DISCUSSION TOPIC

DOL Proposes Extensions of Disclosure Regulation Effective Dates

Roberta Ufford

By Roberta J. Ufford

On June 1, 2011, the U.S. Department of Labor ("DOL") proposed to extend the applicability dates for a new regulation governing disclosure by retirement plan service providers and disclosures provided to participants of participant-directed 401(k) and similar plans. 76 Fed. Reg. 31544 (June 1, 2011). The deadline to submit comments on the proposed extension was June 15, 2011. Here is where matters stand now.

Extension of Service Provider Disclosure Rule Effective Date – On July 16, 2010, DOL published an interim final rule under ERISA section 408(b)(2) that requires most service providers to ERISA-covered retirement plans to provide detailed disclosures regarding their compensation. 75 Fed. Reg. 41600 (July 16, 2010). Originally, the interim final rule set an effective date of July 16, 2011. Many service providers have argued that more time was required to update systems and procedures for information collection and disclosure and, in response, DOL announced its intention earlier this year to extend the effective date of the regulation until January 1, 2012. This proposal officially reflects DOL's earlier announcement and if finalized, covered service providers must comply with the new requirements by January 1, 2012.

A final version of the service provider disclosure rules is still pending. DOL officials have indicated that final rules may soon be transmitted to the Office of Management and Budget, which may take up to 90 days to review the rules before publication.

Extension of Participant Disclosure Transition Rule – On October 20, 2010, DOL published a final rule requiring plan administrators of participant-directed individual account plans to provide detailed disclosures regarding plan fees and investment options to plan participants. 75 Fed. Reg. 64910 (Oct. 20, 2010). The final rule was effective on December 20, 2010, but it provided for an extended "applicability" date and its requirements were set to begin to apply for plan years beginning on or after November 1, 2011. (For calendar year plans, the new requirements would apply beginning January 1, 2012).

The proposed extension does not alter the effective date or applicability date of the participant disclosure rule, but instead provides additional time to comply by extending an existing 60-day transition rule to 120 days. Under the proposal, a plan would have 120 days (rather than 60) after its applicability date to furnish initial disclosures that are otherwise required to be furnished before the date on which a participant or beneficiary can first direct his or her investments. DOL clarified that this extended transition date applies to all plan partic-

ipants. Thus, under the proposal, a calendar-year plan would have to furnish the initial disclosures no later than April 30, 2012. Other disclosures (e.g., quarterly statements of fees/expenses actually deducted) would have to be furnished to participants no later than May 15, 2012.

DOL Opens Dialogue on Electronic Disclosure to Participants

On April 6, the U.S. Department of Labor ("DOL") released a Request for Information ("RFI") regarding electronic disclosure under ERISA-covered welfare and pension plans. 76 Fed. Reg. 19285 (Apr. 7, 2011). The RFI announces DOL's intention to review the use of electronic media (e.g., email delivery or posting information on websites) to deliver information to participants and beneficiaries of ERISA covered plans. The benefits community had hoped that DOL would release new rules that would have addressed differences between rules regarding the use of electronic disclosure in providing communications to plan participants that have already been issued by DOL and by the Internal Revenue Service ("IRS") and the Treasury Department ("Treasury") and perhaps also expanded availability of electronic media for disclosure to participants. Instead, the RFI offers a long laundry list of questions covering a wide range of technical and policy areas. Comments were due to be submitted on or before June 6.

Below is background on current rules applying to the use of electronic disclosure for communications to plan participants and discussion of issues raised by the RFI. Importantly, the RFI and existing DOL electronic disclosure rules do not address the use of electronic media for disclosure and communications between service providers – such as financial institutions – and employers, plan sponsors and administrators. Disclosure and communications between service providers and employers, plan sponsors, and administrators are subject to contract terms and requirements under other law and regulation (including banking and securities law and regulation). However, financial institutions and other service providers still must follow rules regarding use of electronic disclosure where they act on behalf of plan sponsors and administrators in delivering notices and other communications to plan participants.

Electronic Disclosure Under ERISA – Under longstanding DOL rules, plan administrators are required to use delivery methods reasonably calculated to ensure actual receipt of ERISA-required information by plan participants and beneficiaries. 29 C.F.R. § 2520.104b-1. In 2002, the DOL amended its participant disclosure rules to establish a "safe harbor" for the use of electronic media to satisfy the general "furnishing" requirement of the regulation for any documents or notices required to be furnished under Title I of ERISA. The DOL has noted that, while the safe harbor is not the exclusive means for using electronic media to satisfy the regulation's delivery requirements, following the conditions of the safe harbor provides assurance that the delivery requirements have been satisfied.

The current DOL safe harbor is available only if: (1) the plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the system for furnishing documents results in actual receipt of transmitted information and protects the confidentiality of personal information relating to the individual's accounts and benefits; (2) the electronically delivered documents are prepared and furnished in a manner that is consistent with the style, format and content requirements applicable to the particular document; (3) the recipient is informed of the significance of the document and of the right to request and obtain a paper version; and (4) upon request, the recipient is furnished a paper version. 29 CFR § 2520.104b–1(c)(1)(i)-(iv).

The safe harbor is limited to two categories of individuals. The first is participants who "have the ability to effectively access documents furnished in electronic form at any location where the participant is reasonably expected to perform his or her duties as an employee and with respect to whom access to the employer's or plan sponsor's electronic information system is an integral part of those duties." 29 CFR § 2520.104b-1(c)(2)(ii)(A). No affirmative consent is required for this group.

