



E-Disclosure – The DOL Regulations Are Finally Final!

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E-Disclosure Final Regulations: Overview

- ★ On May 21, 2020, the Department of Labor (DOL) published its final rule providing for electronic disclosure of retirement plan information to participants, beneficiaries and alternate payees required by ERISA (the “Rule”).
- ★ The proposed rule was published on October 23, 2019.

E-Disclosure Final Regulations: Overview, cont'd

- ✦ This regulatory project was in response to the President's Executive Order directing 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.

E-Disclosure Final Regulations: Overview, cont'd

- ★ The DOL anticipates implementation of the Rule will reduce plan costs for printing and mailing, etc., by an estimated \$3.2 billion over the next decade, while making disclosures more readily accessible and useful to plan participants.

E-Disclosure Final Regulations: Overview, cont'd

- ✦ What does the Rule put into effect? It creates a new, voluntary fiduciary safe harbor for electronically providing retirement plan disclosures required under ERISA (referred to as “covered documents”).
- ✦ Importantly, the Rule does not supersede the 2002 safe harbor e-disclosure rule, published by the DOL on April 9, 2002 (discussed in more detail later in this presentation).

E-Disclosure Final Regulations: Overview, cont'd

- ★ The Rule only applies to required disclosures that are within the jurisdiction of the DOL, such as:
 - > Summary Plan Descriptions, Summary of Material Modifications, Summary Annual Reports, Annual Funding Notices, Periodic Benefit Statements, Participant Fee Disclosures, Blackout Notices, 204(h) Notices, Suspension of Benefits Notices.
 - > It allows employers to deliver the information and disclosures primarily electronically, including by e-mail, mobile applications and text messaging to smartphones.

E-Disclosure Final Regulations: Overview, cont'd

- ✦ The safe harbor permits a so-called “notice and access” approach, where participants and beneficiaries (referred to in the Rule as “covered individuals”) must first receive a paper notice explaining that some or all covered documents will be furnished electronically.
- ✦ Participants and beneficiaries have a right to opt out of electronic delivery and, instead, receive the documents in paper form, free of charge.
- ✦ These forms of communication can provide links to the documents or the documents can be attached directly.

E-Disclosure Final Regulations: Overview, cont'd

- ★ The Rule is fundamentally similar to the proposed rule.
 - > It preserves the right of participants to receive disclosures in paper form, if they choose.
 - > As a general rule, whenever a covered document is made available, the individual must electronically receive a Notice of Internet Availability (NOIA) that explains what the document is and how to obtain it, and apprises the individual of the right to opt out of electronic delivery and receive a paper copy of the document.

E-Disclosure Final Regulations: Overview, cont'd

- > The system for furnishing the NOIA must be designed to notify the plan administrator of a covered individual's invalid or inoperable electronic address.
- > And, if so notified, the plan administrator must either take prompt steps to fix the problem or treat the individual as having opted out of electronic delivery, in which case the disclosure must be provided in paper form as soon as reasonably practicable.

Documents Outside of the Scope of the Rule

- ✦ IRS regulations (26 CFR 1.401(a)–21) will continue to apply to retirement plan notices within the jurisdiction of the IRS, such as:
 - > Safe Harbor Notice, QACA/EACA Notice, EPCRS Notices, Notice to Interested Parties, Distribution Notices, QJSA Notice, Notice of Funding-Related Benefit Limitations.

Documents Outside of the Scope of the Rule, cont'd

- ✦ Under IRS Regulations, the plan must either satisfy the E-Sign consumer consent requirements (affirmative consent) OR, if the recipient is effectively able to access the communication, the notice can be provided without affirmative consent if at the time the applicable notice is provided, the recipient is advised that he or she may request to receive the notice in paper form at no charge.
- ✦ The Treasury Department and the IRS have indicated that they intend to issue additional guidance relating to the use of electronic delivery for participant notices.

Documents Outside of the Scope of the Rule, cont'd

♦ The Rule does not apply to:

- > Health and welfare plan disclosures required under ERISA, leaving that for future consideration by the DOL.
- > Documents that must be furnished only at the specific request of a participant or beneficiary (for example, a participant's request for a copy of the plan and/or trust document, or the form 5500).
 - If a document must be furnished upon a specific request, but also must be furnished periodically (e.g., SPD), it is covered by the Rule.

The 2002 Regulations

- ♦ As noted previously, the Rule does not replace the e-disclosure regs. issued April 9, 2002 (the “2002 Regs”); rather, it provides for additional e-disclosure options for plan sponsors and administrators. Therefore, documents can be distributed electronically pursuant to the 2002 Regs.

The 2002 Regulations, cont'd

- ★ The 2002 Regs permit e-disclosure notices to current employees if certain requirements are met, such as:
 - > The notice must inform the recipient of the subject matter of the documentation and its significance (if not obvious).
 - > The notice must inform the recipient that they are entitled to receive a paper copy at no cost.
 - > The recipient must either affirmatively agree to e-communications or have the ability to effectively access disclosures where they work, if accessing employer electronic info systems is integral part of their work duties.

