

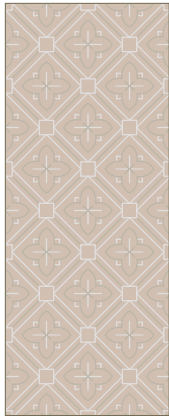


# **Delivering ERISA Disclosure for Defined Contribution Plans**

**WHY THE TIME HAS COME  
TO PREFER ELECTRONIC DELIVERY**

**PETER P. SWIRE & KENESA AHMAD**





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### EXECUTIVE SUMMARY

In 2002 the U.S. Department of Labor (DOL) issued regulations governing the choice between paper and electronic delivery of required information and notices to participants under the Employee Retirement Income Security Act of 1974 (ERISA), including in connection with defined contribution plans, such as 401(k) plans. These regulations created a “safe harbor” that permits electronic delivery, but in practice creates important obstacles to using electronic notice.

This spring, DOL issued a Request for Information (RFI) about whether and how to change the 2002 regulations. This White Paper systematically examines the choice between paper and electronic delivery. **Due to technological changes and widespread current access to the Internet, this paper argues that the time has come for a major shift toward greater reliance on electronic delivery of required information. Defined contribution plans should have the flexibility to choose electronic delivery as the default, while retaining the right of individual participants to receive information or notices in paper if they prefer.**

### BACKGROUND

For a wide range of financial services involving ordinary Americans, federal regulations set forth rules for how individuals should receive required information or notices. For example, DOL administers rules about disclosure to individual participants in employee benefit plans under ERISA. For convenience and ease of reading, this White Paper generally uses the terms “disclosure,” “required information,” and “notices” to refer collectively to the various types of disclosures that plans are required to furnish to participants under ERISA and DOL rules. These disclosures are extensive, including information about the investment options offered by plans, quarterly account statements, and other episodic information and notices. DOL is currently implementing another significant, required disclosure that is designed to help participants compare fees and other key features of investment options.

Required disclosures should present and deliver this information in ways that work for the individual. The overall system of delivery should be highly accessible, highlight key content, and make it easy for the recipient to understand the information and act on it. The system should provide secure storage and, where possible, fit well with other relevant goals, such as enhancing the rate of retirement savings, reducing overall costs, and reducing the effect of discarded paper on the environment.

In designing and delivering required information, a central decision is whether notices should, by default, be in paper form, or else in electronic form such as emails. The 2002 DOL regulation defaults to paper delivery, and has somewhat complex rules that allow electronic delivery with affirmative consent (“opt-in”) by the participant. As Internet access spreads, electronic delivery is becoming the norm in many settings and will increasingly be the norm in years to come. For instance, the Internal Revenue Service no longer mails annual tax forms, but instead makes them available online. The question is whether most required information for defined contribution plans should continue in paper, which was the norm in the 1970s, or else in the electronic format of today or tomorrow.

## **ELECTRONIC NOTICES HAVE MAJOR FACTUAL ADVANTAGES OVER PAPER NOTICES**

This White Paper systematically compares the effectiveness today of electronic and paper delivery. Factually, there are large and growing advantages of electronic over paper delivery.

- **Access** to electronic delivery is widespread and of better quality than paper delivery.
  - Electronic disclosure enables access anywhere, anytime, with the device of the user’s choosing, and with a better filing system than paper notices.
  - Electronic disclosure improves access for the visually impaired, others with disabilities, and those who prefer to read a notice in a language other than English.
  - Internet access has become widespread for working American families—close to the number that have a telephone—with even higher rates for households with defined contribution accounts. Smartphones are speeding the convergence of different demographic groups toward this widespread access.
- Once access exists, electronic delivery provides better notice than paper delivery. Electronic notice can easily be “layered,” with a short and simple notice on top, and click-through to more detailed disclosures where the participant wishes to dig deep. This layering means that the top layer of information is simpler and easier to read than a paper document. Electronic notice can also be “just-in-time,” giving information at the moment and in a manner that helps the participant make decisions.
- Along with these access and notice advantages, electronic delivery provides a **range of improved functions** compared with paper notice.

- Instead of receiving a stack of paper, the online participant works with what is essentially an already organized set of information, which is easy to integrate with the rest of a family's financial records.
- Participants online have access to tools such as calculators that show how saving more now will lead to higher benefits upon retirement, meeting the program goal of higher savings rates and participant control.
- Online services adapt to changing technology and provide quicker and better feedback about what works best for participants.
- There are **other important advantages** of electronic over paper delivery.
  - Electronic delivery provides substantial direct savings—it costs less than paper delivery. Electronic delivery of a single new four-page notice could produce savings of \$36.7 to \$60.5 million per year in printing and mailing costs, depending on printing type.
  - Electronic delivery helps the environment, because of the millions of mailings each year that participants place in the trash. A conservative estimate is that switching to electronic delivery for some annual disclosures to participants in participant-directed defined contribution plans will annually save more than 11,600 trees, or 39 acres of forest.
  - The widespread adoption of electronic delivery in other settings is important evidence of the overall advantages of electronic over paper delivery.
  - There are important cybersecurity advantages compared to risks from paper notices. For instance, bouncebacks on email are more effective than paper change-of-address forms and authentication is more sophisticated online.

## **THE RELEVANT LAW AND ADMINISTRATION POLICY SUPPORT A MAJOR SHIFT TOWARD ELECTRONIC DELIVERY**

- **ERISA** does not prescribe how information must be furnished but shows a recent general intent of “reasonably accessible” notice whether in paper, electronic, or other form. Going forward, the best implementation of this approach is flexibility for plans to default to electronic delivery of information where they choose, while retaining the individual's right to select paper notices.
- The **E-SIGN** Act of 2000 has sometimes been used as a basis for caution in using electronic delivery. The primary and clear intent of that law, however, was to encourage online activity, such as the proposal here for defined contribution plans.
- **President Obama's Executive Order 13563** creates the Administration's framework for choosing between electronic and paper disclosure. That Order decisively supports a major shift toward electronic disclosure.

- The Order calls for a retrospective review of regulations, to ensure that the federal government brings old practices (such as paper notice) up to date.
- The Order requires agencies to maximize the net benefits of a regulation, and the factual discussion here overwhelmingly favors the shift to electronic delivery.
- The Order specifically asks agencies to recognize the effects of changing technology. For this regulation, which may last a decade such as the existing 2002 rule, changing technology for 2020 and beyond clearly calls for electronic delivery.
- The Order tells agencies to provide flexibility in compliance, such as the flexibility for plans to use electronic delivery where that is best.
- The Order fits with the broad Administration goal of competitiveness.
- The Order specifically calls for improved disclosures, which is provided by electronic delivery.
- The Order favors choosing a default carefully in order to meet program goals. An electronic default, where plans choose it, could lead to increased savings and other program goals.

**In sum, the arc of change is overwhelmingly in the direction of electronic rather than paper delivery. Now that access to electronic disclosure is widespread, and access is actually better electronically in major respects, there is a compelling case for the next regulation to permit plans to choose a default rule of electronic delivery.**

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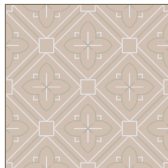
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## **PART ONE: ELECTRONIC DISCLOSURE HAS MAJOR FACTUAL ADVANTAGES OVER PAPER NOTICES**

### **A. INTRODUCTION AND BACKGROUND.**

As part of basic consumer protection, U.S. law requires that individuals receive required information for a wide variety of financial activities. One major set of information arises under the Employee Retirement Income Security Act of 1974 (ERISA). The notices discussed in this White Paper are those for “defined contribution” plans such as a worker’s 401(k) account.<sup>1</sup> For the approximately 72 million Americans in participant-directed defined contribution plans,<sup>2</sup> ERISA requires a variety of notices upon enrollment in the plan, on a quarterly and annual basis, and when certain episodic events occur.<sup>3</sup> Historically, notices were generally printed on paper. The Department of Labor (DOL) has now issued a Request for Information (RFI) “to facilitate consideration of its approach to electronic disclosure by employee benefit plans.”<sup>4</sup>

This White Paper systematically evaluates the facts and law relevant to deciding when to favor electronic or paper delivery of notices for defined contribution plans. The paper offers the perspective of a law professor and former White House official who has written since the early 1990s on information technology and Internet law and policy. This experience includes specific writing about notices, as well as extensive experience in how to assess the trade-offs between online and offline solutions to problems. Based on this experience and extensive research for this project, this paper concludes that the time has come for a major shift toward greater reliance on electronic delivery of defined contribution plan notices.<sup>5</sup> Defined contribution plans should have the flexibility to choose electronic delivery of information as the default, while retaining the right of individual participants to receive paper if they prefer.

The RFI itself presents a detailed history of the evolution from all-paper notices to the current approach, which allows electronic delivery in prescribed circumstances. In its last notice-and-comment rulemaking that applies generally to defined contribution plan notices, the Department in 2002 established an electronic disclosure safe harbor.<sup>6</sup> The safe harbor rule states that plan administrators may use other

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<sup>1</sup> A 401(k) account refers to the section number in the Internal Revenue Code. Other examples of defined contribution plans include 403(b) plans and profit-sharing plans. Though this White Paper discusses electronic delivery of required information in the context of ERISA, the research and conclusions offered here have broader application to the delivery of other government-mandated information as well, such as those required under the Federal securities laws.

<sup>2</sup> See 75 Fed. Reg. 64910, 64929 (October 20, 2010) (Department of Labor’s estimates for number of participants in participant-directed accounts, based on the 2007 Form 5500 data).

<sup>3</sup> Notices under ERISA may include the following: (1) summary plan description; (2) summary annual report; (3) summaries of material modifications; (4) blackout period notices; (5) individual benefit statements; (6) investment-related information (notice of investment options, qualified default investment notice, diversification notice of employer securities); and (7) qualified domestic relations order notices.

<sup>4</sup> Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19285 (April 7, 2011).

<sup>5</sup> Factual research for this White Paper focused on defined contribution plans.

<sup>6</sup> 29 C.F.R. § 2520.104b-1(c).

procedures that meet the ERISA general delivery requirements, but interviews with actual administrators show that use of electronic delivery outside of the safe harbor is not common.

The safe harbor covers electronic delivery to two types of individuals: participants who have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee when access to the employer's or plan sponsor's electronic information system is an integral part of those duties (*See* § 2520.104b-1(c)(2)(i)) and participants and beneficiaries who affirmatively consent to receive documents electronically (*See* § 2520.104b-1(c)(2)(ii)(A)).

The current safe harbor thus has a default rule of paper notice. Electronic notice can be sent to the first category of workers only where access to the employer's system is an "integral part" of the worker's duties. Electronic notice can be sent to the second category of workers only with an explicit opt-in, or "affirmative consent." Experience in many other regulatory regimes shows that the default rule often has a powerful effect on actual behavior, and that securing affirmative consent (an opt-in) in many settings is difficult to achieve due to the powerful inertia of many recipients who do not bother to read or act on a message about opting in.<sup>7</sup> Even where recipients shift their activity online, they may not take the extra step of cancelling the paper notice. A 2011 survey found that 60 percent of participants had accessed the plan website during the previous year, but, we understand that fewer take the additional step of cancelling the paper notice.<sup>8</sup> A recipient can receive a paper notice and throw it unopened into a trash or recycling bin, secure in the knowledge that they can go online when they want to check their account or take action.

Given the importance of the default rule, and based on the factual analysis below, this White Paper concludes that the DOL should allow plans the flexibility to choose the default rule. Under this approach, defined contribution plans would be able to use electronic delivery under a general standard that the individual participant has "reasonable access" to electronic delivery, and an opportunity to opt-out of electronic delivery and receive paper notice instead.

## **B. ELECTRONIC NOTICES PROVIDE ACCESS THAT IS BETTER THAN PAPER NOTICES IN MAJOR RESPECTS.**

A central goal in a disclosure regime is to ensure that participants have effective access to information that must be furnished. Electronic delivery sends information to computers, smartphones, and other devices in ways that provide important advantages over paper, both in delivering the notices and in linking to the website where a participant can obtain more information or take action in response to the information. Electronic notices allow more immediate and continuous access. They enable access anywhere, anytime,

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<sup>7</sup> In privacy debates, opt-out or opt-in has been a hugely contentious legislative and policy issue, providing evidence of the importance of the default rule. For instance, opt-out vs. opt-in was a major issue in the drafting of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C. § 6801-6810. The Tenth Circuit has struck down a Federal Communications Commission telephone privacy rule as unconstitutional under the First Amendment because the administrative record did not support the extra burden of an opt-in regime. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Circuit 1999).

<sup>8</sup> A recent survey of defined contribution plan recordkeepers indicates that 60 percent of defined contribution plan participants accessed their plan website during 2010. Source: *ICI Participant Disclosure and Interaction Survey*.

with any device, and with a better filing system than paper notices. In the current parlance, electronic delivery takes advantage of “cloud computing,” a major initiative of the Obama Administration. Electronic notices also provide better access for visually impaired participants, other persons with disabilities, and those who prefer to access notices in a language other than English.

Today, access to the Internet is widespread and continues toward the pervasive availability of other technologies such as the telephone. In 2010, 91.5 percent of working households had access to the Internet.<sup>9</sup> This statistic compares to 92.9 percent of U.S. households that had a telephone in 1980, and 95.7 percent that had a telephone in 2009.<sup>10</sup> Differences persist in access by age, income, education, and ethnic group, but the gap has narrowed considerably in the past decade, and the recent rise in smartphones has a particularly strong effect in providing access for African Americans and Latinos.

