

DOL Adopts Interim Policy on the Use of Email for Participant Fee Disclosures

On September 13, 2011, the Department of Labor issued a technical release providing guidance on the use of email to distribute required fee disclosures to participants in participant-directed 401(k) and similar plans, under rules scheduled to take effect in 2012.

Background

Generally, the use of electronic media to provide required disclosures under ERISA is permitted only 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. Recently, in connection with new rules requiring plan administrators to provide participants in participant-directed plans with specified information about plan fees and expenses (discussed in our [Alert](#) of October 20, 2010), the Department decided to revisit its electronic disclosure rule and issued a request for information and comments.

The participant fee disclosure rules allow certain fee and expense information to be included with quarterly benefit statements. Under Field Assistance Bulletin 2006-03, benefit statements may be sent electronically in accordance with IRS regulations permitting the use of electronic disclosure without affirmative consent. However, other fee disclosures required under the new rules cannot be included with a quarterly pension statement. The technical release sets forth a new interim policy on the use of email for these disclosures.

Using Email for Disclosures

The new guidance provides that fee disclosures that are not included in pension benefit statements may be furnished by email using the following procedures.

1. Initial Notice. An “Initial Notice” must be provided to participants, stating:

- The information that will be furnished by email;
- The participant’s right to request a paper copy;
- The participant’s right to opt out of electronic disclosure; and
- The procedure for updating the participant’s email address.

If a participant has an email address on file, the plan administrator may send the Initial Notice by email between 90 and 30 days prior to the date the fee disclosures will be furnished. However, there must be evidence that the participant has used the email address to interact with the plan during the 12-month period prior to the date of the Initial Notice. If no email address is on file, the plan administrator will need to provide an Initial Notice (using non-electronic means) stating specifically that providing an email address is voluntary. Disclosures can then be sent by email only if the participant voluntarily furnishes an email address for this purpose.

2. Annual Notice. In subsequent years, plan administrators must furnish an “Annual Notice” containing the same information that is required to be provided in the Initial Notice. The Annual Notice may be sent by email, 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 (i) updating, resubmitting, or confirming an email

address to the plan; (ii) sending an email to the plan; (iii) logging on to a secure continuous-access website housing plan information; and (iv) receiving and opening an electronic message sent by the plan.

3. Other Requirements. The plan administrator must take appropriate and necessary measures reasonably calculated to ensure (i) that the electronic delivery system results in actual receipt (*e.g.*, by using a return receipt function for email), (ii) that personal information remains confidential, and (iii) that the notices are written in a manner calculated to be understood by the average plan participant.

For the time being, these procedures may be used *only* to send certain fee disclosures required by the new rules that cannot be included in a quarterly pension benefit statement. The Department is still considering its electronic disclosure rules, and has not indicated when it anticipates issuing more general or more definitive guidance. Nevertheless, these new interim procedures may provide an indication of the direction the Department may take in the future with respect to electronic disclosure for other ERISA purposes.

For additional information about electronic disclosures or the new fee disclosure requirements, please contact any member of the Ropes & Gray [Benefits Practice Group](#).