The 2002 Regulations, cont'd

- ✦ The 2002 Regs for terminated/retired employees (and beneficiaries and alternate payees) permit e-disclosures, provided that:
 - > affirmative consent is obtained to send specific notices electronically;
 - > they are sent via a specific personal e-mail address; and
 - > the former employee must be given notice that the consent may be withdrawn at any time.
- ✦ The 2002 Regs likely work reasonably well for companies in which employees have dedicated computers and e-mail addresses, but perhaps not so well for companies where this not the case.

Covered Individuals

- ★ The safe harbor only applies to “covered individuals” broadly defined as a participant, beneficiary, alternate payee or other individual entitled to receive a covered document **who has furnished to the employer, plan sponsor or plan administrator (or an appropriate designee) an electronic address, such as an email address or smartphone number.**

Covered Individuals, cont'd

- ✦ If an electronic address is assigned by the employer to an employee for this purpose, the employee is treated as if he or she provided the address.
 - > Employers cannot assign electronic addresses for non-employee spouses or other beneficiaries.
- ✦ Electronic address cannot be assigned solely for purposes of satisfying the safe harbor (must be assigned for some other employment-related purpose).

Covered Individuals, cont'd

- ✦ Under the safe harbor, only employers, and not plan administrators or their service providers, can assign electronic addresses.
- ✦ The plan administrator must take steps to ensure the continued accuracy of the electronic address if the employee severs employment or obtains a new electronic address that enables receipt of documents following severance.

Covered Individuals, cont'd

- ✦ In light of the importance of having a working email address, it will make sense to request both work and personal email addresses (as well as a cell phone number) as part of the enrollment process.

Methods of Electronic Disclosure

- ★ Covered documents may be furnished either using a “notice and access” approach or directly via email.
 - > Notice and access means that that when a document is to be furnished, the covered individual is sent a “notice of internet availability” to the electronic address on file that identifies the covered document and provides the website where the document is available.

Initial Paper Notice

- ★ Before any documents are disclosed electronically to a covered individual using the safe harbor, the individual must receive an initial written paper notice that:
 - > Explains that covered documents will be furnished electronically to an electronic address.
 - > Identifies the electronic address that will be used for the individual.

Initial Paper Notice, cont'd

- > Provides any instructions necessary to access the covered documents.
- > Contains a cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document.
- > Contains a statement of the right to request and obtain a paper version of a covered document, free of charge, and an explanation of how to exercise this right.

Initial Paper Notice, cont'd

- > Contains a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.
 - *Note:* Only a global opt-out right is required, although plan administrators may choose to allow opt-out on a document-by-document basis.
- ✦ Initial paper notice must be furnished to any covered individual (even if individual was previously receiving electronic disclosures under 2002 safe harbor).

Notice of Internet Availability

- ★ The notice of internet availability (NOIA) must contain the following:
 - > A prominent statement, for example as a title, legend, or subject line that reads, “Disclosure About Your Retirement Plan.”
 - > A statement that reads: “Important information about your retirement plan is available at the website address below. Please review this information.”

Notice of Internet Availability, cont'd

- > An identification of the covered document by name (for example, a statement that reads: “your Quarterly Benefit Statement is now available”) and a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document.

Notice of Internet Availability, cont'd

- > The internet website address, or a hyperlink to such address, where the covered document is available.
 - The website address or hyperlink must be sufficiently specific to provide ready access to the covered document and will satisfy this standard if it leads the covered individual either directly to the covered document or to a login page that provides, or immediately after a covered individual logs on provides, a prominent link to the covered document.

Notice of Internet Availability, cont'd

- > 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, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.

Notice of Internet Availability, cont'd

- > A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document.
- > A telephone number to contact the administrator or other designated representative of the plan.

Notice of Internet Availability, cont'd

- ✦ A NOIA may contain 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.

Notice of Internet Availability, cont'd

- > Only required content, except that it may include pictures, logos, or similar design elements, so long as the design is not inaccurate or misleading and the required content is clear.
- > Must be written in a manner calculated to be understood by the average plan participant.

Combined NOIAs

- ★ A single combined NOIA may be provided for:
 - > The SPD.
 - > 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.
- ★ Other documents may be included if later authorized by the DOL or IRS.

Combined NOIAs, cont'd

- ✦ Examples of documents that could be covered by the combined annual NOIA: Summary Annual Report, Annual Funding Notice, QDIA Notice, annual pension benefit statement, annual 404(a)(5) disclosure.
- ✦ Examples of documents that would require separate NOIAs: quarterly benefit statements, blackout notice, QDRO determination, notice of failure to meet ERISA minimum funding standards.
- ✦ If a combined NOIA is furnished for each plan year, it must be furnished no more than 14 months following the date the prior plan year's notice was furnished.

Website Standards

- ✦ Documents can be available on a website or “other internet or electronic based information repository,” such as a mobile app.
- ✦ The administrator must take measures reasonably calculated to ensure that the website/app protects the confidentiality of personal information relating to any covered individual.