### **1. Electronic notices enable access anywhere, anytime, with the device of the user’s choosing, and with a better filing system than paper notices.**

Electronic delivery fundamentally permits access in more ways, from anywhere and at anytime. This improvement in access goes far beyond mere convenience—improved access empowers participants to have better control over their benefits, better achieving the goals of ERISA.

**a. Anywhere.** Participants can receive electronic notices wherever they are at the moment, and then go to the plan’s website to interact with their accounts. This flexibility is important. Individuals can access the Internet either from home, at work, or other places. They can check their retirement accounts when at home or work or while travelling on business or for vacation. They may live part of the year in one place and another part of the year somewhere else.

With paper-delivered information, by contrast, a participant likely has a principal location where the documents are stored. This lack of geographic flexibility can be an obstacle to examining documents and making investment decisions—a participant may have time to work on personal finances when on vacation or otherwise not at the principal place of document storage. By contrast, storing information electronically provides flexibility for the participant to have control over personal finances without regard to geography.

**b. Anytime.** Participants have 24/7 access to electronic notices and websites. For paper notices, follow-up questions typically are answered through phone calls to a toll-free number, by visiting the website, or by a company’s HR department; in some cases the call center may be closed early in the morning or late at night, when some people might find it convenient to check on their personal finances. On the web, many follow-up questions can be answered through FAQs (frequently asked questions), help sections of a website,

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<sup>9</sup> Source: ICI tabulation of GfK OmniTel Survey Data (November and December 2010). These results are tabulated from GfK OmniTel Survey data. On behalf of the Institute, GfK Custom Research North America surveyed 1,000 households every other weekend between mid-November and mid-December 2010, for a total of 3,000 interviews. The results were then weighted to represent the U.S. population. The 2010 sample of working households was 1,706, and the sample of working households owning defined contribution accounts was 1,104.

<sup>10</sup> Alexander Belinfante, “Telephone Subscribership in the United States (Data through July 2009),” December 2009, at 1-2, available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/fccsubreport.pdf>.

and other content. Having required information and content-rich websites accessible at any time matches the delivery system with the preferences of participants.<sup>11</sup>

**c. Access through various devices, and innovation over time.** In the 1990s, as the Internet was first developing, electronic access was typically through a desktop computer. Today, a diverse and growing variety of devices can be used to receive electronic notices and access a website. Millions of American consumers today use devices such as: desktop computers, laptop computers, smartphones, and tablets (such as the iPad). Just a few years ago, smartphones and tablets either did not exist or were far less common. Along with this multiplicity of devices, storing account information electronically offers a better backup—records easily can be accessed from the plan and so losing a device (such as a laptop or smartphone) does not result in lost access to the records.

Paper notices are one-size-fits-all and static. Each person uses the same “device”—an envelope containing paper. The delivery system is static, in the sense that the functionality of the paper does not evolve over time. By contrast, the current variety of electronic devices enables individuals to choose the delivery systems that they prefer. In addition, new devices are constantly evolving for accessing plan information, and the speed and functionality of these devices continues to climb steeply. Among technologists, “Moore’s Law” describes the phenomenon that the processing power of microprocessors doubles roughly every 18 months. Faster processing speed, in turn, lead to all the other improvements that we continue to see for computers—greater storage, better graphics, faster downloads, etc. The improved capability of electronic devices creates numerous opportunities to innovate and improve the quality of the consumer experience. Electronic delivery is thus improving rapidly over time, while paper delivery stays the same, meaning that the relative advantages of electronic delivery continue to grow.

**d. A better filing cabinet.** Electronic storage of data by a plan similarly provides a better filing cabinet for many people than the traditional paper file approach. At an intuitive level, we realize that many people (including Professor Swire) do not do a great job of filing paper that comes to the house. Housing information electronically has important advantages because it is professionally managed and searchable. Generally, the system owner is expected to meet traditional “CIA” requirements of confidentiality, integrity, and availability. The data are supposed to be kept confidential (no unauthorized access), have integrity (accurate data), and be available with little or no downtime. To achieve this, a professionally managed system has multiple backups, including a disaster recovery plan. Few individuals achieve this level of professional management of their personal files. Electronic storage also provides a searchability advantage compared to a paper-based system. Participants can instantly search their inbox for emails from their plan or recordkeeper. This search capability reduces the filing burden on participants and helps ensure access to the most up-to-date information.

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<sup>11</sup> One study found, for instance, that “employees are more likely to use web-based applications after hours or on weekends, when they can more easily consult with family members.” Jennifer Taylor Arnold, “Enrolling Online: Employers Are Improving HR Efficiencies with Online Benefits Open Enrollment,” *HR Magazine* (December 2006) (citing ADP survey), available at [http://findarticles.com/p/articles/mi\\_m3495/is\\_12\\_51/ai\\_n27093649/?tag=mantle\\_skin;content](http://findarticles.com/p/articles/mi_m3495/is_12_51/ai_n27093649/?tag=mantle_skin;content).

Some participants may prefer to use traditional paper-based filing systems. To match these preferences, individuals who wish to receive paper notices for all or some of the disclosures should be able to do so by simply letting the plan or recordkeeper know. Or, participants for whom it might be important to keep a particular document in paper can simply print that document or request a paper copy.

## **2. Access for the visually impaired and others with disabilities.**

Electronic disclosure enables better access than paper notice for millions of participants with disabilities. Data from the American Foundation for the Blind shows that more than 25 million American adults, or close to 10 percent of the total U.S. population, suffer from significant vision loss, including more than 18.7 million adults between the ages of 18 and 64.<sup>12</sup> The term “vision loss” refers to individuals who experience difficulty seeing, even when wearing glasses or contact lenses and individuals who are blind or unable to see at all.<sup>13</sup>

Electronic notices allow use of many technologies that improve access for visually impaired and other disabled Americans today. For individuals with modest vision impairment, computers provide the ability to increase font size, or use screen magnifiers to view online information. Participants can use high contrast fonts or colors that reduce the effects of color blindness. For those with more serious visual impairment, many software and hardware tools are available. Individuals who are blind may use a screen reader to convert visual information into speech or refreshable Braille displays to mimic the functionality of a computer monitor.<sup>14</sup> The advantages of electronic disclosure are not limited only to individuals with visual impairments. For example, individuals who do not have use of their hands may use speech recognition software to navigate a website.

Ultimately, using electronic disclosure helps to level the playing field for disabled individuals. When disclosures can be accessed online, disabled individuals can access the same information and engage in the same activities as the rest of the population. In recognition of the importance of continuing to expand computer access for the disabled, President Obama last October signed the Twenty-First Century Communications and Video Accessibility Act,<sup>15</sup> which updates accessibility rules to provide appropriate interfaces for the Internet, mobile and smartphones, television, and other modern communication technologies.

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<sup>12</sup> See “Facts and Figures on Adults with Vision Loss,” available at <http://www.afb.org/Section.asp?SectionID=15&TopicID=413&DocumentID=4900>. See also J. R. Pleis and J. W. Lucas, *Provisional Report: Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2008*, National Center for Health Statistics, Vital Health Stat 10 (242) (2009), available at [www.cdc.gov/nchs/data/series/sr\\_10/sr10\\_242.pdf](http://www.cdc.gov/nchs/data/series/sr_10/sr10_242.pdf). Approximately 30 percent of the visually impaired individuals aged 21 to 64 are employed full-time and full-year. See W. Erickson, C. Lee, and S. von Schrader, “Disability Statistics from the 2008 American Community Survey (ACS),” Ithaca, NY: Cornell University Rehabilitation Research and Training Center on Disability Demographics and Statistics (StatsRRTC) (March 17, 2010), retrieved May 05, 2011, from [www.disabilitystatistics.org](http://www.disabilitystatistics.org). A person is considered employed full-time/full-year if the individual worked 35 hours or more per week (full-time) and 50 or more weeks per year (full-year).

<sup>13</sup> Id.

<sup>14</sup> A listing of screen readers for the blind is available at <http://www.abilityhub.com/vision/blind.htm>.

<sup>15</sup> Full text of the Twenty-First Century Communications and Video Accessibility Act is available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-3304>.

### 3. Translation software.

Electronic notice is better than paper notice for the millions of Americans who either do not read English well or prefer to receive notice in a language other than English. The number of foreign-born people residing in the United States is at the highest level in history. As of 2008, 38 million people, or 12.5 percent of the total U.S. population, were foreign born. Between 2000 and 2008, the foreign-born population contributed almost one-third of all U.S. population growth. During this time, foreign-born individuals accounted for almost all of the U.S. workforce growth between the ages of 25 and 54.<sup>16</sup> Millions of these foreign-born, along with many persons born in the United States, either do not read English well or prefer the option of receiving information in another language.

In recognition of the importance of communicating in a participant's preferred language, ERISA regulations provide that the plan administrator should provide assistance in a non-English language when certain specific thresholds apply based on plan size.<sup>17</sup> This regulatory requirement reflects a balance. For workplaces with many employees literate only in a particular non-English language, effective plan administration justifies the cost of offering non-English assistance. Other workforces may consist of only a few workers with limited English skills and incurring the expense of offering translation services may not justify the cost to the plan.

Software-based translation programs are widespread today and continue to improve rapidly, although they are far from perfect. One such translation product states that it can translate among 75 languages.<sup>18</sup> Free versions of major translation programs are available on the Internet.<sup>19</sup> This revolution in software translation enables participants from a diverse range of countries and cultures to read electronic notices in their preferred language. By contrast, it is considerably more difficult and far less common to re-key an English notice into a computer to take advantage of this sort of translation software.<sup>20</sup>

The availability of free and effective translation software means that electronic notice has important benefits for workers that do not read English well or would like to receive information in another language. This could have particular benefits in workplaces with a small number of workers for whom English is

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<sup>16</sup> William A. Kandel, "The U.S. Foreign-Born Population: Trends and Selected Characteristics," Congressional Research Service (January 18, 2011), at 28-29, *available at* <http://fpc.state.gov/documents/organization/155631.pdf>.

<sup>17</sup> If a plan has participants that are literate only in a foreign language, the plan administrator may be required to provide assistance in that language. This regulation applies to plans with fewer than 100 participants where 25 percent or more of the participants are literate only in the same non-English language. It also applies to plans with 100 or more participants, if the lesser of 500 participants or 10 percent of the total number of participants are literate only in the same non-English language. If the threshold is met, the plan must, at a minimum, include a notice in the plan's summary plan description in that non-English language offering assistance. The assistance need not be written, but must be calculated to provide employees a reasonable opportunity to become informed about their rights and obligations under the plan. *See* 29 CFR 2520.102-2(c)(1)-(2).

<sup>18</sup> *See* <http://www.babelfish.com>.

<sup>19</sup> *Id.*

<sup>20</sup> Instead of re-keying the text, an individual might instead scan a paper notice into PDF or other formats. This scanning approach is less useful for the participant than an electronic notice. First, many participants lack access to a scanner. Second, the task of scanning and then translating is more work than simply translating an electronic notice, and thus less likely to be done by the participant. Third, scanning leads to a higher error rate in translation, because the translation program operates on an image of the paper notice, rather than on the accurate electronic text itself.



not their native language, and therefore the regulatory threshold is not triggered. First, the participant decides whether the advantages of the translation program (reading in the preferred language) outweigh the disadvantages (cutting and pasting the text into the translation program and risking an imperfect translation). Second, the plan may not have good information about which participants prefer to receive communications in which language. Third, at a practical level, the existence of translation software fills a gap where the plan does not have enough workers speaking a foreign language to justify the costs of a professional translation, which must comply carefully with the many technical requirements of ERISA notices. In such instances, the worker can at least get a fairly good translation with today's software, and the quality of that software continues to improve.

#### **4. Cloud computing.**

Further support for electronic delivery comes from the Administration's initiative to shift where possible to "cloud computing." Encouragement of cloud computing is a major initiative of the federal government's first Chief Information Officer, Vivek Kundra. Kundra defines cloud computing as "the next generation of IT in which data and applications will be housed centrally and accessible anywhere and anytime by various devices (this is opposed to the current model where applications and most data is housed on individual devices)."<sup>21</sup> For individuals, this approach is perhaps most familiar for cloud email services, such as Gmail, Hotmail, or Yahoo! Mail. Instead of downloading all email to one user device, individuals instead can access their email anywhere, anytime, and with any web-enabled device. This same email channel applies readily to defined contribution plans, where cloud computing similarly means using emails and other electronic delivery tools for notices and other plan actions.

Kundra emphasizes the efficiency and innovation advantages of cloud computing for federal and other information technology systems owners.<sup>22</sup> Kundra states: "Cloud computing will drive innovation not just in science and technology, but in every industry and at a pace never before experienced."<sup>23</sup> He adds: "This is not a fad. Governments at all levels in the United States are moving to the cloud. We are committed to leveraging the power of cloud computing to deliver better services at a lower cost to the American people."<sup>24</sup>

The Obama administration has "instituted a Cloud First policy"<sup>25</sup> as a major way to "deliver better services at a lower cost to the American people." Benefits exist for the owners and operators of IT systems, who can provide a greater range of services at lower cost. Importantly for deciding whether to allow retirement

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<sup>21</sup> Vivek Kundra, "Streaming at 1:00: In the Cloud," (September 15, 2009), *available at* <http://www.whitehouse.gov/blog/streaming-at-100-in-the-cloud/>.

<sup>22</sup> See Vivek Kundra, "Federal Cloud Computing Strategy," (February 8, 2011), *available at* <http://www.cio.gov/documents/Federal-Cloud-Computing-Strategy.pdf>.

