

DOL Proposes New Electronic Disclosure Safe Harbor

If finalized, the new rule will significantly expand electronic delivery of pension disclosures.

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On October 23, the Department of Labor (“DOL”) proposed a new electronic disclosure safe harbor, “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” (“Proposed Rule”). If finalized, the Proposed Rule could lead to a dramatic expansion in the use of electronic media to for retirement plan communications.

The Rule

Covered Individuals and Documents

The Proposed Rule establishes a framework that identifies “covered individuals” to whom “covered documents” may be provided, as long as additional requirements of the safe harbor are met. Unlike the DOL’s current safe harbor, the new proposed safe harbor would not require electronic confirmation of the covered individual’s ability to access the electronic address he or she provided.

Electronic Standards

The Proposed Rule generally requires the plan administrator to furnish a “Notice of Internet Availability” for each covered document provided using the new safe harbor. Additionally, the plan administrator must take measures reasonably calculated to ensure that:

- the covered document is available no later than the date it is required to be furnished;

- the document remains available until it is superseded by a subsequent version;
- the document is searchable;
- the document is maintained in a widely-available format that allows the document to be permanently retained (such as in PDF form); and
- the website protects confidential information.

Right to Request a Paper Version

The plan administrator is required to provide paper versions of covered documents upon specific request, to comply with requests to opt-out of electronic disclosure entirely, and to maintain procedures governing these requests. In addition, the plan administrator is required to maintain procedures designed to resolve invalid electronic addresses.

Importantly, the DOL states that “[s]o long as the plan administrator is not alerted to an invalid or inoperable address, and the other conditions of the proposed safe harbor are satisfied, the administrator is considered to have furnished the pension documents required under Title I of ERISA.”

Initial Notice of Internet Availability


Prior to relying on the safe harbor, the plan administrator is required to provide a paper notice that explains that some covered documents will be provided electronically, that recipients

may request a paper version of any document, and that recipients have the right to opt-out of electronic delivery. This initial notice must be provided in paper form, regardless of whether the plan administrator is currently relying on the DOL’s current electronic safe harbor.

Special Rule for Consolidating Notices

The Proposed Rule permits certain recurring disclosures to be announced in a single Notice of Internet Availability provided annually:

- Summary plan descriptions (SPDs);
- Summaries of material modification (SMMs);
- Summary annual reports (SARs);
- Annual funding notices;
- Comparative investment-related disclosures provided by participant-directed individual account plans under DOL’s 404a-5 regulation;
- QDIA notices; and
- Pension benefit statements required by ERISA section 105.

We expect final regulations to be released early in 2020. 

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