



ATTORNEYS AT LAW

ELECTRONIC DELIVERY OF PARTICIPANT DISCLOSURES

The Department of Labor (DOL) has issued a series of regulations and guidance that will affect qualified retirement plans beginning in 2012. Many of the changes are only applicable to defined contribution plans (like profit sharing plans and 401(k) plans) where participants are allowed to direct their investments. Other regulations affect all qualified retirement plans. Your investment advisor or third party administrator may have already spoken to you about these changes. If not, you may wish to contact them concerning the information they must disclose to you and what you must disclose to your plan participants.

This is the third of three articles concerning these regulations and guidance and will explain how the new participant disclosure requirements (described in the first article in this series) can be met through electronic delivery.

I. The Guidance

On September 13, 2011, DOL issued Technical Release 2011-03 which is an interim enforcement policy regarding the use of electronic delivery to satisfy the participant disclosure requirements. Retirement plan practitioners had several comments and concerns with that Technical Release and on December 8, 2011, DOL issued a new Technical Release, 2011-03R ("TR 2011-03R"), taking into account some of those concerns.

II. General Rules on Electronic Delivery

A. Safe Harbor Delivery Method

In 2002 DOL issued a regulation setting forth when electronic delivery meets the requirement that disclosures be furnished using "measures reasonably calculated to ensure actual receipt of the material." DOL provided a "safe harbor" for electronic delivery to the following classifications of individuals¹: 1) those individuals who are employees of the plan sponsor and who have the ability to effectively access electronically delivered documents at work where access to the employer's electronic information system was an integral part of that

¹ This article will use the term "individuals" to encompass both participants and beneficiaries of a plan.

individual's job duties and 2) any other individual who, in a manner detailed by the regulations, affirmatively consents to electronic delivery. The requirements for this consent were extensive (and in the view of some, burdensome).² Under these regulations individuals are also entitled to receive paper copies if they so desire. For purposes of this article these regulations will be referred to as the "safe harbor electronic delivery method."

B. FAB 2006-03 Delivery Method

In December 2006, DOL issued Field Assistance Bulletin (FAB) 2006-03 that expanded the use of electronic disclosure in conjunction with the Pension Protection Act's requirements concerning the delivery of benefit statements. That FAB incorporated the terms of certain Treasury electronic disclosure regulations that allow electronic delivery of benefit statements, without prior consent, to all individuals who have the "effective availability" to receive those electronic disclosures as long as the individual is advised that he or she may receive a paper copy of the statement without cost. FAB 2006-03 therefore went significantly beyond the safe harbor delivery method in expanding the circumstances of when benefit statements could be delivered electronically without going through cumbersome consent requirements.

In addition, with respect to secure continuous access websites, the FAB stated that DOL "will view the availability of pension benefit statement information through such media as good faith compliance with the requirement to furnish benefit statement information." DOL, however, requires that individuals be furnished, initially and then at least annually, with a notification which: describes the availability of the benefits statements on the website; explains how to access those statements on the website; and contains a statement concerning the right to receive, free of charge, a paper version of the benefit statement.

For purposes of this article this will be referred to as the FAB 2006-03 delivery method.

² For example the manner of consent must demonstrate that the individuals will have effective access to the disclosures and must provide an address for receipt of the disclosures. The individual must receive a conspicuous statement prior to consent that: describes the types of disclosures to which the consent applies; explains that consent can be withdrawn at any time; provides the procedures for withdrawing consent or updating information; states that paper copies of electronic documents will be provided upon request; and describes any hardware or software requirements to access or save the electronic disclosures. If there is a change to hardware or software that might change an individual's ability to receive or save the disclosures, the individual must be given the option of withdrawing consent or again consenting to receive the disclosures.

III. Electronic Delivery of Participant Disclosures

In TR 2011-03R DOL declined to expand electronic delivery of all of the new participant disclosures to the full extent of the FAB 2006-3 delivery method but did provide some interim relief regarding electronic delivery of these disclosures. DOL provided different rules for plan-related information and investment-related information.

A. Plan-Related Information

Plan-related information **can** be provided in a benefits statement furnished pursuant to the FAB 2006-03 delivery method (but certain changes to plan information must be provided separately).

B. Invested-Related Information

Investment-related information (including the required chart) **can** be provided as part of (or along with) a benefits statement and also through a continuous access website. TR 2011-03R reversed DOL's policy in the earlier version of this release that investment-related information could not be provided as part of a benefits statement. The FAB 2006-03 delivery method, however, **cannot** be used for investment-related information. That information must be provided either pursuant to the safe harbor delivery method or through the following "interim method" provided in TR 2011-03R:

- Individuals must voluntarily provide an e-mail address for the purpose of receiving disclosures. That e-mail address must be provided in response to a request accompanied by an Initial Notice described below. (If a participant, however, is required to provide an e-mail address electronically in order to access a secure continuous access website housing the required disclosure, the provision of such e-mail address is considered voluntary as long as an Initial Notice is provided as well.)
- Individuals must receive an Initial Notice that contains: a statement that providing an e-mail address for the disclosures is entirely voluntary; a statement that the result of providing the e-mail address will be the electronic delivery of the disclosures; a brief description of the investment-related disclosures that will be provided electronically and how those disclosures can be accessed; a statement that the participant or beneficiary has the right to obtain, free of charge, a paper copy of any of the disclosures (and how to exercise that right); a statement that the participant or beneficiary has the right, at any time, to opt out of receiving the disclosures electronically (and how to exercise that right); and the procedure for updating the participant's or beneficiary's e-mail address.
- Individuals who have provided their e-mail address must receive a paper Annual Notice containing essentially the same information as the Initial Notice unless there is evidence that the individual "interacted

electronically” with the plan. This can include, for example, logging onto a secure plan website housing plan information. If there has been electronic interaction during the plan year, then the Annual Notice can be delivered electronically.

- The plan administrator takes steps to ensure that electronic delivery results in actual receipt of transmitted information (*e.g.*, using return receipt or notice of undelivered electronic mail features, conducting periodic reviews or surveys to confirm receipt of transmitted information, etc.).
- The plan administrator takes steps to ensure that the electronic delivery protects the confidentiality of personal information.
- All notices are written in a manner calculated to be understood by the average plan participant.

This guidance is just interim guidance. DOL has indicated that it will be revisiting electronic disclosure generally as part of the ongoing regulatory process.

If you have any questions concerning how these new participant disclosure requirements can be met through electronic delivery, please contact Kenneth M. Johnson at Tuggle, Duggins & Meschan, P.A., 100 N. Greene Street, Suite 600, Greensboro, NC 27401, (336) 271-5264.

© 2012 Tuggle Duggins & Meschan, P.A. All Rights Reserved. The purpose of this bulletin is to provide a general summary of significant legal developments. It is not intended to constitute legal advice or a recommended course of action in any given situation. It is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature. Moreover, information contained in this bulletin may have changed subsequent to its publication. This bulletin does not create an attorney-client relationship between Tuggle Duggins & Meschan, P.A. and the recipient. Therefore, please consult legal counsel before making any decisions or taking any action concerning the issues discussed herein.