<sup>23</sup> Vivek Kundra, "The Economic Gains of Cloud Computing," Keynote speech at the Brookings Institute (April 7, 2010), *available at* <http://www.cio.gov/pages.cfm/page/Vivek-Kundra-Speech-at-Brookings-Institution>.

<sup>24</sup> Vivek Kundra, "The Shift to Cloud Computing," Remarks at the World Economic Forum Cloud Computing Workshop (November 3, 2010), at 2, *available at* <http://www.cio.gov/documents/Vivek-Kundra-World-Economic-Forum-Remarks.pdf>.

<sup>25</sup> Kundra, "Federal Cloud Computing Strategy," (February 2011).

plans the choice between electronic and paper notices, developments in cloud computing will further enhance the ability of participants to access the notices and other plan information anywhere, anytime, by various devices, and with a better filing cabinet.

## **C. ASSESSING THE EVIDENCE ABOUT PARTICIPANTS' DEGREE OF INTERNET ACCESS.**

The Department states in the RFI that it “is aware that some of America’s workers may not have reasonable access to the Internet.” Because concern about lack of Internet access is possibly the biggest objection raised to wider use of electronic notices, it is important to understand how much access has expanded (and will continue to expand) since the last DOL rulemaking in 2002.

### **1. Both electronic and paper delivery have access advantages.**

In choosing between electronic and paper approaches to delivery, there is logically more to the investigation than whether “some” workers may not have reasonable access to the Internet. In our mobile society, some workers may also not have a persistent home mailing address, in which case an email address may well be more effective at reaching them than paper notice. Also, as discussed above, electronic delivery offers the advantages of anywhere, anytime, any device, and improved filing cabinet, as well as improved access for millions of workers who are visually impaired or prefer to receive communications in a non-English language. In short, there are large populations whose access is better for electronic than for paper delivery. The advantages to these populations from electronic delivery should be considered together with any disadvantages to persons that may have better access to paper delivery.

### **2. From early adopter to widespread Internet adoption.**

The Internet is following the adoption patterns of other transformative technologies, such as the telephone, radio, and the television. After a period of early adoption, these technologies become widespread in society. The telephone was invented in the 19th century, and by the 1980 Census 92.9 percent of households reported having a telephone. Since then, telephone penetration has continued to increase, but at a modest rate. By 2000, the Federal Communications Commission found that 94 percent of all American households had a telephone, and the FCC’s 2009 survey found a telephone in a record-high 95.7 percent of households.<sup>26</sup>

The arc of Internet adoption has been much swifter than that for the telephone. Commercial activity on the Internet was prohibited until 1992,<sup>27</sup> and use of the Internet rose steeply from a tiny level at that time to 42 percent of all American households by 2000.<sup>28</sup> **A survey by the Investment Company Institute found that 91.5 percent of working U.S. households had access to the Internet in 2010.**<sup>29</sup> For working

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<sup>26</sup> Alexander Belinfante, “Telephone Subscribership in the United States (Data through July 2009),” (December 2009), at 2, *available at* <https://prodnet.www.neca.org/publicationsdocs/wwpdf/fccsubreport.pdf>.

<sup>27</sup> See Peter P. Swire, “Trustwrap: The Importance of Legal Rules for E-Commerce and Internet Privacy,” 54 *Hastings L.J.* 847, 860 (2003).

<sup>28</sup> Eric C. Newburger, “Home Computers and Internet Use in the United States: August 2000,” (September 2001) at 2, *available at* <http://www.census.gov/prod/2001pubs/p23-207.pdf>.

<sup>29</sup> GfK OmniTel Survey Data (November and December 2010).



households, this means that access to the Internet today is only 1.4 percentage points less than the portion of U.S. households who had a telephone in 1980, and 4.2 percentage points less for 2009.<sup>30</sup>

### **3. A large preponderance of working households has access to the Internet.**

Two different statistical methods both show that approximately nine out of 10 working households in America now have access to the Internet. As just mentioned, an intensive survey by the Investment Company Institute in fall 2010 found that 91.5 percent of working U.S. households had Internet access, either at work, at home, or both.<sup>31</sup> Among working U.S. households, 61.5 percent reported Internet access at work, 86.3 percent reported Internet access at some other location, and 56.3 percent reported Internet access both at work and some other location.<sup>32</sup>

Similar results come from the Census data from a year earlier. In 2009, the Census Bureau data found that 80.3 percent of individual workers had access to the Internet from some location.<sup>33</sup> Of the workers who did not have personal access, 38.7 percent resided in a household where someone else had Internet access. Taking the 19.7 percent of individuals who lacked access together with the 38.7 percent of them whose household had access, an additional 7.6 percent had Internet access in the household, for a total Census estimate of 87.9 percent of working households having Internet access at home, work, or some other location.<sup>34</sup> These 2009 Census statistics were collected before the fall 2010 ICI statistics, and at a time (as we will see below) when Internet use through smartphones was rising for previously underserved populations.

Internet access rates vary by age, education of household head and household income, but Internet access is very high among all working households. For example, in the fall of 2010, over 90 percent of all U.S. working households aged 64 or younger had Internet access, while approximately 82 percent of all working U.S. households aged 65 or older reported Internet access.<sup>35</sup> Access at work was highest among those aged 35 to 49, while access only at other locations was highest among working households younger than 35.

Internet access among working U.S. households is higher for higher income households, but three-quarters of the lowest-income working households (less than \$30,000 in household income) had Internet access in fall 2010, compared with over 93 percent for higher-income households (\$30,000 or more in household income). Access to the Internet only outside of work was highest for working households with less than

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<sup>30</sup> To be clear, the comparison is between the 91.5 percent of working households who had access to the Internet and the 92.9 percent and 95.7 percent who had a telephone in 1980 and 2009, respectively. Although our research has not found good statistics on telephone penetration for working households, the basic point holds—Internet penetration has risen swiftly and access to the Internet is roughly as widespread today as telephone ownership.

<sup>31</sup> GfK OmniTel Survey Data (November and December 2010).

<sup>32</sup> *Id.*

<sup>33</sup> “Table 2, Reported Internet Usage for Individuals 3 Years and Older, by Selected Characteristics: 2009,” *available at* <http://www.census.gov/population/www/socdemo/computer/2009.html>.

<sup>34</sup> To reach the final household access percentage of 87.9 percent, multiply 19.7 percent by 38.7 percent to equal 7.6 percent. Add this 7.6 percent to the 80.3 percent to get the final total of 87.9 percent.

<sup>35</sup> GfK OmniTel Survey Data (November and December 2010).

\$30,000 in household income, while access to the Internet at work was highest for households with \$50,000 or more in household income.<sup>36</sup>

Internet access tends to be higher the higher the educational attainment of the head of the household, but is still high across all education levels. In fall 2010, 81.5 percent of working U.S. households with high school education or less had Internet access, compared with 94.3 percent of working households with some college or an associate's degree, and 98.6 percent with a college degree or higher.<sup>37</sup>

#### **4. Access for mutual fund investor households shows similar demographic convergence.**

Just as there has been convergence for working households on access by age, education, and income, there has been similar convergence in the distinct data available about mutual fund investor households. The similarity in trends between the two sources of data adds confidence to the view that there is considerable convergence in Internet access across these important demographic groups. Differences persist, but are much smaller than a decade ago.

Initially, Internet access was greatest for mutual fund investors among young, highly educated, and higher-income households. In 2000, 68 percent of all U.S. households owning mutual funds used the Internet.<sup>38</sup> Based on Investment Company Institute surveys directed at mutual fund investors, Internet access in 2000 was substantially higher for households aged 18 to 35 (83 percent) and lowest among households aged 65 and older (30 percent). The proportion of 65-or-older households with Internet access rose from 30 percent in 2000 to 70 percent in 2010.<sup>39</sup>

Similar gains can be seen among mutual fund investors with lower levels of education and income. For mutual fund investors with a high school education or less, Internet accessibility increased from 39 percent in 2000 to 77 percent in 2010.<sup>40</sup> Comparable statistics exist for households with income levels under \$50,000. In 2000, only 47 percent of these households had access to the Internet. As of 2010, 76 percent of these lower-income mutual fund investor households have Internet access.<sup>41</sup>

Along with greater access, these households have increased their reliance on the Internet, including for financial transactions. In 2005, nearly two-thirds of these users accessed the Internet at least once a day, compared with 80 percent in 2010.<sup>42</sup> The Internet has been central to the management of everyday tasks as well. By 2010, 82 percent of all mutual fund investor households accessed the Internet for financial purposes, such as checking their investment information.<sup>43</sup>

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> "Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2010," *Investment Company Institute Fundamentals*, Vol. 19, No. 6 (September 2010) at 15, Figure 20, *available at* [www.ici.org/pdf/fm-v19n6.pdf](http://www.ici.org/pdf/fm-v19n6.pdf).

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at 16, Figure 21.

<sup>43</sup> Id. at 17, Figure 23.

## 5. Differences in access for African Americans and Latinos persist, but Internet access on mobile devices is speeding convergence.

Since the emergence of the Internet, access for African Americans and Latinos has lagged behind that of whites. In 2000, access to the Internet was 40 percent for Latinos, 36 percent for African Americans and 50 percent for whites.<sup>44</sup> According to a December 2010 Pew survey, those numbers had shifted to 66 percent for Latinos, 69 percent for African Americans, and 80 percent for whites.<sup>45</sup>

One factor reducing this digital divide is the relatively rapid uptake of mobile Internet devices by African Americans and Latinos. According to a Pew survey from July 2010, almost two-thirds of African Americans and English-speaking Latinos were wireless Internet users, outstripping the percentage for whites at 57 percent.<sup>46</sup> These groups were also more likely to use non-voice data applications on their mobile devices than white Americans.<sup>47</sup> As of May 2010, about 87 percent of African Americans and Latinos owned a cell phone, compared to 80 percent of white Americans, and these groups are more likely than whites to use cell phones to access the Internet.<sup>48</sup> Latino mobile Internet users go online more frequently with their mobile devices than other groups, with 55 percent of English-speaking Latinos using their cell phones to access the Internet several times a day.<sup>49</sup> Moreover, today, there are no longer any noticeable differences in laptop ownership among Latinos, African Americans, and whites.<sup>50</sup>

## D. THE QUALITY OF NOTICE IS BETTER WITH ELECTRONIC DELIVERY.

Once access exists, electronic delivery provides better notice than paper delivery. The history and current debates about privacy notices, a topic with which one of the authors has been engaged as a scholar and policy official, is relevant. Improving privacy notices includes having simpler notices that focus on consumer decisions, “just-in-time” notices that foster consumer interaction, and “layered” notices that meet the multiple goals of a disclosure regime.

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<sup>44</sup> Tom Spooner et al., “Hispanics and the Internet,” Pew Internet & American Life Project (July 25, 2001) at 6, *available at* [http://www.pewinternet.org/-/media/Files/Reports/2001/PIP\\_Hispanics\\_Online\\_Report.pdf.pdf](http://www.pewinternet.org/-/media/Files/Reports/2001/PIP_Hispanics_Online_Report.pdf.pdf). *See also* Tom Spooner et al., “African-Americans and the Internet,” Pew Internet & American Life Project (October 22, 2000) at 3, *available at* [http://www.pewinternet.org/-/media/Files/Reports/2000/PIP\\_African\\_Americans\\_Report.pdf.pdf](http://www.pewinternet.org/-/media/Files/Reports/2000/PIP_African_Americans_Report.pdf.pdf).

<sup>45</sup> “Demographics of Internet Users,” (December 2010), *available at* <http://www.pewInternet.org/Static-Pages/Trend-Data/Whos-Online.aspx>. These statistics were for both working and non-working individuals, and were collected by individual rather than the per-household statistics cited above.

<sup>46</sup> Aaron Smith, “Mobile Access 2010,” Pew Internet & American Life Project (July 7, 2010) at 9, *available at* [http://www.pewinternet.org/-/media/Files/Reports/2010/PIP\\_Mobile\\_Access\\_2010.pdf](http://www.pewinternet.org/-/media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf). The precise percentages were 64 percent for African Americans and 63 percent for English-speaking Latinos.

<sup>47</sup> *Id.* at 4, 16.

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.* at 18. Of all mobile Internet users, frequency is highest among Latinos (55 percent), college graduates (52 percent), young adults aged 18–29 (52 percent), and those with a household income of \$75,000 or more per year (56 percent).

<sup>50</sup> *Id.* at 21. Laptop ownership is now at 55 percent for whites, 51 percent for African Americans, and 54 percent for Latinos.

## 1. Simpler disclosure that focuses on consumer decisions.

Early privacy notices suffered from a view that more disclosure was better disclosure. The 1999 Gramm-Leach-Bliley Act required very detailed annual disclosures to consumers from financial institutions.

Commentators complained the resulting notices were long, complex, and written in legalistic jargon that was difficult for consumers to understand. In 2006, a new statute directed the financial regulatory agencies to jointly develop a streamlined model financial privacy form,<sup>51</sup> and they developed a simple, easy-to-understand form that consumers can use to compare privacy notices among institutions.<sup>52</sup>

The model financial privacy notice fits on one page.<sup>53</sup> Consumer testing commissioned by the agencies showed that consumers were more likely to read notices that were simple, provided key context up front, and had pleasing design elements, such as large amounts of white space. Notice in the form of a table, later incorporated into the model notice, outperformed other approaches, and “performed particularly well on difficult tasks.”<sup>54</sup> In contrast, the long notice originally required by Gramm-Leach-Bliley performed poorly on all measures.<sup>55</sup>

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<sup>51</sup> Financial Services Regulatory Relief Act of 2006, Pub. L. 109-351, § 728, 120 Stat. 1966 (codified at 15 U.S.C. § 6803(e)).

