

## The New Retirement Plan Electronic Disclosure Rules: A Much Needed Update

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It would be an understatement to say the Department of Labor rules governing the use of electronic technologies for distributing required employee benefit plan disclosures have needed updating. The most recent amendment before this year was in 2002, which was also the year Apple introduced its second generation iPod (remember the first iPhone was not released until 2007), the first cell phone with a built in camera was made available publicly, and Quickbooks was introduced by Intuit. Fortunately, newly finalized and now effective regulations supplement the 2002 DOL electronic disclosure rules by providing an additional and a much more user-friendly safe harbor for retirement plans (but unfortunately not for health and welfare plans). We anticipate most retirement plan sponsors and administrators will find the new safe harbor much easier to use than the existing rules and that the administrative costs and burdens of making required plan disclosures will be reduced. In this *Benefits Brief*, we will provide a general overview of these rules and the actions plan sponsors and administrators must undertake for reliance.

### Key Terms and Scope

The new safe harbor applies to “covered individuals” and “covered documents.”

A “covered individual” is a plan participant, beneficiary, or other individual entitled to receive covered documents who provides the plan sponsor, plan administrator, or their designee, his/her electronic address, including an email address or internet-connected mobile computing device (e.g., smartphone) number at which the individual may receive a written notice of internet availability. An employer-assigned email address can also be used but an employer cannot assign an email address solely to receive required plan disclosures.

“Covered documents” means notices and other required disclosures for retirement plan participants and beneficiaries under the jurisdiction of the Department of Labor other than disclosures that must only be made upon request. Examples include summary plan descriptions, summary annual reports, annual participant fee and expense disclosures, quarterly participant benefit statements, and default investment notices. Unfortunately, this new safe harbor is inapplicable to disclosures for health and other welfare benefit plans or for notices and disclosures required under Internal Revenue Service rules, such as the annual 401(k) plan safe harbor notice.

The new rules only address the medium of delivery, not the timing, content, or format of required disclosures, nor do they change the existing records retention obligations. The 2002 electronic disclosure rules are not superseded by these rules, as the new rules provide an additional safe harbor.

## **Initial Notice**

The new safe harbor sanctions two additional methods of electronic delivery. But before either method is used, the plan administrator must first provide a written notification to the covered individual written in a manner calculated to be understood by the average plan participant. The notice must explain that covered documents will be provided electronically; the specific electronic address (i.e., email or mobile phone number) that will be used; provide instructions necessary to access the covered documents; explain that covered documents are 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 document; and include an explanation of the right request a paper copy or to completely opt-out of electronic delivery, both at no cost and how to make those elections.

## **Notice of Internet Availability Option**

The first of the two permitted methods is to send a Notice of Internet Availability (or “NOIA”) to the covered individual at the designated electronic office when the document is made available on a website or mobile application. The notice must be written in a manner calculated to be understood by the average plan participant and can contain only specified information, including mandated verbiage about the importance of the disclosure; the name of the document and a brief description if the name would not sufficiently convey the nature of the document; the internet website address or hyperlink to the address where the covered document is available; an explanation of the right to request a paper copy or to completely opt-out of electronic delivery, both at no charge, and how to make those elections; an explanation that the document is not required to be maintained on the website for more than one year, or, if later, when the document is superseded by a new version; and the phone number to contact the plan administrator or other plan contact.

With one exception (explained below), the NOIA must be provided separate from any other documents provided to the covered individual, and it cannot contain any content other than the required information except for pictures, logos, or similar design elements that are not inaccurate or misleading.

The website address or hyperlink must either take the covered individual directly to the document or to a log-in page, which contains a prominent link to the covered document immediately after the log-in. In other words, the disclosure cannot be “buried” behind a number of submenus.

For the website or mobile application utilized, the document must be posted no later than the deadline required to be distributed under existing rules, and it must remain on the website/mobile app for at least one year, even if superseded by a subsequent version. The document must be searchable by numbers, letters, or words and it must be presented in a widely-available format that is suitable to be read online, printed clearly on paper, and saved electronically. Finally, the website must protect the confidentiality of personal information relating to each covered individual (e.g., if benefit statements will be distributed in this manner).

## **Email Option**

The second of the two permitted methods is to send an email to the covered individual no later than the distribution deadline with the covered document in the body of the email or as an attachment. The email must be written in a manner calculated to be understood by the average plan participant and contain specific information, including a required subject line (“Disclosure About Your Retirement Plan”) and specified verbiage if the document is added an attachment (rather than in the body of the email)

The rules relating to searchability, printing and saving, and confidentiality for utilization of a website or mobile app (described above) also apply with respect to the email option.

