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DOL ISSUES ELECTRONIC DISCLOSURE INTERIM POLICY FOR PARTICIPANT FEE DISCLOSURES

updated
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As the April 31, 2012, deadline for providing initial disclosures under the [DOL's final rule on fee disclosures to participants and beneficiaries](#) draws near, concerns are mounting regarding how the required disclosures may be delivered. The current guidance on distribution of required disclosures, as described in regulation 2520.104b-1, applies to this rule. However, the DOL has reserved final guidance on "manner of furnishing" pending completion of an [RFI on electronic distribution](#). The potential for action on a new and broader safe harbor for electronic distribution has broad implications for making disclosures under the rule. The DOL previously expressed confidence that any changes in electronic distribution would be completed before the applicability date of the rule, but that is very unlikely. In any event, any changes will not be able to be implemented by plan administrators prior to the date for initial disclosures. In its [comment letter on the RFI](#), PSCA asked that temporary relief, fashioned after Field Assistance Bulletin 2006-03, be afforded for disclosures under the participant fee disclosure rule.

On September 13, 2011, the DOL issued [Technical Release 2011-03](#) that provides interim policy for electronic disclosures under the rule until the DOL finalizes its new rules for electronic disclosures. In addition to the normal DOL disclosure rules, the release expands the availability of electronic disclosure methods for participant fee disclosures. [The Technical Release was replaced by Technical Release 2011-03R on December 8, 2011.](#) The revised release clarified the treatment of investment-related information.

Under the Technical Release, plan-related information may be included in the benefit statement mandated under section 105 of ERISA. In 2006, the DOL issued [Field Assistance Bulletin \(FAB\) 2006-03](#), which expands the normal DOL electronic distribution rules for furnishing the benefit statement. The Technical Release clarifies that the FAB applies to plan-related information included in the benefit statement, but it does not apply to plan-related information that is not included in a benefit statement or to the disclosure of investment-related information.

Investment-related information, including the comparative chart, may be included in a quarterly benefit statement, but this information, and presumably a benefit statement that includes this information, cannot

be distributed pursuant to the 2006 FAB. Investment-related information may be electronically distributed pursuant to the special rules in the Technical release or under the current normal DOL distribution rules. Investment-related information may be distributed by delivering a notice of availability on a continuously accessible web site, but only under the special rules included in the Technical release, and discussed below.

The 2006 FAB expands the normal DOL disclosure rule in two ways – it permits the use of the less-stringent Treasury Department standard on “ability to effectively access an electronic medium” and it permits disclosure to be achieved by delivering a notice of availability of the required disclosure on a continuously accessible web site. Regarding the latter, the DOL said:

“With regard to pension plans that provide participants continuous access to benefit statement information through one or more secure websites, the Department will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information, provided that participants and beneficiaries have been furnished notification that explains the availability of the required pension benefit statement information and how such information can be accessed by the participants and beneficiaries. In addition, the notification must apprise participants and beneficiaries of their right to request and obtain, free of charge, a paper version of the pension benefit statement information required under section 105. Such notification should be written in a manner calculated to be understood by the average plan participant, furnished in any manner that a pension benefit statement could be furnished under this Bulletin, and furnished both in advance of the date on which a plan is required to furnish the first pension benefit statement pursuant to section 105(a)(1)(A)(i) and (ii) of ERISA and annually thereafter.”

The Technical Release also includes a new provision for electronic distribution of investment-related information and plan-related information that is not included in a benefit statement. The provision is an alternative to the normal DOL rules on electronic distribution. The provision appears to permit the “notice of availability on a continuously accessible web site” regime. All of the following conditions must be satisfied:

- 1) Participants and beneficiaries must **voluntarily provide** an e-mail address for the purpose of receiving electronic disclosure of fee information. The address must be provided in response to the initial notice described in the second bullet. The provision of the address cannot be a condition of employment; and the establishment of a business e-mail address does not satisfy this provision. However, an e-mail provided in order to access a secure continuously accessible web site housing the disclosures is considered to be voluntarily provided if the initial notice is provided.
- 2) An **initial notice** must accompany a request to voluntarily provide an e-mail address. It must specify that providing an address is voluntary and will result in electronic disclosure; a description of the disclosures and how they can be accessed; the right to receive free paper delivery and how to do so; the right to opt out of electronic delivery and how to do so; and the process to update an e-mail address.
- 3) Following the year that an e-mail address is voluntarily provided, an **annual notice** must be provided to participants and beneficiaries that have voluntarily provided an e-mail address.

The notice must include the initial notice disclosures except a notice that providing an e-mail address is voluntary and will result in electronic delivery. The notice must be furnished on paper unless there is evidence that the participant or beneficiary “interacted electronically” with the plan since the initial notice or preceding annual notice was furnished. Example of electronic interaction include resubmitting or confirming an e-mail address to the plan, sending or receiving a message with the plan, or logging onto the plan web site.

- 4) The plan administrator must take measures to ensure electronic receipt of transmitted information, e.g., return receipt, undelivered mail notice, or surveys or reviews of transmitted information.
- 5) The plan administrator must take “appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system protects the confidentiality of personal information.”
- 6) Notices must be written in manner calculated to be understood by the average participant or beneficiary.
- 7) **Special Transition Provision** – For e-mail addresses on file with an employer, sponsor, or plan administrator (or designee) in the 30 to 90-day period prior to the date when initial disclosures are provided (not later than May 31, 2012), the e-mail addresses will be deemed voluntarily provided and the initial notice will be deemed to have been furnished if a **transitional group notice** is furnished. The transitional group notice must contain the disclosures in the initial notice except a notice that providing an e-mail address is voluntary and will result in electronic delivery. It must be furnished in the 30 to 90-day period prior to the date when initial disclosures are furnished. It must be furnished on paper unless there is evidence of electronic interaction with the plan in the twelve months before furnishing the transitional group initial notice.

The Special Transition Provision is not available for an employer (or its designee)-issued e-mail address unless there is evidence of electronic interaction “for plan purposes” in the twelve months preceding furnishing the transitional group initial notice. This appears to be a significant restriction of the transitional provision.