<sup>52</sup> See “Final Model Privacy Form Under the Gramm-Leach-Bliley Act,” 74 Fed. Reg. 62965 (codified by FTC at 16 C.F.R. Part 313) (2009), *available at* [http://www.ftc.gov/privacy/privacyinitiatives/PrivacyModelForm\\_FR.pdf](http://www.ftc.gov/privacy/privacyinitiatives/PrivacyModelForm_FR.pdf).

<sup>53</sup> The model notice then provides online links or information about where a consumer can get greater detail about the company’s policies.

<sup>54</sup> *Id.* at 62894. The model notice refers to a report titled “Consumer Comprehension of Financial Privacy Notices, A Report on the Results of the Quantitative Testing,” written by expert advisors Dr. Alan Levy and Dr. Manoj Hastak and submitted on December 15, 2008. The report examines measures of how effectively financial notices communicate information.

<sup>55</sup> *Id.*

## **2. Just-in-time notices and the opportunity for interaction.**

Privacy notices increasingly focus on “just-in-time” disclosure. As the Federal Trade Commission (FTC) recently explained: “To be most effective, choices should be clearly and concisely described and offered when—and in a context in which—the consumer is making a decision about his or her data. Depending upon the particular business model, this may entail a ‘just-in-time’ approach, in which the company provides the consumer with a choice at the point the consumer enters his personal data or before he accepts a product or service.”<sup>56</sup>

A common example of just-in-time notice is when consumers buy something online, and are asked as part of the checkout process whether they wish to receive emails from the retailer or emails from third-party partners of the website. Another example today is when the download of a smartphone application informs the user about the sort of personal information that is collected by the application; in that way, a user who does not wish the information to be shared can decide not to complete the download.

In the retirement context, electronic delivery works better than paper for just-in-time notice, notably for increasing a participant’s contributions, changing the mix of investments, or making other modifications to the participant’s account. With a paper notice, an individual must read the notice and then shift to another channel, such as filling in a form and handing it to HR, making a telephone call or visiting a website, to make any change. By contrast, electronic notice allows the participant to click immediately for more information or to take an action. For instance, participants who are falling behind their investment goals can increase their savings rate as soon as they see their quarterly benefit statement report. If a blackout period is coming, the participant can make any desired changes before the blackout period starts.

## **3. Layered disclosure and the multiple goals of a disclosure regime.**

For financial institutions and on the Web, early privacy notices generally had one long block of text. Today, by contrast, state-of-the-art privacy policies use a “layered” approach, with a summary or table of contents on top, and the ability for the user to dig into more detailed layers of disclosure as desired.<sup>57</sup>

One reason for multiple layers of notice is that detailed disclosures exist for audiences in addition to the consumers themselves. For privacy notices, the detailed disclosures inform employees and contractors what information practices are authorized or not. The detailed disclosures are also important for regulators, advocates, and other experts who can learn in detail how an organization is using data.<sup>58</sup> The level of detail and legal precision appropriate for these audiences, however, is often a bad fit with what we

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<sup>56</sup> See Federal Trade Commission, “Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers,” (2010), at vi, *available at* <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

<sup>57</sup> Examples of layered notices for major web companies include: <http://www.google.com/intl/en/privacy/>; <http://privacy.microsoft.com/en-us/fullnotice.mspx>; and <http://info.yahoo.com/privacy/us/yahoo/details.html>. In each instance, the old-style “privacy notice” has been replaced by a rich set of links that let users choose where to get more detailed information.

<sup>58</sup> Peter P. Swire, “The Surprising Virtues of the New Financial Privacy Law,” 86 Minnesota L. Rev. 101 (2003) (explaining the multiple audiences for privacy notices, in addition to consumers).

usually consider the principal goal for disclosure—clear communication with a consumer. Analysis of the readability of privacy notices, for instance, found that many of them are written for a graduate-school reading level.<sup>59</sup>

The “layered” notice is the logical response to the competing demands for detail and clarity. The top layer of notice is brief and often presented in a visually accessible form such as the table used in the model financial privacy disclosure. Further levels of detail are available for employees, regulators, and the subset of consumers who wish to dig deeper into the longer disclosures.

Layered notices work better for electronic than for paper disclosures. In a paper system, there can be a top page that gives the summary. Then a consumer who wishes to dig deeper has to flip through the attached booklet or stack of other forms to find the relevant other pieces. By contrast, electronic disclosures may use hyperlinks—the user simply clicks on a link when interested in learning more or taking an action, and then can click back to the summary when that is complete. Layered notices thus work better electronically on the two key dimensions of better comprehension for the user and greater ability for the user to take action.

#### **4. Comparing the quality of notices.**

The discussion here has highlighted the learning from the privacy realm about the importance of short notices that are presented in a visually helpful way, just-in-time notices to foster interaction, and layered notices to meet the multiple goals of detail and clarity while meeting the needs of multiple audiences. Applied to defined contribution plans, the advantages of short, just-in-time, and layered notices show benefits of electronic as opposed to paper disclosure. Electronic delivery allows visually compelling and summary information that is linked to decisions and allows the participant to dig deeper where desired. The same functionality does not exist for paper notices.

### **E. ELECTRONIC DELIVERY PROVIDES A RANGE OF IMPROVED FUNCTIONS COMPARED WITH PAPER NOTICE.**

The previous sections discussed advantages in the accessibility of electronic delivery, and quality of information presentation. This section analyzes how electronic notices improve the user experience once notices have been received.

#### **1. Electronic delivery shifts the user from managing a large stack of paper to accessing an organized display of information.**

With paper disclosure, the participant collects a stack of documents over time, including information about the investment options offered by the plan (which could be a dozen or more), quarterly account statements and episodic notices such as diversification notices. It is up to the individual to determine which papers

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<sup>59</sup> Erik Sherman, “Privacy Policies Are Great—for PhDs,” (September 4, 2008), *available at* <http://www.bnet.com/blog/technology-business/privacy-policies-are-great-8212-for-phds/282>. For links to similar studies on Internet privacy policies, see Annie I. Antón and Gurleen Kaur, “Readability of Internet Privacy Policies,” *The Privacy Place* (September 5, 2008), *available at* <http://theprivacyplace.org/2008/09/readability-of-internet-privacy-policies>.

should be kept long term (and for how long), and file these disparate pieces of paper effectively, to enable the individual to obtain and keep an overall picture of the information and the underlying account.

As shown in the sample online screenshots in Appendix A, disclosures online can provide a different perspective—basically the view that a professional financial advisor would have of the participant’s account. The online disclosure includes precisely the funds currently held by a participant (while making disclosure accessible for all the other available plan investments). Holdings are updated continuously, which is preferable to the once-per-quarter updates that arrive by mail. Because participants have continuous access to their accounts, they can easily check for updates anytime. The DOL’s Field Assistance Bulletin 2006-03 (December 20, 2006) recognizes the advantages continuous access can provide. The FAB provides interim guidance that includes delivery of benefit statements through continuous access on a secure website as one method a plan can use today to comply with the requirement to provide quarterly benefit statements as required by the Pension Protection Act of 2006 (PPA).

## **2. Calculators and other drivers of increased savings are easier to deploy online.**

Online sites for many plans have “calculators”—tools that let the participant see the different outcomes of different savings scenarios. In recent testimony Edmund Murphy of Putnam Investments described Putnam’s Lifetime Income Analysis Tool,<sup>SM</sup> which highlights a participant’s potential monthly retirement income needs compared with monthly income if he or she keeps saving at current levels.<sup>60</sup> The tool shows a participant’s current contributions and employer matches, as well as outside sources of income, such as Social Security and individual retirement account (IRA) balances, and the impact of remaining life expectancy. The tool “has a bias for action” in the direction of greater savings, including a proposed “next step” for retirement saving.

Putnam’s analysis of aggregate behavior of participants who used the tool on their own on the Putnam website in July and August 2010 shows that about one-third changed their deferral rate after using it. Of those, 80 percent elected to increase their salary deferral by an average of 23 percent, from 6.1 percent before the site visit to 8.6 percent after.<sup>61</sup> Other companies in this market also offer various online tools for retirement plan investors and observe similar changes in participants’ behavior after participants use those tools. In 2010, 40 percent of the plan participants that used Fidelity’s online retirement investment modeling tool, Portfolio Review, made a change to their asset allocation.<sup>62</sup>

The Principal Financial Group provides plan participants with My Principal Edge Milestones, an online interactive tool that uses certain participant information to identify areas of underperformance and provides a personalized guide to help participants meet their retirement goals. After using this tool, participants commonly increased deferrals, adjusted asset allocation, and rebalanced accounts. Based

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<sup>60</sup> Edmund Murphy, Putnam Investments, Testimony on Lifetime Income Issues, Joint Hearing before the U.S. Department of Labor (EBSA) and the U.S. Treasury Department (IRS) (September 14, 2010), *available at* <http://www.dol.gov/ebsa/pdf/Putnam091510.pdf>.

<sup>61</sup> *Id.* at 2.

<sup>62</sup> John F. Sweeney, Fidelity Investments, Testimony on the Definition of Investment Advice under ERISA, Hearing before the U.S. Department of Labor (EBSA) (October 22, 2010), at 6, *available at* <http://www.dol.gov/ebsa/pdf/1210-AB32-T7.pdf>.



on a recent survey, plan participants who used the online tool saved an average of 39 percent more than participants that did not use the tool.<sup>63</sup>

The use of calculator tools is likely to grow and improve over time. Software continues to improve, with enhanced colors, formats, and interactive features. Operators of websites can experiment with the placement and display of calculators, and adopt configurations over time that participants use to increase their savings. By contrast, this sort of sophisticated tool for alternative savings paths is much harder to implement on paper. Electronic notices lead straight to these tools, but paper notices do not.

### **3. Online display integrates with a user's other financial accounts.**

Widely used software enables a participant to integrate information from one financial service provider, such as a plan's recordkeeper, with the rest of that person's financial records. Perhaps the best-known commercial example is Quicken, but at least 25 software packages are currently available, including free software such as Mint.<sup>64</sup>

This sort of integration directly helps a household plan for its overall financial goals, including retirement security. Online disclosure and website use mesh with this category of personal finance software. Paper records, by contrast, require tedious manual entry into a spreadsheet of a household's finances, and individuals can easily make mistakes when entering the data.

### **4. Interactivity online furthers program goals.**

The industry experience described above provides evidence that the interactivity of electronic delivery helps achieve public policy goals for defined contribution plans of increasing retirement savings and enabling participants to manage their accounts.

**a. Increased savings by participants.** The logical result of using the enhanced functionality online is that participants will increase their savings rates. Along with the Putnam and Fidelity statistics reported above, The Principal's survey discussed above indicated that, "[t]he average deferral rate for a sample group of Milestones users is 2.5 percentage points higher (8.9 percent) than those who have not completed Milestones (6.4 percent)."<sup>65</sup> It also found that 46 percent of first-time users "started deferring or increased their deferral amount," and those "who started deferring for the first time did so at a 7 percent higher rate (7.3 percent) than the overall average deferral rate for all participants covered by a 401(k) plan through The Principal (6.8 percent)."<sup>66</sup> In addition, 57 percent of participants that used the online tool contributed "more than 11 percent toward retirement."<sup>67</sup>

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<sup>63</sup> "The Principal: 401(k) Participants Using Online Tool Defer 39% More," (February 28, 2011), *available at* <http://www.principal.com/about/news/2011/ris-milestones-results022811.htm>.

<sup>64</sup> For a review site of 25 personal finance software offerings, see <http://personalfinancesoftwarereviews.com/>.

<sup>65</sup> "The Principal: 401(k) Participants Using Online Tool Defer 39% More," (February 28, 2011).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*



**b. Feedback from participants on what they prefer.** A recordkeeper is in a good position to understand what information and what presentation of information evoke response from participants. A recordkeeper gets little information about what a participant reads or finds useful on paper. By contrast, a recordkeeper can keep track of which plan website features are most used by participants, helping to update the website to be more useful, and identifying features that are unpopular or not working well. Similarly, current email technology enables a recordkeeper to see which emails are actually opened, with what online follow-up such as clicking on a link. This sort of data is highly beneficial feedback about what features or communications participants find most useful.

**c. Adaptation to changing technology.** Electronic disclosure makes it easier to adapt to changing technology over time. Paper notice is static—it does not change with changing software and hardware. Electronic delivery enables a recordkeeper to shift electronic channels as the needs and preferences of participants shift. Today, a large and growing population relies on smartphones for an increasing array of activities and social networks, and other new services are emerging in the electronic realm. Empowering a defined contribution plan to use electronic communication for delivery of required information makes it possible to shift notices to the devices and formats that participants prefer and find more useful.

**d. In-channel customer service.** Customer service is also often more effective with online delivery of information. Barriers to action by participants are lower if they are already online, including filling out a web form or sending an email. According to one major recordkeeper, online chat is now a popular way for participants to ask questions and receive customer service. This sort of “in-channel” service uses the online channel the participant selected to access required notices, such as a quarterly benefit statement. It is slower and not interactive for a participant to use the paper channel—mail—for questions or customer service activities. Though participants, including those who receive paper delivery, can use call centers, call centers with live operators to answer questions about a participant’s retirement account usually are not available 24/7, and may not provide the participant with an automatic electronic record of the information exchange the way email or online chat does. Sending required information electronically allows recordkeepers to provide follow-up customer service in the channel that customers already use.

