



REID AND RIEGE, P.C.

COUNSELLORS AT LAW

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ALERT

UPDATED GUIDANCE ON ELECTRONIC DELIVERY OF CERTAIN PARTICIPANT DISCLOSURES

May 2012

The U.S. Department of Labor (DOL) recently issued new temporary guidance regarding the use of electronic media to comply with the fee disclosure requirements for participant-directed individual account plans. The fee disclosure requirements require an employer (or plan sponsor) to disclose to a plan participant or beneficiary by **August 30, 2012** (or, if later, 60 days after the first day of the first plan year beginning after October 31, 2011), both plan-level and investment-level information. (See our March 2012 Client Alert, *DOL Revises Fee Disclosure Regulations, Extends Compliance Deadlines* [here](#).)

Chart of Permissible Methods of Electronic Disclosure

The chart should be read in conjunction with the Sections that are described on the following pages.

Permissible Electronic Disclosure Methods			
Plan-Level Information			
	<i>DOL Safe Harbor (See Section I)</i>	<i>IRS Safe Harbor as applied by the DOL (See Section II)</i>	<i>New DOL Guidance (See Section III)</i>
Initial Notice	✓		✓
Annual Notice	✓	✓ ¹	✓
Quarterly Statement (Administrative Expenses and Individual Expenses)	✓	✓	✓
Investment-Level Information			
	<i>DOL Safe Harbor (See Section I)</i>	<i>IRS Safe Harbor as applied by the DOL (See Section II)</i>	<i>New DOL Guidance (See Section III)</i>
Initial Notice	✓		✓
Annual Notice	✓		✓

¹ If it is provided at the same time as the quarterly statement.

I. General DOL Safe Harbor Rule on Electronic Disclosures to Participants

The general DOL “safe harbor” can be used for all required disclosures. Pursuant to this safe harbor, electronic disclosures are permitted so long as they are furnished using measures reasonably calculated to ensure that the system furnishing the information actually delivers the information in a manner consistent with the style, format and content of the applicable document, while protecting the confidentiality of the recipient’s accounts and benefits. Under the safe harbor, the recipient of an electronic document must be provided (either electronically or non-electronically) with a notice that describes the document’s significance and informs the individual that he or she has a right to request the information in paper form without charge. In addition, the safe harbor only applies to information furnished to: (a) a participant who can access electronic documents where he or she is reasonably expected to perform work and uses the employer’s (or plan sponsor’s) electronic information system as an integral part of his or her work duties; or (b) any participant, beneficiary or alternate payee who has affirmatively consented to receiving disclosures electronically in accordance with the safe harbor’s consent provisions, and has not withdrawn the consent.

II. IRS Safe Harbor Guidance on Electronic Disclosures to Participants

The “safe harbor” rule of the Internal Revenue Service (IRS) can be used for all plan-level information included in a quarterly benefit statement under the fee disclosure rules, such as the required annual disclosure of plan-level information. However, disclosure of plan-level information that is not included in a quarterly benefit statement (for example, the initial disclosure of plan-level information) cannot be made in accordance with this safe harbor. In addition, disclosure of investment-level information cannot be made in accordance with this safe harbor.

The IRS’s safe harbor rule provides that an electronic method of delivery may be used, if the recipient has the effective ability to access electronic notices and the recipient is advised of his or her ability to request a free paper version of the notice each time an electronic notice is provided. As applied by the DOL, information may be delivered pursuant to the IRS safe harbor by, among other methods of electronic delivery, a secure website, if the employer (or plan sponsor) has furnished a notice to the participant or beneficiary that explains the availability of required disclosure information and how such information may be accessed by the participant or beneficiary. In addition, the notice must explain how a participant or beneficiary has the right to request and obtain, free of charge, a paper version of the disclosure information.

III. New Guidance on Electronic Disclosures to Participants

Recently published DOL guidance offers the employer (or plan sponsor) another electronic option for the distribution of the newly mandated quarterly benefit statements, as well as the initial and annual disclosures of plan-level information and investment-level information.