The plan must obtain affirmative consent for all other individuals. This means that virtually all terminated and retired participants and beneficiaries, as well as active employees in industries that do not have traditional "desk jobs," such as retail or manufacturing, must affirmatively consent to receive ERISA documents

electronically. The consent must be in a manner that reasonably demonstrates the individual's ability to access information in the applicable electronic form. Before consenting, the individual must be provided a clear and conspicuous statement describing the scope of consent, including the types of documents to which the consent would apply.

Electronic Disclosure Under the Code – There are separate and somewhat less restrictive requirements for electronic disclosures under the Internal Revenue Code (the "Code"). In 2000, the IRS and Treasury issued final regulations relating to the use of electronic media for the delivery of certain participant notices and consents required to be provided in connection with distributions from retirement plans. In 2003, IRS and Treasury published final regulations which allow the electronic provision of a section 204(h) pension notice if certain requirements are satisfied.

In 2006, IRS and Treasury published comprehensive final regulations under the Code setting forth standards for systems that make use of an electronic medium to provide notice to a recipient, or to make a participant election or consent, under retirement plans, cafeteria plans and most other employee benefit programs covered under the Code. Treas. Reg. § 1.401(a)-21. These regulations provide two methods by which plans can provide required notices to recipients via electronic means: (1) the "consumer consent" method, where the consumer consents to the electronic delivery of the notice, in a manner consistent with the federal E-SIGN Act, and (2) the "alternative method," which does not require consent, but requires that the recipient demonstrate the ability to effectively access the electronic medium and be advised that he or she may request the applicable electronic notice in written form at no extra charge. While the DOL has expressly given plans the option of relying on the electronic disclosure standards set forth under the Code rather than DOL's regulatory safe harbor in certain very limited circumstances (see DOL Field Assistance Bulletin 2008-03 Q7 (QDIA notices may be provided electronically in compliance with Treasury regulations at the plan's option)), it has not adopted this standard for all ERISA-required participant disclosures and communications

Concerns and Issues – Employers and plan administrators (and financial institutions providing services to ERISA-covered plans) have been eager to use electronic media to communicate with participants. Not only does electronic delivery save substantial postage and paper costs (especially for large documents like summary plan descriptions), but electronic documents can be updated and delivered more quickly and, today, employees often request or expect electronic communications and documents. Many employers have already made extensive use of electronic means to enroll participants in plans, make contribution or benefit elections, effect investment changes, provide searchable summary plan descriptions, and deliver electronic claims determinations.

Employers, plan administrators and others often express a number of concerns about the existing rules and guidance regarding electronic disclosure, including:

- compliance issues raised by different rules for ERISA and IRS disclosures;
- difficulties in interpreting the DOL standard that the participant must use a computer as an "integral part of his duties" (especially for workers who have access for some part of the day or week, but work outside an office or other worksite most of the time);
- how to track consents to receive electronic communications, and the administration of these consents when hardware and software requirements routinely change with technology;
- how to meet the ERISA safe harbor requirement that the plan have a procedure to ensure the electronic delivery system results in actual receipt; and
- whether an entire document must be delivered electronically or whether it is sufficient to post the document on a website that provides continuous access and provide notice that the document is available (similar to the recent SEC approaches for providing prospectuses and other information to shareholders).

Request for Information In the RFI, DOL states that it recognizes that electronic disclosure can be as effective as paper-based communications and can lower costs and administrative burdens for plans to the benefit of all participants. But DOL also says it is also concerned that some participants may not have reasonable access to the internet or "simply prefer paper over electronically disclosed materials even when they have access." Questions in the RFI cover a wide range of technical and policy areas, including (among other topics):

- the level of internet access of Americans generally, and participants in ERISA plans in particular, usage trends at work and home;
- numbers and methods of ERISA plans that currently use electronic disclosures to notify participants, and common methods of furnishing information electronically (*e.g.,* e-mail with attachments, continuous access website, etc.);
- significant impediments to the increasing use of electronic media (*e.g.,* regulatory impediments, lack of interest by participants and plan sponsors, access issues, technological illiteracy, privacy concerns, etc.) and whether spam filters and other security measures pose particular problems with regard to the actual receipt of e-mailed disclosures;
- how current electronic disclosure safe harbor should be revised, if at all; whether a revised safe harbor should have different rules or conditions for different types of disclosures, or for active, inactive and retired participants; and the desirability of adopting different requirements for pension and welfare plans; and
- the desirability of certain procedures and processes, e.g., requiring participants to opt in or opt out of electronic disclosure, requiring plans to maintain a continuous access web site with participant disclosures, whether the current affirmative consent requirement is an impediment to plans and whether eliminating this requirement would increase the material risk of harm to participants and beneficiaries, how to handle of time-sensitive notices (e.g., COBRA election notices) in the electronic context, and how to confirm that a participant received a particular notice and that participant email addresses remain up to date.

In comments, the benefits community sent a strong message supporting the use of electronic disclosure on as broad a basis as possible. In general, comments favor adopting an "opt out" approach rather than an affirmative "opt in" if consent to electronic delivery is required, adopting the 'alternative method' allowed under IRS and Treasury regulations (which does not require consent to electronic delivery in some circumstances), and support the use of delivery by posting information on a continuous access website. On the other hand, some advocate for maintaining DOL's current rules and, possibly even enhancing requirements to prove electronic communications are actually received for certain time-sensitive communications.

The DOL rulemaking process will take considerable time to play out – likely including proposed rules, another comment period, a public hearing, and ultimately, final rules.

About the Author

Roberta Ufford is a principal of Groom Law Group, Chartered, where she concentrates on ERISA's fiduciary responsibility provisions and other laws governing employee benefit plans. Ms. Ufford is admitted to practice in the District of Columbia.