

Publications

DOL Finalizes Safe Harbor Regulation for Retirement Plan Electronic Disclosures

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The Department of Labor (“DOL”) published a [final rule in the Federal Register](#) on May 27th that establishes a new electronic disclosure safe harbor. This rule, “Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA” (“Rule”), provides an additional safe harbor for the furnishing of pension plan information and disclosures to participants, beneficiaries and alternate payees. The DOL Rule responds to Trump Administration Executive Order 13847 [Strengthening Retirement Security in America](#) and finalizes the [October 23, 2019 proposed rule](#). DOL estimates that over the next decade the Rule will save approximately \$3.2 billion in net costs for retirement plans by eliminating significant materials, printing, and mailing costs associated with furnishing printed disclosures. The Rule will be effective on July 27th, 60 days after it is published in the Federal Register. Below, we outline key takeaways, identify changes from the proposed rule, summarize the Rule and share our observations about some of its key elements.

Key Takeaways

Overall, the Rule could greatly expand electronic delivery of retirement plan notices. Importantly, the Rule would allow plans to use mobile applications to deliver notices and disclosures, possibly paving the way for greater overall plan engagement by retirement plan participants. Nevertheless, the Rule is not without its challenges, and it remains to be seen whether the administrative demands of the Rule will outweigh its usefulness for the majority of plans. Importantly, the Rule brings an end to the ability to provide pension benefit statement information via a “continuous access website,” as permitted under Field Assistance Bulletin 2006-03 (“FAB 2006-03”), likely resulting in fewer participants receiving their pension benefit statements electronically. DOL also eliminated the ability to rely on either the DOL’s or the IRS’ electronic delivery rules for qualified default investment alternative notices. As with the proposal, DOL limited the new safe harbor to retirement plan documents and

information thereby excluding employee welfare benefit plans and their related notices (e.g., COBRA Notices and notices of adverse benefit determinations for group health and disability plans). Finally, during the COVID-19 emergency, plans have “good faith” relief allowing notices to be provided through email, text messaging and continuous access website. See EBSA Disaster Relief Notice 2020-01. Given the breadth of this relief, it is likely that many plans will choose not to rely on the new Rule until after the announced end of the COVID-19 emergency.

Changes from the Proposal

Changes from the proposal include:

- Rather than limiting the safe harbor to website links, the Rule permits plan email or texts to attach documents (e.g., in PDF form).
- The Rule specifically allows for the use of mobile apps and other technologies beyond email.
- The requirement that plan fiduciaries undertake additional diligence to update contact information for participants who leave employment is limited to employer-provided addresses.
- Rather than allowing plans to take down superseded documents, the Rule requires all documents to remain available on a website until the later of one year or the time the document is superseded. The initial notice of availability provided to participants must include a caution regarding this one-year retention period.
- Quarterly statements cannot be provided via a single annual notice of internet availability, and must be disclosed with an individual notice of internet availability each quarter.

Groom was able to ask DOL several questions on DOL’s roll-out call that provided additional clarity to certain provisions. We have incorporated DOL’s responses into the provision descriptions below and have highlighted the improvements over the existing safe harbor.

Summary of the Rule and Observations

The new safe harbor relies on a “notice and access” approach. In this regard, the Rule provides a pathway for plan fiduciaries to satisfy document and notice delivery obligations by posting required disclosures on a website while also delivering an electronic notice of availability. In a departure from the prior DOL safe harbor, the Rule imposes no requirements on plan fiduciaries to analyze whether individual participants interact with an electronic system as a function of their job; nor does it impose any specific requirements that participants affirmatively consent to electronic delivery.

The Rule establishes a framework that identifies “covered individuals” to whom “covered documents” may be provided electronically, as long as additional requirements of the safe harbor are met. We describe this new safe harbor below, including our observations.

- **Covered Individuals.** The Rule defines a “covered individual” as a participant, beneficiary, or other individual entitled to covered documents (discussed below), and who provides the employer, plan sponsor, plan fiduciary (or an appropriate designee) with an electronic address, such as an email address or internet-connected mobile-computing device (e.g., smartphone) number. Alternatively, if an employer assigns an electronic address to an employee, the employee is treated as if he or she provided the electronic address.