



September 2013

PRIVATE PENSIONS

Revised Electronic Disclosure Rules Could Clarify Use and Better Protect Participant Choice

GAO Highlights

Highlights of [GAO-13-594](#), a report to congressional requesters

Why GAO Did This Study

With the advent of new technology, sponsors of U.S. private-sector pension plans have begun to deliver plan information to participants electronically in an effort to reduce plan costs and provide greater participant choice. Yet there are concerns that use of electronic disclosure could make it more difficult for some plan participants to receive important information about their plans. GAO was asked to review issues related to electronic disclosure. For this report, GAO: (1) examined the extent to which law and regulations permit electronic disclosure to participants; (2) explored the reported advantages and disadvantages associated with electronic delivery; and (3) evaluated the weaknesses identified, if any, in the agencies' electronic delivery requirements. In conducting this work, GAO reviewed and analyzed relevant federal statutes and regulations; stakeholder responses to Labor's 2011 request for information on electronic disclosure; and any weaknesses identified in interviews of participant advocates and industry representatives, selected by GAO to capture a broad array of perspectives.

What GAO Recommends

GAO recommends that Labor and Treasury consider clarifying regulatory requirements and expanding participants' ability to opt out of electronic delivery. In its written comments, Labor generally agreed with the report's findings and recommendations. Treasury and the Pension Benefit Guaranty Corporation did not provide formal written comments. All three agencies provided technical comments.

View [GAO-13-594](#). For more information, contact Charles A. Jeszeck at (202) 512-7215 or jeszeck@gao.gov.

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Revised Electronic Disclosure Rules Could Clarify Use and Better Protect Participant Choice

What GAO Found





Federal statutes and regulations under the purview of the Department of Labor (Labor) and the Department of the Treasury (Treasury) allow employers who sponsor private pension plans to furnish all pension disclosures to participants electronically:

- as the default delivery method if participants meet specific criteria regarding access, or
- if affirmative consent is obtained.

When neither of these conditions can be met, or when requested by participants, plan sponsors must send paper disclosures.

Industry representatives and participant advocates reported various advantages and disadvantages concerning the use of electronic delivery. Both groups agreed that the popularity of electronic delivery was growing due to various efficiencies—such as reduced costs and better tracking of disclosures—that can be advantageous to both pension plan sponsors and participants. However, both groups also raised concerns with the requirements associated with electronic delivery, citing issues with their lack of consistency and clarity as well as concerns that they may not adequately protect a participant's right to opt to receive paper disclosures.

Pros and Cons of Electronic Delivery of Pension Disclosures

	 Cost	 Access and archiving	 Security	 Receipt
Pros	<ul style="list-style-type: none">■ No printing and mailing costs for sponsors that could add to indirect costs passed on to participants	<ul style="list-style-type: none">■ Electronic notices are always available and easy to archive	<ul style="list-style-type: none">■ Passwords can help protect personal information	<ul style="list-style-type: none">■ Delivery, and "bounce back" return of undeliverable notices is immediate
Cons	<ul style="list-style-type: none">■ Costs of maintaining computer, Internet connection, and printing incurred by participants	<ul style="list-style-type: none">■ May lose access to notices if computer malfunctions or Internet connection is lost	<ul style="list-style-type: none">■ Vulnerable to security breach from hacking and phishing	<ul style="list-style-type: none">■ Undeliverable notices must be re-sent by mail; no way to know if notice sent to unused account

Source: GAO analysis of Labor data and interviews with agency officials, industry representatives, and participant advocacy groups.

GAO's analysis of these concerns identified several weaknesses in the current electronic delivery requirements. For example, although agencies are to draft regulations that avoid inconsistency across agencies and are easy to understand, GAO found that Labor's and Treasury's requirements describing which participants qualify for default electronic delivery to be somewhat inconsistent and unclear, which may impede use of electronic delivery by some plan sponsors. GAO also found that, although participants may request paper disclosures at any time, requirements permitting default electronic delivery and sponsors' use of a secured website to furnish disclosures may not fully protect a participant's ability to choose paper as their preferred delivery method on an ongoing, rather than a document-by-document, basis.

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ABBREVIATIONS

DB	defined benefit
DC	defined contribution
ERISA	Employee Retirement Income Security Act of 1974
E-SIGN	Electronic Signatures in Global and National Commerce Act
PPA	Pension Protection Act of 2006
PDF	portable document format

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September 13, 2013

The Honorable Tom Harkin
Chairman
Committee on Health, Education, Labor and Pensions
United States Senate

The Honorable George Miller
Ranking Member
Committee on Education and the Workforce
House of Representatives

The Employee Retirement Income Security Act of 1974 (ERISA)¹ requires private-sector employers sponsoring pension plans to issue a variety of informational notices to plan participants and beneficiaries, including at enrollment, on a quarterly and annual basis, and when certain events occur, such as job or plan termination. The Department of Labor (Labor) and the Department of the Treasury (Treasury) are responsible for overseeing this disclosure regime, with the purpose of ensuring that participants and beneficiaries have access to plan information to help them make informed decisions about their retirement. Such information is especially important for the tens of millions of participants and beneficiaries who are responsible for making investment decisions regarding contribution levels, asset allocation, and adequacy of savings in their plans.

The proliferation of new forms of electronic devices and communication over the last decade and changes in how some employees access information have changed the way some employers communicate with their employees, leading some private-sector plan sponsors and participants to seek to expand use of electronic media to furnish plan information to participants. In 2011, in response to an executive order² and other administration policies encouraging electronic dissemination of information, Labor solicited public views, suggestions, and comments on whether—and possibly how—to expand or modify the department's 2002

¹ Pub. L. No. 93-406, 88 Stat. 829 (codified in part at 29 U.S.C. §§ 1002 -1461).

² Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (calling on federal agencies to retrospectively consider existing policies to seek to achieve regulatory goals using the most innovative and least burdensome tools).

electronic disclosure regulations for pension plans to take into account current technology, best practices, and the need to protect the rights and interests of participants and beneficiaries. In its request for information,³ Labor acknowledged the need to balance the efficiencies of electronic disclosure—lower employer costs and administrative burden, timeliness, and accuracy—with protections for U.S. workers who may not have reasonable access to the Internet or simply prefer to receive traditional paper disclosures.

You asked us to explore several aspects of electronic disclosure. This report: (1) examines the extent to which federal law and regulations permit electronic disclosure to participants; (2) explores the reported advantages and disadvantages associated with the use of electronic delivery of retirement information; and (3) evaluates the weaknesses identified, if any, in the agencies' requirements for use of electronic delivery.

To examine the extent to which federal laws and regulations permit electronic disclosure, we reviewed and analyzed the relevant federal laws, regulations and guidance related to providing plan information to participants electronically; interviewed officials at Labor and Treasury; and consulted relevant literature. Next, we conducted a comparative analysis of the relevant Labor and Treasury regulations governing electronic delivery to determine which disclosures and which participants qualified for electronic delivery. We limited the scope of our analysis to the pension-related disclosures that plan sponsors are required to furnish to participants and did not examine other disclosures required for employee benefit plans such as those applicable to health and welfare programs, those required under the purview of the Pension Benefit Guaranty Corporation, or participant disclosures provided by the agencies. In this report, we use the term "participants" in general reference to all active, retired, and separated vested participants and their beneficiaries (e.g., surviving spouses and alternate payees) who are entitled to disclosures under Title I of ERISA and the Internal Revenue Code.

³ Request for Information Regarding Electronic Disclosure by Employee Benefit Plans, 76 Fed. Reg. 19,285 (Apr. 7, 2011). Labor received 78 responses to its 2011 request for information. Labor officials said that they continue to review these and have made no decision as to whether the department will issue new regulations on electronic disclosure.

To explore the reported advantages and disadvantages associated with the use of electronic delivery, we analyzed the 78 written responses from participant advocates and industry representatives to Labor's 2011 request for information on electronic disclosure; reviewed relevant literature; and conducted semi-structured interviews with 21 representatives from 11 participant advocacy groups and with 57 industry representatives (including individuals from 10 service providers, 8 plan sponsor advocacy groups, and 2 large plan sponsors). The interview information gathered was not generalizable beyond the individuals we interviewed. However, to ensure that we gathered input from entities that represented large numbers of plans and participants, we selected service providers ranked among the largest 31 recordkeepers (as ranked in 2011 by *Pensions & Investments*) for assets under management, plan sponsors served, and number of participants, and who served plan sponsors of both large and small pension plans. To select plan sponsors, industry representatives, and participant advocates for interviews, we used an iterative process to identify knowledgeable stakeholders, and selected for interviews those who would provide us with a broad range of perspectives on issues surrounding the electronic disclosure of pension plan and retirement information. At each interview, we solicited names of additional stakeholders it would be useful to interview until we had coverage of a broad range of perspectives on electronic disclosure.

To evaluate any weaknesses in the agencies' requirements for electronic delivery, we examined the laws and regulations related to the concerns raised by industry representatives and participant advocates. Based on this review, we identified ways that the requirements for electronic delivery could be improved to help address their concerns.

We conducted this performance audit from September 2012 to August 2013 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for findings and conclusions based on our audit objectives.

Background

ERISA requires the disclosure of certain pension plan and investment-related information, including fee and expense information, to participants in private-sector plans. The Internal Revenue Service at Treasury and Employee Benefits Security Administration at Labor are primarily responsible for enforcing laws that govern these plans. Treasury interprets and enforces provisions of the Internal Revenue Code that

