

FYI[®]

For Your Information[®]

Celebrating
40
years of FYI[®]

DOL proposes new electronic disclosure option for retirement plans

On October 23, the DOL proposed a new safe harbor for electronic retirement plan disclosures. The proposal would supplement existing regulations to allow website posting as an additional method to e-deliver certain disclosures to plan participants, beneficiaries and other individuals entitled to receive them. The DOL will accept comments on the proposed regulations through November 22.

Volume 42

Issue 91

October 30, 2019

Authors

Joanne Jacobson, JD, LL.M.
Nancy Vary, JD

Background

ERISA provides standards for delivery of information required to be provided to plan participants, beneficiaries and other individuals. Until 2002, disclosures were required to be made by hand delivery or by mail. In 2002, the DOL added a safe harbor for electronic disclosure to those individuals who are “wired at work” or affirmatively consent to electronic delivery.

To consent, the individual must be provided a statement that includes the types of documents to which the consent would apply and specifies: consent can be withdrawn at any time without charge; the procedures for withdrawing consent and for updating the electronic address; the right to obtain a paper version; and any hardware and software requirements for accessing and retaining the documents.

Since adding the electronic disclosure safe harbor in 2002, the IRS has periodically issued guidance addressing electronic delivery methods for particular disclosures:

- Pension benefit statements may be provided through access to a secure website ([FAB 2006-03](#)).
- Qualified Default Investment Alternatives and Automatic Contribution notices may be provided electronically ([FAB 2008-03](#)).
- Plan and investment-related disclosures for participant-directed accounts may be disclosed through electronic media (including a website) ([TR 2011-03R](#) — temporary nonenforcement policy).

DOL adds new safe harbor alternative

After many surveys, review of other agency actions, and input from the ERISA Advisory Council, the DOL issued proposed regulations that would add posting online as a new safe harbor alternative for electronic disclosure. The proposed safe harbor would supplement — rather than replace — the 2002 safe harbor and other currently available methods to deliver ERISA disclosure documents.

Covered individuals. The proposed safe harbor only applies to covered individuals — participants, beneficiaries and others entitled to receive covered documents — who provide the employer, plan sponsor or administrator (or appropriate designee) with an email address or Internet-connected mobile computing device (such as a smartphone) number or have an electronic address assigned by the employer for this purpose.

Employees may be required to provide the employer with an email address upon employment or plan participation or be assigned one by the employer. Plan administrators must ensure the continued accuracy of the email address following a termination of employment and must have a way to update former employees' records and detect invalid or inoperable electronic addresses. Where addresses are invalid or inoperable, the administrator would have to treat the individual as if he or she opted out of e-delivery until the problem is cured.

Covered documents. The safe harbor only applies to documents that must be furnished by a pension plan under Title 1 of ERISA, other than documents that must be furnished on request. The safe harbor does not apply to employee welfare benefit plans such as group health or disability plans. However, the proposed rule reserves a section for these plans “so that [DOL] can study the future application of the new safe harbor to documents that must be furnished to participants in employee welfare benefit plans.”

Notice of Internet Availability. Plan administrators must electronically provide to each covered individual a Notice of Internet Availability (Notice) for each covered document. The Notice generally must be separate from the document it covers and furnished each time the required plan disclosure is posted on a designated website. The Notice must be written in a manner calculated to be understood by the average participant.

An initial Notice must be made on paper and advise that some or all covered documents will be furnished electronically. The Notice must also include a statement of the participant's right to request and obtain a paper version of a covered document free of charge, the right to opt out of electronic delivery entirely, and instructions on how to exercise these rights.

The Notice must include specific information:

- A prominent statement that reads: “Disclosure About Your Retirement Plan”
- A statement: “Important information about your retirement plan is available at the website address below. Please review this information”

- A brief description of the covered document
- The website address where the covered document is available
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right
- A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise this right
- A telephone number to contact the administrator or other designated plan representative

Under the proposed rules, an administrator would be permitted to provide a combined Notice that incorporates the content described above for one or more of the following covered documents — Summary Plan Description, Summary of Material Modifications, Summary Annual Report, Annual Funding Notice, Qualified Default Investment Alternative, investment-related disclosures, and pension benefit statements. The combined Notice must be furnished each plan year but no more than 14 months after the prior plan year's Notice. Individuals must have the right to opt out of e-delivery and to receive only paper copies of some or all of the documents.

Additional participant protections. The proposal also requires plan administrators to take certain measures to protect participants. They must ensure that documents are available on the website no later than the date on which they must be furnished under ERISA. The documents must be written so they will be understood by the average participant, suitable for reading online and printing, downloadable, and searchable electronically. In addition, they must remain online until superseded by a later version. Administrators must also take reasonable measures to protect the confidentiality of covered individuals' personal information.

In closing

The proposed website option is welcome news for plan sponsors, providing an easier, more cost-effective and technologically advanced means of furnishing ERISA-required notices in a manner that is likely to appeal to most individuals. The DOL will accept comments on the proposed rules through November 22. The proposed rules cannot be relied upon until finalized.

Produced by the Knowledge Resource Center

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.