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# Refining E-Delivery Of Retirement Plan Disclosure

*Law360, New York (October 04, 2011, 2:04 PM ET)* -- When it published a final rule on disclosure requirements for participant-directed retirement plans in October 2010, the U.S. Department of Labor reserved for further guidance whether this disclosure could be delivered in electronic form. The DOL has now issued interim guidance on acceptable approaches for electronic delivery under this rule.

**Participant-Directed Plan Disclosure Rule**

The participant-directed plan disclosure rule establishes new requirements for the disclosure of general plan-related information and investment-related information to plan participants and beneficiaries who are permitted to direct investments for their retirement plan accounts. The rule applies to plan years beginning on or after Nov. 1, 2011, although the earliest date on which disclosures will have to be made under a transition rule is May 31, 2012 (which is the applicable date for calendar-year plans).

The final rule reserved a subsection on the manner of furnishing the required information to give the DOL an opportunity to seek public comments on the subject of electronic delivery. The DOL requested public comments on the issue this past April. The 80 comments received expressed different views on DOL's current "safe harbor" rule on electronic disclosure to plan participants, which generally permits electronic disclosure to participants who have the ability to effectively access electronic documents in their workplaces, but requires affirmative consent from those who do not use a computer as an integral part of their workplace duties.

Some comments said that the affirmative consent requirement in the safe harbor rule is outdated and limits plans from realizing the benefits of using electronic media; others were concerned that by not requiring affirmative consent in every instance, the rule does not adequately ensure that participants will receive the required disclosures.

Several comments requested that the DOL extend to the disclosure rule a "good-faith compliance" standard applicable to the furnishing of participant benefit statements required by the Pension Protection Act of 2006. This standard is met when participants have continuous access to information through one or more secure websites, provided that the participants are furnished with notification that explains the availability of the information and how it may be accessed, and they are given the opportunity to request a paper version free of charge.

## DOL Guidance

In view of the upcoming applicability date of the new disclosure rule, the DOL recognized that some form of interim relief would be necessary since it is unlikely to provide final regulatory guidance until after the applicability date. The interim relief, contained in Technical Release 2011-03 (released on Sept. 13, 2011, in conjunction with a webinar on the disclosure rule), provides two approaches.

The first approach is available for disclosures that are included in a pension benefit statement, which can only be the case for “plan-related” information (“investment-related” information cannot be provided as part of a benefit statement). These may be furnished in the same manner that the other information in the same pension benefit statement is furnished. This permits the use of a secure continuous access website, in accordance with the DOL’s prior good-faith compliance standard for the provision of benefit statements. No affirmative approval is required.

The second approach is available for disclosures that are not included in a pension benefit statement. There are two options. The first is to use the DOL’s existing safe harbor rule, which, as described above, requires affirmative consent from participants who do not have workplace computer access. The second is an interim procedure using a modified affirmative consent approach, which is available pending further guidance. The interim procedure requires the following:

1) The participant is provided with an “initial notice” that describes the voluntary nature of providing an email address for electronic delivery purposes (see next paragraph), the consequence of disclosure being made electronically, the information that will be furnished electronically and how it can be accessed, the availability of a paper copy, the ability to opt out of electronic delivery at any time, and the procedure for updating the email address.

2) In response to the “initial notice” described above, the participant voluntarily provides an email address for purposes of receiving these disclosures.

- The DOL emphasized that “voluntary” means “voluntary.” For example, the email address cannot be required as a condition of employment, nor can the employer’s assignment to the participant of an email address be considered “voluntary” for this purpose. However, if the participant is required to provide an email address to obtain secure continuous website access to pension benefit statements, that would be considered sufficiently voluntary for this purpose.
- The DOL has provided a limited exception to the “voluntary” requirement through a “special transition provision,” available at the time the first initial disclosures are required under the participant disclosure rule. Under this provision, if the employer, plan sponsor, or administrator has an email address on file for a participant (subject to certain limitations), it can treat the initial notice and voluntary requirements as satisfied if an initial notice, containing most of the information described in section 1 above, is furnished to the participant in paper form (or by email if there is evidence of electronic interaction between the plan and the participant within the last 12 months (the DOL gave examples of what would meet this requirement)), no earlier than 90 days or later than 30 days prior to the date of the first initial disclosures required under the new disclosure rule (e.g., May 31, 2012 for calendar-year plans).

3) The participant is provided with an "annual notice" containing most of the same information as the initial notice, including the ability to opt out. The annual notice must be furnished in paper form unless there is evidence that the participant has interacted electronically with the plan since the last annual (or initial) notice was provided.

4) The plan administrator takes "appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of transmitted information." For example, the plan administrator could use a "return receipt" or "notice of undelivered electronic mail" feature or conduct periodic reviews or surveys to confirm receipt.

5) The plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the electronic system protects the confidentiality of personal information.

6) Notices are written in a manner calculated to be understood by the average participant.

The DOL cautioned that this guidance has the effect of a "no enforcement" policy, and does not necessarily affect the rights or obligations of other parties. This appears to mean that there is no assurance these standards would apply in the event of a participant lawsuit claiming a failure to provide the required disclosures.

**Observations**

The DOL guidance attempts to strike a balance between the opposing concerns raised by the comments. The plan sponsor community generally asked for a "negative consent" approach, whereby a plan administrator could deliver disclosures electronically unless the participant opts out; the other side asked for stronger affirmative consent requirements before permitting electronic delivery.

The interim approach does not go as far as a negative consent approach, still requiring some form of affirmative consent, but provides limited special rules that describe circumstances where affirmative consent can be inferred. The issue for plan sponsors and administrators is to determine the extent to which these limited special rules are available to their plan participant populations.

There will likely be further discussion of electronic delivery issues as the DOL progresses toward its goal of modifying its existing safe harbor rule. The experience of plans using the approaches described in the current guidance is likely to influence the direction of those further changes.

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