it did not make hyperlinks mandatory. The internet information or the hyperlink should be ***sufficiently specific*** enough to provide ready access to the covered document. The final rule states that an internet address is sufficiently specific "if the address leads the covered individual to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document."

The system for delivering an NOIA must be designed to alert the plan administrator if an individual's electronic address is invalid or inoperable. If the administrator is alerted to such a problem, reasonable steps must be taken promptly to correct the problem (such as using a secondary email address or obtaining a new electronic address for the individual). If the problem cannot be promptly resolved, the individual must be treated as having globally opted-out and must be provided a paper version of the undelivered covered document as soon as reasonably practicable. The timeframe afforded to a plan administrator to "promptly resolve" an invalid or inoperable electronic address was not addressed in the final rule. Nevertheless, plan administrators should put in place policies and procedures specifying a set of steps for such circumstances, including a timeframe after which they will deem an individual has globally opted-out of electronic delivery.

Alternative Method for Compliance with the Safe Harbor: Direct Delivery of Covered Documents to an Email Address

In lieu of taking a Notice and Access approach, the administrator can ***directly deliver*** covered documents as an alternative method under the safe harbor. For covered individuals that provided an email address for their electronic address, the plan may directly deliver covered documents to that email address. Notably, sending covered documents to non-email electronic addresses, like smartphone numbers, would not apply under the safe harbor. To avoid confusion, the final rule clarified that administrators do not need to furnish an NOIA with respect to documents directly delivered, and so also do not need to establish and maintain a website to host such documents.

The email containing the covered document is subject to most of the same content requirements as the NOIA. However, statements concerning the website's internet address and the timeframe a covered document is available on a website are obviously not required since the document is being sent directly to the individual. With respect to directly delivering more than one covered document in an email, the final rule clarifies that administrators should use the same standard as if paper documents were furnished, analogizing the email to an envelope and directing

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

administrators to consider the "same envelope" standard under ERISA. Administrators must also take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual.

Final Thoughts

The new safe harbor requires plan administrators to have procedures in place to identify and cure invalid electronic addresses, ensure that an electronic address that is a phone number is able to receive texts, promptly fix any issues that cause documents to become temporarily unavailable, and protect the confidentiality of personal information of covered individuals (among other requirements). It seems that many plan administrators and service providers with systems in place tailored to comply with the 2002 safe harbor will have to re-design and update their processes and procedures in order to comply with all of the requirements of the new safe harbor. Since plans currently have "good faith" reliance on the electronic delivery methods described in EBSA Disaster Relief Notice 2020-01 during the COVID-19 national emergency (including e-mail, text message, and continuous access websites), we anticipate that many plans and providers will be turning their attention to the new safe harbor once the national emergency is over.

[1] Under the existing 2002 safe harbor, electronic delivery is permissible as the default method of delivery only if the participant is required to access the electronic delivery system as an integral part of their job duties. Participants must be able to effectively access the system at any workplace location from which they are reasonably expected to perform services.

[2] For documents not covered under the final rule, the DOL notes that the 2002 safe harbor remains available.

[3] The proposed rule elaborated that NOIAs should use "short sentences without double negatives, everyday words rather than technical legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60."

FIRM NEWS

Trucker Huss has several authors featured in the American Bar Association's Labor and Employment Law Section EBC Newsletter. **Mary Powell** and **Lindsay Docto** authored, "COVID-19 Testing, the CARES Act and Applicable Agency Guidance." **Freeman Levinrad** authored, "SECURE and CARES: Eight Interesting Issues Affecting Retirement Plans."

The firm was also pleased to co-sponsor the Diversity and Inclusion Luncheon at the ABA's Midwinter Meeting held February 5–8, 2020 in Palm Springs, California.

On July 16, **Nick White** will be co-presenter at an online webinar, *The CARES Act: Where Are We Now & How Can We Best Approach the Challenges?,* sponsored by the Western Pension & Benefits Council of Orange County. The webinar will focus on CARES Act practical issues including what challenges are being faced by both employer and employees and how we can best approach them.

