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# Welcome to the New Age of Electronic Participant Communications

Regulators continue to liberalize the requirements for using technology to communicate with participants.

BY CRAIG A. BITMAN AND CARLY E. GREY

As plan administrators face increasingly onerous participant disclosure obligations, they continue to look for ways to alleviate their burden through the use of technology. Using electronic media to communicate with participants not only reduces these administrative burdens on plans but also leads to significant cost savings and more accessible and searchable notices for participants.

While it is common to fulfill many of the notice obligations through electronic means, administrators must navigate the patchwork of rules issued by varying agencies. Notably, different requirements apply when providing different documents: multiple DOL requirements apply to ERISA-mandated disclosures, IRS requirements apply to certain disclosures required under the Internal Revenue Code, and SEC requirements apply to certain disclosures regarding employer stock.

## THE DOL SAFE HARBOR

The DOL issued its original guidance on electronic communication more than a decade ago in the form of a safe harbor regulation. This complex rule has proven to be unworkable for many employers in industries where computers are not an instrumental part of the job (*e.g.*, trucking, construction, etc.). Thankfully, recent DOL guidance eases some of the restrictions of the original safe harbor and should allow for further use of electronic interactions with plan participants.

Because of its breadth, the DOL safe harbor for documents required by ERISA is a vital part of the regulatory patchwork. It applies to documents such as summary plan descriptions (SPDs), summaries of material modifications (SMMs), summary annual reports (SARs), COBRA notices and investment-related information required under ERISA Section 404(c). Importantly, however, the safe harbor only authorizes electronic distribution in cases where either the individual has regular work-based computer access that is integral to his or her job, or if the participant consents to receiving electronic disclosures. Such participant consent must be affirmative in a way that demonstrates that the participant has the effective ability to access the information. When seeking such consent, the plan administrator must, among other things, notify the participant that he or she may opt out of electronic disclosure at any time and request paper disclosures free of charge. If a participant does consent but the technology to access the documents changes, the plan must send notice of the change and resolicit the consent to receive electronic disclosure.

## SPECIAL RULES FOR PENSION BENEFIT STATEMENTS

In addition to its safe harbor, the DOL has issued interpretive guidance providing more lenient rules for electronically distributing quarterly pension benefit statements to participants. Under that guidance, a plan administrator needs only to make the statement continuously available on a secure-access website, provide an annual notice that points participants to that website, and inform them that they may request a paper copy of the statement. The annual notice may be sent electronically to participants who satisfy the work-based computer access requirements in the DOL safe harbor; other participants must be mailed a paper copy.

## SPECIAL RULES FOR PARTICIPANT FEE DISCLOSURES

The DOL also now permits participant fee disclosures to be sent electronically subject to a less stringent consent requirement. Specifically, a participant need only provide his email in response to an annual notice containing the same information as the DOL safe harbor for consent. That is, unlike the general safe harbor, participants need not demonstrate that they have the effective ability to access the information or re-consent if there are technology changes.

For industries in which employees do not use a computer as an integral part of their jobs, meeting even the least stringent of the DOL consent requirements can be quite difficult. The practical result is that plan sponsors in these industries often use electronic communication as a backup to paper-based mailings. Others choose to risk electronically communicating outside of the safe harbor (for instance, by requiring negative — instead of affirmative — consent to electronic communication). Obviously, operating outside the safe harbor carries risks of fiduciary breach claims by participants and the imposition of statutory penalties by a court for failing to provide ERISA-required disclosures.

## IRS ELECTRONIC DISCLOSURE REQUIREMENTS

The IRS has taken a less cumbersome approach, but it applies to fewer required disclosures. Documents subject to the IRS disclosure rules include notices relating to 401(k) safe harbors, automatic enrollment, rollover rights and qualified joint survivor annuities. The regulations provide two methods for delivering these notices electronically. The first method adopts the consumer consent rules of the Electronic Signatures in Global and National Commerce Act (E-SIGN). This method is substantially similar to the DOL safe harbor, requiring among other things that a plan obtain affirmative participant consent before providing electronic notice.

The streamlined alternative method does not necessitate consent but merely requires that participants have the "effective ability to access" the electronic medium being used to provide the notice and be advised that they can request a paper copy at no charge. While there is little guidance on what constitutes an effective ability to access, it is generally interpreted to be more lenient than the DOL safe harbor standard, making it easier to provide IRS notices without participant consent.