## F. EVIDENCE OF BENEFITS FROM ELECTRONIC DISCLOSURE.

In addition to the benefits for participants—greater access to notices and account information, improved quality of notices, and greater functionality once the participant uses the website—the Department also should consider additional categories of benefits, including direct savings from lower costs of electronic delivery and environmental benefits. In addition, the clear trend toward electronic delivery in other similar settings is evidence that other decision makers are reaching the conclusion that electronic delivery is better than paper delivery.

### 1. Direct cost savings.

One major category of benefits comes from direct savings—electronic delivery generally costs less for the sender than paper does. In economic terms, the fixed costs of electronic or paper disclosure are similar—the recordkeeper must prepare the disclosure in a way that complies with legal requirements. The marginal cost (cost per incremental notice), however, is far lower for electronic delivery. Paper delivery incurs the cost of physical operations, notably the cost of paper, printing costs, postage costs, and labor costs to get the notice to the recipient. Electronic delivery, by contrast, has close to zero marginal cost. Once the document is formatted, the cost is almost the same to send to a few or a few million recipients by email or through a website.

Precise dollar estimates for savings from a shift to electronic disclosure for defined contribution plan notices would depend on the exact nature of a regulatory change. The following estimates the mutual fund industry developed in connection with the Securities and Exchange Commission’s (SEC’s) summary prospectus rule are helpful in estimating cost savings to 401(k) plans of allowing plans to deliver electronically the annual chart they will be required, beginning later this year, to send annually to all participants:

- ICI’s 2007 estimate of printing costs for a summary prospectus assumed an average document length of four pages, the same average number of pages the retirement industry estimates, conservatively, for the comparative chart that would be developed for each defined contribution plan.<sup>68</sup>
- Printing costs varied depending on whether a company used “digital print on demand” or “offset printing.” As a rule of thumb, if printing involved volumes greater than 5,000 identical documents, it was more economical per unit to use offset printing.<sup>69</sup> (Though less expensive, offset printing requires longer lead times to allow for document-specific typesetting.) Because most plans have fewer than 5,000 participants, the cost-savings of offset printing may only be available to relatively few large plans.

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<sup>68</sup> See Investment Company Institute, *Cost-Benefit Analysis of the Summary Prospectus Proposal* (February 28, 2008), Appendix B, available at [http://www.ici.org/pdf/rpt\\_08\\_cost\\_benefit\\_analysis.pdf](http://www.ici.org/pdf/rpt_08_cost_benefit_analysis.pdf).

<sup>69</sup> Id. at B-10, n. 16.

- Printing costs also varied for print in color versus in black and white. The average cost of a four-page document in black and white produced with digital print on demand was \$0.14, compared to \$0.40 for color.<sup>70</sup> For offset printing, the black and white cost was \$0.07, with color for \$0.09.<sup>71</sup>

To estimate the cost difference for electronic vs. paper delivery, Table 1 shows cost estimates for the four categories of printing (black-and-white vs. color, and offset vs. print on demand). The Department of Labor estimated that 72 million participants would receive the new comparative chart disclosure.<sup>72</sup> The initial printing estimates are then 72 million times the cost of each type of printing. In addition to printing costs, mailing of a participant disclosure will most likely incur the cost of first-class postage, currently at \$0.44.<sup>73</sup> For 72 million mailed notices, the postage cost would be \$31.7 million per annual distribution of the chart.

As shown in Table 1, column 5, **the low estimate for the 72 million plan participants receiving paper rather than electronic versions of the fee comparison chart is for black-and-white offset printing, with a total cost including postage of \$36,720,000. The high estimate is for color print on demand, with a total cost including postage of \$60,480,000.**<sup>74</sup> These estimates are the incremental costs of paper delivery for one annual disclosure conservatively estimated at four pages—the new annual chart comparing fees and providing other information. ERISA requires many types of disclosures, some of which are often considerably longer, such as the summary plan description, and thus incur higher printing and postage costs.

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<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> 75 Fed. Reg. 64910, 64929 (October 20, 2010).

<sup>73</sup> Although some plans may distribute these disclosures without postage, at the workplace, our research has not found an estimate of that proportion, and interviews with plans suggest this fraction is modest. The estimate in the text therefore does not pull out these non-postage printed disclosures. The estimate similarly does not consider using presorted first-class postage (currently at \$0.414) that some plans may be able to take advantage of.

Although there is not a reduction for non-postage distribution, the overall estimate is likely significantly on the conservative side, because: (1) the printing costs are based on the 2007 estimate, with no adjustment for inflation; and (2) the estimate of four pages for the new chart is likely substantially less than the average will be.

<sup>74</sup> Our research has found limited information about the proportion of defined contribution plan participants who today receive only electronic and not paper notices. In its discussion of the costs of producing the annual chart, the Department of Labor estimated that 38 percent of participants receiving the chart information for the first time would receive it electronically. The Department did not explain the basis for this estimate, appeared to apply this estimate to a subset of plans that had not previously compiled certain information, and did not break out the portion of participants who continue to receive paper notices while also receiving electronic notice. If the estimate accurately states the proportion of overall participants who receive only electronic notices, then the direct savings estimated here would be reduced by 38 percent. *See* 75 Fed. Reg. 64910, 64933 n. 45 (October 20, 2010) (providing the 38 percent estimate).

**TABLE 1: COSTS OF PRINTING AND MAILING A FOUR-PAGE NOTICE**

1. Type of Printing	2. Cost to Print per Four-Page Document	3. Printing Cost if Printed for all Plan Participants <sup>75</sup>	4. Postage Cost if Mailed to all Plan Participants <sup>76</sup>	5. Total Cost if Printed for and Mailed to all Plan Participants <sup>77</sup>
BW Offset	\$0.07	\$5,040,000	\$31,680,000	\$36,720,000
Color Offset	\$0.09	\$6,480,000	\$31,680,000	\$38,160,000
BW Print on Demand	\$0.14	\$10,080,000	\$31,680,000	\$41,760,000
Color Print on Demand	\$0.40	\$28,800,000	\$31,680,000	\$60,480,000

## 2. Environmental benefits.

Along with significant direct savings, the shift to electronic delivery would greatly reduce the use of paper, with consequent environmental benefits. Environmental considerations are becoming increasingly important in business decisions. In 2008, close to one-fourth of Fortune 500 companies had a board committee devoted to considering environmental implications, compared with less than 10 percent in 2003.<sup>78</sup> Shareholders are also more concerned with the environment—the number of investor proposals related to the environment almost doubled between 2004 and 2008.<sup>79</sup>

A range of evidence shows the benefits of shifting from a paper to an electronic system. PayItGreen, a nonprofit coalition led by the National Automated Clearing House Association, or NACHA—the Electronic Payments Association—engages in an e-billing initiative that educates consumers about the environmental and financial benefits of online payments and billing. According to its research, if one in five households went paperless, 151 million pounds of paper would be saved, 8.6 million bags of waste would not be thrown out, and the environment would be saved from 2 million tons of greenhouse gas emissions.<sup>80</sup> “Collectively, the production and transportation of those paper documents consume 755 million pounds of paper, 9 million trees and 512 million gallons of gasoline.”<sup>81</sup> By going paperless, the

<sup>75</sup> Column 3 contains the printing cost if printed for all 72 million plan participants. These numbers are determined by multiplying the cost to print per four-page document in column 2 by 72 million.

<sup>76</sup> Column 4 contains the postage cost if sent to all 72 million plan participants. These numbers are determined by multiplying the first-class postage price of \$0.44 by 72 million.

<sup>77</sup> Column 5 contains the total cost if printed and mailed to all 72 million plan participants. These numbers are determined by adding the numbers in columns 3 and 4.

<sup>78</sup> Joann S. Lubin, “Environmentalism Sprouts Up on Corporate Boards,” *Wall Street Journal* (August 11, 2008), available at <http://online.wsj.com/article/SB121840356252128043.html>.

<sup>79</sup> *Id.*

<sup>80</sup> PayItGreen Green Trade Press Release Announcement (March 26, 2008), available at [http://www.payitgreen.org/files/pressReleases/Green\\_Trade\\_Release-Announcement\\_3-26-08.pdf](http://www.payitgreen.org/files/pressReleases/Green_Trade_Release-Announcement_3-26-08.pdf). The press release cites a study commissioned by PayItGreen and performed by technology consulting firm Project Performance Corporation. This statistic refers to the switch from paper bills, statements, and payments to an electronic system.

<sup>81</sup> *Id.*

average American household would save these resources: 6.6 pounds of paper, 63 gallons of water, 4.5 gallons of gasoline, and 171 pounds of greenhouse gases.<sup>82</sup>

In connection with the 2009 SEC summary prospectus rule, the Aite Group estimated the average tree makes 80,500 sheets of paper and the average acre of forest contains approximately 300 trees.<sup>83</sup> Although there are numerous ERISA-required disclosures,<sup>84</sup> on average and at a minimum, each participant in a participant-directed plan will receive 13 pages of disclosures in 2012, via six separate mailings: a participant comparative chart (4 pages at a minimum); four benefit statements (approximately 8 pages annually, assuming, conservatively, each statement is 2 pages), and a summary annual report (1 page). Using the Aite formula and applying it to 72 million participants in participant-directed plans, shifting from paper to electronic delivery of these three disclosures alone will result in over 11,600 trees, or almost 39 acres of forest, saved annually.

### **3. Other shifts to electronic delivery channels.**

Other consumer-facing organizations have shifted from paper to electronic delivery in recent years. The prevalence of this trend is evidence of the benefits that would result from shifting from paper to electronic delivery. Since release of the RFI, the Social Security Administration (SSA) announced that it will send its own annual beneficiary statements electronically rather than in paper form.<sup>85</sup> For notices about retirement plans, precisely the issue under the RFI, the federal Thrift Savings Plan (TSP) moved to a paperless delivery of quarterly participant statements in 2003: “With the exception of the first statement period after a participant establishes a TSP account, quarterly statements are no longer mailed to participants, instead, they are made available through the account access portion of the TSP website. However, participants may request to receive quarterly statements in the mail. In January 2007, the TSP mailed 367,010 paper statements to participants, which is only about 10 percent of the TSP population. The elimination of quarterly paper statements has produced considerable savings for the plan, estimated at over \$7 million in the 2006 calendar year.”<sup>86</sup> The federal government recently took another large step toward electronic delivery. The Office of Personnel Management (OPM) expects to save \$5 million by no longer requiring health insurers to mail benefits brochures: “The full brochures will be accessible online, and they will still be mailed upon request,” OPM Director John Berry said. “But this will save us a heck of a lot of money and

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<sup>82</sup> See “Frequently Asked Questions,” available at <http://www.payitgreen.org/consumer/FAQ.aspx>. In reference to greenhouse gases, 171 pounds is the “equivalent of not driving 169 miles; planting two trees and allowing them to grow for 10 years; or preserving 24 square feet of forest from deforestation.”

<sup>83</sup> “Environment Sustainability,” Broadridge, available at <http://www.newriver.com/environment.asp> (referring to the Aite Consulting April 2008 report “Green in More Ways Than One: The Economic and Client Impact of Going Paperless.”)

<sup>84</sup> Another example of an ERISA disclosure applicable to all plan participants is a summary plan description, the primary document informing participants about their plans. The SPD may vary in length from a few pages to a hundred pages or more. We did not include the SPD in our calculation for annual notices because, after the initial distribution requirement, SPDs generally are required to be distributed every 5 years.

<sup>85</sup> Stephen Ohlemacher, “Social Security Stopping Mailed Earning Statements,” (April 7, 2011), available at [http://www.huffingtonpost.com/2011/04/07/social-security-stopping-\\_n\\_846284.html](http://www.huffingtonpost.com/2011/04/07/social-security-stopping-_n_846284.html).

<sup>86</sup> Federal Retirement Thrift Investment Board, Memorandum for the Executive Director, Annual Participant Statement (February 6, 2007), available at [www.frtib.gov/pdf/minutes/MM-2007Feb-Att6.pdf](http://www.frtib.gov/pdf/minutes/MM-2007Feb-Att6.pdf). See also GAO-05-38 TSP’s Customer Service, at 12, n. 21, available at [www.gao.gov/new.items/d0538.pdf](http://www.gao.gov/new.items/d0538.pdf) (providing statistics on experience with TSP).

a lot of trees.”<sup>87</sup> As fellow agencies that administer benefits programs, SSA, TSP, and OPM have examined the pros and cons of a shift to electronic disclosure, and concluded that the shift is warranted. Absent some facts specific to defined contribution plan disclosures—facts that are not easy to discern—a similar conclusion would seem to apply to the disclosures at issue here.

The SSA, TSP, and OPM decisions are merely examples of the sweeping trend to electronic methods of doing business. The shift in airline tickets provides a familiar example. Historically, airline tickets were issued in paper form. After a time, consumers had the choice of a paper or electronic ticket. In 2008, however, the rule shifted.<sup>88</sup> Paper tickets were no longer accepted. Only electronic airline tickets are now accepted for travel for domestic U.S. flights, with travelers routinely printing the e-tickets at home or downloading them to their smartphones. And, on many airlines today, electronic payment through credit or debit cards is the only way to purchase food and drink, with cash not being accepted.