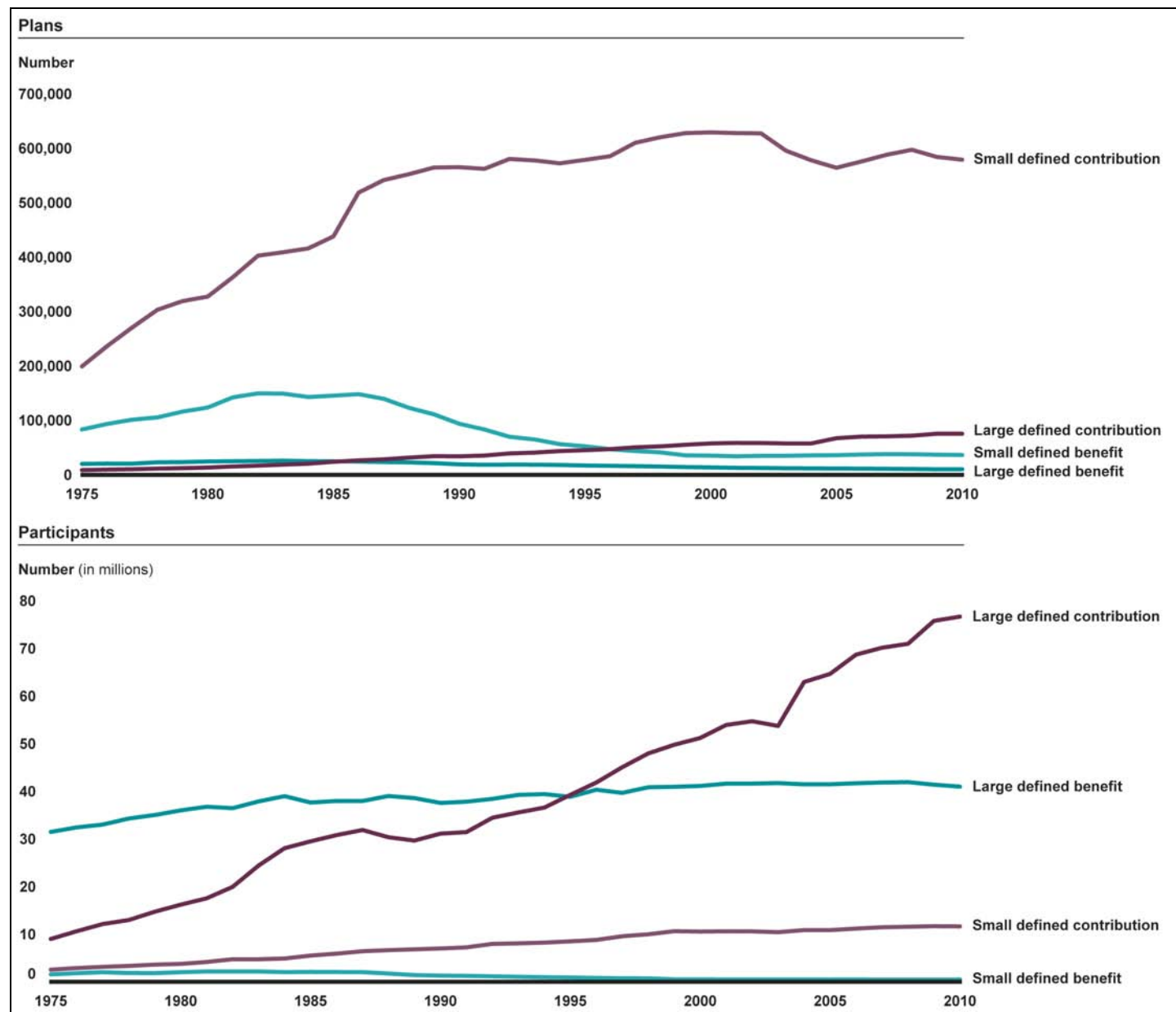
apply to tax-qualified plans. Labor enforces ERISA reporting and disclosure provisions and fiduciary responsibility standards, which among other things, concern the type and extent of information provided to plan participants.

Types of Plans

Private-sector pension plans are classified either as defined benefit (DB) or as defined contribution (DC) plans.⁴ DB plans generally offer a fixed level of monthly retirement income based upon a formula specified in the plan (which often takes into account factors such as years of service and age at retirement), regardless of how the plan's investments perform. In contrast, in DC plans, such as 401(k) plans, benefit levels depend on the contributions made to the plan and the performance of the investments in individual accounts, which may fluctuate in value over time. Over the past 4 decades, DC plans have become the principal retirement savings vehicle for U.S. workers participating in employer-sponsored plans. Unlike employees with more traditional DB pensions, participants in DC plans typically bear responsibility for funding and managing their investments in a way that seeks to achieve sufficient benefits in retirement. The rapid growth in participant-directed DC plans has shifted much of the investment risk and decision-making from the plan sponsor to the participant. In 2010, Labor reported that U.S. employers sponsored 46,543 DB plans with about 41 million participants and 654,469 DC plans with about 88 million participants. As shown in figure 1, there has been a significant growth in the number of small DC plans; however, the majority of participants are in large DC plans.

⁴ Under ERISA, DB and DC plans are referred to as pension plans rather than retirement plans. 29 U.S.C. § 1002(34) and (35).

Figure 1: Number of Pension Plans and Participants, by Plan Size and Type (1975-2010)



Source: GAO analysis of Form 5500 filings with the U.S. Department of Labor.

Note: Labor's Form 5500 data define small plans as those with 1-99 participants and large plans as those with 100 or more participants. Participants are defined as active employees, retirees, and separated employees with vested benefits.

According to the most recent employee benefits survey by the U.S. Bureau of Labor Statistics, employee participation in employer-sponsored plans remained low in 2012, with 65 percent of private-industry employees having access to plans and 48 percent participating in their employer-sponsored DB or DC plan. In addition, the data show that one in four employees who had access to a plan through their employer did not enroll in their employer's plan. Moreover, the overall enrollment rate for high-wage employees in DC plans was twice the enrollment rate of low-wage employees. In response to concerns that many employees were not participating in the DC plans offered by their employers, the Pension Protection Act of 2006 (PPA) included various incentives for employers to adopt autoenrollment.⁵ Under autoenrollment, plan sponsors enroll employees automatically into their DC plans, unless employees explicitly choose not to participate. In 2009, we reported that the percentage of plan sponsors adopting autoenrollment had grown from about 1 percent in 2004 to more than 16 percent in 2009.⁶ As automatic enrollment increases the number of employees participating in a plan, plan sponsors are likely to incur greater costs for matching employer contributions and for fees paid to plan administrators, and for the increased number of disclosures they are required to send to participants.

Participant Disclosures Required under ERISA

ERISA requires pension plan sponsors⁷ to disclose certain material, including reports, statements, notices, and other documents, to participants and other specified individuals. How often plan sponsors must send these disclosures can vary depending on several factors, including whether the disclosure is routine or nonroutine, the type of plan, and the type of information included in the disclosure. Plan sponsors send routine disclosures to participants on a quarterly basis, an annual basis,

⁵ Pub. L. No. 109-280, § 902, 120 Stat. 780, 1033-39. In addition, PPA extended liability protections to plans when participants provide plans with no direction about the investment of their funds, as may be more apt to happen in cases of autoenrollment. § 624, 120 Stat. 980.

⁶ GAO, *Retirement Savings: Automatic Enrollment Shows Promise for Some Workers, but Proposals to Broaden Retirement Savings for Other Workers Could Face Challenges*, [GAO-10-31](#) (Washington, D.C.: Oct. 23, 2009).

⁷ The plan sponsor is ultimately responsible for ensuring that the plan complies with all legal requirements whether it is done directly or through third parties. Therefore, we use the term "plan sponsor" broadly throughout this report to refer to plan administrators, fiduciaries, or other service providers who may provide reports and disclosures on behalf of a plan sponsor.

or over longer periods, depending on the type of plan and filing requirements. A plan sponsor may also be required to send nonroutine disclosures when some type of triggering event occurs to the plan or the participant's circumstances change. Routine and nonroutine disclosures can contain general information about the plan, or personal information, such as a benefit statement or a request for participant action. Table 1 provides examples of some routine and nonroutine disclosures that ERISA requires plan sponsors of DB and DC plans to provide to participants.⁸ Some of these disclosures are under Labor's purview, while others are under Treasury's.

Table 1: Examples of Participant Disclosures Required by Law

Disclosure		Information type	Plan types affected
Under Labor's purview			
Routine	Summary plan description 29 U.S.C. § 1021(a)(1).	General	DB ^a and DC ^b
	Summary annual report 29 U.S.C. § 1021(b)(1).	General	DC and some DB
	Annual funding notice 29 U.S.C. § 1021(f)(1).	General	DB
	Participant fee disclosure under ERISA 404(a) 29 CFR 2550. 404a-5.	Personal	DC
	Periodic benefit statement 29 U.S.C. § 1025(a).	Personal	DB and DC
	Notice of qualified default investment alternative 29 U.S.C. §1104(c)(5)(B).	General	Some DC
Nonroutine	Summary of material modifications 29 U.S.C. § 1024(b)(1).	General	DB and DC
	Notice of failure to meet minimum funding standards 29 U.S.C. § 1021(d).	General	DB and some DC

⁸ We are conducting a separate study on the extent of reporting and disclosure requirements for private-sector plans, scheduled to be issued later this year.

Disclosure		Information type	Plan types affected
Under Treasury's purview			
Routine	Notice of intent to use safe-harbor formula 26 U.S.C. § 401(k)(12)(D).	General	Some DC
	Notice of qualified automatic contribution arrangement 26 U.S.C. § 401(k)(13)(E)(i).	General	Some DC
Nonroutine	Notice of significant reduction in future benefit accruals 26 U.S.C. § 4980F(e).	General	DB and some DC
	Suspension of benefits notice 26 U.S.C. § 418E(e)(1).	Personal	Some DB
	Explanation of rollover and certain tax options 26 U.S.C. § 402(f).	Personal	DB and DC

Source: GAO analysis of pension disclosure requirements.

Note: Required disclosures can vary significantly in length; for example, they can range from one page to several hundred pages.

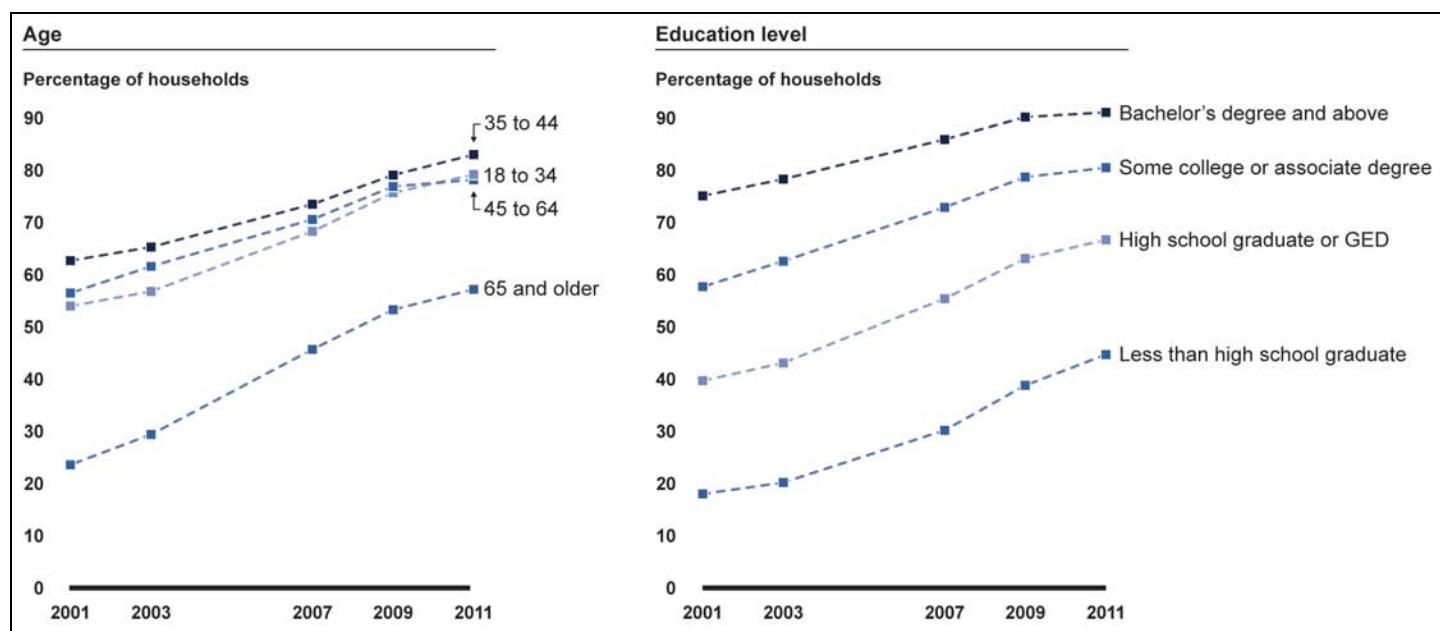
^aDB = defined benefit plan.