## SEC ELECTRONIC DISCLOSURE REQUIREMENTS

SEC electronic disclosure requirements are even easier to administer, but apply to only a limited number of participant communications (*e.g.*, prospectuses for plans offering employer stock). The three components of the SEC electronic disclosure requirements are notice, access and evidence of delivery. More specifically, the communication must:

- provide timely and adequate notice to the participant that the information is available;
- be effectively accessible to the participant so that he may save or access the information on an ongoing basis; and

- provide reasonable assurance that delivery to the intended recipient has occurred.

In contrast to the IRS and DOL rules described above, participants are not required to opt in to electronic disclosure, even if they do not have integral computer access or the effective ability to access the electronic notice at their worksite. The SEC's more liberal electronic disclosure requirements are consistent with its expressed position that there are numerous benefits of electronic distribution of information and that, in many respects, it may be more useful than paper.

## WHICH BENEFITS-RELATED DOCUMENTS ARE COMMONLY PROVIDED ELECTRONICALLY?

Perhaps unsurprisingly given the disclosure requirements described above, common documents plan sponsors disclose electronically include SPDs, SMMs, SARs, quarterly benefit statements, fee disclosures and annual notices during open enrollment. For some voluminous documents like SPDs, there are sizable cost savings by providing documents electronically such that meeting the DOL safe harbor is worth complying with its tricky requirements. For other documents, such as participant fee disclosures, participant statements and annual safe harbor notices, the streamlined DOL consent requirements make providing them electronically more tenable.

On the other hand, items less commonly electronically disclosed include correspondence regarding claims (*e.g.*, adverse benefit determinations and explanations of benefits) and appeals. Generally, the advantages to electronic disclosure are less significant for these communications (given that they are not mailed in bulk), and the risks of providing electronic disclosure are greater (because ensuring actual and timely receipt is arguably more important than for routine plan communications).

## ELECTRONIC DISCLOSURE RISKS

In addition to the potential participant claims and statutory penalties if an administrator fails to provide proper electronic disclosures, transitioning to electronic disclosure may increase the risk of cyberattack. Focusing solely on electronic disclosure in the health plan context, the Health Insurance Portability and Accountability Act (HIPAA) would apply to potential breaches of protected health information. For example, if an email or other electronic communication system were hacked or an electronic notice were sent to the wrong address, HIPAA's burdensome breach notification requirements could be triggered. In the retirement plan context, data is subject to state data security requirements that could similarly be triggered by unauthorized access or inadvertent disclosure of a participant notice (*e.g.*, a personalized benefit statement). Generally, these requirements apply to plan service providers rather than the plans themselves, but could be implicated depending on who is responsible for distribution of the electronic materials.

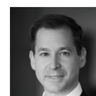
## INNOVATIVE ELECTRONIC DISCLOSURE

The use of social media has now only just begun in the plan administration context. While plan participants may be on Facebook, Twitter and YouTube every day, and even the IRS and DOL host accounts on these sites, benefit plans have generally made limited use of these applications. These types of electronic media do not fit well within the DOL safe harbor or satisfy the IRS disclosure rules. As such, these methods are unlikely to be used as a primary method of communication under current guidance. However, they may continue to be used to reinforce plan messaging sent by mail or more traditional electronic means (*e.g.*, web posting and email).

## DEVELOPMENTS

The DOL and some legislators recognize that the electronic disclosure requirements could be improved. In 2011, prior to providing the special participant fee disclosure rules, the DOL issued a request for information (RFI) regarding electronic disclosure by employee benefit plans. It remains to be seen whether this RFI will lead to further enhancements to the DOL's guidance. In addition, Congress has periodically introduced bills (most recently, the RETIRE Act (HR 2656)) to further streamline the varying regulatory requirements in this area. While these efforts have generally been supported by plan sponsors, none has made it to a congressional vote.

We are clearly still at the dawn (or perhaps early morning) of the age of electronic plan administration. As the regulators continue to liberalize the requirements for using technology to communicate with participants, we can expect fewer trees to be converted into SPDs, SMMs and benefit statements — a greener world we could all hope for! PC



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