



DOL Interim Policy on Electronic Fee and Investment Disclosure

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On September 13, 2011, the Department of Labor issued Technical Release 2011-03 [<http://www.dol.gov/ebsa/pdf/tr11-03.pdf>], which creates conditions that plan administrators can follow in using electronic media to satisfy the participant-level fee and investment disclosure requirements that take effect on May 31, 2012.

Background

Generally, plan administrators are able to furnish required disclosures under Title I of ERISA in an electronic medium, as long as they meet the safe harbor requirements of DOL Reg. §2520.104b-1(c). This safe harbor is only available with respect to individuals who can access the disclosures at work and who actually use the electronic medium as an integral part of their duties, or individuals who have affirmatively consented to receipt of electronic disclosure. The means of delivery must also be designed to result in actual receipt and to protect participants' confidentiality. When PPA '06 added the pension benefit statements requirement, the DOL issued FAB 2006-03 permitting these statements to be furnished using electronic media, as long as they met either the safe harbor conditions or those contained in Treasury Reg. §1.401(a)-21 (generally, the participant must consent to electronic delivery and must be effectively able to access the electronic medium). See *asap* 06-44.

On October 20, 2010, the DOL published Reg. §2550.404a-5 regarding fiduciary requirements for disclosure in participant directed individual account plans. With the employee benefits community

expressing concerns about the approaching applicability date and absence of any guidance regarding the use of electronic media under this rule, the DOL published the Request for Information Regarding Electronic Disclosure by Employee Benefit Plans on April 7, 2011. On June 6, 2011, ASPPA submitted a comment letter in response to this RFI [<http://www.dol.gov/ebsa/pdf/1210-AB50-051.pdf>].

Using Electronic Media to Furnish Participant-Level Disclosures

As a result of the approximately 80 comments received by the DOL, Technical Release 2011-03 was issued to provide temporary guidance to plan administrators who wish to use electronic media to furnish the disclosures required under the final rule. The guidelines for complying with the electronic media requirements depend upon whether or not the disclosures are included on the pension benefit statements. The following is a summary of those guidelines.

Fee and Investment Disclosures Included In Pension Benefit Statements

In general, these disclosures can be furnished in electronic medium using the FAB 2006-03 guidelines discussed above under "Background."

Fee and Investment Disclosures That Are Not Included In Pension Benefit Statements

The Technical Release emphasizes that these disclosures may not be furnished electronically using the guidance under FAB 2006-03. Instead, plan administrators may use the safe harbors of DOL Reg.

§2520.104b-1(c) (i.e. the conditions in Treasury Reg. §1.401(a)-21 are not allowed), or satisfy all of the following conditions:

- An “Initial Notice” must be provided which contains:
 - A statement that provision of an email address is completely voluntary and will be used to provide required disclosures electronically,
 - Identification of required disclosures which will be provided electronically,
 - A statement of the participant’s/beneficiary’s right to receive, free of charge, a paper copy of any required disclosure delivered electronically,
 - A statement of the right to opt-out of receiving required disclosures electronically and how to do it, and
 - An explanation of procedures for updating email address

In response to the “Initial Notice”, the participant/beneficiary must voluntarily provide an email address for purposes of receiving these disclosures. Please note that in order to be considered voluntary, the provision cannot be a condition of employment or participation in the plan. However, if the participant/beneficiary is required to provide an email address electronically in order to access a secure continuous web site which houses the required disclosures, it would be considered voluntary.

- An “Annual Notice” must be furnished in each subsequent year and must contain, generally, the same information on the “Initial Notice”. The “Annual Notice” may be sent electronically, but only if there is evidence that the participant used email to interact with the plan after the date of the

Annual Notice for the preceding year (or in the case of the first Annual Notice, after the date of the Initial Notice). Examples of electronic interaction include, but are not limited to:

- Updating, resubmitting, or confirming an email address to the plan;
 - Sending an email to the plan;
 - Logging on to a secure continuous-access website housing plan information; and
 - Receiving and opening an electronic message sent by the plan.
- The plan administrator must take appropriate and necessary measures reasonably calculated to ensure:
 - Delivery system results in actual receipt of the transmitted information (e.g. - using return receipt function for email or notice of undelivered email, conducting periodic reviews or surveys to confirm receipt),
 - Confidentiality of personal information is protected, and
 - Notices are written in a manner calculated to be understood by the average plan participant.

Special Transition Provision

If the employer, plan sponsor or plan administrator currently has participant/beneficiary email addresses on file by May 1, 2012, the “Initial Notice” and voluntary email provision requirements will be deemed satisfied if a “Transition Group Initial Notice” is furnished which:

- Contains the same information required in the “Initial Notice”,
- Is furnished no earlier than 90 nor later than 30 days prior to May 31, 2012, and
- Is furnished in paper or electronically to the email address of record, but only if there is

evidence of electronic interaction with the plan during the preceding 12-month period from the date the “Transition Group Initial Notice” is furnished.

In general, the electronic interaction guidelines under the “Annual Notice” requirement apply in order to use this special transition provision.

Conclusion

The scope of the Technical Release is limited to the

use of electronic media to distribute required disclosures for participant directed individual account plans under DOL Reg. §2550.404a-5. Please note that the DOL is still considering these electronic disclosure rules, and has not indicated when it anticipates issuing more general or more definitive guidance. Until then, plan administrators, who satisfy all of the relevant conditions contained in this Technical Release, will be provided relief from any enforcement actions should any further DOL guidance be issued to the contrary.