

DOL Proposes New E-Disclosure Regulations

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Background

On October 23, 2019, the Department of Labor (DOL) published proposed regulations that provide for a new e-disclosure safe harbor for distribution of participant notices required under ERISA. This regulatory project is in response to President Trump's Executive Order on Strengthening Retirement Security, issued in August of last year. In that order, the President directed the DOL to consider what actions could be taken to make retirement plan disclosures more understandable and useful for participants and beneficiaries. The DOL was also specifically directed to consider broader use of electronic delivery, with the goal of reducing plan administrative expenses. It is estimated that the new safe harbor will reduce plan costs by \$2.4 billion over the next 10 years.

This regulatory project is not new. In April of 2011, the Department issued a "Request for Information" (RFI). The RFI solicited comments from interested parties on whether and how the DOL could expand the existing electronic delivery safe harbor, which was adopted in 2002. Under the current safe harbor, which will remain in effect even after the proposal is finalized, electronic delivery is permissible as the default method of delivery only if the participant is required to access the electronic delivery system as an integral part of his or her job duties. In addition, the participant must be able to effectively access the system at any workplace location from which he or she is reasonably expected to perform services.

The DOL received 78 comment letters in response to the 2011 RFI. Many commentators complained that the safe harbor standard was too strict and of little use in the real world. Other commentators who were in favor of the more restrictive standard were concerned that electronic delivery would not be easily accessed by certain populations, such as seniors who may not have ready access to the internet or understand how to use it. Because of the diverging opinions of commentators and the DOL's increasing focus on the fiduciary regulation in the years following the RFI, no action was ever taken in response to that process. The 2011 RFI did, however, result in the creation of an administrative record, which was an important first step to issuing a regulation. The DOL was able to use that record as the basis for issuing the proposed regulation.



The Proposed Regulation

The proposal sets forth a new alternative safe harbor for providing participant disclosures electronically. It only applies, however, to those notices that are within the jurisdiction of the DOL. (IRS regulations will continue to apply to retirement plan notices within IRS jurisdiction.) Additionally, the new safe harbor only applies to retirement plan disclosures, leaving for future consideration by the DOL the possible extension to health and welfare plans. Finally, it does not apply in circumstances where a document must be furnished at the specific request of a participant or beneficiary (for example, if the plan administrator received a participant request for a copy of the latest summary plan description or annual report for the plan). It should also be noted that the proposal will supersede the good faith compliance standards of Field Assistance Bulletin 2006-03.

The new safe harbor follows a “notice and access” approach patterned to some degree on a similar approach taken in Field Assistance Bulletin 2006-03 for distribution of participant benefit statements. Under this approach, the plan administrator will be permitted to send a participant or beneficiary a notice of internet availability, explaining that a document is available for viewing on a website. The participant will then go to the website to view the document. There are, however, detailed requirements that must be met.

To begin, the safe harbor will apply only to covered documents and covered individuals. A covered document is any retirement disclosure or notice required under Title I of ERISA (other than one that must be furnished on request). A covered individual is broadly defined as anyone entitled to receive a covered document. In addition, to qualify as a covered individual, the participant or beneficiary must furnish to the employer, plan sponsor or plan administrator (or an appropriate designee) an electronic address (such as an email address or a cell phone number for a smart-phone). Alternatively, the employer may assign an electronic address to an employee for this purpose. The plan administrator, however, must take steps to ensure the continued accuracy of the electronic address after the employee severs from employment (or obtain a new electronic address that enables receipt of documents following severance).

To use the new safe harbor, the individual must first receive an initial written notice on paper that some or all of the covered documents will be furnished electronically to an electronic address. In addition, the individual must be informed of his or her right to request and obtain a paper version of a covered document, free of charge; the right to opt out of receiving covered documents electronically; and an explanation of how to exercise those rights.

After giving the initial notice, covered documents may then be furnished using the notice and access approach. This means that when a document is to be furnished, the participant must be sent a notice of internet availability to the electronic address that was assigned to or furnished by the individual. This notice must contain the following information:

- A prominent statement — for example, a title, legend, or subject line that reads, “Disclosure About Your Retirement Plan.”
- A statement that: “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 internet website address where the covered document is available. The website address must be sufficiently specific to provide ready access to the covered document, such as by an address that leads the covered individual directly to the covered document. A website address also satisfies the "sufficiently specific" standard if the address leads the covered individual to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document.
- 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 that right.
- A statement of the right to opt out of receiving covered documents electronically, and an explanation of how to exercise that right.
- A telephone number to contact the administrator or other designated representative of the plan.

The notice of internet availability must be written in a manner calculated to be understood by the average plan participant. The proposal specifically provides that "... a notice that uses short sentences without double negatives, everyday words rather than technical and legal terminology, active voice, and language that results in a Flesch Reading Ease test score of at least 60 satisfies this standard."

The notice must be sent separately for each document at the time the document is being made available on the website. However, a special rule allows a combined annual notification of internet availability for one or more of the following documents:

- The summary plan description;
- The summary of material modifications;
- The summary annual report;
- The annual funding notice;
- The required investment-related disclosure for plans offering participant directed investments;
- The qualified default investment alternative notice: and
- The pension benefit statement.

The combined notice must be given once each plan year and no more than 14 months after the prior plan year's notice was given.

The system for delivering the notice must be designed to alert the plan administrator if an individual's electronic address is invalid or inoperable. If the administrator is alerted to such a problem, steps must be taken to correct the problem (such as using a secondary email address or obtaining a new address for the individual). If the problem cannot be quickly cured, the individual is treated as having elected paper notices. At all times, the covered individual must have the opportunity to request a paper copy of the document furnished on the website at no charge.

Additionally, the individual must have the opportunity at any time to elect to opt out of electronic delivery and receive only paper copies in the future.

There are also requirements for how the covered document is made available on the website. The plan administrator must take reasonable steps to ensure that the covered document:

- Is available on the website no later than the date on which the covered document must be furnished under the ERISA;
- Remains available on the website until it is superseded by a subsequent version of the covered document;
- Is presented on the website in a manner calculated to be understood by the average plan participant;
- Is presented on the website in a format that is suitable to be read online or printed clearly on paper;
- Must be capable of being searched electronically by numbers, letters, or words; and
- Must be presented in a format that allows the covered document to be permanently retained in an electronic form.

The plan administrator must also ensure that the website protects the confidentiality of the individual's personal information.

What's Next?

The DOL has invited comments on the proposal itself and a number of specific questions set forth in the preamble. The comment period is a relatively short 30 days. It is likely the DOL will hold a public hearing after the comment period closes to receive testimony from interested parties. It is expected there will be some comment letters highly critical of the initiative. For example, the Coalition for Paper Options provided comments to the Office of Management and Budget characterizing the proposal as unnecessary and unjustified before it was even released. AARP has also voiced its concerns that many older Americans may be disadvantaged by the new safe harbor.

Since the DOL will have to give due consideration to the comments it receives, 2020 is the earliest it could be finalized. The new rule is slated to be effective 60 days after the final regulation is published in the Federal Register. Its applicability date, however, will be January 1 of the calendar year following its publication. The DOL has asked for comments as to whether the applicability date should be sooner, since the new safe harbor is not a mandate, or later to ensure participants are at no risk of harm if plan administrators implement the changes too soon.

Trucker Huss will continue to monitor the rulemaking process and we will report back on developments in future editions of our Benefits Report.

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