

MEMO# 25499

September 19, 2011

DOL Issues Restrictive Interim Policy on E-Disclosure for the New Participant Disclosure Rule

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TO: BROKER/DEALER ADVISORY COMMITTEE No. 59-11 RE: DOL ISSUES RESTRICTIVE INTERIM POLICY ON E-DISCLOSURE FOR THE NEW PARTICIPANT DISCLOSURE RULE

The Department of Labor issued interim guidance that would allow plans to deliver new participant disclosures (29 CFR 2550.404a-5) electronically in certain circumstances and under certain conditions set out in Technical Release 2011-03. [\[1\]](#) Plans generally will have to provide the first participant disclosures under the new rule by May 31, 2012. [\[2\]](#) The interim guidance does not take the approach urged by the Institute [\[3\]](#) and others of extending to the participant disclosure rule all of the e-delivery options allowed for benefit statements in Field Assistance Bulletin 2006-03. [\[4\]](#)

The Release sets out interim guidance, pending further rulemaking by the Department on electronic disclosure. When the Department adopted the new participant disclosure rules in 2010, it reserved the electronic delivery issue pending review of its general electronic delivery rules. That review remains ongoing. [\[5\]](#)

The participant disclosure regulation establishes a regime of initial, annual and quarterly disclosure. As adopted, the regulation allows plans that choose to do so to include on the quarterly benefit statement any quarterly disclosures the new rule requires (e.g., actual charges against a participant's account during the quarter, such as a loan fee or other plan-imposed charges) rather than delivering disclosures separately. The Release states that these new quarterly disclosures can be delivered electronically in the benefit statement under the methods in FAB 2006-03, which includes notifying participants the plan will deliver benefit statements through a secure continuous access web site.

The Release makes clear that plans cannot rely on FAB methods to deliver the other disclosure required by the participant disclosure rule, such as the disclosures of investments and fees provided to participants on enrollment and annually thereafter.

Rather, the Release states that plans can furnish new participant disclosures:

- Using the safe harbor in the Department's existing e-delivery regulation (which limits e-delivery to participants for whom computer use is an integral part of their employment duties or participants who give affirmative consent), or
- By using the interim relief set out in the Release explained below.

New Alternative Method for E-delivery of Participant Disclosure

The new alternative sets out a general rule for all employees and a transition provision for 2012 with respect to those employees whose e-mail addresses already are on file with the employer.

General rule

The general rule requires that a participant voluntarily provide the employer with an e-mail address for the purpose of receiving these disclosures after receiving a prescribed notice. The Release states the "voluntarily" condition would not be met, for example, if an employee supplied the email address as a condition of employment or participation in the plan or if the employer merely established or assigned an e-mail address to a participant. It would be met if the employee responds to the notice by voluntarily furnishing the e-mail address or supplies an e-mail address electronically in order to access a secure continuous access web site housing the required disclosure, provided the initial notice conditions are met.

On notice, the Release sets out requirements for an initial notice to be provided contemporaneously with a request for an email address and an annual notice thereafter, commencing with the year beginning after the year in which the participant voluntarily provided his or her e-mail address. The initial notice must be provided in the same medium as the request for the e-mail address. The annual notice must be furnished on paper, unless there is evidence the participant interacted electronically [\[6\]](#) with the plan after the date the annual notice for the preceding year was furnished.

Content. The initial notice must explain that providing an email address is voluntary and will result in the required disclosures being made electronically. Both the initial and the annual notice must include a brief description of the information that will be furnished electronically and how it can be accessed by participants; a statement that the participant has the right to request and obtain, free of charge, a paper copy of any of the information provided electronically and how to exercise that right; that the participant has the right, at any time, to opt out of receiving this information electronically and how to exercise that right; and an explanation of the procedure for updating the participant's e-mail address.

Other conditions. Notices must be written in a manner calculated to be understood by the average plan participant. The plan administrator must also take appropriate and necessary measures reasonably calculated to ensure that the e-delivery system results in actual receipt of transmitted information and that the system protects the confidentiality of personal information. Measures to ensure actual receipt include using return receipt or notice of undelivered electronic mail features or periodic reviews to confirm receipt.

Transition provision for 2012 for employees with emails already on

file

The Release set outs a transitional provision for participant disclosures required to begin in 2012. For employees with emails already on file, in lieu of requiring plans to satisfy the voluntary provision of e-mail and initial notice conditions of the general rule, the transition provision would require a Transition Group Initial Notice containing the same information as in the annual notice. This notice must be provided no earlier than 90 but no later than 30 days prior to the date the initial participant disclosures are to be provided. The Transition Group Initial Notice must be furnished in paper, rather than electronically, unless there is evidence of electronic interaction by the participant [7] with the plan during the preceding 12 months.

The transition provision applies only with respect to e-mail addresses of participants that are on file with the employer or its designee on the date the transition notice must be provided. It is not available, however, for an e-mail address established or assigned by the employer or its designee unless there is evidence the e-mail address was used [8] by the participant for plan purposes during the 12-month period preceding the transition notice.

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endnotes

[1] Technical Release 2011-03 is available at <http://www.dol.gov/ebsa/newsroom/tr11-03.html>.

[2] See [Memorandum](#) to Pension Members No. 40-11, Operations Members No. 14-11, Bank, Trust and Recordkeeper Advisory Committee No. 41-11, Transfer Agent Advisory Committee No. 55-11 [25330], dated July 14, 2011. For a description of the participant-level fee disclosure regulation, see [Memorandum](#) to Pension Members No. 49-10, Transfer Agent Advisory Committee No. 76-10, Bank, Trust and Recordkeeper Advisory Committee No. 49-10, Broker/Dealer Advisory Committee No. 56-10 and Operations Committee No. 37-10 [24702], dated November 11, 2010.

[3] See [Memorandum](#) to Pension Members No. 29-11 [25262], dated June 8, 2011.

[4] See [Memorandum](#) to Pension Members No. 75-06 [20718], dated December 21, 2006.

[5] For the Institute's comment letter on the Department's request for information on its e-delivery rules, see [Memorandum](#) to Pension Members No. 30-11 [25270], dated June 9, 2011.

[6] Examples of electronic interaction include, but are not limited to: the participant updating, resubmitting, or confirming his or her e-mail address to the plan; the participant sending an electronic message to the plan; logging onto a secure continuous access web site housing plan information; or the receipt and opening of an electronic message sent by the plan to the participant. The guidance explicitly states that these examples are only relevant for the purpose of determining whether the annual notice may be furnished electronically. They are not a substitute for the voluntary provision of an email address.

[7] See n. 6.

[8] For this purpose, examples of using e-mail address for plan purposes include, but are not limited to, the participant sending an electronic message to the plan from such e-mail address; receiving and opening an electronic message sent by the plan to such e-mail address; or logging onto a secure continuous access web site housing plan information, using such e-mail address as the username.

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