^bDC = defined contribution plan.

Computer Usage and Internet Access

Employers' use of electronic means to deliver information to employees has grown as the prevalence of computers and Internet access has grown. According to the U.S. Census Current Population Survey, the proportion of households that connect to the Internet at home among heads of household in all age groups and levels of educational attainment has grown over the last decade, including those age 65 or older or with less than a high school education (see fig. 2). Nevertheless, significant proportions of the workforce and the population continue not to have access or participate in mass digital technology. Disparities in household access persist based on age and education level, with older and less educated heads of household less likely to have Internet access in the home, compared with younger and more educated heads of household.

Figure 2: Rising Percentage of Households That Connect to the Internet at Home, by Age and Educational Attainment of Head of Household, 2001-2011



Source: GAO analysis of U.S. Census data.

Note: 2005 data on Internet connectivity were unavailable.

In 2010, only about half of the U.S. population had Internet access at home and about a quarter had Internet access at work, according to data from the most recent panel of the U.S. Census Survey of Income and Program Participation.⁹ These data show significant disparities persist among individuals based on a variety of characteristics, including income level, education level, race and ethnicity. For example, about 58 percent of those in the highest income quintile had access to the Internet at work, compared with only about 7 percent of those in the lowest quintile. About 74 percent of individuals with a college degree or higher had Internet access at home compared to 33 percent of individuals with less than a high-school degree. Similarly, the proportion of non-Hispanic individuals with Internet access in the home was more than one-and-one-half the access of Hispanic individuals.

⁹ U.S. Census Bureau, *Survey of Income and Program Participation*, 2008 Panel. (Internet release date June 2012)<http://www.census.gov/hhes/computer/publications/2010.html>.

A proliferation of electronic devices, including smart phones, tablets, and laptop computers all capable of accessing digital networks, websites, and information from nearly any location, has made electronic communication commonplace in much of the United States. According to recent surveys on Internet usage, 56 percent of U.S. adults have a smart phone and 34 percent have a tablet computer.¹⁰ This growth in the use of electronic devices and connectivity, however, has not been uniform across all segments of the population. A 2010 industry survey also found that approximately 20 percent of U.S. adults do not use the Internet at all and nearly half of them did not go online because they did not believe the Internet was relevant to them. Most of these non-users also reported that they had never used the Internet before, and did not have anyone in their households who did have access. In addition, 61 percent of these non-users reported that they would need someone to help them access the Internet.

However, the population of adults who do not use the Internet will likely continue to decline. Census data show that more than 60 percent of 15-to-44-year-olds had Internet access in their homes in 2010. A 2013 study found that many of the disparities in Internet usage found in the adult population (whose reported use of the Internet ranged from 56 to 98 percent), no longer persisted among teens, with about 90 percent of teens in all demographic groups reporting that they use the Internet.¹¹ (For more detailed data on the characteristics of individuals with and without Internet access, see app. I.)

¹⁰ Pew Research Center Internet & American Life Project, *Spring Tracking Survey, April 17-May 19, 2013*, accessed on July 2, 2013, <http://www.pewinternet.org/Static-Pages/Trend-Data-%28Adults%29/Whos-Online.aspx>. It is likely that some of the individuals surveyed had multiple devices.

¹¹ Pew Research Center Internet & American Life Project, *Teens and Privacy Management Survey, July 26-Sept. 30, 2012*, accessed on July 2, 2013, <http://www.pewinternet.org/Static-Pages/Trend-Data-%28Teens%29/Whos-Online.aspx>. Some of this access may be at school or other location, and may not signify that these teens have home or continuous access. However, it does indicate a rapid increase in familiarity with electronic communication among this generation.

Electronic Delivery Allowed for All Plan Disclosures under Certain Circumstances

Federal law and regulations allow sponsors of private pension plans to furnish all pension disclosures to participants electronically under certain circumstances. In some cases, plan sponsors may use electronic delivery as their default delivery method as long as the participants receiving the disclosures meet specific requirements for accessing information electronically. In other cases, plan sponsors must obtain affirmative consent from participants before sending disclosures electronically. Plan sponsors may also furnish certain disclosures on a plan's secure continuous access website. When the criteria for either default delivery or obtaining affirmative consent cannot be met, plan sponsors must mail paper disclosures to participants. In addition, federal regulations require that participants be allowed to request paper disclosures at any time.

Certain Conditions Must Be Met to Implement Electronic Delivery

Electronic Signatures in Global and National Commerce Act (E-SIGN)

Enacted on June 30, 2000, E-SIGN facilitates the use of electronic records and signatures in interstate and foreign commerce by generally ensuring the validity and legal effect of transactions entered into electronically. To protect consumers, however, the act provides that if a consumer disclosure is required to be made in writing, the use of an electronic media to deliver it will be valid only if detailed conditions are in place to obtain the consumer's informed consent and ensure that the consumer knows how to also receive the information on paper. For example, consumers must be provided with clear information about how to withdraw their consent as well as the hardware and software necessary to access and retain the information provided electronically. The law also allows federal agencies to make exemptions to these conditions if it is necessary to eliminate a substantial burden on electronic commerce and does not increase the material risk of harm to consumers.

Source: GAO analysis of the E-SIGN statute.

The Electronic Signatures in Global and National Commerce Act (E-SIGN)¹² provides for the use of electronic disclosure of any information that is required to be in writing, as long as certain conditions concerning consent are met. Certain provisions under ERISA also explicitly specify that sponsors of private pension plans may furnish participant disclosures in written, electronic, or other form as long as they are reasonably accessible.¹³ Consistent with these federal laws, regulations pertaining to electronic delivery of plan information to participants were issued by Labor in 2002¹⁴ and by Treasury in 2006.¹⁵ These regulations expanded the scope of electronic delivery to apply to all related ERISA pension plan disclosures under the respective purview of each agency and established standards and procedures to guide the use of electronic delivery. However, the procedures for identifying those participants who qualify for default electronic delivery¹⁶ and those who must provide affirmative consent for electronic delivery can vary depending on which agency has purview over the disclosure, the capacity of the plan sponsor's electronic information system, and the participant's work environment (see fig. 3).

¹² Pub. L. No. 106-229, 114 Stat 464, codified at 15 U.S.C. §§ 7001-7006.

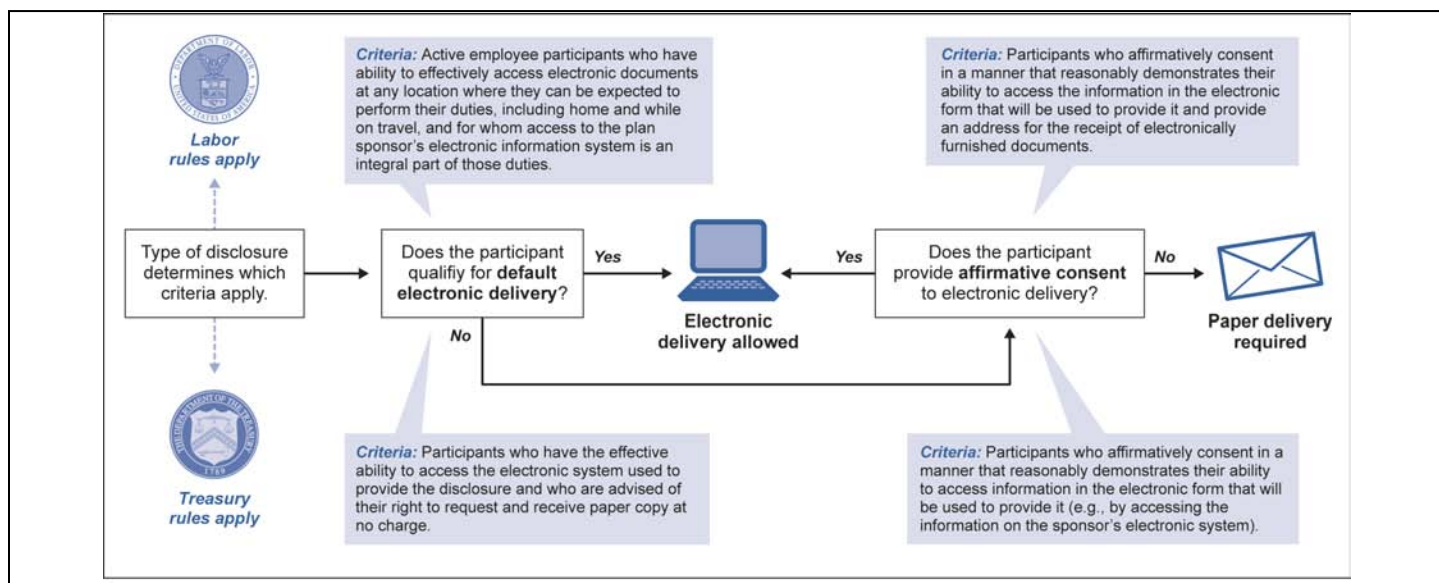
¹³ For example, 29 U.S.C. §§ 1021(f)(4)(C) (annual funding notice) and 1025(a)(2)(A)(4) (periodic benefit statement).

¹⁴ Final Rules Relating to Use of Electronic Communication and Recordkeeping Technologies by Employee Pension and Welfare Benefit Plans, 67 Fed. Reg. 17,264 (Apr. 9, 2002).

¹⁵ Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents, 71 Fed. Reg. 61,877 (Oct. 20, 2006).

¹⁶ Throughout this report, we use the term "default electronic delivery" to refer to the conditions under which plan sponsor may provide notices to participants electronically without obtaining participant consent.

Figure 3: Procedures for Identifying Participants Who Qualify for Electronic Delivery



Source: GAO analysis of Labor and Treasury regulations.

Electronic Delivery as the Default Delivery Method

Labor and Treasury have structured their regulations quite differently regarding their requirements for sending disclosures to certain participants electronically without consent. Both agencies require, among other things,¹⁷ that in order for plan sponsors to use electronic delivery as the default delivery method, they must identify participants who can effectively access the plan sponsor's electronic information system, but the agencies' criteria for determining effective access vary. Table 2 provides examples of how plan sponsors can meet Labor's and Treasury's different regulatory criteria for default electronic delivery for the disclosures under each agency's purview.

