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DOL's Proposed Rule on Electronic Disclosure Safe Harbors

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Complying with all the required notices and disclosures to retirement plan participants can be expensive and burdensome. The Department of Labor has moved one step closer to making it a little bit easier for plan sponsors to meet these requirements.

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On October 23, 2019, the Department of Labor (DOL) proposed new rules regarding electronic disclosure for retirement plans. [Prop. Labor Reg. §2520.104-31] If adopted, the rule generally would expand a plan sponsor's ability to use electronic means to provide plan disclosures. Currently, electronic delivery can be the default delivery method for individuals only if the participant is an active employee and interacts with an employer's electronic system as an integral part of the job. In all other cases, the plan can use electronic delivery only if the employer obtains affirmative consent to receiving disclosures electronically.

The proposed regulation would retain these safe harbors and add an additional safe harbor for electronic

delivery. As a result, employers currently relying on a safe harbor need not make any changes to their procedures unless they wish to expand their electronic delivery using the new safe harbor (or otherwise decide to comply with the new safe harbor instead of the current safe harbors).

The proposed regulation would allow electronic disclosure to be the default delivery method for individuals if the following requirements are met:

1. The individual provides an electronic address to receive disclosures;
2. The administrator provides an initial paper notice before electronic disclosure begins;
3. The administrator provides a timely notice of Internet availability for each disclosure;
4. The availability notice is delivered appropriately; and
5. The Internet site meets certain requirements.

Each of these requirements will be reviewed in turn.

Electronic Address

An administrator can use electronic delivery for any individual who provides an electronic address, including either an email address or a phone number for a smartphone or other Internet-connected device. If an employer assigns an electronic address to an employee, then the employee is treated as providing an electronic address—effectively allowing employers who assign email addresses or phones to employees the ability to use electronic delivery as the default delivery method, regardless of whether using the email or phone is an integral part of the employee’s duties. In fact, it would appear the employer could assign an email address solely for purposes of delivering retirement plan notices.

The regulations also contemplate that the administrator might collect multiple electronic addresses for an individual, for instance, a work email, a personal email, and a phone number. This opportunity to collect multiple addresses may be advisable, as it may prevent the need to send paper notices if one of the addresses becomes inoperable (as discussed below).

In addition, the regulations specifically require the employer to take reasonable measures to ensure the continued accuracy of the electronic address or to obtain a new electronic address when an employee terminates from employment. It would seem this procedure also might have the ancillary benefit of reducing the number of missing participants—an outcome the DOL is sure to appreciate.

Initial Notice

Under the new safe harbor, the administrator will have to provide a paper notification before electronic disclosure can begin. That paper notice must state that some or all retirement plan disclosures will be furnished electronically to an electronic address; that the individual has a right to request and obtain a paper version of a covered document, free of charge; and that the participant has a right to opt out of receiving disclosures electronically, along with an explanation of how to exercise those rights.

With respect to current employees who receive electronic disclosures because they use the employer’s electronic system, this requirement of the safe harbor is different from the current safe harbor in two significant respects: (1) the administrator does not have to provide any notice that disclosures will be provided electronically; and (2) employees do not have the right to opt out of future electronic disclosures. With respect to item (2), the employees may request a paper notice each time a disclosure is provided electronically, but they do not have a right to opt out altogether and receive notices on paper.

The difference is significant, because the employer will have to keep track of those individual employees who must receive paper notices, rather than using the current broad categories of delivering to all employees (or all employees in particular classes) electronically and the remainder with paper notices. This distinction may lead some administrators to continue using the current safe harbor to avoid tracking opt-outs for current employees. It appears one may combine safe harbors, so those administrators could still use the new safe harbor for all other participants, beneficiaries, etc.

Notice of Availability

After providing the initial paper notice, plan administrators would be able to satisfy their disclosure obligation by posting required disclosures on a Website and delivering an electronic notice of availability to covered individuals. The availability notice would need to meet certain content requirements, including:

- Prominently state, “Disclosure About Your Retirement Plan” and “Important information about your retirement plan is available at the Website address below. Please review this information.”
- Provide a brief description of the covered document.

- Identify the Website address where the covered document will be posted.
- State that the individual may request and receive a paper version of the covered document at no cost and include instructions on how to make such a request.
- Explain the individual may opt out of receiving covered documents electronically, with instructions on how to opt out.
- Provide a telephone number to contact the plan administrator.

The availability notice cannot include additional information (other than certain company or branding information that does not cause confusion) and it must be understandable by the average participant. For the first time, the DOL has expanded on what it means to be “understandable by the average participant.” Specifically, the DOL would require the use of short sentences composed of everyday words in the active voice, with no double negatives and a Flesch Reading Ease score of at least 60 (the equivalent of an eighth- or ninth-grade reading level; the higher the score, the easier it is to read).

Further easing the burden of disclosure, certain regularly recurring annual disclosures—SPDs, SMMs, SARs, Annual Funding Notice, QDIAs, Investment-Related Disclosures, and Benefit Statements—can be announced in a single notice of availability provided annually within a 14-month period.

Delivery Requirements

Under the current safe harbors, the administrator must ensure that the electronic delivery system results in actual receipt of electronically transmitted information. To accomplish this, a plan administrator may use a return receipt or notice of undelivered electronic mail feature to track whether a participant actually received the disclosure, or may conduct periodic reviews or surveys to confirm receipt of the electronically transmitted information.

While the plan administrator would no longer have to ensure the actual receipt under the new safe harbor, the system used to deliver the availability notice would have to alert the administrator to invalid

addresses or phone numbers. If the administrator is alerted that an address is invalid, then it must resolve the matter by sending the notice to a secondary electronic address or treating the participant as having opted out of electronic disclosure. If no other valid electronic address is available, the administrator must provide a paper copy of the notice as soon as reasonably practicable.

Website Requirements

Finally, the Website on which the document is posted must meet certain requirements, as well. For fear of omitting the obvious, the regulations require the plan administrator to ensure existence of the Website hosting covered documents. However, the regulations also require that the Website have security measures to protect confidential information and the plan administrator must have procedures to restore access to documents as soon as practicable should the Website become temporarily unavailable due to unforeseen circumstances. Further, the plan administrator must post the documents in accordance with certain minimum standards, specifically:

- The document must be made available no later than the date it is required to be provided.
- Documents must remain available until they are superseded by subsequent version.
- The document must be searchable.
- The document must be posted in a widely available format that allows permanent retention (such as pdf).

Conclusion

The new electronic disclosure safe harbor would be a welcome expansion of plan administrators' ability to use electronic delivery. However, there may still be advantages of using the existing safe harbors for current employees. Together the safe harbors should create a workable regulatory scheme for providing electronic disclosures—which would benefit both plan administrators and participants by reducing plan costs, preserving retirement assets, and providing disclosures to participants in a usable format. ■

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