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Volume 34 | Issue 80 | October 11, 2011

## DOL Issues Interim Policy on Electronic Disclosure

*In September 2011, the DOL issued Technical Release 2011-03, which provides guidance regarding the use of electronic disclosure methods to comply with the upcoming required disclosures of information concerning participant-directed individual account plans. TR 2011-03 remains in effect until the DOL issues further guidance.*

### Background

#### DOL Electronic Communication Rules

Under the Employee Retirement Income Security Act (ERISA), employers are required to provide various documents and disclosures to participants in employee benefit plans. In 2002, the Department of Labor (DOL) issued final rules permitting the use of electronic media to provide documents and disclosures required under ERISA. Under these rules there is an electronic disclosure safe harbor approach that can be used for the following two classes of individuals:

- A participant who is able to effectively access electronic documents at any location where the participant is reasonably expected to perform his or her duties as an employee and for whom access to the electronic information system is an integral part of his or her duties, and
- Other participants and beneficiaries (including retirees, former employees, beneficiaries, and employee-participants where access to the employer's electronic information system is not an integral part of their duties) who have affirmatively agreed to receive disclosures through electronic media.

In 2006, the DOL released Field Assistance Bulletin 2006-03 (FAB 2006-03), which stated that pension benefit statements could be provided electronically using the safe harbor rule described above. In addition, FAB 2006-03 provided that pension benefit statements could be issued electronically using two other methods:

- In accordance with Department of Treasury regulations relating to the provision of documents via electronic media; or
- Via a secure website if certain requirements are satisfied.

(See our November 21, 2006 [For Your Information](#).)

## Final Disclosure Rules for Participant-Directed Individual Account Plans

On October 20, 2010, the DOL issued final regulations on disclosure of plan fees, expenses and investment information by plan administrators to participants (both existing and newly eligible) under ERISA Section 404(a) (participant disclosure rules). The final regulations allow both plan level and individual fee and expense information to be included in the quarterly pension benefit statement. The DOL did not specifically address the electronic distribution of other required participant disclosures, such as the investment related disclosures. The preamble to the final rule noted that until further guidance was released, the DOL's general disclosure rules and the 2002 safe harbor would continue to apply. (See our November 30, 2010 [For Your Information](#).)

**BUCK COMMENT.** *In July 2011, the DOL extended the date plan administrators must provide an initial fee disclosure to all current participants and beneficiaries until the later of May 31, 2012 or 60 days after the first day of the first plan year beginning on or after November 1, 2011.*

## Technical Release 2011-03

On September 13, 2011, the DOL issued [Technical Release 2011-03](#) (TR 2011-03) to clarify the circumstances under which disclosures required by the participant disclosure rules may be sent electronically. TR 2011-03 provides interim relief for two categories of disclosures:

- Disclosures that are included in pension benefit statements (fee and expense information); and
- Disclosures that are not included in pension benefit statements (investment and other information).

**BUCK COMMENT.** *TR 2011-03 applies only to disclosures required by the participant disclosure rules.*

## Disclosures Included in Pension Benefit Statements

Under TR 2011-03, disclosures required under the participant disclosure rules that are included in a pension benefit statement may be furnished in the same manner that the pension benefit statement is furnished. For example, if the pension benefit statement was sent electronically via a secure website in compliance with FAB 2006-03, then the fee and expense information for the participant-directed individual account plan may be sent electronically as well.

## Disclosures Not Included in Pension Benefit Statements

TR 2011-03 provides separate guidelines for disclosures required under the participant disclosure rules that are not included in pension benefit statements. In these situations, the plan administrator has the option of using the DOL's 2002 safe harbor electronic disclosure methods. In the alternative, pending further guidance, a plan administrator may furnish disclosures through electronic media in accordance with the following requirements:

**Voluntary Provision of Email Address.** Participants and beneficiaries to whom the information is being disclosed must voluntarily provide their email address for the purpose of receiving the disclosure. The email must be requested at the same time that the plan sponsor provides an “Initial Notice” (discussed below). Note, however, that the provision of an email address as a condition of employment (or plan participation) or the assignment of an email address by the employer is not considered voluntarily provided by a participant or beneficiary.

**Initial Notice.** An Initial Notice must be provided to participants and beneficiaries at the same time and in the same medium as the request for the email address (as described above) and contain certain information, including:

- (a) A statement that providing an email address for the disclosures is voluntary and will result in disclosures being made electronically;
- (b) Identification or a brief description of the information that will be furnished electronically and how it can be accessed;
- (c) A statement that participants and beneficiaries may request and obtain the information, free of charge, via a paper copy and an explanation of how to exercise that right;
- (d) A statement that the participant or beneficiary has the right to opt out of receiving disclosures electronically at any time and an explanation of how to exercise that right; and
- (e) An explanation of the procedure for updating the participant’s or beneficiary’s email address.

**Annual Notice.** A plan administrator must provide to each participant and beneficiary an “Annual Notice” containing the information described above in (b) through (e). The Annual Notice must be provided beginning the year after a participant or beneficiary voluntarily provides his or her email address. If a participant or beneficiary has interacted electronically with the plan (for example, by updating or confirming an email address, sending an electronic message to the plan, or logging in to a website housing plan information) after he or she received the prior year’s Annual Notice or Initial Notice, the current Annual Notice may be provided electronically.

**BUCK COMMENT.** *To be able to continue to provide the investment disclosures electronically, the plan administrator must also provide the Annual Notice. To be able to provide the Annual Notice electronically, the plan administrator must be able to show that each participant or beneficiary interacted electronically with the plan. Because showing this for each participant or beneficiary may be difficult and time consuming, to be able to provide the investment information electronically, the Annual Notice may need to be provided in paper form.*

**Delivery.** A plan administrator must take reasonable steps to ensure that the electronic delivery results in actual receipt of the information. This can be accomplished through the use of return receipt or notice of undelivered electronic mail or through reviews or surveys.

**Confidentiality.** A plan administrator must take appropriate measures to make sure the confidentiality of personal information is protected within the electronic delivery system.

**Clarity.** The notices must also be written in a manner that is easily understood by the average plan participant.

**Transition Rule.** For participant and beneficiary email addresses already on file with an employer, plan sponsor, or plan administrator on the date specified below at (b), the voluntary provision of email and Initial Notice requirements will be deemed satisfied if a Transition Group Initial Notice meets the following requirements:

- (a) It must contain the information set out in (b) through (e) above;
- (b) It must be provided no earlier than 90 days and no later than 30 days before the date that the initial disclosure of plan-related information under the 2010 final rule is provided to members of the group;  
and
- (c) The notice must be sent in paper form unless a participant has interacted with the plan electronically in the past year.

The special transition provision is not available for an email address established or assigned by the employer, plan sponsor or its designee unless there is evidence that a participant or beneficiary used the email address for plan purposes during the 12-month period before the date the notice is furnished. A participant or beneficiary uses an email address for plan purposes if he or she, for example, sends an electronic message to the plan, receives and opens an electronic message sent by the plan, or logs onto a secure continuous access Web site housing plan information using the email address as the username.

***BUCK COMMENT.*** *To use the transition rules, a plan administrator would need to show that each plan participant or beneficiary used his or her email address for plan purpose during the previous 12 months. Because of the difficulty in tracking this information, some plan administrators may not be able to use the transition rules.*

## Conclusion

TR 2011-03 remains in effect until the DOL issues further guidance. Buck's consultants are available to assist you in assessing whether you want to use electronic disclosures in complying with the participant disclosure rules, and, if so, how to comply with the DOL's electronic disclosure requirements.

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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.*