¹⁷ For example, both agencies require electronic disclosures to include notification of the significance of the information provided and that the recipient has a right to request and receive the material in paper form. 29 C.F.R. § 2520.104b-1(c)(1)(iii) and 26 C.F.R. § 1.401(a)-21(a)(5)(ii).

Table 2: Criteria for Allowing Default Electronic Delivery of Disclosures, by Agency

	Labor	Treasury
Criteria for default electronic delivery	<p>A plan sponsor can choose to provide required disclosures electronically to any participant who meets the following criteria:</p> <p>Participant has ability to effectively access electronic documents at any location where he or she can be expected to perform his or her duties, including at home and while on travel.</p> <p>AND</p> <p>Participant's access to the employer's or plan sponsor's electronic information system is an integral part of his or her duties. 29 C.F.R. § 2520.104b-1(c)(2)(i) .</p>	<p>A plan sponsor can choose to provide required disclosures electronically to any participant who meets the following criteria:</p> <p>Participant has effective ability to access the electronic system used to provide the disclosure.</p> <p>AND</p> <p>Participant is advised of his or her right to request and receive a paper copy at no charge. 26 C.F.R. § 1.401(a)-21(c).</p>
Descriptive examples	<p>An employee works at a job that requires regular use of a computer to access the employer's e-mail and other electronic systems of the employer to perform his or her duties. The employer e-mail system contains a bounce back feature. If a document bounces back, the plan sponsor follows up to ascertain the problem and if necessary provides the document in paper. The plan sponsor CAN use the employee's work e-mail to send ERISA Title I disclosures electronically.</p> <p>An employee separating from employment provides a personal e-mail to the employer as part of the employee's forwarding contact information. The employer who sponsors a plan CANNOT use this personal e-mail to send notices electronically as the default delivery method.</p> <p>An employee provides a personal e-mail to the employer as part of the employee's emergency contact information. The employer who sponsors a plan CANNOT use this personal e-mail to send notices electronically as the default delivery method.</p>	<p>An employee works at a job that involves use of a computer. The employer who sponsors a plan CAN use the employee's work e-mail to send disclosures electronically, as long as the employee has the effective ability to access the notice, as determined based, for example, on the employee's receipt of the electronic disclosure.</p> <p>An employee separating from employment provides a personal e-mail to the employer as part of the employee's forwarding contact information. The employer who sponsors a plan CAN use this personal e-mail to send notices electronically, as long as the employee has the ability to effectively access the notice, as determined based, for example, on the employee having provided the e-mail address and/or receipt of the electronic notice.</p> <p>An employee provides a personal e-mail to the employer as part of the employee's emergency contact information. The employer who sponsors a plan CAN use this personal e-mail to send notices electronically, as long as the employee has the ability to effectively access the notice, as determined based on the employee having provided the e-mail address and/or receipt of the electronic notice.</p>

Source: GAO analysis of Labor and Treasury regulations.

Labor's notice of final rulemaking indicated that the agency's regulations were designed to be consistent with the goals of E-SIGN and to facilitate the voluntary use of electronic records while ensuring continued accuracy, integrity, and accessibility of employee benefit plan information

and records required to be kept by law.¹⁸ Labor's electronic disclosure regulations require pension plan sponsors to take appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt of transmitted information and protects personal account and benefit information.¹⁹ If the system for furnishing documents does not include appropriate and necessary measures that are reasonably calculated to ensure actual receipt of electronically furnished documents, the plan sponsor must furnish the disclosure through a nonelectronic medium, such as paper. These regulations establish a safe harbor for plan sponsors to use electronic delivery as the default delivery method as long as the employee uses the electronic information system as an integral part of their work duties. According to Labor, this safe harbor applies to furnishing electronic disclosures to actively employed participants, including those who work at home or who may be on travel as long as they have "ready access" there to the employer's electronic information system.²⁰ In addition, by definition, this safe harbor limits use of electronic delivery as the default delivery method to actively employed participants only; former employees, retirees, and beneficiaries are effectively excluded, and must either provide their consent to electronic delivery or receive paper disclosures.

Treasury's regulations are also designed to comply with the requirements of E-SIGN,²¹ but Treasury's regulations establish somewhat different criteria than Labor for allowing pension plan sponsors to use electronic delivery as the default delivery method for participant disclosures under Treasury's purview. Under E-SIGN federal agencies may create exemptions to these conditions if it is necessary to eliminate a substantial burden on electronic commerce and does not increase the material risk of

¹⁸ 67 Fed. Reg. 17,269.

¹⁹ 29 CFR § 2520.104b-1(c)(1)(i). One method that a plan sponsor could use to ensure actual receipt would be the use of an automatic read receipt feature in the e-mail software. When the recipient opens the e-mail, an automatic notification would be sent to the plan sponsor that the e-mail was received and opened. Another method would be to require all undeliverable e-mail messages be returned, or "bounced back," thereby alerting the plan sponsor that the e-mail address that they have for a participant is no longer valid. Still another method would be for the administrator to use periodic reviews or surveys to confirm that the employer's e-mail system results in actual receipt.

²⁰ 67 Fed. Reg. 17,265.

²¹ 71 Fed. Reg. 61,877.

Obtaining Participant Consent for Electronic Delivery

harm to consumers.²² In general, a plan sponsor may use default electronic delivery to participants who demonstrate an ability to use the hardware or software used to provide the disclosure. For example, if a participant requested a distribution on a plan's website after entering protected identifying information and an e-mail address to which a disclosure was to be sent, a plan sponsor who sent a disclosure via e-mail, and requested and received automatic notification that the participant opened the e-mail, would meet the disclosure requirements. However, if a plan sponsor sent an e-mail and did not receive a return receipt, the plan sponsor could not ensure the disclosure requirements are being met.²³ In addition, as is the case under Labor's regulations, participants who are defaulted to electronic delivery under Treasury's regulations may request paper copies of any notice sent electronically, but they must submit their requests for paper on a document-by-document basis.²⁴

Labor and Treasury regulations also allow pension plan sponsors to send electronic disclosures to other participants who do not qualify for default electronic delivery but provide their affirmative consent. Each agency established separate criteria for plan sponsors to use to obtain participant consent (see table 3).

²² § 104(b)(1), 114 Stat. 469 (codified at 15 U.S.C. § 7004(b)(1)).

²³ Treasury's regulations do not include a rule under which an e-mail sent to the last known e-mail address would be deemed to have been successfully delivered. 71 Fed. Reg. 61, 881. A disclosure that is "provided" in a manner consistent with Treasury's electronic delivery requirements will meet a requirement that the disclosure be in writing, but merely because it may meet the "in writing" requirement does not mean that the plan sponsor met the requirement to provide the notice to the recipient. Treasury officials noted that this is important because, for example, a plan sponsor that keeps sending notices to a participant's e-mail address after receiving a notification that the messages are undeliverable cannot be said to have met its legal obligation to provide that notice.

²⁴ 26 C.F.R. § 1.401(a)-21(c)(3).

Table 3: Criteria for Obtaining Affirmative Consent for Electronic Delivery of Disclosures, by Agency

	Labor	Treasury
Criteria for obtaining affirmative consent	<p>A plan sponsor must seek affirmative consent from participants before sending any notices electronically.</p> <p>A plan sponsor delivers to participants an initial notice about the documents to which consent would apply, their right to withdraw consent at any time and receive paper copies, and the procedures for updating their contact information.</p> <p>Participant provides affirmative consent to receiving documents electronically in a manner reasonably demonstrating ability to access information in electronic form and provides an e-mail address.</p> <p>Plan sponsors are only required to reaffirm participant consent if they change the information system's hardware or software requirements.</p> <p>29 C.F.R. § 2520.104b-1(c)(2)(ii).</p>	<p>A plan sponsor must seek affirmative consent from participants before sending any notices electronically.</p> <p>A plan sponsor delivers to participants an initial notice about the documents to which consent would apply, their right to withdraw consent at any time and receive paper copies, and the procedures for updating their contact information.</p> <p>Participant provides affirmative consent to receiving documents electronically in a manner reasonably demonstrating the ability to access the electronic system used to deliver the notice. For example, once a participant accesses the system, the plan sponsor may send disclosures electronically.</p> <p>Plan sponsors are only required to reaffirm participant consent if they change the information system's hardware or software requirements.</p> <p>26 C.F.R. § 1.401(a)-21(b)(2)(i).</p>
Descriptive examples	<p>After delivering to a participant the initial notice, a plan sponsor mails or e-mails a notice with instructions on how to consent to electronic delivery of plan information. By following these instructions, the participant affirmatively consents to electronic delivery.</p>	<p>A plan sponsor e-mails a notice containing an attached file (e.g., an application, spreadsheet, or web link) that will be used to deliver plan information. If a participant opens the attachment, selects the consent button, and returns the attachment, this constitutes affirmative consent to electronic delivery through that electronic medium.</p> <p>A plan sponsor can also mail a paper notice with instructions on how to access the electronic medium. If a participant successfully accesses the information system and indicates consent, this constitutes affirmative consent to electronic delivery through that electronic medium.</p>

Source: GAO analysis of Labor and Treasury regulations.

Both Labor's and Treasury's regulations require plans seeking to obtain affirmative consent to provide participants with an initial notice explaining certain rights. Among other things, this notice must identify the scope of the consent (e.g., whether it applies to one notice or all subsequent notices), a participant's right to withdraw consent at any time, and

procedures for withdrawing consent and for updating information needed to contact the participant electronically. While Labor's regulations require participants who choose to consent to electronic delivery to provide an e-mail address,²⁵ Treasury regulations do not. Specifically, Treasury's regulations allow plan sponsors to rely on whatever e-mail they may have for a participant. If a participant accesses a notice sent to him or her, selects a consent button on the notice, and then returns the notice through the sponsor's electronic information system used to deliver this notice—that is sufficient to constitute affirmative consent. Under both regulations, plan sponsors must develop a process for requesting and recording whether consent was obtained from each participant.

Posting to a Secure Website

In 2006, Labor issued general guidance²⁶ that addressed the requirement for pension plan sponsors to furnish periodic pension benefit statements to participants. The Labor guidance included provisions stating that plan sponsors wishing to furnish pension benefit statements to participants electronically could (1) determine participant eligibility for electronic delivery following either the Treasury or Labor rules or (2) make the statements available on a secure continuous access website,²⁷ as long as the plan sponsor provided certain information to the participant (either electronically or by paper) prior to posting the statement online. The guidance also stated that a plan sponsor must, in any case, notify participants that the statement is available, provide instructions on how to access the statement online, and apprise participants of their right to request and obtain a paper version of the current statement free of charge. To furnish the statements this way, a plan sponsor would need to notify participants—either electronically or on paper—that the statement is available. Participants would either follow a web link provided in the notice or manually access the plan's website. The participant would be prompted to enter a username and password in order to access the statements. Participants not wanting to access their statements electronically would have to follow instructions on the notice to request a paper copy of the current statement, such as by contacting a call center after the receipt of a notice.

