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## DOL Requests Information for Drafting Electronic Disclosure Regulations

*The DOL has issued a request for information (RFI) to assist it in revising its regulations on using electronic media to provide information to employee benefit plan participants and beneficiaries. Comments are due by June 6, 2011.*

### Background

The Department of Labor (DOL) adopted the general standard for disclosure of information to participants and beneficiaries under the Employee Retirement Income Security Act (ERISA) in 1977. Under that standard, plan administrators must use delivery methods reasonably calculated to ensure actual receipt of information by plan participants and beneficiaries and other specified individuals. With the internet and other methods of electronic media virtually unknown in 1977, the guidance did not specifically address electronic media.

In 2000, Congress enacted the [Electronic Signatures in Global and National Commerce Act](#) (E-SIGN), which treats electronic records and signatures as having the same legal effect as their paper counterparts. E-SIGN also provides that when a rule of law requires information to be made available to a consumer in writing, the consumer must affirmatively consent to receive it electronically. A federal agency is allowed to exempt specific categories from the E-SIGN requirement if the agency makes a finding that the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

In 2002, the DOL published regulations ([DOL Reg. Section 2520.104b-1\(c\)](#)) that provide plan administrators with a safe harbor under which they could deliver notices using electronic media. Plan administrators may provide electronic notices to:

- A participant who has the ability to effectively access electronic documents at any location where the participant is reasonably expected to work and where the electronic information system is an integral part of his or her work; and
- A participant not included in the first category, a beneficiary, or any other person who affirmatively consents to receive the document electronically.

The Department of the Treasury and the Internal Revenue Service (collectively Treasury) have their own guidance, which is broader than the DOL's guidance. Under the Treasury's latest guidance ([Treas. Reg. Section](#)

[1.401\(a\)-21](#)), which was issued in 2006, the plan administrator may use either of the following methods as long as the recipient is “effectively able” to access the electronic medium:

- The “consumer consent method” follows E-SIGN and allows electronic delivery only if the recipient affirmatively consents to the electronic delivery; or
- The “alternative method” allows electronic delivery without prior recipient consent if the recipient is effectively able to access the electronic medium and the recipient is told that he or she may request written notice at no charge.

In several recent regulations (e.g., see the DOL’s [preamble discussion](#) in the final participant fee disclosure regulations), the DOL has reserved the electronic media section for future regulatory action. The DOL has explained this approach by stating that it will be reexamining electronic media requirements pursuant to a RFI it will be issuing (this RFI), and it hopes to have final electronic media regulations in place before the applicable date of the participant fee disclosure regulations. In the interim, the existing regulations continue to apply, including the 2002 safe harbor. Plan administrators retain the option of not following the safe harbor, but doing so means that their methods are not automatically treated as satisfying the regulations.

***BUCK COMMENT.*** *With the RFI just now being issued, it is impossible for the DOL to issue proposed, and then final, regulations before the start of the first plan year beginning on or after January 1, 2012, which is the applicability date of the participant fee disclosures regulations.*

## Request for Information (RFI)

The DOL RFI solicits information by June 6, 2011 from plan participants and beneficiaries, employers and other plan sponsors, plan administrators, plan service providers, health insurance issuers, members of the financial community, and the general public. The RFI asks, in 30 questions, whether, and possibly how, to expand or modify the DOL’s current electronic disclosure safe harbor. The RFI also welcomes any additional thoughts.

The DOL questions probe the percentage of workers with electronic access regularly at work or at least at home and how the percentage breaks down by socioeconomic groups and types of work. The DOL is also interested in information on current electronic notice practices including how many plans currently provide information electronically, for how many participants, and in what forms. Another line of inquiry addresses whether the current safe harbor is adequate and, if not, the problems. The DOL wants this information broken down, if possible, by recipient groups, types of plan, and types of disclosure. The DOL also asks how specific any regulations should be with respect to hardware and software requirements. Finally, the DOL seeks cost and benefit data so the DOL can perform the required economic analyses. The DOL wants to know if there are different cost considerations for small plans, and whether there is a benefit to simply following the Treasury guidance.

## Conclusion

In order for the DOL to move from the current opt into electronic notices approach for some participants and beneficiaries to an opt out of electronic notices approach for all participants and beneficiaries, the DOL must make a finding that the change would eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. Responses to the RFI will provide the DOL with the information to make that determination. Based on the questions asked and the fact that the DOL has reserved this issue in some regulations, it appears likely that there will be at least some expansion of the ability of plans to use electronic media.

Although many plan administrators are eager for guidance that would make electronic disclosure easier, especially in light of the upcoming participant fee disclosure regulations, it does not appear that the DOL will be able to issue this guidance before the effective date of the participant fee disclosure regulations. Furthermore, it is doubtful that the DOL will extend the fee disclosure effective date to coincide with new electronic disclosure regulations.

Buck's consultants are available to discuss with you your current disclosures, and to provide assistance in submitting comments on the RFI to the DOL. Comments are due by June 6, 2011.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*