Website Standards, cont'd

- ✦ Plan administrators must take measures reasonably calculated to ensure that:
 - > The covered document is available on the website/app no later than the date on which the covered document must be furnished.
 - > The covered document remains available on the website/app at least until the date that is one year after the date the covered document is made available on the website/app or, if later, the date it is superseded by a subsequent version of the covered document.

Website Standards, cont'd

- > The covered document is presented on the website/app in a manner calculated to be understood by the average plan participant.
- > The covered document is presented on the website/app in a widely available format or formats that are suitable to be both read online and printed clearly on paper (e.g., PDF).

Website Standards, cont'd

- > The covered document can be searched electronically by numbers, letters or words.
- > The covered document is presented on the website/app in a widely available format or formats that allow the covered document to be permanently retained in an electronic format.

Right to Request Paper Copies and Globally Opt-Out

- ✦ Upon request, administrator must promptly furnish an individual at least one paper copy of a covered document, free of charge.
- ✦ Covered individuals must have the right, free of charge, to globally opt out of electronic delivery and receive only paper versions of covered documents.
- ✦ Administrator's procedures governing requests for paper copies and opt-outs may not contain any provision or be administered in a way that unduly inhibits or hampers the initiation or processing of a request or election.

Problems With Delivery

- ✦ The system for delivering an NOIA 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, reasonable steps must be promptly taken to correct the problem (such as using a secondary email address or obtaining a new electronic address for the individual).
- ✦ If the problem cannot be promptly resolved, the individual must be treated as having globally opted-out and must be provided a paper version of the undelivered covered document as soon as reasonably practicable.

Reasonable Procedures for Compliance

- ★ The safe harbor is satisfied even if covered documents are temporarily unavailable on the website/app for a reasonable period of time due to technical maintenance or unforeseeable events or circumstances beyond the control of the administrator, provided that:
 - > The administrator has reasonable procedures in place to ensure that the covered documents are available in the manner required by this section; and

Reasonable Procedures for Compliance, cont'd

- > The administrator takes prompt action to ensure that the covered documents become available on the website/app as soon as practicable following the earlier of the time at which the administrator knows or reasonably should know that the covered documents are temporarily unavailable.

Disclosing Directly Via Email

- ✦ Instead of notice and access, covered documents can be directly emailed to a covered individual's email address (either as an attachment or in the body of the email).
- ✦ No NOIA required – instead, email must:
 - > Include a subject line that reads: "Disclosure About Your Retirement Plan."

Disclosing Directly Via Email, cont'd

- > If the document is attached, the email must identify the covered document by name (and provide a brief description of the covered document if identification only by name would not reasonably convey the nature of the covered document).
- > Contain 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.

Disclosing Directly Via Email, cont'd

- > Contain a statement of the right, free of charge, to opt out of electronic delivery and receive only paper versions of covered documents, and an explanation of how to exercise this right.
- ✦ Email must be written in a manner calculated to be understood by the average plan participant.

Disclosing Directly Via Email, cont'd

- ★ Covered documents disclosed via email are subject to the same requirements as covered documents provided on a website (e.g., must be in a format suitable to be read online or printed clearly on paper and permanently retained electronically, and must be searchable electronically).
- ★ Administrator must take measures reasonably calculated to protect the confidentiality of personal information relating to the covered individual.

Procedures Upon Severance from Employment

- ✦ If an employee who was assigned an electronic address severs from employment, the administrator must take measures reasonably calculated to ensure the continued accuracy and availability of the electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual's severance from employment.
 - > *Note:* Plan Administrators may want to consider soliciting personal email addresses upon plan enrollment to avoid having to request one at termination.

Effective Date

- ★ Final regulations are effective July 27, 2020, however, the DOL states that as an enforcement policy, it will not take any enforcement action against a plan administrator that relies on this safe harbor before that date.
- ★ Transition Period for Prior DOL Interpretive Guidance: The DOL previously issued interpretive guidance permitting electronic delivery of certain documents (e.g., benefit statements, participant-level investment disclosures and QDIA notices) if certain requirements were met. The Rule supersedes this guidance; however, plan administrators may rely on this guidance for 18 months following the Rule's effective date.

Final Thoughts . . .

- ★ The Rule has the potential for significantly expanding electronic delivery of retirement plan information in a manner that is more attractive and convenient, and consistent with what we are seeing in the marketplace in terms of investment education and getting participants to be more engaged in saving for retirement and growing their plan accounts.

Final Thoughts . . . cont'd

- ♦ At the same time, the Rule:
 - > supersedes FAB 2006-03 and, thus, the ability to furnish quarterly benefit statements through a secure, continuous access website;
 - > supersedes prior DOL and IRS rules on electronic delivery of QDIA notices;
 - > leaves us with two standards for electronic delivery – one for DOL notices and one for IRS notices;
 - > has the potential for being initially challenging; and
 - > does nothing to insure that participants actually read what they are provided.

Final Thoughts . . . cont'd

- ♦ However, plans still have:
 - > the 2002 safe harbor, upon which they can rely; and
 - > during the COVID-19 period, plans have “good faith” reliance on the electronic delivery methods described in EBSA Disaster Relief Notice 2020-01, which includes e-mail, text messages and continuous access websites.

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