## **Special Rules for Annual Disclosures**

There is one exception to the requirement that the Notice of Internet Availability only apply to a single document; the following documents can be combined in a single Notice of Internet Availability - a summary plan description; a covered document or notice that must be furnished annually (rather than on the occurrence of a particular event) and does not require action by a particular deadline (e.g., a default investment notice or participant fee and expense disclosure); any other document specifically authorized by the DOL; and any applicable notice required by the Internal Revenue Code. Plan sponsors and administrators using this exception must assure that the annual disclosure is made within 14 months of the most recent combined disclosure.

## **Covered Individual Opt-out**

The Plan Administrator must promptly furnish, free of charge, a covered document upon request of a covered individual. Likewise, the plan administrator must promptly implement a covered individual’s opt-out election. The election of written disclosures must also be permitted free of charge, however, the opt-out is a global election of paper or electronic disclosures and does not have to be implemented only as to specific documents.

## **Plan Administrator Compliance Duties**

The plan administrator must establish reasonable procedures for receiving and processing opt-out requests.

The system for furnishing a notice of internet availability must be designed to apprise the administrator of a covered individual’s invalid or inoperable electronic address. The plan administrator must act promptly to cure the problem (e.g., by sending a NOIA to a secondary electronic address), and if the plan administrator is unable to obtain a working replacement electronic address, the plan administrator must treat the covered individual as if he/she had opted for paper copies of all disclosures.

If an employer email address is being used, the plan administrator must secure a new electronic address for the former employee upon his/her severance from employment.

The regulations contemplate that there may be times when covered documents will not be available online due to technical maintenance or unforeseeable events or circumstances beyond the control of the plan administrator. The plan administrator must implement reasonable procedures are in place to ensure the covered documents are available as the regulations prescribe and to act as soon as practicable once the plan administrator knows or reasonably should have known that the covered documents were temporarily unavailable.

## **Plan Sponsor and Administrator Action Items**

Plan sponsors will want to review their retirement plan enrollment procedures to obtain newly eligible participants' email addresses at time of initial eligibility and if possible, provide them the initial notice at that time. If the retirement plan has immediate entry, these actions can also be integrated with the HR onboarding procedures. Plan sponsors will also want to assure their HR exit procedures include obtaining a personal email address for future disclosures, especially for employees who have been receiving disclosures at their employer-provided email address.

Plan sponsors and administrators will need to establish procedures (with designation of individuals or positions responsible for specific tasks) to address the ongoing compliance duties, including assuring timely follow-up on "bounce backs," updating electronic addresses, and responding to opt-out requests. Coordination of the HR system with retirement plan system will be needed to assure changes made in HR are timely reflected in the retirement plan's records and vice versa. Any forms or electronic elections should clearly indicate that changes to an employee's electronic address will apply for both HR and retirement plan purposes.

Although not required by the regulations, adding the disclosures on the company intranet (if one is maintained) for those using the email option would be a prudent practice.

If the documents will be maintained on a website or mobile app, the plan sponsor or administrator will need to consult with its IT Department or their third party vendor to assure the requirements of the safe harbor can be satisfied. If an outside vendor is utilized, the plan sponsor or administrator must monitor the vendor's actions as the sponsor or administrator will have full responsibility for any breaches (notwithstanding contractual claims the sponsor or administrator may have against the vendor).

Many third party administration agreements include additional charges for the TPA making required disclosures. If the new safe harbor is utilized, a fee adjustment may be in order.

The best defense to a potential claim and perhaps the most important of the actions items is to assure contemporaneous written or electronic records are maintained to document all actions taken with respect to electronic disclosures. Because personnel files are often disposed of after a period of time following termination of employment, these records should be maintained as part of the permanent retirement plan records. The burden will be on the plan sponsor or administrator to establish compliance with these new standards. If the plan's recordkeeper or third party administrator will be handling these disclosures, it is especially important to obtain documentation; the legal responsibility for compliance with the regulations falls on the plan administrator, and the plan sponsor is likely obligated to indemnify the plan administrator except in limited circumstances.

## Concluding Thoughts

While there will be some additional work on the front end putting procedures in place, we expect that most employers will find the cost savings and reduced administrative burdens of electronic delivery more than offsets the set-up costs and procedures, especially with the seemingly ever-increasing disclosures (both in number and volume).

It remains to be seen when the Department of Labor will finalize revised rules for health and welfare benefit plans. With the proliferation of required notices for those plans, more user-friendly electronic disclosure rules for those plans will be welcomed by plan sponsors and administrators.

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