

Client Action Bulletin

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DoL Proposes New Voluntary Electronic Disclosure Rule for Retirement Plans

SUMMARY

The Department of Labor (DoL) released a [proposed rule](#) that, if finalized, will provide an additional “safe harbor” for plan administrators to use electronic media to furnish retirement plan information to participants and beneficiaries. The proposed rule would allow for such disclosures via an internet posting for plan participants and beneficiaries with valid electronic addresses. However, participants and beneficiaries would be able to request paper disclosures and entirely opt out of electronic delivery.

The proposed safe harbor does not apply to employee welfare benefit plans, such as disability or group health plans. The DoL intends to study the application of this new safe harbor to disclosures required for such plans. The proposed rule states that commenters should feel free to respond to the 21 questions contained in the proposed rule for both retirement and welfare benefit plans.

DISCUSSION

[Background](#)

On Aug. 31, 2018, the White House issued [Executive Order 13847](#), which instructed the DoL and the Treasury Department to review whether potential regulations or guidance could make retirement plan disclosures more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens imposed.

The DoL’s review has determined that its policy objectives would be best promoted through the adoption of a “notice and access” and “continuous access” structure, similar to that described in the agency’s Field Assistance Bulletin 2006–03 and Technical Release 2011–03R. Those pieces of guidance on good-faith compliance for both individual account and defined benefit plan periodic benefit statements and electronic disclosure generally permit the disclosure of statements through a continuous-access, secure website, if advance notice is furnished to participants and beneficiaries and other conditions are satisfied.

[The Proposed Rule](#)

The proposed rule addresses the following key areas:

- *Covered individuals and covered documents* – Covered individuals are participants, beneficiaries, or other individuals entitled to covered documents and who provide the employer, plan sponsor, or administrator an electronic address. For example, an individual may provide the employer an email address or a smartphone number as a condition of employment or at commencement of plan participation. If an employer supplies a work email address or smartphone number to an employee for the purpose of furnishing the covered documents, the employee is treated as having voluntarily provided the electronic address. Covered documents are those that must be furnished pursuant to ERISA, but excludes documents that must be furnished upon request (e.g., latest updated summary plan description, latest Form 5500, trust agreement, and other instruments under which the plan is established or operated).
- *Initial notification of default electronic delivery and right to opt out* – The plan sponsor or administrator must not default covered individuals into electronic delivery. Instead, it must first furnish a paper notification explaining some or all covered documents will be furnished electronically to individuals’ electronic addresses, their right to request and obtain free of charge a paper version of a covered document or to opt out of electronic delivery altogether, and the procedures for exercising such rights.

Under the proposed rule, the plan sponsor or administrator is permitted to default to electronic delivery if it does not receive a response from the plan participant.

- *Notice and timing of internet availability* – The plan sponsor or administrator must notify covered individuals whenever a covered document is made available on the website. If a notice of internet availability applies to more than one covered document, the plan sponsor or administrator must furnish the internet availability notice each plan year (and within 14 months of the prior plan year’s notice).
- *Content of notice of internet availability* – The proposed rule specifies the content of the internet availability notice. In addition to requiring a prominent subject-line and other statements alerting the recipient about the retirement plan disclosure documents’ importance and availability, the proposed rule mandates the inclusion of: a brief description of the covered document; a website address that is sufficiently specific to provide ready access to the covered document or to a login page that provides, or immediately after logging in provides, a prominent link to the covered document; a statement about requesting and obtaining a paper version of the document without cost; a statement on opting out of receiving some or all covered documents electronically; and a telephone number to contact the administrator or other designated representative of the plan.
- *Form and manner of furnishing notice of internet availability* – The notice must be furnished electronically to the address provided by the participant or beneficiary and contain only the required content. Any pictures, logos, or similar design elements used in the notice must not be misleading. The notice must be sent separately from any other documents or disclosures provided to covered individuals and written in a manner calculated to be understood by the average plan participant.
- *Standards for internet website* – The plan sponsor or administrator must take steps to ensure that the website is secure and that the covered document is: available on the website no later than the date on which the covered document must be furnished and remain there until it is superseded by a subsequent version; presented in a widely available format or formats that are suitable to be both read online and printed clearly on paper; searchable by numbers, letters, or words; and permanently retainable in an electronic format.
- *Special rule for severance from employment* – When an employee severs employment, the plan sponsor or administrator must take measures reasonably calculated to ensure the continued accuracy of his or her electronic address or to obtain a new electronic address that enables receipt of covered documents following the individual’s employment termination.

ACTION

Retirement and welfare benefit plan sponsors and their administrators should review the DoL’s proposed rule for its potential effects on the disclosure of plan information and consider commenting on the ease or difficulties they may encounter if the rule is finalized. Although the proposed rule does not cover employee welfare benefit plans, the DoL urges the submission of comments for both retirement and welfare benefit plans. The proposed rule also would impose requirements on the system used for furnishing the notice of internet availability, including being able to alert the plan administrator of invalid or inoperable electronic addresses. Thus, information technology personnel should be in discussions about the electronic disclosure processes. As the DoL’s intent is “to improve the effectiveness of the disclosures and significantly reduce the costs and burden associated with furnishing many of the recurring and most costly ERISA disclosures,” plan sponsors and administrators are in a unique position to respond with constructive comments. The deadline for submission of comments is Nov. 22, 2019.

For additional information about the DoL’s proposed rule on a safe harbor for electronic disclosures by employee benefit plans, please contact your Milliman consultant.

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