²⁵ 29 C.F.R. § 2520.104b-1(c)(2)(ii)(B).

²⁶ Field Assistance Bulletin 2006-03.

²⁷ A secure continuous access website is a continuously available website that uses authentication and encryption to protect interactions and transactions conducted through the Internet.

Paper Delivery Required for Some Participants

When neither the default electronic delivery nor the affirmative consent criteria can be met, pension plan sponsors must mail paper disclosures to participants. Federal regulations and guidance governing electronic delivery underscore the importance of protecting a participant's right to request and receive paper disclosures from their pension plans. When promulgating its electronic delivery regulations in 2002, Labor acknowledged that electronic disclosures may not accommodate the needs of every participant on every occasion for a variety of reasons, such as malfunctioning hardware or software, and readability and portability. Therefore, preserving participants' ability to receive paper versions of electronically furnished documents is important to ensuring adequate disclosure to participants.²⁸ Labor's and Treasury's regulations both require that all participants receiving notices electronically be notified of their right to request documents in paper at any time, and without exception, plan sponsors are required to provide participants with paper disclosures upon request.

Various Advantages and Disadvantages Reported Concerning the Use of Electronic Delivery

Industry representatives and participant advocates we spoke with agreed that the popularity of electronic delivery was growing due to various efficiencies—such as reduced costs and better tracking of disclosures—that can be advantageous for some pension plan sponsors and participants.²⁹ However, both groups also raised various concerns with the requirements associated with electronic delivery, citing issues with their lack of consistency and clarity as well as concerns that they may not adequately protect participant choice for those who need or prefer to receive paper.

²⁸ 67 Fed. Reg. 17,267-68.

²⁹ The terms "industry representatives" and "participant advocates" used in this report refer only to those industry representatives and participant advocates we interviewed or who submitted written comments in response to Labor's 2011 request for information. Because this is a nongeneralizable sample, the views presented here do not represent the views of all industry representatives or participant advocates.

Reported Advantages of Electronic Delivery

Reduced Costs

A major impetus for expanding electronic disclosure is its ability to reduce plan sponsors' costs. Industry representatives and participant advocates we spoke with agreed that electronic delivery could reduce plan costs by decreasing the amount of paper needed for disclosures, and by rolling back the level of printing and mailing required of paper delivery. In its 2002 regulations, Labor estimated that use of electronic delivery would reduce plan sponsors' printing, materials, and mailing costs associated with relevant ERISA disclosures by approximately 14 percent in the first year of implementation and result in tens of millions of dollars in annual savings in subsequent years.³⁰ One industry representative estimated that mailing a one-page document—including the paper, postage, and envelope—costs, on average, about 53 cents. In contrast, the average estimated cost to send the same document electronically, including the posting of the file and issuing an e-mail notifying the individual of the document's availability, was less than 1 cent. One service provider that administered accounts for approximately 9 million participants told us that it could cost up to \$15 to print and deliver a 500-page paper summary plan description to each participant. In contrast, sending this disclosure electronically to all participants could result in millions of dollars in savings in the form of significant reductions in administrative costs for the plan.³¹ Industry representatives and participant advocates also acknowledged that, in addition to cost savings for plans, electronic delivery can result in numerous environmental benefits including reductions in the use of paper, print products, and fuel used to deliver paper disclosures to participants through the U.S. mail.

Built-in Tracking

Another advantage of electronic delivery is that pension plan sponsors' information systems have the built-in capacity to track the delivery of electronic disclosures. According to industry representatives, plan sponsors can track the receipt of electronic notices using the delivery and

³⁰ 67 Fed. Reg. 17,270.

³¹ Some plan sponsors transfer such cost savings to participants, while others do not. In a recent study, we surveyed more than 1,000 401(k) plan sponsors and found that larger plans were more likely to pass recordkeeping fees along to participants than were smaller plans, but that larger plans' typically paid lower fees than small plans. See GAO, *401(K) Plans: Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees*, [GAO-12-325](#) (Washington, D.C.: Apr. 24, 2012).

read receipt functions of their existing e-mail systems.³² For example, they said that some plan sponsors track and monitor the extent to which they successfully deliver electronic notices to participants and can monitor how many participants access the plan's website after opening and reading an e-mail notification. Tracking the receipt of e-mail notices allows plan sponsors to confirm whether a participant received the e-mail. If an e-mail bounces back as undeliverable, one service provider told us that this activates automatic paper delivery as a safety net and sends a paper notice to the participant's last known address. Plan sponsors can also use existing systems to monitor more participant responses to certain disclosures better than is possible using paper delivery. For example, plan sponsors can track the rate at which participants use web links embedded in their electronic disclosures to access their online pension accounts or available online retirement management tools. Although such tracking capability exists, plan sponsors are not required to use this capability to ensure that participants open disclosures sent electronically.³³ Industry representatives said that such a requirement would require plan sponsors using electronic delivery to incur the costs of taking the additional steps of tracking and documenting receipt for electronic delivery—steps that are not required for plan sponsors using paper delivery. Moreover, they noted that tracking the receipt of notices sent electronically cannot ensure that a participant actually reads the notice. Participant advocates suggested that the costs incurred by plan sponsors would be minimal and a requirement that plan sponsors use existing technology and e-mail systems to track which documents were opened would provide some assurance of actual receipt.

Improved Access and Archiving

One further advantage of electronic delivery is that it offers participants who receive electronic disclosures improved access to their most current retirement information and better archiving capability, according to both industry representatives and participant advocates. For example, electronic delivery can provide participants with greater access to their retirement information since it is always available on the plan sponsor's

³² One service provider reported that Microsoft Outlook includes a delivery receipt function in its e-mail application, but that many other e-mail platforms (e.g., Apple) do not include a delivery receipt function. In addition, this service provider found that often employer e-mail addresses for participants are more prone to non-delivery than personal e-mail addresses.

³³ Labor regulations provide several examples of appropriate measures that are reasonably calculated to ensure that the system results in actual receipt of transmitted information, such as using return-receipt or notice of undelivered electronic mail features, or conducting periodic reviews or surveys. 29 C.F.R. § 2520.104b-1(c)(1)(i)(A).

website or electronic archive. Participants can also access the information from any location with a working Internet connection and archive disclosures more efficiently. For example, participants can download disclosures to their electronic devices in Portable Document Format (PDF) for electronic filing at any time and from any location. Industry representatives reported that some plan sponsors provide participants with secure online storage accounts where they can archive disclosures. Industry representatives also reported that electronic delivery offers other efficiencies related to access, such as improved delivery times for disclosures and greater accuracy and timeliness of retirement information provided on account statements and plan documents. For example, plan sponsors who use electronic delivery can provide nearly real-time retirement information and account balances on a participant's statement, and can include the most up-to-date provisions in the summary plan description posted to the plan's website or as a PDF file attached to an e-mail. Participant advocates supported the concept of an online electronic archive that contained all plan notices so that participants could easily locate the information they needed when they needed it.

Increased Participant Choice of Electronic Communication

Electronic delivery offers participants a choice of delivery methods and aligns with the needs of a growing sector of the population, according to both industry representatives and participant advocates we interviewed. Participant advocates acknowledged that there are situations, such as in industries that employ a young professional workforce, in which electronic delivery is preferable to plans and participants, especially when a participant has elected to receive information electronically. One large service provider who monitors participant delivery preferences told us that the proportion of participants communicating electronically with the firm had grown in the past several years from about 40 percent to about 60 percent, and that 91 percent of its DC plan participants conducted transactions using the Internet compared to 9 percent who conducted transactions over the telephone. In 2012, another large service provider who administered accounts for approximately 20 million participants reported that 60 percent of participants in plans with paper as the default delivery method opted to receive their statements electronically. Another service provider reported that, among participants in smaller plans, the number of participants opting into electronic delivery had increased significantly in the last 3 years, from just under 22,500 participants in

2010 to nearly 140,000 participants in 2012, with 46 percent of its total participants opting to receive statements electronically.³⁴

Reported Disadvantages of Electronic Delivery Requirements

Default Criteria Too Complex

According to some industry representatives, more plan sponsors—both large and small—would like to take advantage of efficiencies associated with electronic disclosure, but given the complexity of the requirements for default electronic disclosure, they are fearful of misinterpreting some aspect of these criteria or being found in noncompliance. In particular, they told us that they find the criteria for meeting Labor’s “integral part of duties” safe harbor threshold especially challenging, especially with respect to how these criteria apply to employees who perform their duties at a field location. They noted that while these employees may have ready access to the plan sponsor’s information system, the extent to which an employee must regularly access the employer’s electronic information system to qualify for the safe harbor is unclear. Without specific standards that clearly describe the requirements for these kinds of scenarios, industry representatives told us that some plan sponsors were reluctant to use electronic delivery as the default delivery method, opting instead to reduce their risk of noncompliance either by seeking affirmative consent from their employees for electronic disclosure or by providing only paper disclosures. In contrast, participant advocates did not agree with the industry representatives’ point of view. They told us that when compared to Treasury’s criteria for default delivery, in their view, Labor’s integral part of duties safe harbor requirements struck a good balance between protecting a participant’s rights to paper disclosures and permitting plan sponsors to use electronic delivery.

Further, industry representatives told us that in general the criteria can be cumbersome to apply. For example, one plan sponsor told us that

³⁴ Another service provider reported that in 2012, 18 percent of their DC plan participants who had the ability to opt-in to electronic delivery did so and 3 percent of those participants already receiving disclosures electronically opted for paper delivery.

although the company's workforce was highly technical and therefore more likely than not to use the plan sponsor's information system to conduct an integral part of their duties, there were exceptions. As a result, the plan sponsor had to conduct a thorough review of all business operations and employee classifications, and monitor its workforce's access to computers on an ongoing basis as businesses opened or closed. If there were any doubt as to an employee's qualifications for default electronic delivery, the plan sponsor would exclude that employee from automatic e-disclosure and default to paper delivery.³⁵ Industry representatives also told us that plan sponsors were hesitant to attempt default electronic delivery for disclosures under Labor's purview because the requirements lack clarity as to how the "integral part of duties" safe harbor applies to nonstandard work situations. For example, as noted earlier, some plan sponsors may have many employees who work outside the office and use their personal computer once a day to access the plan sponsor's electronic information system to check their schedule, input orders, and review e-mail. Industry representatives told us that they thought this level of computer use is integral for these employees to successfully carry out their duties and it likely met the safe harbor threshold, but a number of plan sponsors were reportedly reluctant to use default delivery in such cases because it was unclear whether this met Labor's threshold.

