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DOL finalizes new electronic disclosure option for retirement plans

On May 27, 2020, the DOL issued a new safe harbor for electronic retirement plan disclosures that supplements existing regulations to allow an additional method to electronically deliver certain disclosures to plan participants, beneficiaries and other individuals.

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Electronic distribution — an evolution

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 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a statement that includes the types of documents to which the consent would apply and specifies: consent can be withdrawn at any time without charge; the procedures for withdrawing consent and for updating the electronic address; the right to obtain a paper version; and any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).

Buck comment. DOL Employee Benefit Security Administration Disaster Relief Notice 2020-1, which was issued as part of the response to the COVID-19 pandemic, provided temporary relief from deadlines for providing benefit statements, annual funding notices, and other notices, but cautioned that in order to use the relief provided under this guidance, the plan and responsible fiduciary must act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. IRS Notice 2020-1 provides that “good faith” for this purpose includes use of alternative electronic means of communicating with plan participants and beneficiaries whom the plan fiduciary reasonably believes have effective access to those means, including email, text messages, and continuous access websites. The relief provided in IRS Notice 2020-1, including the expanded use of electronic means of communicating, is short-term during the COVID Outbreak Period (see our May 12, 2020 FYI for more information). Whereas these final regulations, along with the 2002 final regulations, should be used to determine retirement plan compliance on an ongoing basis, when combined with Notice 2020-1, plans now have substantial flexibility to respond to the challenges of the COVID outbreak.

DOL adds new electronic distribution safe harbor alternative

The final regulations expand the safe harbors for electronic distribution. Plan administrators can continue to use and follow the existing safe harbors for electronic disclosure to employees who are “wired at work” or individuals who affirmatively consent to electronic delivery. Now, however, plan administrators can provide covered documents electronically to covered individuals either through publication on a website or by direct email. For this purpose, “website” includes an internet website, or other internet or electronic-based information repository, such as a mobile application.

Buck comment: With the addition of this guidance, plan administrators should review their communication strategies to ensure they are meeting the intended safe harbor. Many administrators used the “wired at work” safe harbor for some employees and provided paper notices to other recipients. Even with the new safe harbors, employers may still have to follow different rules for different groups if it is not possible to apply a single strategy to all.

Who are covered individuals and what are covered documents?

The new safe harbor only applies to covered individuals and to documents or information that must be furnished by a pension plan under Title 1 of ERISA — such as defined benefit and defined contribution plans.

Covered individuals. Covered individuals are participants, beneficiaries and others entitled to receive covered documents and who either:

- 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 (an

“electronic address”) where the covered individual may receive a written notice of internet availability, or

- Have an electronic address assigned by the employer for employment-related purposes, including but not limited to delivery of covered documents.

This provision excludes individuals with electronic addresses assigned by an employer solely for the purpose of communicating ERISA required documents from the definition of “covered individual.”

Plan administrators must have a way to update former employees’ records and detect invalid or inoperable electronic addresses. In addition, they must have procedures in place to ensure the continued accuracy of the email address following a termination of employment. Where addresses are invalid or inoperable, the administrator must treat the individual as if he or she opted out of electronic delivery until the problem is fixed.

Buck comment. In addition to participants, covered individuals include beneficiaries and others entitled to receive covered documents (e.g., alternate payees entitled to benefits under a divorce decree). If a plan administrator wants to leverage the new safe harbor for individuals other than participants, they must establish a procedure for obtaining and maintaining email addresses for those individuals. Otherwise, the plan administrator or sponsor would have to provide the covered documents by hand delivery, mail, or another safe harbor. It may not be enough to collect the beneficiary’s email address on an election form. The plan administrator or service provider also may have to obtain affirmative consent to the use the individual’s email address.

Covered documents. Covered documents do not include documents that must be furnished only on request. The safe harbor does not apply to employee welfare benefit plans such as group health or disability plans. However, the final 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.”

