



BENEFITS AND COMPENSATION ALERT

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NEW GUIDANCE HELPS WITH ELECTRONIC DISCLOSURE OF BENEFIT PLAN INFORMATION

On September 13, 2011 the Department of Labor (“DOL”) issued Technical Release 2011-03 (the “Technical Release”) regarding the use of electronic media to satisfy the participant disclosure requirements under DOL regulation section 2550.404a-5 (the “Participant Disclosure Regulation”). The Technical Release was necessary because the Pension Protection Act (“PPA”) created changes in the Participant Disclosure Regulation that require plan administrators to make additional specific disclosures as early as May 31, 2012 to plan participants regarding fees and expenses in their individual accounts.

Electronic Disclosures to Plan Participants

Initially, most of the disclosures were related to participant statements and plan documents such as the summary plan description and summary annual report. In the publication of the electronic disclosure “safe harbor” regulations in 1997 and the revisions in 2002 and 2006, the DOL took a conservative approach to electronic disclosure by distinguishing between (i) participants who have computer access to the plan sponsor’s electronic information system as an integral part of their duties; and (ii) all other employees, beneficiaries, and alternate payees (i.e., under a qualified domestic relations order). The first group may be provided the information electronically without additional consent, while the second group must affirmatively consent to electronic delivery after being provided a specific notice. In each case the plan sponsor must take appropriate, reasonable steps to ensure actual receipt of the disclosures, and maintain an alternate paper delivery procedure for participants who require or request that means of disclosure.

The Effect of the Pension Protection Act

The PPA required a new type of quarterly benefit statements for defined contribution plans, and the DOL published Field Assistance Bulletin 2006-03 (the “2006 Guidance”) to provide guidance on the new disclosure requirements. The 2006 Guidance provided that in addition to the traditional safe harbor disclosure methods described above, a plan administrator could provide electronic delivery by the regulations under the Internal Revenue Code for delivering plan notices documents, or through a secure website that provides continuous access to benefit information, with notice and a right to receive a hard copy. The 2006 Guidance also confirmed

that information on directing investments, exercising voting rights, plan administrative expenses and individual expenses (such as annual account fees) can be disclosed electronically along with the rest of the benefit statement.

Electronic Disclosure of Investment-Related Fees and Expenses

Despite all of this guidance, the DOL had not specified how the disclosure of *investment-related fees and expenses* should be accomplished, even after the final DOL regulations were published in October 2010; the Technical Release provides plan sponsors with interim rules until final guidance is provided. The Technical Release discusses which benefit disclosures may be included in the pension benefit statements and which disclosures must be provided separately, indicating that “plan-related information” can be included in the pension benefit statements, including the general and administrative fee information, individual account balance information and other data required under the PPA. The Technical Release confirms that using a continuous access website that complies with the standard for providing pension benefit statements offers adequate disclosure for such “plan-related information”.

The Technical Release Creates an Alternative Method

The Technical Release also notes that certain disclosures must be provided separately, and provides an alternative approaches for information which must be provided in a second document (primarily the investment-related fee and expense disclosures). For such disclosures, the plan administrator may either comply with the standards under the 2006 Guidance for pension benefit statements, or use an interim procedure which offers a modified affirmative consent approach. Under this alternate method the plan administrator provides an initial notice and an annual notice to participants, written in a manner calculated to be understood by the average plan participant, which includes:

- A statement that the participant can make a *voluntary* decision to provide an email address for receiving electronic disclosures;
- A description of the information which will be disclosed electronically;
- The availability of a paper copy of the disclosures, and the participant’s right to opt out of electronic delivery at any time; and
- The procedure for updating an email address.

The plan sponsor also must take appropriate steps to (i) confirm that the information is successfully transmitted, and (i) protect the confidentiality of the electronically transmitted information.

The Technical Release provides a limited exception to the “voluntary” provision of an email address which may be used by a plan sponsor or plan administrator who has an email address on file. Under this exception, the plan sponsor may satisfy the initial notice and voluntary requirement by a either delivering a paper version of the initial notice, or by emailing the notice to the participant if there is evidence of electronic interaction between the plan and the participant within the last 12 months, and delivering this notice at least 30 and no more than 90 days before the new disclosure rules become effective (May 31, 2012 for plans that operate on a calendar year).

Understanding the Disclosed Material and Electronic Disclosure Methods

Following this last release of DOL guidance on the Participant Disclosure Regulation, a plan sponsor has to be aware of the different types of disclosed information which must be provided and comply with three standards for electronic disclosures, which can be broken down as follows:

<u>Disclosed material</u>	<u>Method(s) of Disclosure</u>
Plan documents (SPD, etc.)	Traditional "safe harbor" method
PPA pension benefit statements	Traditional "safe harbor" method or the 2006 Guidance
Investment Fees and expenses	The 2006 Guidance or the Technical Release alternate method

Plan sponsors must make available benefit plan information, and the changes to the Participant Disclosure Regulation may make that task easier. However, the requirements are not simple, and a plan sponsor should carefully consider the most effective way to deliver information to plan participants while remaining in compliance with the law and regulations. Shumaker's benefits professionals can assist you in deciding what disclosure method will work best for your plans and participants.

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