To realize the efficiencies of electronic delivery as use of electronic communication grows, industry representatives told us that many plan sponsors would like to use electronic delivery as their default delivery method for all disclosures for any participants whose working e-mail address was on file, with an opt-out provision for those that prefer paper. Labor officials, however, questioned whether the pension marketplace should be setting the precedent in moving to electronic default notification systems. They noted that banks, insurance companies, and mutual fund companies are not establishing electronic default notification systems for their customers, but instead are allowing customers to opt into electronic delivery if they choose. Participant advocates we spoke with did not support efforts to make electronic delivery the default method for all

³⁵ Industry representatives also reported that for participants who do not meet the integral part of duties safe harbor, participant inertia may contribute to plan sponsors' difficulty with obtaining affirmative consent for electronic disclosure. However, without confirmation from the participants as to why they did not respond, there is no way to determine whether a participant's inaction resulted from a conscious choice or was the result of participant inertia.

disclosures sent to all participants, saying that such a move would likely deny access to plan information for significant numbers of participants who did not have Internet access.

Use of Website Too Restrictive

According to industry representatives, the regulatory requirements for furnishing disclosures on a plan's secure continuous access website are too restrictive in that only two disclosures qualify. Plan sponsors told us that they would like to use this medium to furnish other required disclosures and plan information.³⁶ Specifically, they noted that allowing plan sponsors to expand the use of their websites to furnish disclosures that contain general plan information, such as a summary annual report, would significantly reduce plan administrative costs. In contrast, the participant advocates we spoke with had mixed views on this idea. Some agreed with the industry representatives, noting that it made sense to allow plan sponsors to furnish certain general information disclosures on a plan sponsor's website. However, others disagreed, saying that a secure website, unlike paper, could not ensure that all participants could access plan information.

Inadequate Participant Protections

Several participant advocates expressed concerns that the Treasury's rules for default electronic delivery do not adequately safeguard a participant's ability to choose to receive paper disclosures. Specifically, they were concerned that these requirements give pension plan sponsors too much discretion to determine whether participants have the effective ability to access the plan sponsor's electronic system and receive disclosures electronically. According to participant advocates, the lack of an affirmative consent requirement for these disclosures could prove problematic for participants who may inadvertently have demonstrated their effective ability to access electronic communication at some point in the past and may be unaware that plan sponsors are sending electronic notices to an old or unused e-mail address. In these situations, plan sponsors would only know that the disclosure was not reaching the participant if the e-mail bounced back as undeliverable.

Several participant advocates also expressed concern that over the course of a career some participants who affirmatively consented to electronic delivery may forget the choice they made, resulting in failure to

³⁶ Field Assistance Bulletin 2006-03.

receive key retirement disclosures.³⁷ This can be especially problematic for spouses and beneficiaries after a participant's death. According to participant advocates, spouses and beneficiaries may not even know that a deceased participant earned a benefit or provided affirmative consent to receive disclosures electronically. For example, officials at one service provider told us that they would continue to send disclosures electronically to an e-mail address after the participant has separated from employment or retired, if they had a working e-mail address on file.³⁸ In such a situation, spouses and beneficiaries could potentially lose connection to their benefit after the participant's death unless they were aware of the participant's personal e-mail account and knew how to access it.

Industry representatives and participant advocates alike stressed the importance of safeguarding participant choice of delivery method to ensure that all participants with a retirement account can access plan information. To accomplish this, they noted that paper delivery would remain necessary for some time. While national data on participant preferences for how plans communicate plan information are limited, a 2012 survey of a national sample of participants found that a majority of participants at all ages preferred to receive plan information on paper.³⁹ At the same time, both industry representatives and participant advocates acknowledged that choice applies to both paper and electronic delivery









³⁷ Electronic delivery may have greater implications for participants who are automatically enrolled in a plan. As we have reported in the past, these participants may tend to engage less with their plans. See GAO, *Retirement Savings: Automatic Enrollment Shows Promise for Some Workers, but Proposals to Broaden Retirement Savings for Other Workers Could Face Challenges*, [GAO-10-31](#) (Washington, D.C.: Oct. 23, 2009).

³⁸ Several service providers told us that they gather participants' personal e-mail addresses when they access the plan website for the first time and voluntarily provide their e-mail address as a condition of affirmatively consenting electronic delivery. In addition, they said they relied on plan sponsors to send work e-mail addresses of participants who qualified under Labor's integral part of duties safe harbor. One service provider told us that all active employees and participants were asked to provide both work and personal e-mail addresses.

³⁹ AARP, *Paper by Choice: People of all Ages Prefer to Receive Retirement Information on Paper*, (Washington D.C.: November 2012). According to AARP, the survey was conducted via telephone omnibus by an independent research company from October 10-October 21, 2012, among a sample of 1,028 respondents ages 25 and older who are currently participating or have ever participated in a retirement savings plan, such as a 401(k) or pension plan. The reported margin of error for total respondents was +/- 3.06 percent at the 95-percent confidence interval.

methods and that each delivery method has a range of pros and cons that may be weighed differently by different participants (see fig. 4).

Figure 4: Pros and Cons That May Affect a Participant's Choice of Delivery Method for Pension Disclosures

	 Paper delivery		 Electronic delivery	
 Default delivery	Pros <ul style="list-style-type: none"> ■ If prefer paper, no extra effort required to obtain disclosure 	Cons <ul style="list-style-type: none"> ■ If prefer electronic, extra steps may be required to obtain electronically (if available) 	Pros <ul style="list-style-type: none"> ■ If prefer electronic, no extra steps required 	Cons <ul style="list-style-type: none"> ■ If prefer paper, extra steps required to obtain paper
 Access and archiving	<ul style="list-style-type: none"> ■ Paper notices, once received, are available any time ■ Easier for spouses and beneficiaries to maintain access 	<ul style="list-style-type: none"> ■ Requires extra steps and physical space to store ■ Notices can be misplaced 	<ul style="list-style-type: none"> ■ Electronic notices, once received, are available any time ■ No extra steps or physical space required to store in an organized manner 	<ul style="list-style-type: none"> ■ May lose access to notices if computer malfunctions or Internet connection is lost ■ Harder for spouses and beneficiaries to maintain access
 Receipt	<ul style="list-style-type: none"> ■ Low risk of post office failing to deliver notice or delivering to unoccupied home 	<ul style="list-style-type: none"> ■ Delivery (and return if undeliverable) could take days or weeks ■ Could get lost among participant's other mail ■ No guarantee that received paper notice will be read 	<ul style="list-style-type: none"> ■ Delivery and return (bounce-back) of undeliverable notices is immediate 	<ul style="list-style-type: none"> ■ If bounces back, notice has to be re-sent by mail ■ If delivered to unused account or blocked by spam filter, would not be identified as undeliverable ■ Could get lost among participant's other email ■ No guarantee that received electronic notice will be read
 Cost	<ul style="list-style-type: none"> ■ No direct costs to participants 	<ul style="list-style-type: none"> ■ Costs of printing and mailing for sponsors could add to indirect costs that are passed on to participants 	<ul style="list-style-type: none"> ■ No costs of printing and mailing that could add to indirect costs passed on to participants ■ Less paper consumed/better for environment 	<ul style="list-style-type: none"> ■ Costs of printing electronic notices incurred by participants ■ Participant incurs costs of maintaining computer, software, and Internet connection
 Security	<ul style="list-style-type: none"> ■ No extra steps required to ensure security 	<ul style="list-style-type: none"> ■ Vulnerable to security breach if mail is lost or stolen 	<ul style="list-style-type: none"> ■ Passwords can help protect personal information^a 	<ul style="list-style-type: none"> ■ Vulnerable to security breach from hacking^b or phishing^c
 Personalization	N/A	<ul style="list-style-type: none"> ■ Cannot adjust font size to improve readability or use links to access other related documents or tools (including translation tools for non-English speakers and narration tools for the blind) 	<ul style="list-style-type: none"> ■ Can adjust font size to improve readability or use links to access other related documents or tools (including translation tools for non-English speakers and narration tools for the blind) 	N/A

Source: GAO analysis of Labor data and interviews with agency officials, industry representatives, and participant advocacy groups.

^aPension plan sponsors also employ additional countermeasures to protect participant information online by using encryption software and firewalls to increase the security of plan websites, and in some cases, by requiring participants to answer security questions or to validate their computer's Internet protocol address before allowing access to online retirement accounts.

^bWe recently reported that federal agencies have seen increasing numbers of cybersecurity incidents that have placed sensitive information at risk, with potentially serious impacts on federal and military operations; critical infrastructure; and the confidentiality, integrity, and availability of sensitive government, private sector, and personal information. The increasing risks are demonstrated by the dramatic increase in reports of security incidents, the ease of obtaining and using hacking tools, and steady advances in the sophistication and effectiveness of attack technology. See GAO, *Cybersecurity: National Strategy, Roles, and Responsibilities Need to Be Better Defined and More Effectively Implemented*, [GAO-13-187](#) (Washington, D.C.: Feb. 14, 2013). In addition, the Federal Trade Commission has reported that consumer complaints about identity theft were the most frequent form of complaint filed in 2012, accounting for 18 percent of all consumer complaints filed that year. Individuals age 50 or older filed just over a third of these complaints (98,100). Consumers also reported that e-mail was the most common method of contact used to initiate fraud.

^cThe Department of Justice has described phishing as luring techniques that identity thieves use to fish for personal information of unsuspecting Internet users to perpetrate fraud. Phishing often involves the use of deceptive websites or e-mail to trick Internet users into disclosing their bank and financial information or other personal data such as usernames and passwords. It is estimated phishing attacks have resulted in global losses of billions of dollars.

As the popularity of electronic communication grows, the demand for electronic disclosures will also grow. Facilitating electronic delivery to meet future growing demand also serves to safeguard participant choice for those participants who prefer electronic communication but currently cannot exercise this preference.⁴⁰

Certain Electronic Disclosure Requirements Are Somewhat Inconsistent and Unclear, and May Not Fully Protect Participant Choice

Our examination of the regulations and guidance related to the concerns raised by industry representatives and participant groups identified several weaknesses in the agencies' requirements related to electronic disclosure. For example, we found the requirements describing which participants qualify for electronic delivery to be somewhat inconsistent and unclear, especially with respect to requirements for default electronic delivery and obtaining affirmative consent. In addition, we found that the requirements permitting default electronic delivery to furnish disclosures may not fully protect participants' ability to choose a preferred delivery method or revisit this choice when their circumstances change.

⁴⁰ Currently, a participant's ability to choose electronic delivery is not universal. According to one industry representative, many smaller employers—defined as for-profit companies that employ 100 or fewer employees—do not offer electronic delivery because they do not have an e-mail system for delivery of personnel information and the establishment of an electronic infrastructure is prohibitively expensive. Industry representatives also believed that some small plan sponsors may shy away from offering electronic delivery because of the complex rules involved.

Requirements for Default Electronic Delivery Are Somewhat Inconsistent and Unclear

Federal agencies are to draft regulations that are easy to understand with the goal of minimizing the potential for uncertainty and avoid regulations that are inconsistent or incompatible with regulations of other agencies.⁴¹ Our analysis of the regulations governing the use of electronic disclosure found, as was indicated in our interviews with industry representatives, that the regulatory requirements for determining which participants qualify for default electronic delivery are somewhat lacking in consistency and clarity.