The change from paper checks to direct deposit is another prominent example of the massive shift toward electronic channels. Direct deposit became common in the 1990s as a replacement for paper checks and some states today allow an employer to use direct deposit as a default payment system, with the employee able to opt out.<sup>89</sup> Last December, Michigan went further, allowing employers to mandate electronic payment of wages.<sup>90</sup> Federal government policy also strongly favors electronic deposit—the Debt Collection Improvement Act of 1996 requires federal salary payments be made electronically, rather than by paper check.<sup>91</sup> Also, effective May 2011, all social security and supplementary security income must be distributed via direct deposit or debit card.<sup>92</sup>

The IRS provides a final example of the dramatic shift to electronic delivery. The IRS no longer mails paper tax forms to individuals and businesses. Taxpayers are now required to go to its website ([www.irs.gov](http://www.irs.gov)) to view, download, or order the forms, schedules, and instructions needed for filing a paper income tax return. The IRS also strongly encourages electronic delivery of tax forms back to IRS, improving legibility,

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<sup>87</sup> Joe Davidson, “OPM Asks Health Insurers to Provide Incentives for Wellness Programs,” *Washington Post* (March 24, 2011), *available at* [http://www.washingtonpost.com/local/politics/opm-asks-health-insurers-to-provide-incentives-for-wellness-programs/2011/03/24/ABV58QRB\\_story.html](http://www.washingtonpost.com/local/politics/opm-asks-health-insurers-to-provide-incentives-for-wellness-programs/2011/03/24/ABV58QRB_story.html).

<sup>88</sup> International Air Transport Association, “Fact Sheet: Electronic Ticketing,” *available at* [http://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/Pages/et.aspx](http://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/et.aspx).

<sup>89</sup> See e.g., Ark. Code Ann. § 11-4-402; Minn. Stat. § 177.23(4).

<sup>90</sup> Public Act 323 of 2010 (MCL § 408.476). The Michigan law now allows employers to require employees to accept either direct deposit or to receive their pay via payroll debit card if certain notices and other conditions are met. Other states that allow employers to mandate direct deposit include Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, North Dakota, Ohio, South Carolina, Tennessee, Washington, and Wisconsin. See Robert J. Nobile, *Guide to Employees Handbooks*, Appendix I. State Laws for Direct Deposit of Payroll, West Group (2011 Edition).

<sup>91</sup> Public Law 104-134, 31 U.S.C. § 3332. This requirement may be waived if compliance imposes a hardship on the individual. 31 U.S.C. § 3332(f)(2)(A). There are limited waivers allowing individuals to continue receiving paper checks. Electronic payment is not required for those over the age of 90 before May 1, 2011.

<sup>92</sup> See Direct Deposit, Frequently Asked Questions, *available at* <http://www.ssa.gov/deposit/DDFAQ898.htm>. Those currently receiving paper checks have until March 1, 2013, to switch to direct deposit or debit card.

reducing physical handling of files by IRS employees, and eliminating the need for storage of paper back-ups. The IRS says, “the fastest and easiest way to get your tax refund is to e-file and use direct deposit.” E-file has become so popular that seven out of 10 individual taxpayers now e-file their return.<sup>93</sup>

## **G. ELECTRONIC NOTICE PROVIDES IMPORTANT CYBERSECURITY ADVANTAGES COMPARED TO RISKS FROM PAPER NOTICE.**

One potential concern about a shift from paper to electronic records is that the electronic approach will have cybersecurity problems. A steady stream of press stories and government reports has drawn attention to data breaches and other cybersecurity problems. Decision makers might therefore feel that the “safe” approach is to treat paper records as the baseline or that paper records are simply more familiar—people understand and know how to manage the risks of paper records, but lack the same length of experience in safeguarding electronic records.

The view of the authors is that electronic-based delivery is safer than paper-based delivery. Based on one of the author’s extensive research and experience in the area of cybersecurity,<sup>94</sup> as well as interviews with experts on cybersecurity in the 401(k) recordkeeping industry, there are strong reasons to think that electronic delivery is safer than paper delivery. The basic point is that electronic delivery provides a fuller set of security precautions, and allows for updating and additional layers of security over time. Importantly, the data breaches that make the news do not vary in frequency or severity based on whether the individual receives notices through electronic or paper delivery. Data breaches occur at the enterprise level—the breach happens when the central computer system is compromised. Notices, by contrast, are sent to the individuals, and delivery of the notices is not the way that hacking or other data breaches occur.

### **1. Bouncebacks on email are more effective than paper change-of-address forms.**

One prominent advantage of electronic records is that the recordkeeper learns more quickly and effectively when a communication has gone awry. With delivery through email, the recordkeeper receives an instantaneous “bounceback”—the sender learns immediately about the delivery failure when an email goes to a no-longer-current account. One major recordkeeper reported to the authors that their bounceback rate is about 2 percent per year.<sup>95</sup> These bouncebacks have a major security advantage—they allow the recordkeeper to detect a problem immediately, stop sending to the incorrect email, and begin a process to learn an up-to-date address for communications with that plan participant. The bouncebacks also are a customer service advantage—a customer’s account is quickly flagged for action, so that current account information will get to the customer at a new location.

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<sup>93</sup> See the 2010 1040 Instructions at 2, *available at* [www.irs.gov/pub/irs-pdf/i1040gi.pdf](http://www.irs.gov/pub/irs-pdf/i1040gi.pdf).

<sup>94</sup> Professor Swire has served on security and privacy advisory boards for companies including IBM, Intel, and Microsoft. His security-related publications are available at [www.peterswire.net/pspublications.htm](http://www.peterswire.net/pspublications.htm).

<sup>95</sup> For a national population of 72 million participant-directed accounts, the 2 percent estimate means approximately 1.44 million accounts would get a bounceback and thus attention to possibly changed addresses per year.



By contrast, the recordkeeper using paper disclosures receives much slower and less complete feedback. Not all customers provide the post office with a change of address form for redirecting the mail to a new address. Although over 40 million people do file a change of address form with USPS each year, 40 percent of all people who move do not file an updated forwarding address.<sup>96</sup> If the USPS does not have an updated address, it will simply continue to send mail to the old address until it is notified, or the sender is notified, of a new address. This puts the burden of providing an updated address on the customer, who may not effectively update the senders or the USPS about the change of address.

Moreover, the mechanics of the change of address system are far from perfect in execution—one of the authors (Swire) has personally moved in the past year, has had important documents go to his old address, and has received bank statements and other important documents for previous residents of his current house.<sup>97</sup> The complex rules and forms about change of address contribute to the substantial likelihood that paper notices will be delivered incorrectly for participants who change residence.

In addition to benefits of quick and reliable bouncebacks, commonly available technology further increases the advantages of electronic delivery in detecting possible problems in delivery. For instance, recordkeepers can send emails in a format that reports back whether the email was opened.<sup>98</sup> An account that consistently is not opened can be flagged for follow-up. By contrast, paper delivery provides no feedback about whether the mail is being opened. This lack of feedback increases the risk that the authorized person is not receiving the communications or that unauthorized persons are. A related security advantage from online delivery is that a new homeowner or tenant typically can receive paper documents sent to the old address. By contrast, as we know by our daily experience, other people rarely take over a person's old email account. The risk of fraud from a subsequent person using an abandoned address is thus less for electronic delivery.

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<sup>96</sup> See NCOALink® Systems, *available at* <http://www.usps.com/ncsc/addressservices/moveupdate/changeaddress.htm>. See also "The Devastating Financial Impact of Return Mail," White Paper, Pitney Bowes, 2009, at 3, *available at* <http://www.pbconnect.com/ResourceViewer.aspx?id=539>. Only 60 percent of movers inform the USPS in a timely manner, meaning that 40 percent of movers do not.

<sup>97</sup> When filing a non-electronic change of address, the customer submits Form 3575 to the USPS, after which it may take up to 10 business days for mail to arrive at the new residence. Once the change of address takes effect, mail is forwarded to the new residence. Specific mail classes are forwarded for different amounts of time. First Class and Priority mail is forwarded to the new address for 12 months. During this time, only companies that subscribe to the National Change of Address Service (NCOA) will be notified of the change in address. Other senders will not receive notice. During months 13–18 following the change of address, mail sent to the old address is returned to the sender with the address of the new residence, if available. After 18 months, any mail sent to the old address is automatically returned to the sender without the new address.

When filing a temporary change of address, mail will be forwarded for six-month intervals, not to exceed one year. Customers who want to extend the forwarding for more than six months must submit another temporary change of address form to the USPS. The information filed through a temporary change of address is not made available to NCOA subscribers. Consequently, if a temporary move inadvertently extends beyond the one-year maximum, mail will no longer be forwarded to the new address, and will revert back to being sent to the old address. "USPS Change of Address FAQ," *available at* <http://faq.usps.com>.

<sup>98</sup> Although there have been privacy debates about when and how so-called "web bugs" should be used, computer expert Richard Smith has stated: "Any kind of commercial e-mail is probably going to have them in there." Robert McMillian, "Web Bugs Trained to Track Your E-Mail," *PCWorld* (October 9, 2006), *available at* [http://www.pcworld.com/businesscenter/article/127444/web\\_bugs\\_trained\\_to\\_track\\_your\\_email.html](http://www.pcworld.com/businesscenter/article/127444/web_bugs_trained_to_track_your_email.html). Although not perfectly accurate, these web bugs typically send information back to the sender about whether and when an email is opened.



## **2. Authentication is more sophisticated and adaptable online.**

For financial accounts, a central security issue is “authentication”—determining whether the people who say they are authorized users in fact are those authorized users. An online authentication system today adds extra layers of protection depending on the level of risk. For instance, authentication at one current recordkeeper has the following steps:

1. The online user gives an initial username, so that the recordkeeper knows what account is involved.
2. The recordkeeper provides an image, so that the user can trust that the sponsor’s site is being used, rather than a fraudulent site.
3. The online user gives a second username and password. At this point, the recordkeeper does a risk assessment for whether additional security is needed. For instance, if the request is coming from a new computer or a new geographic location, the user may need to answer an additional security question.
4. For actual financial transactions (as opposed to the user simply looking at the account), there can be additional security measures.

Today, one common additional security measure is to ask “secret questions” that are difficult for a fraudster to know. Good questions are “out of wallet”—the question should not be answerable based on Social Security number or other answers that a thief could answer based on a stolen wallet. The questions should also avoid topics that are easily searchable online, such as mother’s maiden name or other information that often appears on genealogy websites.

For important transactions, in addition, electronic delivery also fits well with “out of band” authentication that makes fraud substantially more difficult. One example is to have a one-time code texted to a person’s phone. In that way, fraud is successful only if the criminal can answer all of the online computer questions and also gets access to the person’s cell phone. Another example is to place a one-time code in an email—the fraudster then must have access to the person’s email in addition to the account number or other information needed to log into the account.

These sorts of multifactor authentication, which become stricter for higher-risk interactions, are far less common in paper-based delivery. A fraudster who gains access to the paper records of a participant quite possibly can use paper-based change of address forms and other paper-based methods for taking over an account and ultimately stealing funds. In addition, as shown by the description here of the multiple layers of electronic-based authentication, an electronic-based system is far more flexible and capable of adding additional layers of protection as new risks emerge.

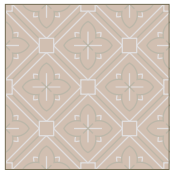
### **3. Defined contribution plans have few instances of distribution and are thus less susceptible to fraud than many types of financial accounts.**

Although electronic-based delivery is more secure and robust against new attacks than paper-based delivery, the level of risk is especially low for the retirement accounts that are the subject of the current Request for Information. First, authentication is stronger for plan participants than for many other sorts of financial services customers, due to the company-based structure of defined contribution accounts. The initial enrollment of an employee into a plan is relatively secure, because it is much more difficult to fake creation of an employee account than of a typical financial account for a consumer who simply signs up for a service online or in a retail setting. Second, the company-based nature of defined contribution plan accounts means that someone who wishes to attack a participant's electronic retirement account would need to learn the identity of a service provider (e.g., a recordkeeper) for that company's defined contribution plan. This information is not widely reported publicly, making it more difficult for a fraudster to know the target for an online attack. Third, and perhaps most importantly, the number of instances in which money can be withdrawn from defined contribution accounts is low, and certainly far lower than for checking and other transaction accounts online. Under the Tax Code money in a defined contribution account cannot be withdrawn until the plan permits it (and in accordance with its procedures), typically when a worker leaves employment, reaches age 59 ½, or requests a hardship withdrawal or loan. In addition, sponsors can and do put additional safeguards on electronic withdrawals from accounts, such as additional requirements of out-of-band authentication.<sup>99</sup> The actual risk of loss connected with electronic delivery of these accounts, therefore, is especially low.

The substantial security advantages today for electronic delivery of financial transactions generally, and as applied to defined contribution plans in particular, lead to an overall conclusion that electronic delivery of account information is safe, and very likely safer on many dimensions and overall than paper delivery.

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<sup>99</sup> "Out-of-band" refers to using a different band, or method, of delivery of information. For instance, a consumer accessing a bank account through the Internet today may be asked to enter a security code sent through a different device, such as a smartphone. This sort of authentication tends to be more secure because a fraudster would need to control both the computer and the smartphone to learn both required codes.



## **PART TWO: THE LEGAL FRAMEWORK FOR ASSESSING ELECTRONIC AND PAPER NOTICES**

Two statutes—ERISA and E-SIGN—create the basic legal framework for deciding between electronic and paper notices. E-SIGN strongly encourages electronic commerce, and the ERISA statute provides great flexibility in how disclosure is made available to participants. The other major legal authority is Executive Order 13563, which declares President Obama’s approach to regulations in numerous ways that support a shift toward electronic notice.