Initial notice

Prior to utilizing the new safe harbor, whether by posting on the internet or by direct email, an initial notice must be provided on paper and advise that some or all covered documents will be furnished electronically. The initial notice must be written in a manner calculated to be understood by the average plan participant and must include:

- The electronic address to be used for the individual
- Any instructions necessary to access the covered documents
- A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, until after it is superseded by a subsequent version of the covered document

- A statement of the participant's right to request and obtain a single paper version of a covered document free of charge and an explanation of how to exercise that right
- A statement of the participant's right to opt out of electronic delivery entirely and instructions on how to exercise this right

Notice of internet availability

Plan administrators must electronically provide to each covered individual a Notice of Internet Availability (NOIA) for each covered document. The NOIA generally must be separate from the document it covers and furnished each time the required plan disclosure is made available on a designated website. The NOIA must be written in a manner calculated to be understood by the average participant. The NOIA itself will be sent to the email address on file for the covered individual and may not be posted on the designated website.

The NOIA must include only the following information, except that the administrator may include pictures, logos or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear.

1. A prominent statement that reads: "Disclosure About Your Retirement Plan"
2. A statement: "Important information about your retirement plan is now available. Please review this information"
3. Identification of the covered document by name and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document
4. The website address, or a hyperlink to such address, where the covered document is available that is sufficiently specific to provide ready access to it directly or via a login page that provides a prominent link to the covered document
5. A statement of the right to request and obtain a single paper version of the covered document, free of charge, and an explanation of how to exercise this right
6. A statement of the right to opt out of receiving covered documents electronically, free of charge, and an explanation of how to exercise this right
7. A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, until after it is superseded by a subsequent version of the covered document
8. A telephone number to contact the administrator or other designated plan representative

In addition, the notice may include a statement as to whether action by the covered individual is invited or required in response to the covered document and how to take such action, or that no action is required, provided that such statement is not inaccurate or misleading.

The final regulations also clarify that a NOIA is not required if the plan administrator furnishes the covered document itself to a covered individual via a direct email sent to the covered individual's applicable email address. The email must include the subject line "Disclosure About Your Retirement Plan" and the information otherwise required in the NOIA listed in items 3, 5, 6, and 8, above.

Under the final rules, an administrator would be permitted to combine the NOIAs and covered documents, subject to the rules above, for one or more of the following covered documents:

- Summary plan description (but not a summary of material modification)
- Any covered document or information that must be furnished annually, rather than upon the occurrence of a particular event, and does not require action by a covered individual by a particular deadline (e.g., a summary annual report, annual funding notice, QDIA notice, annual (but not quarterly) pension benefit statement, annual investment related information required by DOL Regulation 2550.404a-5(d)(2))
- Any other covered document if authorized in writing by the Secretary of Labor by regulation or otherwise
- Any applicable notice required by the Internal Revenue Code if authorized in writing by the Secretary of the Treasury

The combined NOIA 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 electronic delivery and to receive only paper copies of all of the documents. The election to opt out of only some of the documents was eliminated in the final rule.

Additional participant protections

Plan administrators must 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 electronically searchable. In addition, they must remain online for at least one year or, if later, until superseded by a later version. Administrators must also take reasonable measures to protect the confidentiality of covered individuals' personal information.

Buck comment: Plan administrators should retain copies of each document, as published, along with the date of publication and manner of distribution for ERISA recordkeeping and compliance purposes.

Effect on prior guidance

In the interest of creating uniformity in the electronic delivery of ERISA disclosures, the final rule supersedes relevant portions of prior interpretive guidance (FAB 2006-03, FAB 2008-03 and TR 2011-03R, described above).

However, DOL will take no enforcement action and plan administrators may continue to rely on the prior guidance for 18 months from the effective date as they make system changes necessary to comply with the final rule.

In closing

The new 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 likely to appeal to most individuals. The final regulations are effective and applicable on July 27, 2020 (60 days after published in the Federal Register) but may be relied upon immediately.

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