Labor's and Treasury's regulations governing electronic disclosure set different standards for plan sponsors to follow for using default electronic delivery. Specifically, to ensure compliance with Treasury's requirements for default electronic delivery, plan sponsors need to monitor participants' ability to access the electronic information system. On the other hand, to ensure compliance with Labor's default disclosure requirements, plan sponsors need to monitor changes in the work status and computer access of their active employees to ensure that employees continue to meet these regulatory criteria of (1) having the effective ability to access their employer's information system; (2) using this system as an integral part of their duties; and (3) conducting their work from a worksite with ready access to the system. If an employee's work status changed and no longer met the Labor threshold, the plan sponsor would need to discontinue default electronic delivery to this participant. These regulatory schemes are not necessarily incompatible; plan sponsors could simultaneously comply with both. The fact that the requirements are different could mean that some sponsors would need to develop different compliance strategies for each.

This issue becomes of particular concern in nonstandard work situations where employees may not have ready access to their computers. Our analysis of the Labor requirements found that while they do offer some flexibility with regard to alternative worksites, they could be clearer about the thresholds qualifying employees must meet. Specifically, Labor's regulations describe an employee's worksite as "any location where a participant is reasonably expected to perform his or her duties as an employee,"⁴² and this description includes "employees who work at home or who may be on travel, provided they have ready access to the

⁴¹ See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) and Exec. Order No. 13,563 (reaffirming and supplementing Exec. Order No. 12,866).

⁴² 29 C.F.R. § 2520.104b-1(c)(2)(i)(A).

employer's information system.”⁴³ Labor officials told us that employees who worked in the field (such as salespeople, delivery workers, or telecommuters) would likely meet the safe harbor criteria because the actual location of an employee's work was less important than the expectation that an employee would have ready access to the employer's electronic information system and would likely receive timely notice of any disclosures. However, we found that the regulations do not contain this level of specification or provide clear examples of how plan sponsors can determine whether an employee meets the “integral part of duties” threshold of having ready access to the employer's electronic information system.

**Certain Requirements May
Not Fully Protect
Participant Choice**

ERISA's overall reporting and disclosure framework is intended to assure, among other things, that participants in private pension plans are provided or have access to sufficient information to protect their rights and benefits under the plans. To help assure sufficient access, both Labor's and Treasury's regulations safeguard participant choice in how disclosures are delivered by requiring plan sponsors to send paper documents to participants upon request. However, in light of participant concerns in this area, we examined the regulations related to participant choice and identified certain weaknesses in the current regulatory structure. Specifically, we found that participants are not allowed to easily opt out of all default electronic delivery entirely, but must request paper on a document-by-document basis. We also found that participants are afforded limited opportunities to revisit participant consent. While neither of these weaknesses represents a failure to protect participant choice, as participants have the right to request paper copies of disclosures at any time, strengthening the regulatory structure in these areas could better ensure that participants receive information in a timely way by their preferred delivery method.

**No Opportunity to Opt Out of
Default Electronic Delivery**

Neither Labor's nor Treasury's requirements for permitting default electronic delivery include provisions that give participants the choice of opting out of all electronic disclosures entirely. Although some plan sponsors may make such an option available, they are not required to do so. As mentioned earlier in this report, both Labor's and Treasury's regulations⁴⁴ require plan sponsors to make paper versions of

⁴³ 67 Fed. Reg. 17,265.

⁴⁴ 29 C.F.R. § 2520.104b-1(c)(1)(iv) [Labor]; 26 C.F.R. § 1.401(a)-21(c)(3) [Treasury].

electronically furnished documents available to participants and beneficiaries upon request. However, Labor and Treasury officials confirmed that under these provisions, in situations where plan sponsors do not allow participants to opt out of electronic delivery entirely, participants wanting paper documents can only request a paper copy of a disclosure on a document-by-document basis, which is more tedious and time-consuming for both participants and plans sponsors than an arrangement that would permit participants to exercise the choice to opt out of electronic disclosures entirely.⁴⁵

We also found that Labor's 2006 general guidance requires plan sponsors to apprise participants of their right to request and obtain a paper version of their current benefit statement free of charge, but does not require them to allow participants to opt out entirely of receiving their statements electronically in this manner.⁴⁶ Therefore, participants wanting paper copies of their quarterly benefit statement or quarterly fee information would need to request a paper copy from the plan each time a new statement became available on the plan's website. In these situations, participants would have no ability to change their preferred delivery method for how they wished to receive information about their retirement accounts on an ongoing basis.

Few Opportunities to Revisit Consent

Our analysis also found that under the current requirements for electronic disclosure, plan sponsors are required to notify participants of their rights to withdraw consent for electronic delivery, but they are not required to revisit participant consent for electronic delivery except under limited circumstances. Specifically, both Labor's and Treasury's regulations require plan sponsors, prior to obtaining participant consent, to notify participants of their right to withdraw their consent for electronic delivery at any time. However, the regulations do not require plan sponsors to remind participants of this right, or to reconfirm participants' preferences, except under certain, limited circumstances, such as when plan sponsors make a change to their hardware or software that could affect

⁴⁵ Several participant advocacy groups also noted that reducing the barriers to requesting paper disclosures would further strengthen participant safeguards. One group, for example, suggested that plan sponsors be prohibited from requiring participants to follow unduly burdensome procedures, such as having to write a letter, in order to register their preference for paper disclosures.

⁴⁶ Field Assistance Bulletin 2006-03.

participants' access.⁴⁷ Having requirements that sponsors provide such reminders would help ensure that participants, who may prefer paper disclosures or who do not have the proper hardware or software to receive electronic disclosures, have the opportunity to register a preference in how they wish to receive plan information.

Conclusions

The ultimate purpose of the ERISA disclosure requirements is to ensure that participants can access information about their pension plans when they need it in order to help them make informed decisions about their retirement. To this end, efforts to facilitate the broader use of electronic delivery must be accompanied by efforts to safeguard participants' right to receive paper disclosures, if they so choose.

Much has changed in the workplace since Labor and Treasury issued their respective final electronic disclosure regulations. Advances in technology in the areas of digital communication, and widespread use of the Internet at work and at home have redefined the workplace. In addition, the broad adoption of new technologies, such as remote access and secure continuous access websites, has made it possible for employees to conduct their work and access information any time from any location with Internet access. Yet the regulatory requirements for determining which participants qualify for default electronic delivery are somewhat inconsistent and unclear, leaving some plan sponsors uncertain as to how to apply the requirements to their participants. In addition, participants defaulted into electronic delivery may have few opportunities to express their preferences for how they receive plan information, increasing the risk that they will not get information in a way that best serves their needs.

The transition underway towards greater use of electronic disclosure has the potential to achieve benefits for plan sponsors and participants in the form of reduced costs and greater access. At the same time, paper disclosures continue to play an important role in meeting the needs of

⁴⁷ Industry representatives told us that plan sponsors often include statements on electronic disclosures reminding participants of their right to change their delivery preference and method for accessing disclosures; however, they are not required to do so, except with respect to the fee disclosure notice. Although Labor requires plan sponsors that do not use the safe harbor under 29 C.F.R. § 2520.104b-1(c) to notify participants annually of their delivery choice for receiving fee disclosures with instructions on how participants can change their preference, the requirement does not apply to any other required ERISA disclosures under Labor's purview. Technical Release 2011-03R.

those not connected to the Internet or who prefer paper, and in helping locate participants when e-mail communications are returned as undeliverable. For these reasons, it is essential that plan sponsors maintain the capacity to provide paper disclosures even if the bulk of their disclosures move to electronic format over time, and that a participant's right to choose to receive paper disclosures is strengthened and protected.

Recommendations for Executive Action

We recommend that the Secretary of Labor and the Secretary of the Treasury take the following three actions:

1. Work together to develop clear and consistent requirements for default electronic delivery of pension-related disclosures.
2. Consider requiring pension plan sponsors to provide participants with an opportunity to opt out of all forms of electronic delivery, including (but not limited to) disclosures sent by default electronic delivery and disclosures posted on a secure continuous access website.
3. Consider requiring pension plan sponsors to send a periodic paper notice to participants reminding them of their right to change their preferred delivery method at any time and the steps they must take to make these changes.

Agency Comments and Our Evaluation

We provided a draft of this report to Labor, Treasury, and the Pension Benefit Guaranty Corporation for review. Only Labor provided formal written comments, which are reproduced in appendix II. Labor generally agreed with our findings and recommendations. In its comments, Labor emphasized its view that employees are in the best position to determine the method of delivery that is most effective in communicating plan information to them. Moreover, Labor said that it would continue to seek to foster delivery systems that both protect a participant's right to get required information while offering plans flexibility to use electronic disclosure to achieve efficiencies. In addition, all three agencies provided technical comments, which we incorporated in the report, as appropriate.