### **A. ERISA AND E-SIGN PROVIDE THE APPLICABLE STATUTORY STANDARDS THAT PERMIT AND ENCOURAGE A SHIFT TO GREATER USE OF ELECTRONIC DISCLOSURE.**

#### **1. ERISA shows recent general intent of “reasonably accessible” notice.**

As the Department considers greater use of electronic disclosures, the statutory framework is quite simple. ERISA originally did not provide any statutory language concerning the form of notice, whether paper or electronic. In 1977, the Department opined on what it meant to “furnish” documents, requiring plans to use delivery methods calculated to ensure actual receipt. This standard, formulated in rulemaking and not in the statute itself, gives examples designed for a paper world—in-hand delivery or first-class mail. Nearly 10 years ago, the Department took the initiative to amend its rules to establish a narrow “safe harbor” for electronic media. The Department used its general rulemaking authority to establish e-delivery rules without any specific Congressional direction or statutory guidance. Because ERISA is silent on what it means in general to furnish documents electronically, the Department has broad discretion to interpret the statute through notice and comment rulemaking and revise its current rule to reflect improvements in access to electronic media.

To the extent that DOL looks at legislative pronouncements as a guidepost in issuing new rules, the clear trend of Congress has been towards encouraging a more flexible means of delivering disclosures required by ERISA.

- In 1996, as part of the Health Insurance Portability and Accountability Act, Congress amended ERISA § 104(b)(1) to specifically require DOL to issue regulations providing an alternative mechanism to delivery by mail for notifying participants in group health plans of material reductions in covered services or plan benefits.<sup>100</sup> The statute provided a first step towards delivery outside of a paper context and did not impose an “actual receipt” standard.

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<sup>100</sup> 29 U.S.C. 1024(b)(1)(B).

- In 2002, the Sarbanes-Oxley Act established the blackout period notice provisions of ERISA § 101(i). The law stated that the blackout period notice “shall be in writing, except that such notice may be in electronic or other form to the extent that such form is reasonably accessible to the recipient.”<sup>101</sup> In this case, Congress explicitly permitted electronic delivery “or other form” of delivery. The Act indicated that the electronic delivery need only be “reasonably accessible to the recipient,” a statutory standard that is easier to satisfy than the “actual receipt” standard that DOL adopted in the electronic delivery regulation that same year.<sup>102</sup>
- The biggest changes came in 2006 with the adoption of the Pension Protection Act (PPA) when Congress specifically made e-delivery available to all plans subject to ERISA, including defined contribution plans, in complying with new PPA requirements.
- Congress expressly provided that the pension benefit statement for defined contribution plans “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant or beneficiary.”<sup>103</sup> This approach is consistent with the more flexible approach adopted for blackout period notices in Sarbanes-Oxley. To implement this requirement, DOL took the position in informal guidance in 2006 (FAB 2006-03) that the continuous availability of pension benefit statement information under ERISA §105(a) through one or more secure websites constitutes good faith compliance with the requirement to furnish benefit statement information.<sup>104</sup>
- PPA creates a standard more favorable to electronic delivery for benefit statements for defined benefit plans. These plans can meet the benefit statement requirement by providing notice to participants “of the availability of the pension benefit statement and the ways in which the participant may obtain such statement.” The statement itself does not have to be delivered, and notice of the pension benefit statement’s availability “may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant.”<sup>105</sup>
- Also as part of PPA, Congress specifically mandated the filing of plan information included in the annual report (Form 5500) with DOL in an electronic format that can be displayed on the Internet.<sup>106</sup> This requirement assumes that every plan administrator has access to electronic methods of delivering information to DOL. Moreover, this section requires DOL to post such information on an Internet site maintained by DOL. The information also must be displayed “on any Intranet website maintained by the plan sponsor...for the purpose of communicating with employees.” In this case, the exclusive method of plan sponsor delivery of annual report information to participants is posting on the website.

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<sup>101</sup> 29 U.S.A. 1021(i)(2)(D).

<sup>102</sup> DOL rejected a public comment that the reasonably accessible standard is broader and more flexible than the actual receipt standard. *See* 68 Fed. Reg. 3716, 3719 (January 24, 2003). DOL supplied no explanation for that conclusion, and the plain language of “reasonably accessible” would appear different and easier to satisfy than the “actual receipt” standard.

<sup>103</sup> ERISA § 105(a)(2)(A)(iv).

<sup>104</sup> *See* DOL Field Assistance Bulletin 2006-03.

<sup>105</sup> ERISA § 105(a)(3)(A).

<sup>106</sup> ERISA § 104(b)(5).

- Finally, PPA requires additional participant notices, such as the reduction of adjustable benefits notice under ERISA § 305(e), and the annual funding notice under ERISA §101(f). As with the benefit statements under ERISA §105(a), the statute provides that such notices “may be provided in written, electronic, or other appropriate form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided.”

These statutory changes over time show a clear trend in Congress towards encouraging a more flexible means of delivering disclosures required by ERISA. **This intent of Congress and the underlying flexibility in the general ERISA language support substantially greater use going forward of electronic delivery of ERISA-required information.**

## **2. The principal intent of E-SIGN is to encourage electronic commerce.**

The second applicable statute is the Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. § 7001 et seq. E-SIGN was designed to encourage electronic media and e-commerce generally by providing a general rule that electronic records and signatures have the same legal effect as their paper counterparts. The passage of E-SIGN avoided the need to individually amend innumerable federal and state statutes that required “written” notice. President Clinton, in signing the statute as it stands today, explained: “Businesses will be able to collect and store transaction records that once filled up vast warehouses on servers the size of a laptop. And consumers will have the option of buying insurance, getting a mortgage, or opening a brokerage account online, without waiting for the paperwork to be mailed back and forth.”<sup>107</sup>

The clear intent of E-SIGN was to encourage electronic commerce. The first principle of the statute, written into law, was to “remove paper-based obstacles to electronic transactions.”<sup>108</sup> When introduced in the Senate, the first purpose cited was “[a] bill to regulate interstate commerce by electronic means by permitting and encouraging the continued expansion of electronic commerce through the operation of free market forces, and for other purposes.”<sup>109</sup> The first two findings in the bill emphasized the overall intent of the bill: “(1) The growth of electronic commerce and electronic government transactions represent a powerful force for economic growth, consumer choice, improved civil participation and wealth creation. (2) The promotion of growth in private sector electronic commerce through Federal legislation is in the national interest because that market is globally important to the United States.”<sup>110</sup> The Senate report was crystal clear about the intent to accelerate the use of online tools: “The purpose of this legislation is to promote electronic commerce by providing a consistent national framework for electronic signatures and transactions.”<sup>111</sup>

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<sup>107</sup> President William J. Clinton, “Statement on Signing the Electronic Signatures in Global and National Commerce Act,” (June 30, 2000), *available at* [www.presidency.ucsb.edu/ws/index.php?pid=1627#ixzz1OWzzhdaD](http://www.presidency.ucsb.edu/ws/index.php?pid=1627#ixzz1OWzzhdaD).

<sup>108</sup> 15 U.S.C. § 7031(a)(2)(A).

<sup>109</sup> Introduction of Bills and Joint Resolutions, 145 Cong. Rec. S3438-02 (March 25, 1999).

<sup>110</sup> Third Millennium Electronic Commerce Act, 15 Cong. Rec. S14881-01 (November 19, 1999).

<sup>111</sup> P.L. 106-229, Millennium Digital Commerce Act, S. REP. 106-131 (July 30, 1999).

When the House and Senate considered E-SIGN in conference, specific consumer protections were added, including the language in 15 U.S.C. § 7001(d) that the consumer under certain circumstances should provide affirmative consent for electronic notice. Based on one of the author's participation in the White House Working Group on Electronic Commerce during consideration of E-SIGN, a main purpose of this consent requirement was to avoid certain sorts of consumer fraud. Much of the discussion focused on "cooling off" period statutes, which exist under state law and under the Federal Trade Commission's "Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations."<sup>112</sup> The FTC rule assures consumers of the right to cancel door-to-door sales transactions within three days of the purchase, and requires clear written notice of that right. The door-to-door rule exists to combat the high-pressure sales tactics and risk of fraudulent signatures from door-to-door sales, and the lack of a place of business where the consumer can address complaints. The concern in the E-SIGN debate was that the effectiveness of the door-to-door rules would be greatly reduced if the consumer did not receive a visible, written notice at the time of the transaction.<sup>113</sup> Electronic notice would often not reach the consumer, and consumers would thus fail to learn about their important rights before the three days ended. This sort of high-pressure, fraud-laden situation is entirely different from the long-term participation of an individual in an ERISA plan, where the employer's role and participant's clear ability to revisit decisions about the account offer protection not available in the retail environment of particular concern in the E-SIGN debate.

When adopting the limited affirmative consent provision, the drafters of E-SIGN recognized that electronic notice would in many instances provide important benefits to consumers. Section 7004(d) provides federal agencies, such as the Department of Labor, authority to waive entirely the affirmative consent requirement for electronic notice to consumers:

"A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers."

The language of Section 7004(d) lends important support for the view that its purpose was to address important consumer harms such as fraud. First, the statute specifically mentions "material risk of harm to consumers"—a harm standard rather than a preference for paper-based transactions. Second, Section 7004(d) is unusually broad in the type of exemption permitted—the agency may "exempt without condition" where the findings are made. This ability for an agency to give a blanket exemption fits with the discussion here about the problem of "cooling off" period rules—there are specific instances where paper notice is important, but the general intent of the statute is to promote online transactions.

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<sup>112</sup> 16 C.F.R. Part 429.

<sup>113</sup> Because the language about affirmative consent was added at the end of the legislative process, during the House-Senate conference, there is no written legislative history about why it was added. The discussion here is based on Professor Swire's clear recollection, which he has confirmed with others involved in negotiations at the time, about the discussion in conference—the provision was included to reduce the risk of fraud rather than express a preference for paper in consumer transactions.

Under ERISA and E-SIGN, there are thus three statutory criteria that apply to the decision about how to use electronic and paper disclosure:

1. Recent changes to ERISA set a precedent that the notice be “reasonably accessible” to recipients;
2. E-SIGN requires a finding that an exception to affirmative consent is “necessary to eliminate a substantial burden on electronic commerce”; and
3. E-SIGN requires a finding that an exception to affirmative consent “will not increase the material risk of harm to consumers.”

The Department has clear authority to adopt or revise the electronic delivery rules and the public responses to the current RFI will help develop the factual record for the Department to decide what new regulations should apply for electronic and written disclosure to ERISA participants.<sup>114</sup> ERISA itself provides considerable flexibility and the approach Congress recently used for defined contribution plan benefit statements—that the notice must be “reasonably accessible”—supports permitting each plan to determine how to deliver all ERISA disclosures to comply with that standard. The E-SIGN determinations are also entirely within the power of the Department. As discussed in the remainder of this White Paper, the required determinations are justified based on the current facts about electronic and written disclosure.

## **B. EXECUTIVE ORDER 13563 CREATES THE ADMINISTRATION’S FRAMEWORK FOR ASSESSING THE CHOICE BETWEEN ELECTRONIC AND PAPER DISCLOSURE.**

On January 18, 2011, President Obama issued Executive Order 13563, titled “Improving Regulation and Regulatory Review.” This Executive Order is the most important administration direction on how to address regulatory topics, such as the choice between electronic and paper disclosure for defined contribution plans.

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<sup>114</sup> The RFI itself contains references to extensive previous proceedings and reports, which also provide a factual basis for greater use of electronic disclosure.



Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs in the OMB, who is also an eminent scholar in the area of regulation, has said: “The Executive Order can be seen as a kind of constitution for the twenty-first century regulatory state.”<sup>115</sup> The Executive Order and OMB explanations<sup>116</sup> represent a clear and authoritative statement of Administration policy. The Executive Order provides the intellectual framework for assessing the issues in the RFI, in ways that strongly support greater use of electronic disclosure going forward.

The Department of Labor, in issuing the RFI, recognized the importance of Executive Order 13563. The Department gave a summary of how the executive order would apply to the topic of how to assess electronic and paper disclosure for defined contribution plans:

- “Executive Order 13563 reaffirms the importance of achieving regulatory goals through the most innovative and least burdensome tools available....
- In light of these goals, and in consideration of Administration-wide policies encouraging electronic dissemination of information to the public by federal government agencies consistent with the principles of transparency, participation, and collaboration,
- EBSA is issuing this RFI to facilitate consideration of its approach to electronic disclosure by employee benefit plans.
- The Department is aware that electronic disclosure can be as effective as paper based communications, and that it can lower costs and administrative burdens and increase timeliness and accuracy for all involved.
- The Department also is aware that some of America’s workers may not have reasonable access to the Internet, and others may prefer traditional (paper) disclosure methods for important financial interactions regarding their pensions and other employee benefits.”

Looking at Executive Order 13563 in more detail, key themes of the executive order bear directly on the issues in the RFI:

1. ***Update regulations, using retrospective review.*** The executive order directs agencies to “consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.” At the most basic level, agencies should not assume that the status quo is the correct outcome. Agencies should “modify, streamline, expand, or repeal [rules] in

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<sup>115</sup> Cass Sunstein, “Executive Order 13563: Economic Growth and Public Protection,” Speech at NYU Law (April 4, 2011) at 1, *available at* <http://www.whitehouse.gov/sites/default/files/omb/inforeg/speeches/economic-growth-and-public-protection-04042011.pdf>.

<sup>116</sup> In addition to the Executive Order, key administration statements about the topic come from: OMB Memorandum, M-11-10, Executive Order 13563, “Improving Regulation and Regulatory Review” (February 2, 2011); a White House blog post by Cass Sunstein on February 7, 2011, entitled “Smarter Regulation,” *available at* <http://www.whitehouse.gov/blog/2011/02/07/smarter-regulation>; and an op-ed by President Barack Obama, published in the *Wall Street Journal* on January 18, 2011, titled “Toward a 21st-Century Regulatory System,” *available at* <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html>.



accordance with what has been learned.” For defined contribution plan disclosure, this means that the Department should assess the best regulatory approach for 2011 and the future, rather than assuming that past approaches should continue.

