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DOL Releases Interim Guidance on Electronic Disclosure to Participants of Fee and Expense Information

On September 13, 2011, the Department of Labor (DOL) issued [Technical Release 2011-03](#), which provides interim guidance on the electronic disclosure of fee and expense information by participant-directed individual account retirement plans under ERISA Reg. § 2550.404a-5 (the "[participant fee disclosure regulation](#)").

Background

When DOL published the participant fee disclosure regulation in October 2010, it reserved the provisions of the rule governing the manner in which the required fee information must be disclosed, stating only that its existing [electronic disclosure safe harbor rule](#) (Reg. § 2520.104b-1(c)) could be utilized pending review of [public feedback it subsequently solicited on that safe harbor](#). DOL continues to review the public comments it has received and has not yet published any updated electronic disclosure guidance.

- The safe harbor regulation for electronic disclosure, published in 1997 and revised in 2002, takes a conservative approach, distinguishing between: (1) participants who have effective computer access to the plan sponsor's electronic information system as part of their work function; and (2) all other participants, beneficiaries and alternate payees, who must affirmatively consent to electronic delivery after receiving a specified notice. The safe harbor also obliges the plan administrator to take appropriate and necessary measures reasonably calculated to ensure actual receipt of the disclosures and protection of confidential information, and to maintain an alternative paper delivery system for recipients who request that form of disclosure.

Electronic Disclosure Under the Participant Fee Disclosure Regulation

With the [applicability date of the participant fee disclosure regulation](#) approaching, many plan sponsors and service providers have been concerned about the lack of guidance regarding the manner in which the fee and expense information required under the regulation may be provided. Technical Release 2011-03 is intended to provide temporary guidance on the electronic delivery of fee and expense information until the DOL finalizes the applicable provisions under the participant fee disclosure regulation. This new interim guidance is limited to the participant fee disclosure and cannot be relied on for any other purpose.

The participant fee disclosure regulation permits certain plan-related information (with respect to, e.g., directing investments and exercising voting rights, or plan administrative expenses and individual expenses) to be disclosed on the pension benefit statement, and the Technical Release confirms that such information can be delivered electronically (like the rest of the benefit statement) under [FAB 2006-3](#).

- Following revisions enacted in the Pension Protection Act to the requirements for quarterly benefit statements, DOL published guidance specific to electronic delivery of those statements in FAB 2006-3. In that guidance, DOL authorized, in addition to its safe harbor, electronic delivery either: (1) in accordance with the [tax rules for electronic delivery of retirement plan notices and documents](#) required under the Internal Revenue Code; or (2) through a secure website that provides continuous access to benefit statement information, with notice and the opportunity to request a paper copy.

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To furnish, electronically, fee information that is not included in the pension benefit statement (e.g., the investment-related information required under Reg. §2550.404a-5(d)), the Technical Release provides that the plan administrator must either rely on the existing electronic disclosure safe harbor rule or satisfy all of the following conditions:

- **Voluntary Provision of E-mail Address.** Participants and beneficiaries entitled to receive the information must voluntarily provide an e-mail address for purposes of receiving the disclosure. This requirement cannot be met merely by demonstrating that the participant has a company-assigned e-mail address, or by showing that participants were required to furnish an e-mail address as a condition of employment or participation in the plan. Rather, the e-mail address must be provided in response to a request by the plan or employer that is accompanied by the initial notice described below.
- **Initial Notice.** At the same time and in the same medium as the request to provide an e-mail address for electronic disclosure purposes, participants must also be provided a “clear and conspicuous” initial notice: (1) stating that providing the e-mail address for purposes of receiving the required information is entirely voluntary and that a recipient can opt out of electronic disclosure at any time; (2) describing the fee information that will be furnished electronically and how it may be accessed; and (3) providing a procedure for updating the e-mail address, among other things.

Transition Rule. The Technical Release includes a transition rule under the foregoing requirements with respect to participants and beneficiaries who already have e-mail addresses on file with the plan or employer, if:

- They are provided a notice containing most of the information required for the initial notice 30 to 90 days before the initial disclosures under the participant fee disclosure regulation. Like the annual notice (described below), the notice under this transition rule may be provided electronically only if the participant or beneficiary has used the e-mail address on file to interact electronically with the plan in the previous 12 months; and
- If the e-mail address on file was assigned by the employer or the plan, the special transition rule will apply only if there is evidence that the participant or beneficiary used the e-mail address on file “for plan purposes” in the previous 12 months (e.g., by opening an e-mail message from the plan or using the e-mail address to log on to a secure website housing plan information).
- **Annual Notice.** Beginning in the year following the year in which the participant or beneficiary first provides his or her e-mail address, the participant or beneficiary must be provided an annual notice containing most of the same information as the initial notice, which can be sent electronically to the e-mail address on file for the recipient if there is evidence that he or she used the e-mail address to interact electronically with the plan after the previous year’s notice was provided (e.g., by confirming the e-mail address to the plan, opening an e-mail message from the plan or using the e-mail address to log on to a secure website with plan information).
- **Other Requirements.** As under DOL’s safe harbor, the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the electronic delivery system results in actual receipt of the information (e.g., by using notice of undeliverable e-mail features or conducting

periodic reviews to confirm receipt) and to protect the confidentiality of personal information, and must on request provide a paper disclosure at no charge.

Comment: DOL continues to move incrementally and cautiously on this issue, undertaking to balance the cost savings and other efficiencies of electronic delivery with its concerns for recipients who either do not routinely have reasonable Internet access or are not computer literate or simply prefer paper disclosures.

- DOL has now accepted, at least in form and on an interim basis, four electronic delivery methodologies: the general safe harbor rule, the new rule for participant fee disclosures, and, for benefit statements, the IRS electronic disclosure rule and the secure website rule.
- Outside of the participant disclosures permissible to provide on quarterly benefit statements, the new interim guidance seems functionally an application of the principles underlying the existing safe harbor in the specific context of the participant fee disclosure regulation.
- In this respect, the interim guidance continues to contemplate a “plan-centric” digital world operating on different terms than electronic communications generally.
- In our experience, FAB 2006-3 has had more practical utility than the DOL safe harbor rule.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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