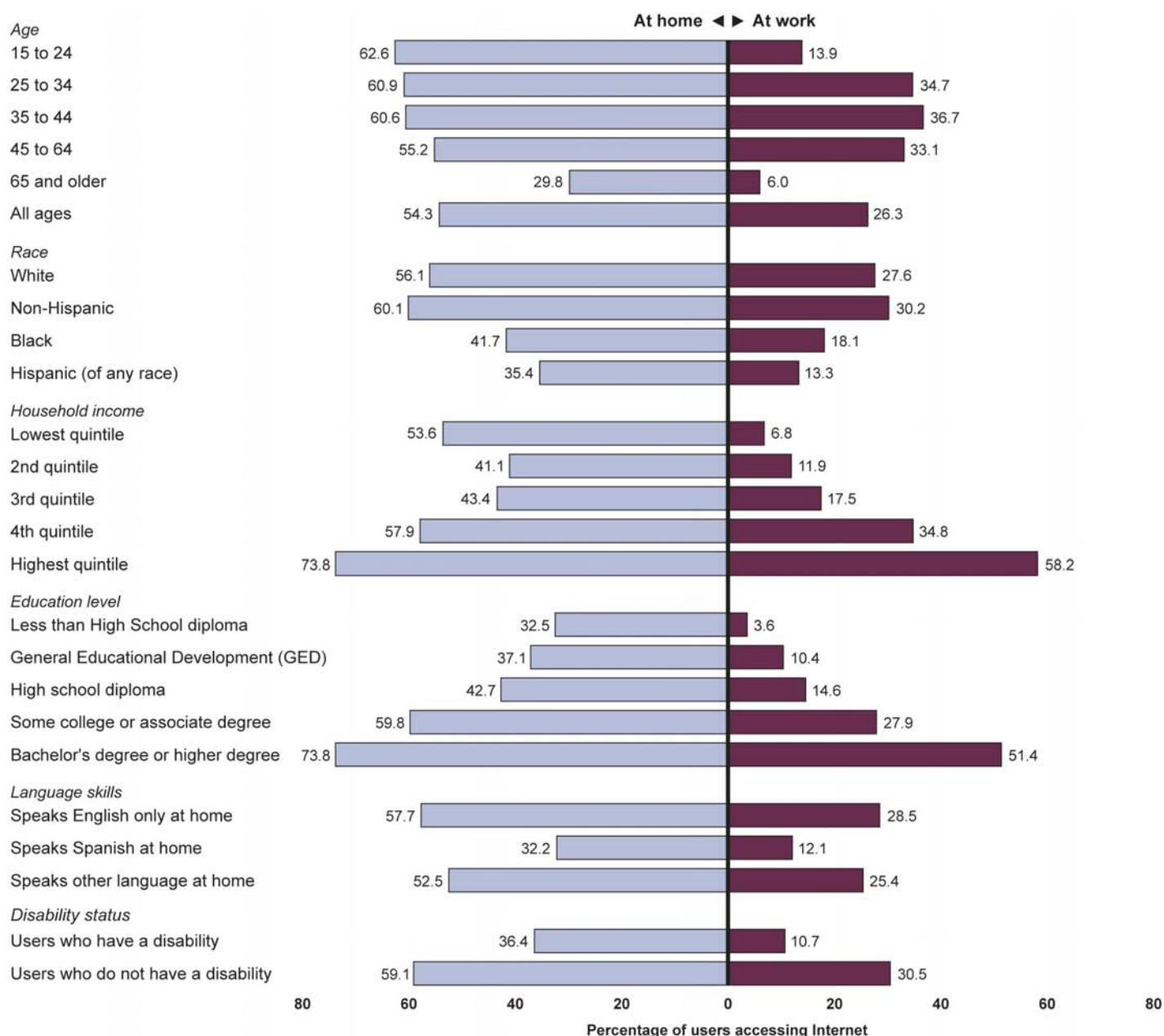
As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary of Labor, Secretary of the Treasury, and Director of the Pension Benefit Guaranty Corporation. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-7215. Contact points for our Office of Congressional Relations and Office of Public Affairs can be found on the last page of this report. GAO staff making major contributions to this report are listed in appendix III.

A handwritten signature in black ink, appearing to read "Charles Jeszeck". The signature is fluid and cursive, with the first name "Charles" and last name "Jeszeck" clearly distinguishable.

Charles A. Jeszeck, Director
Education, Workforce, and
Income Security Issues

Appendix I: Internet Access for Individuals Age 15 and Older, by Selected Characteristics (2010)



Source: U.S. Census Bureau, 2008 SIPP Panel.

Appendix II: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, D.C. 20210



August 21, 2013

Charles A. Jeszeck
Director, Education, Workforce, and Income Security
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Jeszeck:

Thank you for the opportunity to review the Government Accountability Office's (GAO) draft report entitled "Revised Electronic Disclosure Rules Could Broaden Use and Better Protect Participant Choice." We share GAO's interest in exploring how employee benefit plans and plan sponsors may best use current and emerging electronic media to furnish plan participants and beneficiaries with important disclosures required under federal pension law.¹ We also believe that employees are in the best position to determine the method of delivery that will be the most effective means of communicating plan information to them. In our view, that must be a core consideration in any regulations or other guidance issued in this area.

Your draft report notes that much has changed in the workforce since Labor and Treasury issued our respective final electronic disclosure rules in 2002 and 2006. One important change, also noted in your draft report, is the continued and dramatic shift away from defined benefit pension plans to defined contribution pension plans. According to the Department of Labor's most recent data, there are nearly 506,000 participant-directed individual account plans, covering approximately 66 million active participants. Of these plans, about 92 percent are 401(k)-type plans, which hold approximately \$3 trillion in assets. With this change, more and more individual employees are responsible for setting aside retirement savings from their wages and personally managing the investment of those savings over their working careers. The Department recently noted in its final rule on fiduciary requirements for disclosure in participant-directed individual account plans that "[t]his increased responsibility has led to a growing concern that participants and beneficiaries may not have access to or, if accessible, may not be considering, information critical to making informed decisions about the management of their accounts, particularly information on investment choices, including attendant fees and expenses." Because of this concern, we believe that measures to facilitate the broader use of electronic delivery must be accompanied by safeguards to ensure that participants' actually receive information about their plans and their individual accounts.

In 1977, the Department adopted regulations establishing general standards governing the delivery of information required to be furnished to participants, beneficiaries, and other specified individuals under Title I of ERISA. See 29 CFR 2520.104b-1. These regulations require that

¹ We understand your draft report focuses on only private sector pension plans subject to the Employee Retirement Income Security Act of 1974, and does not address electronic disclosure issues with respect to other types of employee benefit plans.

plan administrators use measures “reasonably calculated to ensure actual receipt” by plan participants, beneficiaries and other individuals. Materials which are required to be furnished to a class of participants and beneficiaries also must be sent by “a method or methods of delivery likely to result in full distribution.”

In 2002, the Department amended its general disclosure regulation to establish a “safe harbor” for the use of electronic media. See 29 CFR § 2520.104b-1(c). The safe harbor applies to two categories of individuals (described in paragraph (c)(2) of Sec. 2520.104b-1). The first category is 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 and with respect to whom access to the employer’s or plan sponsor’s electronic information system is an integral part of those duties. As your draft report notes, this category also includes employees who work at home or who may be on travel, provided they have ready access to the employer’s information system.

Some commenters on the Department’s 2002 regulation recommended eliminating the requirement that access to the employer’s or plan sponsor’s information system be an integral part of the participant’s duties. The commenters argued that the availability of a computer kiosk in a common area at a participant’s workplace should be sufficient to satisfy the access requirement. The Department disagreed and explained its view that the actual location of an employee’s work is less important than whether the employee is expected to regularly access the employer’s electronic information system and, therefore, more likely to receive timely communication of plan information. In fact, the Department long held the view that, where documents are required to be furnished to participants, it is not acceptable merely to make the documents available in a location frequented by participants, e.g., by posting the document on a worksite bulletin board. See 29 CFR 2520.104b-1(b). The Department explained that, even where a participant is otherwise provided notice of the availability of a document, requiring participants to physically seek out the documents in common areas of the workplace would be a disincentive for participants to obtain and review important information affecting their rights, benefits, and obligations under their plan. Accordingly, while the use of electronic information systems in common areas of the workplace may be an appropriate means by which to make plan information available for inspection, as a supplemental method of disclosure, or as a way to access additional non-mandated materials, we said that it is not an appropriate means by which to deliver documents required to be furnished to participants.

The second category of individuals to whom documents may be furnished electronically under the safe harbor is participants, beneficiaries and other persons entitled to disclosure documents under Title I who affirmatively consent to receive such documents electronically. The furnishing of documents to this category of individuals assumes the furnishing of documents electronically beyond the workplace and, therefore, the utilization of electronic information systems beyond the control of the plan or plan sponsor. For this reason, the safe harbor establishes conditions to ensure that individuals in this category have the right to decide whether their electronic information and communication system is adequate for receipt of plan disclosures. The conditions were fashioned on the consumer consent requirements Congress included in the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001(b).

We agree with the conclusion in your draft report that changes in technology impact the way people communicate with each other, including how employee benefit plans communicate with plan participants and beneficiaries. Recognizing the fast pace of these changes, the Department of Labor, in 2010 published a Request for Information (RFI) regarding electronic disclosure by employee benefit plans. The RFI sought information to help the Department consider whether, and possibly how, to expand or modify the safe harbor standards. The RFI solicited views, suggestions, and comments from plan participants and beneficiaries, employers and other plan sponsors, plan administrators, plan service providers, health insurance issuers, and members of the financial community, as well as the general public, on this important issue. The public comments are posted on the Department's website and were reviewed as part of your study. Our guiding principle has been, and will continue to be, to foster delivery systems that ensure that participants and beneficiaries rights to get the information required by law is protected while permitting plan's the flexibility to use prevailing technologies and economical and efficient methods of electronic disclosure. Although plan economies are an important consideration, our emphasis is to ensure that employees' legal rights to information are protected.

With that as background, we have the following comments regarding the draft report's three recommendations directed to the Secretary of Labor and the Secretary of the Treasury.

1. The Agencies should work together to develop clear and consistent requirements for default electronic delivery of pension-related disclosures.

Although disclosures required under the Internal Revenue Code and ERISA may serve different purposes and be subject to different technical requirements, we agree that the Labor and Treasury Departments should have clear and appropriately consistent requirements for electronic delivery of pension plan disclosures. For example, the Department will consider your observation that further guidance or an alternative articulation of the "integral job responsibilities" component of the Department's safe harbor regulation would provide plan sponsors with more certainty about compliance efforts. Also, we intend to actively engage with our colleagues at the Treasury Department and Internal Revenue Service to discuss the differences in our respective regulatory standards outlined in your draft report.

2. The Agencies should consider requiring pension plans to provide participants with an opportunity to opt out of all forms of electronic delivery, including (but not limited to) disclosures sent by default electronic delivery and disclosures posted on a secure continuous access website.

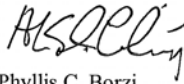
Ensuring that plan participants and beneficiaries have the right to receive pension plan disclosures in paper form on request has always been part of the Department's regulatory standard and other guidance in this area. We adopted this requirement in large part because the Department believes that individual employees are in the best position to determine the method of delivery that will be the most effective means of communicating plan information to them. Under the Labor Department's current safe harbor, employees in the second category, who must give affirmative consent to receive disclosures electronically already have an opportunity to opt out of all forms of electronic delivery. They may revoke their consent at any time without penalty. For employees in the first category, who may be defaulted into electronic disclosure at

their worksite, we agree that it is appropriate for us to consider the merits of broader rights to opt out of electronic delivery. Different opt-out standards may be appropriate for general plan information versus individual account or other personal information, but that is an issue we would want to consider in consultation with the Treasury Department/IRS.

3. The Agencies should consider requiring pension plan sponsors to send a periodic paper notice to participants reminding them of their right to change their preferred delivery method at any time and the steps they must take to make these changes.

Our current regulations and guidance do not require a periodic reminder on paper of the sort described in your report. The sort of periodic notice that you describe could be a safeguard against malfunctions in the electronic communication system and act as a reminder that important plan information is being provided through electronic media. Accordingly, we believe it would be appropriate to consider and obtain further input on requiring some sort of a periodic paper reminder of the sort described in your draft report.

Sincerely,


for Phyllis C. Borzi
Assistant Secretary

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact:

Charles A. Jeszeck, (202) 512-7215 or jeszeckc@gao.gov

Staff Acknowledgments

In addition to the contact named above, Margie K. Shields, Assistant Director; Ted Burik; and Jonathan S. McMurray made key contributions to this report. James Bennett, Amy Buck, Holly Dye, Kathy Leslie, Walter Vance, Craig Winslow, and Jeff Woodward also provided support.

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