Firm News continues on the next page

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

Super Lawyers Recognizes Twenty-One Trucker ✦ Huss Attorneys for 2020

Every year Super Lawyers identifies the top five percent of attorneys in each state or region, as chosen by their peers and through independent research to receive this honor. In addition, each year no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of Rising Star. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of exceptional attorneys.

Super Lawyers 2020

Trucker Huss Super Lawyers — Northern California

- J. Marc Fosse
- Angel L. Garrett
- Robert R. Gower
- R. Bradford Huss
  - *Brad was also selected as a 2020 "Northern California Top 100 Attorney"*
- Clarissa A. Kang
- Elizabeth Loh
- Kevin E. Nolt
- Mary E. Powell
- Tiffany N. Santos
- Robert F. Schwartz
- Charles A. Storke
- Nicholas J. White

Trucker Huss Rising Stars — Northern California

- Adrine Adjemian
- Jahiz Noel Agard
- Sarah Kanter
- Freeman L. Levinrad
- Gisue Mehdi
- Dylan D. Rudolph

Trucker Huss Super Lawyer — Southern California

- Joseph C. Faucher

Trucker Huss Rising Stars — Southern California

- T. Katuri Kaye
- Brian D. Murray

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

Editor: Shannon Oliver, soliver@truckerhuss.com

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

Copyright © 2020 Trucker Huss. All rights reserved. This newsletter is published as an information source for our clients and colleagues. The articles appearing in it are current as of the date which appears at the end of each article, are general in nature and are not the substitute for legal advice or opinion in a particular case.

TRUCKER ✦ HUSS

Adrine Adjemian
aadjemian@truckerhuss.com
415-277-8012

Jahiz Noel Agard
jagard@truckerhuss.com
415-277-8022

Ron Assadi
rassadi@truckerhuss.com
415-277-8009

Bryan J. Card
bcard@truckerhuss.com
415-277-8080

Briana Desch
bdesch@truckerhuss.com
415-277-8062

Lindsay R. Docto
ldocto@truckerhuss.com
415-277-8030

Joseph C. Faucher
jfaucher@truckerhuss.com
213-537-1017

J. Marc Fosse
mfosse@truckerhuss.com
415-277-8045

Angel Garrett
agarrett@truckerhuss.com
415-277-8066

Robert R. Gower
rgower@truckerhuss.com
415-277-8002

R. Bradford Huss
bhuss@truckerhuss.com
415-277-8007

Clarissa A. Kang
ckang@truckerhuss.com
415-277-8014

Sarah T. Kanter
skanter@truckerhuss.com
415-277-8053

T. Katuri Kaye
kkaye@truckerhuss.com
415-788-3111

Freeman L. Levinrad
flevinrad@truckerhuss.com
415-277-8068

Elizabeth L. Loh
eloh@truckerhuss.com
415-277-8056

Gisue Mehdi
gmehdi@truckerhuss.com
415-277-8073

Brian D. Murray
bmurray@truckerhuss.com
213-537-1016

Kevin E. Nolt
knolt@truckerhuss.com
415-277-8017

Yatindra Pandya
ypandya@truckerhuss.com
415-277-8063

Barbara P. Pletcher
bpletcher@truckerhuss.com
415-277-8040

Mary Powell
mpowell@truckerhuss.com
415-277-8006

Catherine L. Reagan
creagan@truckerhuss.com
415-277-8037

Dylan D. Rudolph
drudolph@truckerhuss.com
415-277-8028

Tiffany N. Santos
tsantos@truckerhuss.com
415-277-8039

Robert F. Schwartz
rschwartz@truckerhuss.com
415-277-8008

Charles A. Storke
cstorke@truckerhuss.com
415-277-8018

Jennifer Truong
jtruong@truckerhuss.com
415-277-8072

Nicholas J. White
nwhite@truckerhuss.com
415-277-8016

PARALEGALS

Shannon Oliver
soliver@truckerhuss.com
415-277-8067

Susan Quintanar
squintanar@truckerhuss.com
415-277-8069

TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION

ERISA AND EMPLOYEE BENEFITS ATTORNEYS

One Embarcadero Center, 12th Floor
San Francisco, California 94111-3617

15821 Ventura Blvd, Suite 510
Los Angeles, California 91436-2964

Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com

www.truckerhuss.com