Rather than providing the newly mandated notices and quarterly benefit statements using the existing DOL safe harbor rule for electronic disclosures (*see* Section I, above), the employer (or plan sponsor) may make the mandatory disclosures electronically if the notices and quarterly benefit statements comply with each of the following requirements:

1. Participants and beneficiaries entitled to receive information must voluntarily provide the employer (or plan sponsor) with an e-mail address in order to receive the mandatory plan-level and investment-level disclosures. The e-mail address must be provided in response to an initial notice (*see* requirement 2, below).
2. An initial notice must accompany the request for the participant's or beneficiary's e-mail address. It must include the following information:
 - A statement that providing an e-mail address for the receipt of mandatory disclosures is voluntary and, as a result of providing the e-mail address, the required mandatory disclosures will be made electronically;
 - Identification of the mandatory disclosures that will be furnished electronically and how the disclosures can be accessed by participants and beneficiaries;
 - A statement that the participant or beneficiary has the right to request and obtain, free of charge, a paper copy of the mandatory disclosure information and an explanation of how to exercise that right;
 - A statement that the participant or beneficiary has the right, at any time, to opt-out of receiving mandatory disclosures electronically and an explanation of how to exercise that right; and
 - An explanation of the procedure for updating the participant's or beneficiary's e-mail address.
3. The plan administrator must provide an annual notice including the information specified in the second through fifth bullets above. This notice may be sent electronically via e-mail if there is evidence the participant has "interacted electronically" with the plan during the past 12 months. If not, the plan administrator must provide a paper copy of the annual notice.
4. The plan administrator must ensure that the electronic delivery system results in actual receipt of the transmitted information. This requirement could be satisfied by using the return receipt or notice of undelivered e-mail functions to track receipt of the transmitted information. Alternatively, the plan administrator might choose to conduct participant surveys or other reviews periodically to ensure receipt.
5. The plan administrator must ensure that the electronic delivery system protects the confidentiality of personal information.
6. All notices must be written in a manner that will be understood by the average plan participant.

The DOL guidance also provides a special transition rule that applies in the event the employer (or plan sponsor) already has a participant's or beneficiary's e-mail address on file. An e-mail address will be deemed to have been provided voluntarily if the participant or beneficiary is provided a notice that contains generally the same information required in the initial notice, between 30 and 90 days prior to the date the initial fee disclosures must be provided. The transition rule notice must be provided on paper, unless there is evidence that the participant or beneficiary interacted with the plan electronically during the preceding 12 months. In addition,

the transition rule does not apply to an e-mail address established or assigned by the employer (or plan sponsor), unless there is evidence that the e-mail address was used by the participant or beneficiary for plan purposes during the preceding 12 months. Evidence of use of an e-mail address includes, but is not limited to: sending an electronic message to the plan from the e-mail address; receiving and opening an electronic message sent by the plan to the e-mail address; or logging onto a secure, continuous access website housing plan information, using the e-mail address as the username.

What Employers (and Plan Sponsors) Should Do Now

Employers (and plan sponsors) should familiarize themselves with the electronic disclosure rules to determine whether they will provide the mandatory disclosures in an electronic format.

If you have any questions concerning electronic delivery of the participant fee disclosures, please contact us.

Note from the Editor This edition of the Employee Benefits and Executive Compensation Alert highlights DOL guidance on service provider fee disclosures in participant-directed individual account plans. The Alert was written by Ron Koniuta, a member of the Employee Benefits & Pension Practice Area at Reid and Riege, P.C., One Financial Plaza, Hartford, CT 06103. The Practice Area works closely with clients to design and draft tax-qualified and nonqualified retirement plans, and counsels on compliance with the complex and changing rules governing such plans. For information or additional copies of this Alert, or to be placed on our mailing list, please contact Ron (tel. 860-240-1034)(e-mail rkoniuta@rrlawpc.com), another member of the Practice Area: John J. Jacobson, Chairman (tel. 860-240-1006) (e-mail jjacobson@rrlawpc.com), John V. Galiette (tel. 860-240-1009) (e-mail jgaliette@rrlawpc.com), Erek M. Sharp (tel. 860-240-1074) (e-mail esharp@rrlawpc.com) or Devin M. Karas (tel. 860-240-1063) (e-mail dkaras@rrlawpc.com), or the Reid and Riege attorney with whom you regularly work. For other information regarding Reid and Riege, P.C., please visit our web site at www.rrlawpc.com.

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