2. **Maximize net benefits from regulation.** Executive Order 13563 “is designed to affirm and supplement” the previous federal directives about regulations, “rather than displacing or qualifying them.”<sup>117</sup> Notably, “agencies are required to maximize net benefits.” This maximization should apply to decisions concerning the mix of electronic and paper disclosures. As discussed above, there are numerous and major benefits from electronic disclosure compared with paper disclosure.
3. **Recognize the effects of changing technology.** In describing “best available techniques” for assessing costs and benefits, the first factor listed is technological innovation—agencies are instructed to identify “future compliance costs that might result from technological innovation.” The same theme occurs with respect to retrospective review, where “candidates for reconsideration include rules that new technologies or unanticipated circumstances have overtaken.”<sup>118</sup> The historical shift from paper to electronic records is a preeminent example of the effects of “new technologies” that affect compliance costs and benefits.
4. **Provide flexibility in compliance.** The executive order instructs agencies to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.” The current rule constrains “flexibility and freedom of choice” for plans in how they make disclosures and interact with participants. Plans that wish to benefit from innovation through electronic disclosure face significant hurdles, rather than being free to choose an electronic approach as the default. This paper recommends offering flexibility to plans and recordkeepers on how to provide notice to participants while preserving the ability of an individual participant to opt out of electronic disclosure.
5. **Promote competitiveness.** The executive order says that regulations must promote “competitiveness.” President Obama, in the *Wall Street Journal* op-ed explaining the executive order, said: “We can make our economy stronger and more competitive” and added that we should make “sure the government does more of its work online, just as companies are doing.” As a government and a society, we will be more effective and competitive globally when we spur companies across the economy to make use of effective new technologies, including providing online access and delivery of information to workers about their retirement security. In addition, competition for high quality online service to retirement plan participants already exists.<sup>119</sup> Removing the obstacles the Department of Labor’s current rule places on delivery of information to participants will increase and strengthen this competition within the industry and contribute to the overall competitiveness of the United States by shifting more activities online.

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<sup>117</sup> OMB Memorandum M-11-10.

<sup>118</sup> *Id.*

<sup>119</sup> For instance, *Pensions and Investments* annually presents “Eddy Awards” to honor high-quality web service and education to defined contribution plan participants. See [www.pionline.com](http://www.pionline.com).

6. ***Improve disclosures.*** Administrator Sunstein emphasized the importance of good disclosure, because “in the past, information has sometimes been provided in a way that is not a model of clarity and intelligibility. The order is meant to ensure that information provision is actually useful—‘clear and intelligible’—to those for whom it is intended.” As discussed above, electronic notices have substantial advantages over paper notices by being shorter, just-in-time, and layered.
7. ***Lean toward defaults that meet program goals.*** Administrator Sunstein also placed particular emphasis on automatic ways to enroll individuals, in order to gain important benefits. In January he said: “The reference to ‘appropriate default rules’ signals the possibility that important social goals can be obtained through simplification—as, for example, in the form of automatic enrollment. We know that automatic enrollment plans in the domain of savings can greatly increase participation. With respect to savings, the Administration has taken numerous steps to promote such plans.”<sup>120</sup> As discussed above, plans and recordkeepers report that online notices and greater web contact with participants similarly increase participant interaction with their defined contribution accounts, leading to an increased savings rate. If plans are allowed to make e-delivery the default mechanism for delivering required information to participants, we would expect participants to be incented to be more engaged with their plans, taking advantage of the information tools the plan makes available and making changes in their accounts.<sup>121</sup>

### **C. LEGAL CONCLUSION: ENCOURAGING ELECTRONIC DISCLOSURES THROUGH PLAN FLEXIBILITY.**

Summarizing the legal analysis, ERISA provides great statutory flexibility in how disclosures are delivered to participants. Recent amendments of ERISA require “reasonable access,” and that is an appropriate standard for the Department to use in assessing alternative types of disclosure. The other applicable statute, E-SIGN, was designed from the start to encourage online commerce. Its dominant legal intent is on the side of electronic delivery of notices and promoting a shift toward online ways of doing business. The limited provisions in E-SIGN about affirmative consent should be understood in this context. These provisions were added to address specific sorts of consumer fraud that can arise in other contexts. So long as participants have reasonable access to notices, E-SIGN’s intent of fostering online commerce should be upheld.

The single biggest objection to an electronic-first approach has probably been a concern about lack of Internet access for some participants. As the discussion here has shown, the vast majority of plan participants have access to and use the Internet today. Moreover, electronic notice has important

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<sup>120</sup> Before becoming Administrator of OIRA, then-Professor Sunstein wrote about the importance of seeking default rules that increase the rate of worker savings: “If a default rule increases savings, and if the increase improves workers’ welfare, the case for a prosavings default rules seems extremely plausible.” Cass R. Sunstein, “Switching the Default Rule,” 77 N.Y.U. L. Rev. 106, 114-15 (2002).

<sup>121</sup> A recent example of a policy supporting default rules such as auto enrollment includes the Patient Protection and Affordable Care Act (ACA). Section 1511 of the ACA (which adds Section 18A to the Fair Labor Standards Act) requires that employers with more than 200 employees that offer one or more health benefit plans automatically enroll new full-time employees in their health benefits plans with the option to opt out. The DOL is currently engaged in developing regulations to implement this requirement and definitive guidance is expected by 2014.

advantages in terms of access, for visually impaired participants, and for those who wish to use translation software.

President Obama's regulatory policies, as embodied in Executive Order 13563, strongly accelerate the legal basis for supporting a significant shift toward encouraging the use of electronic delivery: (1) The executive order calls for retrospective review, so that there is no presumption that the status quo of paper delivery is correct. (2) Agencies are instructed to maximize net benefits, and the analysis here shows numerous, significant benefits that weigh on the side of electronic delivery. (3) Electronic notice recognizes the effects of changing technology. (4) Electronic notice provides greater flexibility in compliance than the paper-first system currently in place in agency guidance. (5) Electronic notice promotes competitiveness and provides improved disclosure. (6) Finally, allowing plans to make electronic delivery the default delivery method, unless a participant elects paper, does a better job at meeting overall program goals.

To implement these legal and factual conclusions, it makes sense for the Department to have broad support for a shift toward electronic delivery. At the level of notice-and-comment regulation, likely the best path is to announce a general rule of "reasonable access." Plans and recordkeepers would have flexibility to respond to current facts in order to assure that level of access. In practice, given the savings for plans and benefits for participants, many plans would likely set default approaches that rely heavily on electronic disclosure, including by providing continuous access to information on a secure website. Consistent with the principle of participant choice, individual participants should be able to opt out of an online approach.

This approach at the level of regulation can be supplemented by guidance through agency instruments that are more flexible and less formal than notice-and-comment rulemaking. For instance, the Department might supply reasonable measures to assure "reasonable access" in particular settings, such as for smartphones and other devices or methods of access that evolve over time. In short, a new rulemaking can signal that the time has come to allow plans to use electronic delivery as a default, and additional guidance over time can ensure that participants continue to receive reasonable access as technology continues to evolve.

## APPENDIX A

Below are displayed sample screenshots from a current interface for a participant who goes online to look at fee disclosures and other information. The screenshots illustrate how online delivery facilitates a simpler, layered approach to notice. The participant can view the material in a visually organized way, and click on links to go deeper into any area of particular interest.

My Account

Enroll

Plan Benefits

Investments

Tools

Distributions

Switch Plans

Contact Us

Logout

# Performance

[Click here to access fund prices.](#)  
 For up-to-date quarter-end performance, please click Quarter End button below.  
**View Fund Performance As Of:** ☒ Month End ☐ Quarter End

ASSET CLASSES

MY FUNDS

ALL FUNDS

STOCKS

BONDS

MONEY MARKET/

STABLE VALUE

RETIREMENT

Compare / View Selected Funds

Hide Benchmark Comparisons

Print

Tricker	Fund Name	3 Month	YTD	1 YR	3 YR <sup>1</sup>	5 YR <sup>1</sup>	10 YR <sup>1</sup>	Since Inception <sup>1</sup>	Inception Date	Period End-Date	Expense Ratio	As of Date
<input type="checkbox"/> AAAA	INTERNATIONAL FUND + Redemption fee: 2% - 90 days or less.	7.98%	37.50%	48.44%	-3.25%	5.86%	3.70%	10.35%	12/28/1995	11/30/2009	1.22%	09/30/2008
<input type="checkbox"/> BBBB	MSCI EAFE INDEX	4.63%	30.56%	38.43%	-5.05%	4.62%	2.31%	-	-	11/30/2009	-	-
<input type="checkbox"/> CCCC	EQUITY INCOME FUND +	5.92%	23.29%	24.49%	-5.86%	1.04%	3.85%	10.70%	10/31/1985	11/30/2009	0.71%	12/31/2008
<input type="checkbox"/> DDDD	LIPPER EQUITY INCOME FUNDS INDEX	6.70%	21.53%	24.01%	-6.28%	0.85%	2.18%	-	-	11/30/2009	-	-
<input type="checkbox"/> EEEE	FUND CLJ +	8.95%	32.36%	40.14%	-2.73%	1.83%	-3.01%	12.42%	02/05/1970	11/30/2009	0.88%	10/31/2008
<input type="checkbox"/> FFFF	RUSSELL 1000 GROWTH INDEX	9.16%	33.10%	35.50%	-2.77%	1.80%	-3.33%	-	-	11/30/2009	-	-
<input type="checkbox"/> GGGG	S&P 500 INDEX	7.91%	24.07%	25.39%	-5.79%	0.71%	-0.57%	-	-	11/30/2009	-	-
<input type="checkbox"/> HHHH	MID-CAP GROWTH FUND +	6.43%	38.26%	46.34%	-0.86%	4.48%	6.25%	12.82%	06/30/1992	11/30/2009	0.83%	12/31/2008
<input type="checkbox"/> IIII	LIPPER MID-CAP GROWTH FUNDS INDEX	6.42%	35.22%	39.73%	-2.82%	3.19%	-0.12%	-	-	11/30/2009	-	-



Use the arrows ↕ to sort by column.

**Print**

Ticker ↕	Fund Name ↕	3 Months ↕	YTD ↕	1YR ↕	3YR <sup>1</sup> ↕	5YR <sup>1</sup> ↕	10YR <sup>1</sup> ↕	Since Inception <sup>1</sup> ↕	Inception Date ↕	Period End-Date ↕	Expense Ratio ↕	As of Date ↕
AAAAA	<a href="#">SMALL-CAP VALUE FUND</a> +	4.15%	29.04%	38.12%	-2.82%	3.07%	11.91%	10.54%	07/31/1998	11/30/2009	1.49%	03/31/2009
▶ B8888	<a href="#">INTERNATIONAL FUND</a> + <b>Redemption fee: 2% - 90 days or less.</b>	7.98%	37.50%	48.44%	-3.25%	5.86%	3.70%	10.35%	12/28/1995	11/30/2009	1.22%	09/30/2008
CCCCC	<a href="#">BLUE CHIP GROWTH FUND</a> +	9.44%	38.11%	41.06%	-3.24%	1.52%	-0.06%	8.36%	06/30/1993	11/30/2009	0.80%	12/31/2008
▶ DDDDD	<a href="#">EQUITY INCOME FUND</a> +	5.92%	23.29%	24.49%	-5.86%	1.04%	3.85%	10.70%	10/31/1985	11/30/2009	0.71%	12/31/2008
EEEEE	<a href="#">INTERNATIONAL STOCK FUND</a> + <b>Redemption fee: 2% - 90 days or less.</b>	10.05%	48.99%	60.76%	-3.10%	4.92%	0.85%	9.70%	05/09/1980	11/30/2009	0.87%	10/31/2008
▶ FFFFF	<a href="#">FUND CLJ</a> +	8.95%	32.36%	40.14%	-2.73%	1.83%	-3.01%	12.42%	02/05/1970	11/30/2009	0.88%	10/31/2008
▶ GGGGG	<a href="#">MID-CAP GROWTH FUND</a> +	6.43%	38.26%	46.34%	-0.86%	4.48%	6.25%	12.82%	06/30/1992	11/30/2009	0.83%	12/31/2008
▶ HHHHH	<a href="#">MID-CAP VALUE FUND</a> +	6.56%	40.01%	44.69%	-2.09%	4.31%	10.32%	10.95%	06/28/1996	11/30/2009	0.83%	12/31/2008
IIIII	<a href="#">XYZ VALUE FUND</a> + <b>Redemption fee: 2% - 10 days or less.</b>	9.28%	24.78%	28.45%	-6.10%	-0.90%	5.98%	6.58%	09/10/1998	11/30/2009	1.13%	03/31/2009
JJJJJ	<a href="#">PERSONAL STRATEGY INCOME FUND</a> +	5.56%	24.45%	28.39%	2.24%	4.56%	5.45%	7.76%	07/29/1994	11/30/2009	0.78%	05/31/2009
▶ KKKKK	<a href="#">SMALL-CAP STOCK FUND</a> + 2	4.18%	28.84%	36.49%	-5.48%	1.09%	6.58%	12.62%	06/01/1956	11/30/2009	0.93%	12/31/2008
▶ LLLLL	<a href="#">TOTAL EQUITY MARKET INDEX</a> + <b>Redemption fee: 0.5% - 90 days or less.</b>	7.33%	25.23%	27.55%	-5.76%	1.04%	0.07%	3.03%	01/30/1998	11/30/2009	0.40%	12/31/2008